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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.
Hon. FRANCIS C. LOWELL, Circuit Judge.....Boston, Mass.
Hon. CLARENCE HALE, District Judge, Maine.....Portland, Me.
Hon. FREDERIC DODGE, District Judge, Massachusetts.....Boston, Mass.
Hon. EDGAR ALDRICH, District Judge, New Hampshire.....Littleton, N. H.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.....Providence, R. I.

SECOND CIRCUIT.

Hon. RUFUS W. PECKHAM, Circuit Justice.....Washington, D. C.
Hon. WILLIAM J. WALLACE, Circuit Judge.....Albany, N. Y.
Hon. E. HENRY LACOMBE, Circuit Judge.....New York, N. Y.
Hon. WILLIAM K. TOWNSEND, Circuit Judge.....New Haven, Conn.
Hon. ALFRED C. COXE, Circuit Judge.....Utica, N. Y.
Hon. JAMES P. PLATT, District Judge, Connecticut.....Hartford, Conn.
Hon. EDWARD B. THOMAS, District Judge, E. D. New York.....Brooklyn, N. Y.
Hon. GEORGE W. RAY, District Judge, N. D. New York.....Norwich, N. Y.
Hon. GEORGE B. ADAMS, District Judge, S. D. New York.....New York, N. Y.
Hon. GEORGE C. HOLT, District Judge, S. D. New York.....New York, N. Y.
Hon. CHARLES M. HOUGH, District Judge, S. D. New York [1].....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.

THIRD CIRCUIT.

Hon. HENRY B. BROWN, Circuit Justice [2].....Washington, D. C.
Hon. MARCUS W. ACHESON, Circuit Judge [3].....Pittsburgh, Pa.
Hon. GEORGE M. DALLAS, Circuit Judge.....Philadelphia, Pa.
Hon. GEORGE GRAY, Circuit Judge.....Wilmington, Del.

[1] Additional appointment June 27, 1906. [2] Retired June, 1906. [3] Died June 21, 1906.

Hon. EDWARD G. BRADFORD, District Judge, Delaware.....Wilmington, Del.
Hon. WILLIAM M. LANNING, District Judge, New Jersey.....Trenton, N. J.
Hon. JOSEPH CROSS, District Judge, New Jersey.....Elizabeth, N. J.
Hon. JOHN B. McPHERSON, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. JAMES B. HOLLAND, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. ROBERT WODROW ARCHBALD, District Judge, M. D. Pennsylvania..Scranton, Pa.
Hon. JOSEPH BUFFINGTON, District Judge, W. D. Pennsylvania.....Pittsburgh, Pa.

FOURTH CIRCUIT.

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Hon. JETER C. PRITCHARD, Circuit Judge.....Asheville, N. C.
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Hon. THOMAS R. PURNELL, District Judge, E. D. North Carolina.....Raleigh, N. C.
Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....Greensboro, N. C.
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Hon. EDMUND WADDILL, Jr., District Judge, E. D. Virginia.....Richmond, Va.
Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia.....Lynchburg, Va.
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FIFTH CIRCUIT.

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Hon. HARRY T. TOULMIN, District Judge, S. D. Alabama.....Mobile, Ala.
Hon. CHARLES SWAYNE, District Judge, N. D. Florida.....Pensacola, Fla.
Hon. JAMES W. LOCKE, District Judge, S. D. Florida.....Jacksonville, Fla.
Hon. WILLIAM T. NEWMAN, District Judge, N. D. Georgia.....Atlanta, Ga.
Hon. EMORY SPEER, District Judge, S. D. Georgia.....Macon, Ga.
Hon. CHARLES PARLANGE, District Judge, E. D. Louisiana.....New Orleans, La.
Hon. ALECK BOARMAN, District Judge, W. D. Louisiana.....Shreveport, La.
Hon. HENRY C. NILES, District Judge, N. and S. D. Mississippi.....Kosciusko, Miss.
Hon. DAVID E. BRYANT, District Judge, E. D. Texas.....Sherman, Tex.
Hon. EDWARD R. MEEK, District Judge, N. D. Texas.....Ft. Worth, Tex.
Hon. WALLER T. BURNS, District Judge, S. D. Texas.....Houston, Tex.
Hon. THOMAS S. MAXEY, District Judge, W. D. Texas.....Austin, Tex.

SIXTH CIRCUIT.

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Hon. HENRY F. SEVERENS, Circuit Judge.....Kalamazoo, Mich.
Hon. HORACE H. LURTON, Circuit Judge.....Nashville, Tenn.
Hon. JOHN K. RICHARDS, Circuit Judge.....Cincinnati, Ohio.
Hon. ANDREW M. J. COCHRAN, District Judge, E. D. Kentucky.....Maysville, Ky.
Hon. WALTER EVANS, District Judge, W. D. Kentucky.....Louisville, Ky.
Hon. HENRY H. SWAN, District Judge, E. D. Michigan.....Detroit, Mich.
Hon. GEORGE P. WANTY, District Judge, W. D. Michigan [4].....Grand Rapids, Mich.
Hon. AUGUSTUS J. RICKS, District Judge, N. D. Ohio.....Cleveland, Ohio.
Hon. ROBERT W. TAYLER, District Judge, N. D. Ohio.....Cleveland, Ohio.
Hon. ALBERT C. THOMPSON, District Judge, S. D. Ohio.....Cincinnati, Ohio.
Hon. CHARLES D. CLARK, District Judge, E. and M. D. Tennessee....Chattanooga, Tenn.
Hon. JOHN E. McCALL, District Judge, W. D. Tennessee.....Memphis, Tenn.

[4] Died July 9, 1906.

SEVENTH CIRCUIT.

Hon. WILLIAM R. DAY, Circuit Justice.....Washington, D. C.
Hon. PETER S. GROSSCUP, Circuit Judge.....Chicago, Ill.
Hon. FRANCIS E. BAKER, Circuit Judge.....Indianapolis, Ind.
Hon. WILLIAM H. SEAMAN, Circuit Judge.....Sheboygan, Wis.
Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge.....Chicago, Ill.
Hon. KENESAW M. LANDIS, District Judge, N. D. Illinois.....Chicago, Ill.
Hon. SOLOMON H. BETHEA, District Judge, N. D. Illinois.....Chicago, Ill.
Hon. FRANCIS M. WRIGHT, District Judge, E. D. Illinois.....Urbana, Ill.
Hon. J. OTIS HUMPHREY, District Judge, S. D. Illinois.....Springfield, Ill.
Hon. ALBERT B. ANDERSON, District Judge, Indiana.....Indianapolis, Ind.
Hon. JOSEPH V. QUARLES, District Judge, E. D. Wisconsin.....Milwaukee, Wis.
Hon. ARTHUR L. SANBORN, District Judge, W. D. Wisconsin.....Madison, Wis.

EIGHTH CIRCUIT.

Hon. DAVID J. BREWER, Circuit Justice.....Washington, D. C.
Hon. WALTER H. SANBORN, Circuit Judge.....St. Paul, Minn.
Hon. WILLIS VAN DEVANTER, Circuit Judge.....Cheyenne, Wyo.
Hon. WILLIAM C. HOOK, Circuit Judge.....Leavenworth, Kan.
Hon. ELMER B. ADAMS, Circuit Judge.....St. Louis, Mo.
Hon. JACOB TRIEBER, District Judge, E. D. Arkansas.....Little Rock, Ark.
Hon. JOHN H. ROGERS, District Judge, W. D. Arkansas.....Ft. Smith, Ark.
Hon. ROBERT E. LEWIS, District Judge, Colorado.....Denver, Colo.
Hon. HENRY THOMAS REED, District Judge, N. D. Iowa.....Cresco, Iowa.
Hon. SMITH McPHERSON, District Judge, S. D. Iowa.....Red Oak, Iowa.
Hon. JOHN C. POLLOCK, District Judge, Kansas.....Topeka, Kan.
Hon. WM. LOCHREN, District Judge, Minnesota.....Minneapolis, Minn.
Hon. PAGE MORRIS, District Judge, Minnesota.....Duluth, Minn.
Hon. GUSTAVUS A. FINKELNBURG, District Judge, E. D. Missouri.....St. Louis, Mo.
Hon. JOHN F. PHILIPS, District Judge, W. D. Missouri.....Kansas City, Mo.
Hon. W. H. MUNGER, District Judge, Nebraska.....Omaha, Neb.
Hon. CHARLES F. AMIDON, District Judge, North Dakota.....Fargo, N. D.
Hon. JOHN E. CARLAND, District Judge, South Dakota.....Sioux Falls, S. D.
Hon. JOHN A. MARSHALL, District Judge, Utah.....Salt Lake City, Utah.
Hon. JOHN A. RINER, District Judge, Wyoming.....Cheyenne, Wyo.

NINTH CIRCUIT.

Hon. JOSEPH McKENNA, Circuit Justice.....Washington, D. C.
Hon. WM. W. MORROW, Circuit Judge.....San Francisco, Cal.
Hon. WILLIAM B. GILBERT, Circuit Judge.....Portland, Or.
Hon. ERSKINE M. ROSS, Circuit Judge.....Los Angeles, Cal.
Hon. JOHN J. DE HAVEN, District Judge, N. D. California.....San Francisco, Cal.
Hon. OLIN WELLBORN, District Judge, S. D. California.....Los Angeles, Cal.
Hon. JAMES H. BEATTY, District Judge, Idaho.....Boise City, Idaho.
Hon. WILLIAM H. HUNT, District Judge, Montana.....Helena, Mont.
Hon. THOMAS P. HAWLEY, District Judge, Nevada[a].....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.

[a] Retired June 30, 1906.

CASES REPORTED.

CASES

ARGUED AND DETERMINED

IN THE

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

BROWNE v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. December 7, 1905.)

No. 42.

1. GRAND JURY—INDICTMENT—SUFFICIENCY—UNITED STATES ATTORNEY—REGULARITY OF APPOINTMENT.

It is no objection to an indictment that the assistant United States attorney, who appeared before the grand jury finding the indictment, took his oath of office the day before such appearance, and, indictment being found, resigned after holding office only six days; and it is immaterial whether the salary of such assistant was illegal, and whether he was also counsel for persons having claims against the government.

2. CUSTOMS DUTIES—CUSTOMS EXAMINER—INDICTMENT.

An indictment charging a customs examiner with knowingly passing invoices containing false statements as to the weight of imported merchandise will not be held insufficient on the theory that the law provides that weighing is to be done by officers known as weighers, and that therefore the examiner could not legally pass the invoices.

3. CONSPIRACY—INDICTMENT—CHARGING PART—VIDELICET.

The first part of a count in an indictment set forth that certain persons "unlawfully did conspire" to defraud the United States, the conspiracy "to be effected in the manner following; that is to say"—and the following part stated the details of the alleged conspiracy. *Held*, that the latter part is not to be construed as a videlicet separate from the charge of the indictment, but that the whole sentence may be considered as the charging part.

4. CUSTOMS DUTIES—INDICTMENT—ALLEGATION OF FRAUDULENT INTENT—EQUIVALENT EXPRESSION.

The allegation, in an indictment for conspiracy to defraud the customs revenue, that certain acts were done "to the end that" less than the legal amount of duties should be collected by the collector of customs, *held* sufficient as an allegation of corrupt and fraudulent intent.

5. CONSPIRACY—INDICTMENT—REFERENCE IN ONE COUNT TO MATTER IN ANOTHER.

The first count of an indictment alleged conspiracy, and each of the other counts presented a different overt act, but did not repeat the presentment as to the conspiracy in furtherance of which the act was committed, but did state that such act was "in further pursuance of the said unlawful conspiracy in the first count in this indictment mentioned

and described," etc. *Held*, that repetition may properly be avoided by so referring from one count to another, and that this was a sufficient reference to the first count to incorporate the matter therein with that in the count containing the reference, without expressly stating that such matter is made a part of the latter count.

6. JURY—EXAMINATION OF TALESMEN.

Held without merit, the objection that on a criminal prosecution the defendant should have had opportunity, before being compelled to make his peremptory challenges, to examine on voir dire not only the jurors whose names have been drawn from the wheel and who have gone into the box, but also the entire panel from which vacancies caused by challenges may be filled.

7. CONSPIRACY—EVIDENCE—PROOF OF EX POST FACTO ACTS.

An indictment charged the defendants with having conspired together "before and on" a certain date. *Held* that, while evidence of acts done after that date was inadmissible as direct proof of an act then done in furtherance of the conspiracy, it was competent as proof of acts done before or on said date.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Conspiracy, § 100.]

8. CRIMINAL LAW—TRIAL—CHARGE TO JURY—REQUESTS TO CHARGE.

In charging the jury, the judge is under no obligation to adopt the verbiage of any particular court. If he has already set forth a rule of law correctly, he may properly refuse to repeat it in a different form of words which may have been used in the opinion of some court.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 2011–2014.]

9. SAME—REASONABLE DOUBT—REPUTATION OF DEFENDANT.

Regarding the rule that a jury must be convinced beyond a reasonable doubt of the guilt of the defendant, *held* not reversible error to refuse to charge, in a case depending upon circumstantial evidence, that evidence of good character is of itself sufficient to create a reasonable doubt to which the defendant is entitled.

10. SAME—NEW TRIAL—CO-CONSPIRATORS.

Held that, where two persons on trial for conspiracy had been found guilty, it was no error to refuse a new trial to one of the defendants and grant it to the other.

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

For proceedings below, see 126 Fed. 766 and 128 Fed. 615.

This cause comes here upon writ of error to review a conviction of the plaintiff in error under section 5440, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3676], which reads as follows: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than $1,000 and not more than $10,000, and to imprisonment not more than two years."

Three persons were included in the indictment, A. S. Rosenthal and Martin L. Cohn, composing the firm of A. S. Rosenthal & Co., importers of silk goods, and plaintiff in error, an examiner in the appraisers' division of the New York custom house. The contention of the government was that the members of the firm were to enter goods knowingly and fraudulently upon false invoices made abroad —false as to weight and otherwise—and that Browne, the examiner, when these invoices should get to him in the due course of business, should disregard his duty as an examiner, should neglect and omit to examine the goods covered by them as the law demanded, and should pass them along reporting the invoices to be correct so that, on the basis of his report, the entries might

be liquidated and the government deprived of its lawful duties. Five separate overt acts (three by the firm, two by Browne) were charged, and each was made the subject of a separate count.

Rosenthal forfeited his bail and did not appear, Cohn and Browne were tried together. The jury found each guilty as charged in the indictment with a recommendation to mercy as to Cohn. Subsequently, upon motion, the trial judge set aside the conviction of Cohn and granted him a new trial. In making this disposition of Cohn's conviction the judge filed an exhaustive discussion of the testimony (128 Fed. 615), which makes it unnecessary to rehearse the same here. It will be sufficient to refer to such of the 196 assignments of error as are of moment or have been pressed in argument upon the attention of the court.

The indictment sets forth that Rosenthal, Cohn, and Browne "before and on the thirtieth day of July, in the year of our Lord nineteen hundred and one, at the city of New York aforesaid, in the district aforesaid, unlawfully did conspire and agree together, and with divers other persons to the said grand jurors unknown, to defraud the said United States of large sums of money then legally due and to become due to the said United States, and which should have been paid by the said Abraham S. Rosenthal and Martin L. Cohn to the said United States, as duty upon divers importations of dutiable goods, wares, and merchandise into the said United States, from foreign countries, then made and thereafter to be made by the said Abraham S. Rosenthal and Martin L. Cohn at the port of New York, in the said district, which said unlawful conspiracy then and there was one which was to be effected in the manner following; that is to say: The said Abraham S. Rosenthal and Martin L. Cohn were to cause such goods, wares, and merchandise to be shipped from foreign countries consigned to them under the firm name of A. S. Rosenthal & Co., at the said port of New York, at which port they, the said Abraham S. Rosenthal and Martin L. Cohn, upon consular invoices containing, and known to them to contain, false statements as to the weight of the said goods, wares, and merchandise and false descriptions of the same goods, wares, and merchandise, were to make their written estimated entries of the said goods, wares, and merchandise at the custom house of the United States at the said city and port of New York, with the collector of customs at that port, upon their arrival, and when certain of the said goods, wares, and merchandise should according to law be designated and sent to the public stores at the said port for examination and appraisement, and when the same goods, wares, and merchandise, and the invoices accompanying the same, should be given to the said Charles C. Browne (who was then an examiner of imported merchandise at the said port) for examination and appraisement, he, the said Charles C. Browne, was thereupon to neglect and refuse to ascertain the true weight and nature of the said goods, wares, and merchandise, as it then and there was his duty under the law and under the practice at the said port to do as such examiner, and was, contrary to his duty as such examiner, to knowingly make false returns and reports upon the said invoices as to the weight and nature of the said goods, wares, and merchandise, to the end that in either case the said entries thereof and the duty upon the same should be, according to the practice at the said port, liquidated by the said collector upon the said returns and reports, and less than the amounts of duty legally due thereon collected by the said collector." The indictment then proceeds to set out the overt acts in separate counts.

Judson G. Wells and Louis Marshall, for plaintiff in error.

W. Wickham Smith, Special Asst. U. S. Atty. Gen.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). It was sought by plea in abatement to quash the indictment, upon the ground that W. Wickham Smith appeared before the grand jury on April 2, 1903, when the case was presented to that body and indictment

found. This point was first raised by a motion to quash. Attached to the motion papers was the following document:

"Department of Justice, Washington, D. C., March 26, 1903.

"W. Wickham Smith, Esq., New York—Sir: You are hereby appointed an assistant to the United States attorney for the Southern district of New York with compensation at the rate of $3,600 per annum. Your official residence is fixed at New York City. Before entering upon duty please execute the inclosed oath of office, returning it to this department.

"Respectfully, P. C. Knox, Attorney General.

"Through Henry L. Burnett, Esq., United States Attorney, New York."

It is stated in the brief submitted for plaintiff in error that Smith took his oath of office as such assistant United States attorney on April 1, 1903, the day before the grand jury took up the cause, and that he resigned his position as assistant United States Attorney, having served six days as such, on April 6, 1903. The motion was denied, and the same objection subsequently renewed by plea in abatement, which plea was demurred to and demurrer sustained. The plea contains the averment that Smith, as an assistant to the United States attorney for the Southern district of New York continued his investigations and prosecution of defendant, and that "the written appointment of W. Wickham Smith as assistant to the district attorney is dated the 26th day of March, 1903, and that immediately after the finding of said indictment on April 2, 1903, the said W. Wickham Smith resigned from said office." Upon the face of the plea, therefore, it stands conceded that he was on the day in question an Assistant United States attorney for the district, and we know of no reason, and are referred to no authorities, which would sustain the proposition that there is any impropriety in such an assistant appearing before the grand jury to present a criminal cause to their consideration. No impropriety in his conduct or methods before that body is charged. Whether the government should have selected him as such assistant, in view of the fact that he had already familiarized himself with the case upon retainer by the Merchants' Association, which was making an investigation of customs frauds, whether the amount of the salary named, $3,600, was in excess of the statutory designation or of the appropriation, whether at the time of his appointment he was or was not counsel for individuals who had claims against the government, are questions wholly immaterial here. It stands conceded that he was an assistant United States district attorney. It is not contended that he misconducted himself in any way before the grand jury, and that is sufficient to dispose of the plea. It is wholly without merit.

The points principally relied upon in argument are directed to a criticism of the indictment—some 80 pages of the "brief" are devoted to that and to the plea. Quite naturally so, because a careful reading of the testimony in connection with the original exhibits satisfies us that the trial judge was entirely right in the conclusion (expressed in his decision on motion for new trial) that the evidence presented upon the trial by government "amounted to a demonstration that could have left no properly equipped mind unconvinced that there was a fraudulent scheme formed * * * for the purposes

of defrauding the government" of a portion of the duties accruing upon importations of A. S. Rosenthal & Co.

In criticism of the indictment it is contended that the United States "could not have been defrauded through the conspiracy set forth in the indictment, and therefore no crime is charged." The theory is this: The invoices and entries were to contain false statements as to weights, and were to be passed as correct by Browne, who is averred in the indictment to be "an examiner of imported merchandise at said port." Various statutes and treasury regulations are referred to as showing that the weighing of imported goods is to be done by officers known as "weighers"; wherefore, it is argued, Browne could not have "passed" the documents. This point was considered by the trial judge upon hearing of the demurrer to the indictment. We fully concur with him in the reasoning and conclusions expressed in his opinion (126 Fed. 766) and deem it unnecessary further to discuss the point.

It is further contended that the indictment is bad because it charges offense only in the language of the statute ("did conspire to defraud the United States") without setting forth the means proposed to be used to accomplish the purpose, and because it does not allege that the conspiracy was willful or corrupt, or that it was entered into with any criminal, willful, fraudulent, or corrupt intent. Examination of the argument in support of this proposition, as set forth in the brief in connection with the excerpt from the indictment quoted supra, shows that the criticism deals with words rather than substance. The theory is that the charging part of the indictment ends with the words "to be made by the said Abraham S. Rosenthal and Martin L. Cohn at the Port of New York, in the said district"; that the words "which said unlawful conspiracy then and there was to be effected in the manner following, that is to say," are a videlicet; and that the rest of the sentence down to and including "thereon collected by the said collector," which sets forth with sufficient fullness just what false invoices, false statements, false returns, and false reports were to be made, cannot be regarded as any part of the charge. If the charge were only that defendants did unlawfully conspire to defraud the United States of large sums of money to become due as duties upon divers importations by the firm, it might be fairly open to criticism as too vague and bald; but, under the broader and less hypercritical rules of construction which more modern authorities apply in criminal causes, and which have been followed in this circuit (U. S. v. Terry [D. C.] 39 Fed. 355, note by the court; Bromberger v. U. S., 128 Fed. 346, 63 C. C. A. 76), we cannot assent to the defendant's analysis of the sentence. We do not find in the quotation, supra, a videlicet, which cuts off the specific statement of the details of the conspiracy from the general language which states the statutory offense. Logically, practically, and grammatically the sentence conveys the same meaning as if it were expressed as it is now down to and including the words "at the port of New York in the said district," and then proceeded "by said Abraham S. Rosenthal and Martin L. Cohn causing such goods, wares, and merchandise to be shipped,

consigned to them," etc., etc. The whole sentence quoted, supra, in the statement of facts is the charging part, and in the indictment is followed by a further presentment of overt acts done in furtherance of the conspiracy therein set forth.

Many authorities are cited to support the propositions that no indictment is sufficient if it does not allege all the ingredients of the offense; that to make an agreement between two or more parties criminal it is not enough that the act is prohibited by statute, but the agreement must be entered into with a willful, fraudulent, or corrupt intent; that the words "unlawfully conspired" are not sufficient to charge such intent. The applicability of all such authorities to the cause at bar, however, is based upon the same analysis of the sentence which seeks to limit the charging part, as above indicated. Construed as a whole the sentence is not obnoxious to any criticisms in the cases cited. It is not necessary to repeat with every verb the words "willfully, fraudulently, and corruptly." One assertion of intent may be so made as to cover a joint specification of unlawful acts. Nor is there any exclusive force in any particular word indicative of intent, such as "corrupt," "fraudulent," etc. As is said in one of the cases cited by plaintiff in error, "the agreement must have been entered into with an evil purpose." People v. Powell, 63 N. Y. 88. The indictment sets forth the elements of the conspiracy: That the firm was to import goods upon consular invoices containing, and known to them to contain, false statements and false descriptions; that upon such invoices the firm were to make their entries at the custom house; that the examiner with goods and invoices before him was to make false reports, to the end that duty should be liquidated upon such false reports and "less than the amounts of duty legally due thereon collected by the collector [of the port]." Whoever framed this indictment would have saved court and counsel a great deal of unnecessary trouble, if he had been careful to insert an allegation that the agreement between the alleged conspirators as to what one or other of them should do to defraud the government of its lawful revenues was entered into with a corrupt and fraudulent intent. It is indeed unfortunate that, in preparing an indictment in a cause of this importance, more care was not exercised to present the essential elements of the charge in the plain and explicit phraseology which has been approved in so many decisions that all criticisms of the sort now under discussion would have been avoided. However, in the concluding clause last above quoted, there is, we think, sufficient to save the indictment. When it is said that some one does a certain act "to the end that" such and such a thing may happen, it is but another form of expressing the idea that he does it "with the intent" that such and such a thing shall happen. And when the intent is stated to be that the government should be hoodwinked into collecting less amounts of duty than are legally due to it from one or other of the alleged conspirators, it is not a violent construction which would hold such an intent to be fraudulent.

It is contended that the counts, other than the first, are bad because they do not allege that defendants unlawfully conspired and agreed

together for an unlawful purpose. The first count consists of the sentence quoted in the statement of facts, and of a further presentment by the grand jurors that in pursuance of the said unlawful conspiracy a certain overt act was committed. Each of the other counts presents a different overt act, but does not repeat in his verbis the presentment as to the conspiracy in pursuance and furtherance of which the overt act was committed. But each count does contain the statement: "The grand jurors do further present that in further pursuance of the said unlawful conspiracy in the first count of this indictment mentioned and described and to effect the object thereof," etc., etc. This is a sufficient reference to the first count "to incorporate the matter going before with that in the count in which [the reference] is made." See Blitz v. U. S., 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725, which holds that repetition may be avoided by referring from one count to another, a rule well-recognized by courts and text-writers. The reference expressly imports the description of the conspiracy set forth in the first count, and is quite as effective as if it added the words, which plaintiff in error contends it should contain, "which is hereby made a part of this count."

Other objections: That the overt acts charged in the first three counts are not averred to be fraudulent; that Browne is charged not only with making false returns, but also with neglect and refusal to ascertain the true weight and nature of the goods; that the particular merchandise to be imported is not stated, nor the identity of the country or countries from which it was to come—are too unimportant to warrant discussion here. They were not touched upon in the argument, and are without merit.

It is unnecessary to discuss the point raised as to the order in which peremptory challenges were exercised, and the jury was impaneled. The provisions of the state statute (section 385, Cr. Code N. Y.) are not controlling (Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208; Radford v. U. S., 129 Fed. 49, 63 C. C. A. 491), and we fail to see that the method pursued deprived the defendant of any substantial right—he was confronted with the jury while the challenging was going on; he was not deprived of any of his challenges by reason of duplication with the government's, as happened in the extraordinary case relied on (Lewis v. U. S., 146 U. S. 370, 13 Sup. Ct. 136, 36 L. Ed. 1011); there were 12 men in the box when he was called on to challenge. The practice suggested that, before peremptory challenging begins, the defendant shall have the opportunity to examine on voir dire not only those whose names have been drawn from the wheel and who have gone into the box, but also the entire panel from whom vacancies caused by challenges may be filled, is certainly novel in this circuit, and we know of no authority which constrains its adoption. The defendant's right of choice as to whom he shall challenge is sufficiently secured by his being provided in advance of the drawing with a list of the names and residences of the jurymen constituting the panel (and the subsequent panel of talesmen) from whom the 12 were to be drawn. The record shows that

defendants' counsel had been furnished with such a list. The objection that the jury was improperly selected is without merit.

Out of the enormous mass of objections to testimony gathered together in the printed brief of nearly 300 pages, it will be sufficient to deal with but three classes. A careful perusal of the record shows that there was hardly a document which did not come in under one or more exceptions reserved by the respective counsel for the two defendants, and it would be a waste of time to undertake to cover them all, or even those recited in the bill of exceptions. The indictment charged that the defendants conspired together "before and on July 30, 1901." This could not be sustained by evidence showing, as an act constituting with others the conspiracy, something done subsequent to that date. Upon that ground defendant objected to the introduction of certain false invoices of which one may be taken as a sample. It was dated Yokohama, August 9, 1901, and could not be received against Browne as direct proof of an act then done in furtherance of the conspiracy. But it had a further evidential value which made it competent, while the defendant's rights could be fully protected by instructions in the charge to the jury. If defendant did not think such instructions sufficiently full he might have asked for some more specific statement.[1] The charge in the indictment was that the firm were to procure shipments to be made from foreign countries upon false invoices. The jury were to ascertain whether the firm here had in fact done something which caused false invoices to be prepared in the foreign country, and there was evidence tending to show that they had. Yokohama is so far from New York that it is quite apparent that whatever was done here to procure the making of the false invoice there must have been done more than 10 days before the result was produced. The false invoice, therefore, of August 9th, while not admissible as itself an act done in furtherance of the conspiracy, was admissible as a fact from which the jury was entitled to infer, in connection with the other proof, that prior to July 30th the firm had given instructions that that particular invoice should be falsified in the way it was. And that act, the directing or setting in motion of the train of causes which produced the false invoice, was within the period covered by the indictment.

As to some other invoices also subsequent in date, the facts are as follows: On July 30th Browne was transferred from his position

[1]Defendant requested the court to charge: "No act or declaration by the defendants Rosenthal or Cohn after July 30, 1901, can be considered in determining whether the defendant Browne was on or before that day a party to the alleged conspiracy." To which the court replied: "I cannot charge that in that way. Yes. 'No acts or declarations actually made by Rosenthal or Cohn after July 30th can be considered against Browne; but the invoices that I have admitted in evidence—the original invoices that I have admitted in evidence—may be considered by you, although they are dated after July 30th, as enabling you to take a survey of the business of Rosenthal & Co., and provided these invoices were of such a nature that they might fall under the conspiracy if there was such, but what either of these men did after July 30th cannot be used against Browne.'" To this qualification of the request no objection was taken.

as examiner of silk goods to some other department, where A. S. Rosenthal & Co.'s entries and invoices would not come before him, and apparently on the same day the firm learned of the transfer. At that time there were goods afloat coming here with false invoices. As an instance: There were goods coming from Yokohama with an invoice dated July 8, 1901, which falsely stated their weight. Subsequent to July 30th the firm presented another invoice dated Yokohama August 15, 1901, covering the same goods and correctly stating their weight, which later invoice they asked to substitute for the earlier one. The later one added about 40 per cent. to weight. There were five similar instances of so-called substituted invoices. Now the making of the later invoice, and its presentation at the custom house, were in no sense acts done in furtherance of the conspiracy; quite the contrary, for their only tendency was to give the government a truthful statement as to the weight of the goods and to secure a liquidation at the true amount of duty. But these acts cast a vivid light upon the situation as it existed on July 8th, when the goods were first invoiced and started on the way from Yokohama. The circumstance that the firm, upon learning that their alleged co-conspirator was no longer at his post to cover up their frauds by false reports, was able to procure from the port of shipment an invoice which truthfully stated the weights, would tend strongly to induce the conviction that they knew before July 30th that their goods then afloat were coming here under false invoices. Their knowledge prior to July 30th was a material element in the case, and the subsequent making of a true invoice was competent evidence thereto.

Exceptions were taken to various items of evidence which related to certain experiments and calculations. Some time after Browne's removal, his successor found in a closet in his office a large number of samples of goods. To these there were pinned tickets in Browne's handwriting. The tickets were addressed to the Bureau of Analysis and were such as Browne would make in the regular discharge of his duties. About 100 of these tickets contained marks (A. diamond R. S. Co.) which indicated that they were Rosenthal's goods; they also contained the package number, entry number, and invoice number—all these marks and numbers being in Browne's handwriting. The samples were small, generally about the width of the goods, and some six inches in running length. Two expert examiners and analysts of this kind of goods, one from the appraiser's department in the Chicago custom house, the other from the like department in New York, cut off portions of these samples and made most careful measurements of the pieces cut off so as to determine their proportion to the full length of the piece of goods from which the sample came, on the basis of 50 yards for the length of the bolt or full piece, which the testimony showed was the standard length of the bolt of such goods. They next weighed the sample portions they had thus secured upon scales of extreme delicacy—the scale recorded to a one-quarter milligramme, about 1/150,000 part of an ounce. Having found the actual weight of the sample, they calculated what would be the weight of the whole piece. Having thus obtained a calculated

weight of the piece of goods, the number of which in Browne's handwriting was pinned to the sample, they turned to the invoice, which covered that piece. The invoice gave only the total weights of the several cases which it covered, and each case contained several pieces. They took the total invoice weight of the case which had contained the piece in question, and divided it by the number of pieces in the case, thus obtaining an average invoice weight per piece, which they took for purposes of comparison with the calculated weight of the piece as deduced from the sample. The comparisons, with apparently a single exception, show an excess of the calculated weights over the average weights, and in almost every instance an extremely large increase, no mere 5 or 10 per cent., but an "enormous discrepancy," to quote the language of appellant's brief—in many instances the full 40 per cent., which was proved to be the discrepancy in the instance where the goods, arriving after Browne's transfer, were weighed by other examiners. The weak points of this testimony are pointed out in the brief and are quite manifest. The samples were not found till some time after Browne's removal. In the interim it was possible for some enemy of himself or of Rosenthal to have shifted the tickets from one sample to another, or even to have affixed them to samples of goods which were not Rosenthal's at all, although no one from Rosenthal's store testified that a single sample represented goods which the firm were not importing at that time. The goods were handmade, not in factories, but in peasants' homes, not every piece being woven by the same hand, hence it might not be of identical weight throughout its entire length. Differences of pattern and differences of color produce differences in weight. Each piece is not exactly 50 yards in length; some will overrun, and some underrun, 2 or 3 yards. The cases contain goods of different colors and patterns, and sometimes of differing proportions of silk and cotton in their composition, although the goods in each case were of the same general character. All these criticisms, however, go to the credibility and weight of the evidence. Had the discrepancy shown been somewhat under 10 per cent., that circumstance might have left it so valueless as proof, even corroborative proof, that the court might quite properly have excluded it; but, on the record as it stands, the evidence was competent, it was not error to admit it for what it was worth, and the testimony sufficiently advised the jury of all the possible and probable sources of error in the calculation to enable them to estimate its weight, which was a question properly for them to determine upon all the testimony in the case. Counsel for the government states in his brief that the average deficiency of weight in the goods passed as correct by Browne, according to the calculations of these experts, was 38 2-5 per cent. We have not verified these figures, which presumably were used in argument to the jury; but when it is shown by uncontroverted proof that on the goods weighed in bulk, after Browne's transfer, by other examiners, the average excess of real weight over invoice weight was 39 3-5 per cent., and that when, after such transfer, the importers began making additions to weight on entry, the average of their additions was 39 1-6 per cent., it would

seem that the various inevitable errors one way and the other, which were to be expected in such a calculation, substantially balanced each other, as such errors generally do, when a sufficient number of items are taken under investigation to secure a fair average.

The other exceptions to admission of testimony need not be discussed, they present no ground for reversal.

Exception was reserved to refusal to advise the jury to acquit the plaintiff. Many of the grounds upon which this was based have already been disposed of, in connection with the demurrer and the admission of entries which arrived after July 30th. As to the contention, reiterated so often in the brief, that the evidence failed to connect Browne with the conspiracy, it is sufficient to say that, as was stated supra, the proofs were a demonstration to any intelligent mind that within the period in question there was a conspiracy by some persons to defraud the government of part of its customs duties, to the pecuniary benefit of Rosenthal & Co., by means of invoices containing false statements as to the weight and character of the goods. The falsity of an invoice could readily be detected by any one who had it, and the goods which came with it, before him. From January 1st to July 30th the person to whom the false invoices and the goods were to come was Browne. He might be absent occasionally for a day or so by reason of sickness or other cause, but Rosenthal invoices did not come every day, and upon the discovery of a single false invoice the worst to be anticipated would be the infliction of the penalty duty for undervaluation. The conspirators, however, if they had sense enough to conspire, must also have had sense enough to know that, if successive false invoices were presented to an official who made the examinations which his duties required, and transmitted truthful reports to his superiors, it was inevitable that the existence of a scheme to defraud the government would soon be discovered; and it was known that the official assigned by the customs authorities to make examinations and reports was Browne. Nevertheless, there were presented many invoices covering Rosenthal's goods, some of which were shown by uncontroverted proof to contain false statements, and as to others of which there was sufficient evidence to warrant the jury in finding that they also were false. When, in addition, it was shown affirmatively that in several instances Browne made false reports as to the percentage of silk in goods which he had submitted to the analyst, contrary to the analyst's report, with the effect of subjecting the goods to a lower classification and rate of duty, and in another instance certified as correct the invoice of a case actually in his hands, which contained four times as many pieces and a great deal larger weight and value than that set out in the invoice, it would have been a grave error in the trial court to have taken the case from the jury on any theory that Browne's connection with the conspiracy was not established by competent proof.

Touching refusals to charge as requested: The sixth request was modified as indicated, supra, in footnote. It is argued here that the modification was error, but no objection was made to such modification, and no exception reserved.

The court charged as requested:

"A conviction can only be had upon circumstantial evidence when the circumstances so distinctly point to the guilt of the accused as to leave no reasonable explanation consistent with the theory of innocence."

And also:

"To warrant a conviction on circumstantial evidence, the existence of inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

Thereupon counsel requested the court to charge:

"The government having sought to sustain the charge against the defendants wholly by circumstantial evidence, before you are justified in convicting them, you must find that the facts and circumstances established by the evidence are not only consistent with, and point to their, guilt, but they are inconsistent with their innocence."

It was suggested, as an excuse for this requested reiteration, that it was taken from the language of some opinion of the New York Court of Appeals. But the trial judge was under no obligation to adopt the verbiage of any particular court. He had already fully and accurately set forth the rule of law applicable to the point, and quite properly refused to repeat it in a different form of words.

The sixteenth request was charged in part, in part refused, and the jury further instructed as to the point raised; but neither the refusal, nor the further instructions, were objected to, nor any exception reserved.

Exception was reserved to the court's refusal to charge:

"That, in cases depending upon circumstantial evidence, evidence of good character of itself creates a reasonable doubt, to which the defendant is entitled."

Inasmuch as it is necessary in criminal cases to convince the jury of defendant's guilt "beyond a reasonable doubt," the request was really for an instruction that no person of good character can be convicted of crime by circumstantial evidence, however strong. It is needless to say that this point on the brief is supported by the citation of no authority.

The other requests deal merely with comments asked for on details of the evidence suggesting to the jury what certain of the witnesses did or did not testify to and need not be considered.

Under the heading of errors in giving instructions to the jury, the brief quotes some sentences from the charge dealing generally with the failure of Browne on some occasions to follow the returns of the analyst, and criticizes them in several particulars. The objections advanced need not be considered. They are not legitimately before this court. After the charge was ended, counsel said: "I except to your honor's charge in the respect where you spoke of the duty of the examiner, and the obligation was upon him to follow the analyst." To this the court replied: "I did not say that. I took particular pains not to say it. I said it was his duty to return the goods according to the sample, so far as the sample applied to the goods that were passing under his examination." Thereupon counsel said: "I except."

So far as the last above-quoted remarks of the court are concerned, they correctly instructed the jury, and any exception to them would be wholly without merit. So far as the colloquium of the charge may have gone further as to any obligation of the examiner to follow the analyst, it was (if erroneous, which we do not now determine) fully corrected by the statement made when attention was called to it. So far as anything further in the charge is now complained of, neither objection nor exception called attention to it, and it cannot be here considered.

As to various other objections to portions of the charge, which are argued on the brief under point 23, subd. B, C, D, and E, it is sufficient to say that no exception was taken to them, or to any part of them. There was no error in refusing a new trial to Browne, and at the same time granting one to Cohn. The evidence certainly showed that more than one person participated in the corrupt understanding; that some one, who had power and authority to manipulate the invoices of A. S. Rosenthal & Co. and fill them with false statements, had conspired with the individual who was to pass upon those invoices. It might have been Cohn, or Rosenthal, or both, or one of them with the guilty assistance of others, and we fail to see how the finding of the court that the evidence was not sufficient to identify Cohn as the guilty party changes the situation. The evidence certainly warranted a verdict that Browne conspired with one or more persons, unnamed or unknown, who were to prepare false invoices, to defraud the United States.

The judgment of conviction is affirmed.

THE BENJAMIN FRANKLIN. THE EDWIN H. MEAD. THE EMMA J. ROSE.

(Circuit Court of Appeals, Second Circuit. January 16, 1906.)

Nos. 74, 75.

1. COLLISION—NAVIGATION OF NARROW CHANNELS—RULES APPLICABLE TO HUDSON RIVER.

   The Hudson river, in the vicinity of Yonkers, where it has a single deep and straight channel for a number of miles, is a "narrow channel," within the meaning of article 25 of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), requiring steam vessels in narrow channels, when safe and practicable, to keep to that side of the fairway which lies on their starboard side, and such rule governs its navigation.

2. SAME—STEAMER AND MEETING TOW—VIOLATION OF RULES.

   A tug with a tow of 15 boats, coming down the Hudson river, *held* in fault for a collision, which occurred opposite Yonkers and near the docks on the east side of the river in the evening between one of her tows and a tug passing up, for being on the wrong side of the channel, in violation of article 25 of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]); it being shown by her own evidence that the evening was only slightly hazy, which made it safe and practicable for her to keep to the west side of mid channel, and also that she was proceeding on a course angling across

the river, so that her tow occupied a considerable part of the channel and unduly interfered with navigation of ascending vessels.

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

For opinion below, see 127 Fed. 457.

This cause comes here upon appeals from decrees of the District Court, Southern District of New York, which held the steamtugs Benjamin Franklin and Edwin H. Mead both liable for damages from a collision of the former with the barge Emma J. Rose, in tow of the Mead. The Mead was bound down the Hudson river from Rondout, with 15 boats and barges in tow; the Rose being starboard boat on the hawser tier. The Franklin, which had landed an excursion at Hoboken, was bound up to Yonkers unincumbered. The collision happened between 10 and 11 p. m. July 14, 1901. The district judge found that: "In this case the Franklin was clearly in fault. If there was such a fog that she could not see the lights on the Mead, she was in fault for running at a very high rate of speed in a fog. If, as I think was the truth, the weather was simply hazy, and the lights of the Mead and on her tow could be seen, she was in fault for not seeing them. Her navigation was reckless. * * * I cannot see that the Rose was in fault. * * * She had a light, and it was in a sufficiently correct position." Since the appellant does not dispute the finding as to the Rose, and the Franklin, by not appealing, concedes her own fault, it will not be necessary to enter into the details of the navigation. Such facts as bear on the navigation of the Mead will be stated in the opinion. The opinion below is reported in 127 Fed. 457.

R. D. Benedict, for the Mead.

A. G. Thacher, for the Rose.

James E. Carpenter, for the Franklin.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). The District Court held the Mead in fault for "being on the east side of the river with her tow, in violation of rule 25," which reads as follows:

"In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such vessel."

This rule, long in force in the regulations governing navigation in the open ocean, was applied to inland waters by Act of June 7, 1897, c. 4, 30 Stat. 96 [U. S. Comp. St 1901, p. 2875]. The question presented on this appeal is whether that part of the Hudson river where this collision and the immediately antecedent navigation took place is a narrow channel, within the meaning of the rule, and its decision is not of such momentous importance as the arguments assume. If the result of an affirmance would be to hold that the Hudson river, from the head of navigation "at the railroad bridge at Troy" (Atlantic Coast Pilot) to the upper bay of New York, is to be considered a single narrow channel, under rule 25, the question would be a very far-reaching one. The testimony—much of it given by men who for years, by day and night, have navigated the big passenger steamboats carrying hundreds of passengers on a single trip, under all conditions of weather—shows that such a finding would revolutionize the navigation of the river. But the situation presented here is a far simpler one. From some miles above Yonkers to some miles below it, the river

runs without a bend and, roughly speaking, about S. S. W. In the vicinity of Yonkers the portion of the river near the west bank is comparatively shallow. It is deep enough to float even the large passenger boats (the Albany draws only seven feet, the Adirondack ten), but of course a moving boat needs plenty of water under her, and for a fast-moving boat there must be a sufficient distance kept from shoal water to guard against the effects of suction and displacement-waves upon vessels moored or berthed at landings near the shore. Moreover, it is not unusual to find a vessel drawing 20 feet of water included in some tow. The District Judge has correctly found that a "safe channel for ordinarily large boats at that point extends from the eastern shore two-thirds of the way across the river." This channel varies from about 2,500 to 3,000 feet, it deepens from 3 to 3½ to 4 fathoms on the west side to 6 to 6½ to 7½ on the east, shoaling again to 5 fathoms near the docks at Yonkers. It will be seen that here we have a single, wide, straight deep-water channel; not the situation presented elsewhere in the river, where two (or more) deep-water channels each navigable by the larger vessels, running generally in the direction of the river's course, are separated by shoaler reaches of water, safely navigable only by vessels of lighter draft. Nor have we the complication presented in The Bee and The Booth (C. C. A.) 138 Fed. 303, where the federal government has designated a part of the natural channel as an anchorage ground. The collision took place above the limits of the port of New York. The pleadings and some of the witnesses state that it took place "below Yonkers"; but the pleader and the witnesses were referring to the riverman's "Yonkers," Yonkers' landing, where the docks of Yonkers are. They were not concerned with the political divisions of the state, nor the geographical boundaries of the city of Yonkers. The overwhelming weight of the evidence shows that it took place within a few hundred feet of the landing at Ludlow, which is within the limits of the city of Yonkers, whose southerly boundary is the northerly line of Mt. St. Vincent (chapter 866, p. 2046, Laws N. Y. 1873). The Topographical Sheet (Tarrytown quadrangle) issued by United States Geological Survey shows the landing place at Ludlow to be over half a mile from the northerly line of Mt. St. Vincent, which is described thereon as the boundary between the counties of Westchester and New York. Therefore the complication presented by the designation of anchorage grounds within the port of New York is not found in the cause at bar.

Is this a "narrow channel," within the meaning of the statute? The Mead has called experienced pilots to testify that navigators on the Hudson river have never considered this part of it a narrow channel. What they considered it before the passage of the act of 1897 is, of course, immaterial. Nor is their present opinion on the question important. It must be assumed that Congress used the phrase "narrow channel" with the meaning which it had acquired by prior decisions of the courts. If that definition fits the Hudson at this part of its course, the new rule must govern, although it may change existing practice and be a shock to the persons who navigate there. The power to regulate rests wholly with Congress. Under the decisions there can

be no doubt that the phrase "narrow channel" correctly describes the channel hereinabove set forth. The leading cases will be found cited in Judge Holt's opinion in The Bee and The Booth (D. C.) 127 Fed. 453. Some effort was made to show that navigation under the rule was wholly impossible; but that failed, because all the witnesses conceded that it was safe and practicable to follow it when the weather was so clear that objects could be plainly distinguished at a considerable distance. We concur therefore with the District Judge in holding that rule 25 governs navigation in that part of the Hudson.

It will be observed, however, that the rule is not of universal application. It is to be followed only when it is safe and practicable to do so. Upon this branch of the case much evidence has been introduced which we find highly persuasive. It appears that vessels which anchor here almost universally select the west side (sometimes quite well over towards midriver), not because that side has been designated by authority, but because it has been the custom for many years, and there is better holding ground. At certain seasons of the year shad poles are to be encountered, and they too are generally on the west side, sometimes running over as far as midriver. There is no testimony as to whether they are lighted or not, and we have found no state statute regulating them, except one which applies solely within the limits of New York. See consolidation act of New York of 1882, Laws 1882, p. 206, c. 410, § 736, a re-enactment of a statute which was originally passed in 1857. It forbids the placing of nets in New York Harbor where the water is more than six feet deep, and seems to be generally disregarded, although it was saved from repeal by the Charter of Greater New York and by the game law of 1892. (Laws 1892, p. 983, c. 488, as amended by Laws 1895, p. 893, c. 974). The west bank is the narrow strand at the foot of the Palisades with very few landings and a few scattered lights, while the east bank is a succession of settlements, many of them populous, so that, as one of the witnesses expresses it, there "is one continuous lighthouse from Yonkers to New York." On the east bank too is the Hudson River Railroad with its constantly moving trains, the sound of which as they enter and leave stations will often be a valuable clue to the listener's whereabouts when thick weather obscures all lights. By listening carefully he can thus determine how far down he is, and, if he is bound for some landing on the east shore, can thus ascertain when he should turn in. No doubt, as the district judge found, a vessel can be run on the Hudson by compass courses without seeing the banks, but the margin of safety, in the case of deviation when running a long course, or when some bend or trend of the river makes it necessary to change course at some point which can only be guessed at upon a calculation of speed and time, is vastly less than it is on the open ocean. We should be inclined to hold on the evidence in this case that a vessel navigating at night in a heavy fog, which passed Kingsland Point Light and the bell there (Tarrytown) near midchannel, and undertook to lay her course down river on the westerly side of midchannel, would find it not practicable to make her turn in at the proper place for a landing at Ludlow or Mt. St. Vincent—without considering the measure of

safety incident to such a course. But all this testimony does not help the Mead. The forest and game law of the state forbids the taking of shad after June 15th from the Hudson below Troy. The evidence shows that by the end of June the shad poles are removed. This collision happened July 14th. The Mead was not bound in for any landings on the east bank, but down into the port of New York. Throughout her navigation, according to her own witnesses, it was "only a little hazy," and "you could see lights on both sides of the river and for some distance." We cannot find that it was either not safe or not practicable for her to navigate in compliance with rule 25, and she was in fault for not obeying it.

The appellant contends further that, even if The Mead was in a part of the channel which was forbidden to her, her position was not the proximate cause of the collision, citing The Fanita, 8 Ben. 17, Fed. Cas. No. 4,635; The Maryland (D. C.) 19 Fed. 551; The E. A. Packer (D. C.) 20 Fed. 327; The Clara, 55 Fed. 1023, 5 C. C. A. 390. Mere presence at the place of collision is not always enough to charge a vessel with fault. Her presence must in some way contribute to the happening of the collision, as, for example, when a vessel in forbidden water has been concealed by fog or by some other vessel and suddenly appears where she was not to be expected, or where the forbidden water is so restricted, or already so incumbered with other craft, that her presence embarrasses the navigation of the other vessel. We think the Mead's disobedience of the rule was such a contributing cause. She was not only east of midchannel, but very far to the east of it; the collision happening close to the dock at Ludlow. Moreover, instead of proceeding straight down the river with her tow in line behind her, she was angling over towards the west, with her tow of 15 boats trailing over towards the east, thus occupying a considerable part of the channel in which the Franklin was navigating, and embarrassing her navigation.

For these reasons, we are of the opinion that the decree of the District Court should be affirmed, with interest and costs.

HOME LAND & CATTLE CO. v. McNAMARA et al.

(Circuit Court of Appeals, Seventh Circuit. January 10, 1906.)

No. 1,201.

1. DAMAGES—BREACH OF CONTRACT—LAW GOVERNING.

A contract made in Illinois for the purchase and sale of cattle then in Montana, and to be there delivered, in the absence of any provision or extrinsic circumstances indicating a different intention, is governed by the law of Montana, where it was to be executed with respect to the measure of damages for its breach.

2. SAME—STIPULATION FOR LIQUIDATED DAMAGES—MONTANA STATUTE.

A contract for the purchase and sale of a large number of beef cattle to be executed in Montana, provided that in case of failure to deliver a certain number the seller should pay to the buyer a stipulated sum per head for the number short. Mont. Civ. Code 1895, §§ 2243, 2244, provide that stipulations in a contract for liquidated damages for its breach

shall be void, except where "from the nature of the case it would be impracticable or extremely difficult to fix the actual damage." *Held*, that the contract could not be said, as matter of law, to be within the exception so as to justify the court in instructing the jury that the measure of damages for a failure to deliver the required number of cattle was that stipulated for in the contract.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 164–168.]

3. TRIAL—OBJECTION TO EVIDENCE—ESTOPPEL.

The fact that a party objects to the admission of evidence offered to establish a certain measure of damages does not estop him from objecting that an alternative measure adopted by the court is erroneous.

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

The facts are stated in the opinion.

Wm. Brace, for plaintiff in error.

Merritt Starr, for defendant in error.

Before GROSSCUP, BAKER and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. This case—an action at law in the Circuit Court to recover the purchase price of cattle delivered by plaintiff in error to defendants in error—was here once before (McNamara & Marlow v. Home Land & Cattle Co., 121 Fed. 797, 58 C. C. A. 245) the judgment of the court below being reversed, chiefly because McNamara and Marlow had been excluded from showing damages suffered by them in the failure of the Home Land and Cattle Company to perform the ninth paragraph of the agreement between them.

On the second trial this error was corrected; but in its correction, instead of permitting McNamara and Marlow to prove the actual damages suffered by them, by plaintiff in error's failure to perform, they were allowed the sums stipulated in the paragraph as liquidated damages—the jury being practically instructed to accept the stipulated sum as the measure of damages. And upon this action of the court below, exceptions having been duly preserved, this proceeding in error is chiefly based.

The ninth clause of the contract is as follows:

"Ninth. Said first party hereby guarantees to deliver to said second parties during the season of 1897 not less than nine thousand head (9,000) of steers of the ages of three years old and up, and spayed heifers of the ages of four years and up. Should they fail so to do, they hereby agree to pay to said second parties the sum of twenty dollars ($20.00) in cash for each and every head less than nine thousand (9,000) head of such cattle so delivered."

The statute of Montana (Civ. Code, 1895) in force at the time the agreement was made and the case tried, contains the following provision:

"Section 2243: Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent, void, except as expressly provided in the next section.

"Section 2244: The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

In Illinois there is no statute upon the subject.

Two questions, therefore, are raised. First: Is the ninth clause of the agreement to be governed by the law of Montana, or by the law of Illinois? And if it be governed by the law of Montana, Secondly: Was the subject matter of the contract one in which damages would be impracticable or difficult to ascertain?

The contract was made in Illinois, but the subject matter of the contract was the purchase and sale of cattle then in Montana, to be delivered by the seller to the buyer in Montana. The contract, therefore, especially in its main provision, was one to be executed in Montana.

When confronted with the inquiry under what law a specific contract is to be interpreted and enforced, the principle that governs is this: In view of what law was the contract made. Wayman v. Southard, 10 Wheat. 1, 48, 6 L. Ed. 253. And apart from any circumstance other than the contract itself, we think it obvious that the law in view was the Montana law, where the contract was to be executed. Such, apparently, was the understanding of defendants in error, for they asked and obtained interest upon the default, according to the rates allowed by the laws of Montana. And such must have been the view of the court below, for the interest was allowed according to the Montana law. Indeed, other considerations being equal, the presumption is that the law where the performance is to take place is the law under which the performance shall be governed.

But it is argued, on the authority of Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104, that assuming that the law of Montana forbade that portion of the contract relating to liquidated damages, such circumstance, alone, shows that the law of Montana was not in the view of the parties, but that, within their view, the contract was to be governed by the law of Illinois, where the contract was made, and where no such prohibition exists. Pritchard v. Norton did not involve, however, the validity or invalidity of a mere subsidiary part of a larger contract. The question presented in that case was the validity or invalidity of the whole contract. Did the sale and purchase of these cattle, as an entirety, depend for validity upon whether the contract was to be governed by the Montana law or the Illinois law, Pritchard v. Norton would perhaps be in point. But such is not the case. The sale and purchase here involved is valid under the law of either state. Damages for failure to perform follow under the law of either state. It is to the measure of damages alone—an incident only to the general and greater purpose of the contract as an entirety—that the circumstance relates; a circumstance that cannot be accepted as showing that the parties meant that the whole contract should be determined by the law of a state other than that where the whole contract was to be performed.

This brings us to the second question, Was the subject matter of the contract one in which damages would be impracticable or difficult to as-

certain? On this question we are without much doubt. Beef cattle, in the matter of market value, are unlike horses or other animals purchased for use as live animals. In the purchase of animals for use as live animals, speed, temperament, docility, lasting qualities, and the like, are all elements that enter into the calculation. Two animals from the same sire and dam, may, on account of difference in quality, in these respects, stand wholly separate in the matter of market value. But beef cattle are not purchased for use as live animals. Their value consists wholly in the value of the carcass after the animal is dead. They are nothing more than beef on the hoof; and constitute, therefore, a staple almost as uniform as other staples. We can safely assume, we think, that taken all in all, one herd of beef cattle will average per head, in the market, about as much as another herd. And the very least that can be said about this part of the case is, that the question of impracticability and difficulty was one to be submitted, along with other questions of fact, to the jury, that it might thereby be determined whether the liquidated damage mentioned in clause nine, or the actual damages, should be taken as the measure of defendant in error's damage.

It is urged, however, by defendants in error, that effort was made by them to introduce evidence showing the impracticability and difficulty of ascertaining the damages under the contract; and also that effort was made by them to introduce evidence showing the value of the cattle in the market—both efforts meeting the objection of the plaintiff in error, and, on such objection, ruled out by the court. As a matter of fact, the court allowed the defendants in error to show, by at least one witness, that in the Chicago market beef cattle of the kind described, and at the time designated for delivery, were worth something like sixty dollars per head. But had this evidence been ruled out, even though erroneously ruled out, that would not have corrected the counter error of fixing a measure of damages not justified by the law. We know of no rule of law that prevented the plaintiff in error from objecting to both methods of ascertaining the damage, or that estopped it by reason of such objection, from urging that neither measure, as finally adopted by the court, is erroneous.

We fail, however, to find any evidence clearly showing an offer upon the part of the defendants in error to show the impracticability or difficulty of ascertaining the actual damage. True, much effort was made to introduce evidence of conversations leading up to the price named in clause nine, and the liquidated damages named. But this bears very remotely, if at all, upon the question involved. It was an attempt, not so much to show that the actual damages could not have been ascertained, as to show in detail the negotiation that led to the ultimate contract. Such negotiations might, or might not throw light upon the question involved.

The view already expressed, that the contract as an entirety is to be governed, under the circumstances shown, by the laws of Montana, disposes of the question of the rate of interest involved, the only other question that in view of a new trial needs to be decided. On the question of interest the court below was not in error.

The judgment of the court below is reversed, with instructions to grant a new trial.

VILLAGE OF BRADFORD v. CAMERON.

(Circuit Court of Appeals, Sixth Circuit. April 10, 1906.)

No. 1,501.

1. MUNICIPAL CORPORATIONS—BONDS—ESTOPPEL BY RECITALS.

Negotiable bonds issued by an Ohio village contained recitals that they were issued under authority given by Rev. St. Ohio 1892, § 2701, for the purpose of providing means for the payment of an indebtedness made upon the corporation building and electric light plant, and pursuant to an ordinance referred to and that all acts and things required to be done and performed precedent to and in the issuance of such bonds had been done and performed in due form as required by law. The ordinance referred to authorized the issuance of the bonds to take up a certain note and time orders given for such indebtedness and a resolution was passed by the council determining the validity of the indebtedness as required by said section 2701, which authorized the issuance of bonds to extend an indebtedness the validity of which had been so determined. The village also had authority under the statutes to purchase real estate and to build and maintain a corporation building and an electric light plant. *Held*, that the village was estopped by the recitals in the bonds to contest their validity as against a bona fide purchaser, on the ground of any irregularity in creating the original indebtedness.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1972–1977.

Bona fide purchasers of municipal bonds, see note to 41 C. C. A. 6.]

2. SAME—VALIDITY OF BONDS.

Where a municipal corporation under statutory authority issued bonds to extend or refund an indebtedness which it had power to contract, it is immaterial to the validity of the bonds whether or not it had authority to issue the particular form of obligations by which such indebtedness was evidenced.

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

Sherman T. McPherson, for plaintiff in error.

Morrison R. Waite, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit upon certain bonds and coupons thereon, issued by the village of Bradford, Ohio, under and by virtue of the provisions of section 2701, Rev. St. 1892, of Ohio, in pursuance of an ordinance passed May 18, 1901, for the purpose of extending the time of payment of certain indebtedness, made upon a corporation building and electric light plant. The petition, in addition to stating the facts respecting the issue of the bonds, which after legal publication were sold to the highest bidder, and are now held by bona fide purchasers in the open market, set forth copies of the same and the coupons, and of the resolution and ordinance under which they were issued. The court below overruled a demurrer to the petition and rendered judgment in favor of the plaintiff, holding that the village was estopped by the recitals of the bonds from setting up as a defense any irregularities in the proceedings of the village council in contracting or refunding the original indebtedness. Clapp v. Village of Marice City, Ohio, 111 Fed. 103, 49 C. C. A. 251. Sec-

tion 2701, of the Revised Statutes of Ohio, for 1892, under which these bonds were issued, provided that "the trustees or council of any municipal corporation, for the purpose of extending the time of payment of any indebtedness, * * * shall have power to issue bonds * * * or borrow money so as to change but not increase the indebtedness * * *; provided, however, that no indebtedness * * * shall be funded, refunded, or extended, unless such indebtedness shall first be determined to be an existing valid and binding obligation * * * by a formal resolution of the trustees or council, * * * which * * * shall also state the amount of the existing indebtedness," and the amount, number and denomination of the refunding bonds. It was provided further, that all such bonds shall express upon their face the purpose for which they were issued, and under what ordinance. Section 2703.

Each of the bonds issued contains the following recitals:

"This bond is one of a series of eleven bonds of like date, amounting in the aggregate to five thousand, seven hundred and forty-five ($5,745.00) dollars, issued for the purpose of providing the means to pay the indebtedness made upon corporation building and electric light plant. This bond as well as other bonds herein referred to, is issued under and by virtue of section 2701, Rev. St. of Ohio, and in pursuance of an ordinance passed by the council of said village on the 18th day of May, A. D., 1901, entitled, 'An ordinance to issue bonds, etc., and it is hereby certified and recited that all acts, conditions and things required to be done precedent to and in the issue of said bonds have been properly done, happened and performed in regular and due form as required by law."

The resolution of April 23, 1901, required by section 2701, provided that:

"Whereas, certain time orders of the village of Bradford, in Darke and Miami counties, Ohio, for the improvement of electric light and real estate amounting in the aggregate to $5,745.00, with interest at the rate of 6 per cent. per annum, have become due and payable as follows: [Giving list of obligations, being one note and 20 time orders, 12 of the latter being non-interest-bearing.] Therefore, be it resolved by the village council of the village of Bradford, that said indebtedness above described be and the same is hereby declared and determined to be an existing valid and binding obligation of said village, that $5,745.00 of said indebtedness be refunded and that the bonds of said village—be issued for the purpose of refunding said indebtedness and the interest thereof [giving numbers and denominations of the bonds]."

The ordinance of May 18, 1901, recited in the bonds, is similar to the resolution and provided:

"Whereas, a certain note and recent time orders of the village of Bradford, in Darke and Miami counties, Ohio, issued for the purpose of improving electric light and real estate, amounting in the aggregate to $5,745.00, and bearing interest at the rate of 6 per cent., having matured and were payable, or are about to mature and become payable, as follows: [Giving list of obligations as in resolution.] Whereas, said village was at the time said indebtedness became due and payable and still is unable to pay said indebtedness and will be unable to pay those time orders which are not yet due when they shall become due, but is desirous of extending the time for payment of the same without increasing said indebtedness: Therefore, be it ordained, etc., that for the purpose of refunding the said indebtedness above described and for no other purpose, there be issued the bonds of said village in the sum of $5,745.00, dated June 1, 1901," etc. [describing them and giving their numbers and denominations].

The validity of the bonds is assailed on the ground that the village acted without authority in issuing the note and time orders for the indebtedness incurred for the purpose of improving the corporation building and electric light plant; that this indebtedness was therefore not valid but void, and could furnish no foundation for the issue of the refunding bonds under section 2701; and, finally, that any would-be purchaser of the bonds, by reading the ordinance recited therein, would have been advised of this fact, and therefore took the bonds with notice of their invalidity. The bonds state that the indebtedness which they were intended to extend, was incurred upon "corporation building and electric light plant," the ordinance that the note and time orders to be paid by the proceeds of the bonds, were issued for the purpose "of improving electric light and real estate," and the resolution recites a similar purpose. The question, therefore, is, whether the council of the village had authority to improve the real estate or building of the municipality and its electric light plant. If, under the law of Ohio, such power existed, although upon condition, it is to be presumed that the condition attached to the exercise of the power had been complied with, for the bonds so recite. City of Defiance v. Schmidt, 123 Fed. 1, 59 C. C. A. 159, 164. Now, by section 1692, Rev. St. Ohio 1892, then in force, among other powers conferred upon cities and villages, was the power "to acquire by purchase, or otherwise, and to hold real estate, or any interest therein, and other property for the use of the corporation, and to sell or lease the same" (clause 34); and "to erect and maintain public halls" (clause 36).

By section 2486, the council of any city or village was given power to erect electric light works at the expense of the corporation, or to purchase the same if already erected therein. By section 2682, the council of a city or village was given power to levy taxes for "the general purposes of the corporation," not exceeding certain rates, and by section 2683, in addition to these taxes, the council of each city or village was given "power to levy taxes for any improvement authorized by this title," which included the above sections, and for the following purposes:

"14. For erecting, enlarging and improving halls and public offices.
"18. For erecting, enlarging and improving gas works and for lighting the corporation."

By section 2487, the management of the electric works, authorized by section 2486, was handed over to a board of trustees, to be first created by the council and afterwards (section 2488), elected by the people. To this board was given the power not only of constructing, but of extending the works, and of collecting and disbursing the money due the city from its operation. Section 2489. By section 2683–1, the municipality was empowered to levy a tax not to exceed five mills on the dollar, to pay a reasonable amount found to be due on the running expenses and the extensions made to the electric light plant owned and operated by the municipality, after applying the proceeds of its operation. We find in these statutory provisions, authority for the village of Bradford to improve its corporation building and its electric light plant. Along with the right to make such improvements, went

the authority to create an indebtedness for that purpose. If there was power to create the indebtedness, it matters not whether there was authority to issue the note and time orders evidencing the indebtedness or not. It was the indebtedness which was refunded or extended, not the evidences of it.

Before issuing the bonds, the council was required to determine by a formal resolution, that the indebtedness to be extended, was an existing valid and binding obligation of the municipality (section 2701), and in the bonds themselves to state the purpose for which they were issued, and under what ordinance (section 2703). These requisites were complied with, and there was nothing either in the bonds or the ordinance or the resolution, taken in connection with the general recitals, to put the purchaser upon notice of any irregularity, but everything to give him assurance that the bonds were valid and binding obligations of the municipality. If there was any irregularity in creating the original indebtedness (which does not appear in anything before us), the village is estopped to show it, under the circumstances. Village of Kent v. Dana, 105 Fed. 56, 40 C. C. A. 281; City of Defiance v. Schmidt, 123 Fed. 1, 59 C. C. A. 159, 165, and cases cited; Kinney v. Eastern Trust & Banking Co., 123 Fed. 297, 59 C. C. A. 586.

Judgment affirmed.

HIGGINS et al. v. HAMBURG-AMERICAN PACKET CO.

(Circuit Court of Appeals, Second Circuit. April 2, 1906.)

SHIPPING—LOSS OF CARGO—LIABILITY FOR NEGLIGENCE.

Cargo was shipped at Baltimore on respondent's steamship Bulgaria to be carried to Hamburg. When the ship reached a point in the river Elbe some 14 miles below Hamburg, owing to the low water in the river she anchored and proceeded to discharge her cargo into lighters owned by respondent, as was customary and provided for in the bill of lading. The Patricia, another ship owned by respondent, was also anchored above the Bulgaria a sufficient distance away, so that the two vessels swung clear of each other with the changes of the tides. Early on the morning of the second day at the commencement of the flood tide when the Bulgaria swung up stream it was seen that she was likely to collide with the Patricia, and her engines were started ahead, and a lighter into which a part of the cargo had been discharged was cast off and drifting against the Patricia was injured and sunk. *Held*, under the evidence that the drifting together of the two ships was caused by the fact that at some time during the night the Patricia dragged her anchor and moved with the tide into dangerous proximity to the Bulgaria, and that the negligence of the officers of the ships in failing to discover such fact, and in not taking measures to avert the danger, rendered respondent liable for the cargo lost in the lighter.

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

This cause comes here upon appeal from a decree of the United States District Court for the Southern District of New York, holding the respondent liable for cargo damage. This suit was brought by a libel in personam filed by the underwriters of the owners of

said cargo, alleging that the loss was due to the negligence of respondent.

The following is the opinion of Holt, District Judge, in the court below:

In my opinion the Harter act has no application to this case. That act applies to a vessel transporting merchandise or property to or from any port in the United States. The Patricia was simply lying at anchor and was not making any voyage. The Alster was transporting property which had come from the United States, but she was not transporting the property from any port of the United States. She was simply transporting it from the Bulgaria up the river to Hamburg. The Bulgaria had ended her voyage, and had delivered the merchandise, the injury to which has given rise to the controversy in this suit. By the terms of the bill of lading the steamer's responsibility ceased immediately the goods were discharged from the steamer's deck. I think, therefore, that the transportation of these goods from a port of the United States to a foreign port, in the sense of the language used in the Harter act, had been completed, and that whatever took place after the delivery of the goods to the lighter is not to be governed by the provisions of the Harter act, but is to be governed by the law and rules applicable to vessels swinging at anchor in a harbor.

There are only two possible explanations of this collision; either the Bulgaria anchored originally too near the Patricia or one or the other of these vessels dragged her anchor. If the Bulgaria originally anchored too near the Patricia, I think that the officers of both steamships were negligent in not discovering that fact during the two days which elapsed after the Bulgaria came to anchor and before the collision. But the witnesses from both steamers are positive that the Bulgaria was originally anchored at a safe distance from the Patricia, and their only explanation of the accident is that the anchor of one of the steamers must have dragged. If, as the respondent claims, the anchor of the Bulgaria dragged, so as to bring her nearer to the Patricia, it could only have occurred the day before, for the tide was ebb substantially all the night before the collision. The tide turned about 9 o'clock in the evening, and was ebb until about 4 o'clock in the morning, when it turned and caused the collision. But the evidence established that at that time of the year, at that place, it continued daylight until about 9 o'clock at night, and if the Bulgaria dragged her anchor in the daytime, so as to bring her within reach of the Patricia, I have no doubt that the officers of both steamers were negligent in not noticing it and anchoring further apart. But I think that the evidence preponderates that it was the Patricia that dragged her anchor in the night. The officers all testify that there had been no change in the situation of the two steamers on the day before the accident. If the Bulgaria had dragged her anchor that night, it would have taken her further away from the Patricia than she was before. If either vessel dragged that night, it must have been the Patricia, and I think that the evidence preponderates that that was what took place, and that that was the cause of the collision.

The important question in the case, therefore, in my opinion, is whether the dragging of the Patricia's anchor in the night was an excepted sea peril, for the result of which her owners are not responsible. The sudden dragging of an anchor and any consequent injury to a vessel, which is not preventable by ordinary care and skill, is an excepted sea peril, but in this case, assuming that the Patricia dragged her anchor that night, there was no danger of a collision until the tide turned, and it seems to me that the lookouts on both steamers were negligent in not discovering that the two vessels had come nearer together before the tide turned. The danger of the two steamers drawing too near each other was an obvious danger, which the officers of each vessel were bound to look out for constantly and vigilantly. Although it was at night and the change of position not as obvious as if it had occurred in the day time, the steamers' anchor lights must have been in place, and I think that the officers on watch were negligent in not discovering that the steamers had drawn too near together. When the collision occurred it was about dawn; the weather

was clear, and although there would be less likelihood of a small change of situation being noticeable in the dark, I think that when two such steamers had drifted near enough to each other to be in risk of collision, their officers were negligent in not discovering the fact either in the night or the day. If they had discovered it at any time before the tide actually turned the danger could have been averted. There were several tugs present which could have moved the Patricia back or moved the Alster away, or the Bulgaria could have gone further down the river under her own steam. Her officers claim that in swinging she stuck on the mud forward, but I do not understand that there is any claim that she was aground before she began to swing with the tide. In short, in my opinion, whatever view may be adopted as to the manner in which the Patricia and the Bulgaria got too near together, the respondent's agents on some of these vessels were negligent in not discovering that they had done so before the tide turned and in not taking efficient steps to prevent the collision before it occurred.

The clause in the bill of lading providing that the carrier shall not be liable for damage capable of being covered by insurance in my opinion constitutes no defense in this case. Such a clause is no protection against a claim by the owner of the cargo for damage caused by the respondent's negligence (The Titania [D. C.] 19 Fed. 101, 104; The Egypt [D. C.] 25 Fed. 320, 329); and the libelants in this case are subrogated to the rights of the owner of the part of the cargo referred to in this libel. The lighterage clauses in the bill of lading, providing in substance that the Bulgaria should not be responsible for forwarding the cargo in lighters up the Elbe to Hamburg, also, in my opinion, have no application to this case. If the owner of the Bulgaria had not been also the owner of the Alster, and the Alster had left the Bulgaria with the property which was injured on board, and was proceeding to Hamburg, the Bulgaria, under these clauses, would probably not be liable for any injury to the cargo from the negligence of the Alster; but as in this case all three of the vessels were owned by the respondent, and this suit is a suit in personam, and the ground of liability is the negligence of some of the respondent's agents, I do not see that the lighterage clauses in the bill of lading have any application to the case.

My conclusion is that there should be a decree for the libelants, the form of which should be settled upon notice.

Everett P. Wheeler, for appellant.
Charles C. Burlingham, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. In the view we have taken of the case the defenses based on the claims of exemption from liability by reason of the Harter act and of certain provisions in the bill of lading need not be discussed. The cargo was shipped at Baltimore on respondent's steamship Bulgaria to be forwarded to Hamburg. When the steamship reached a point in the River Elbe opposite Brunshausen, and some 14 miles below Hamburg, the water in the river was low, and under a provision of the bill of lading, and in accordance with the usual procedure in such conditions, the Bulgaria, on the afternoon of May 27, 1902, anchored at the customary place, and some 300 or 400 yards from a point where the steamship Patricia, also belonging to the respondent, was anchored, and proceeded to discharge a portion of her cargo into lighters belonging to the respondent. One of the lighters was made fast on the port side of the Bulgaria near her stem, and the portion of the cargo for which damage is claimed herein had been discharged into this lighter. During the 27th and

28th, with lighters alongside, the steamers had swung clear of each other with the turning of the various tides. At about 4 o'clock on the morning of May 29th, just as the tide was commencing to flood, the Bulgaria began to swing and drift broadside up the river toward the Patricia, and, while so swinging, it is claimed that she stuck in the mud forward. In any event, her stern continued to swing, and her officers saw that she was likely to collide with the Patricia, and started her engines ahead, and ordered the lighter cast off, in order to prevent it from being crushed between the two steamships. The lighter went adrift, caught on a safety hook of the rudder of the Patricia, sprung a leak, broke the hook, and sank before it could be towed ashore.

The evidence indicates that one of the steamships had dragged her anchor during the preceding night. The court below held that the preponderance of evidence showed it was the Patricia which dragged her anchor, and that this was the cause of the collision.

The testimony of the officers of the Patricia that she did not drag her anchor is indefinite and inconclusive. Her chief officer was asleep at the time of the accident and, therefore, could not testify as to the position of his vessel at that time. His second officer testified that he took the bearings of the Patricia the night before the accident, and they were the same as when they first anchored, and that when he came on deck just before the collision the ships were the same distance from each other as on the previous night, "as far as I can say," or "as far as I could see," but he admitted, "I didn't notice; I didn't take bearings."

The log of the Bulgaria and the testimony of the Bulgaria's officers are to the effect that it is "very likely" that one of the ships dragged her anchor the night before; that it was much more likely it was the Patricia than the Bulgaria; that if the Bulgaria had dragged during the night, she would have drifted down and away from the Patricia, and her officers would have noticed it; that they did not notice any such dragging, and did not believe the Bulgaria dragged.

In the face of this testimony, counsel for respondent argues that either the Bulgaria dragged her anchor on the flood tide on the morning of the accident, or that the Bulgaria swung with the flood tide, while the Patricia remained stationary. The unsoundness of the first contention appears from the fact that while the Bulgaria was swinging around with the flood tide there would be no strain on her anchor; the second contention is a mere conjecture, and is not supported by any testimony, except "a guess" on the part of one witness, who ascribes the cause of the accident to the dragging of one of the anchors, and the statement of the second officer of the Patricia, who said that when the Bulgaria was swinging "she took away the current from the Patricia." The fact that all the witnesses on the part of the respondent concur in ascribing the collision to other causes, and that no such blanketing or swinging had occurred on any of the previous tides, is a sufficient answer to this second contention.

The foregoing considerations establish the correctness of the find-

ings and conclusion of the court below, for the reasons stated in its opinion, that the dragging of the Patricia's anchor was the cause of the collision, and that the respondent was liable for negligence, in failing to discover the fact that the two vessels had drawn so near together that there was risk of collision, and in not taking measures to avert the danger.

The decree is affirmed, with interest and costs.

BOARD OF TRADE OF CITY OF CHICAGO v. CELLA COMMISSION CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 16, 1906.)

No. 1,992

1. EXCHANGES—PROPERTY IN QUOTATIONS—RIGHT TO PROTECTION BY INJUNCTION.

The Chicago Board of Trade has a property right in the market quotations made and posted in its exchange, and is entitled to protection in equity by injunction against the use of such quotations by another without its consent for such length of time after they are made as to enable it to secure to itself the benefit of such right; nor is it required to furnish its quotations to one conducting a bucket shop.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exchanges, § 16.

Quotations of prices and transactions on exchanges, see note to Sullivan v. Postal Tel. Cable Co., 61 C. C. A. 2.]

2. COURTS—JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY.

In a suit to enjoin a threatened or continued commission of certain acts, the amount or value involved, for the purpose of determining the jurisdiction of a federal court, is the value of the right which complainant seeks to protect from invasion, and not the sum he might recover in an action at law for the damage already sustained; nor is he required to wait until it reaches the jurisdictional amount.

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

3. SAME.

A suit for an injunction to protect a claimed property right, from which it is alleged and shown that complainant realized $30,000 per year, and which right is denied by defendant, involves a sufficient amount to be within the jurisdiction of a federal court.

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

For opinion below, see 121 Fed. 1012.

Henry S. Robbins, for appellant.

Chester H. Krum, for appellee Cella Commission Co.

Before SANBORN and HOOK, Circuit Judges.

HOOK, Circuit Judge. The Chicago Board of Trade exhibited its bill to enjoin the Cella Commission Company and others from surreptitiously acquiring and using its continuous market quotations. Upon final hearing the bill was dismissed, upon the ground that the quotations were the result of gambling transactions upon the floor of

its exchange, and did not constitute a species of property which appealed to the conscience of a court of equity for protection. So far as these questions are concerned, the record before us is substantially the same as that in the case of Board of Trade v. Stock Co., 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, and therefore the decree of the Circuit Court cannot be sustained upon the grounds assigned. In the Stock Co. Case no application for the right to use the quotations was made, and there was no proof that the Christie Company was conducting a bucket shop. In the case before us such an application was made, but was rejected by the Board of Trade. On the other hand, the proof here is conclusive that the Cella Company was conducting a bucket shop, within the accepted meaning of that term. So this difference between the cases is immaterial, for, if for no other reason, it is well settled that the Board of Trade is not required to furnish its market quotations to those engaged in such occupation. Board of Trade v. Stock Co., supra; Central Stock & Grain Exchange v. Board of Trade, 196 Ill. 396, 63 N. E. 740; Smith v. Western Union, 84 Ky. 664, 2 S. W. 483.

It is contended by the defendants that the record does not show that there is involved in this case the jurisdictional amount or value. In the bill of complaint it is averred "that the amount involved and matters in dispute in this suit, exclusive of interests and costs, is much more than the sum of $2,000." Assuming that this averment is traversed in the answer (which is doubtful), we are of the opinion that the evidence sustains it.

In a suit to enjoin a threatened or continued commission of certain acts the amount or value involved is the value of the right which the complainant seeks to protect from invasion, or of the object to be gained by the bill. It is not the sum he might recover in an action at law for the damage already sustained, nor is he required to wait until it reaches the jurisdictional amount. In City of Hutchinson v. Beckham, 55 C. C. A. 223, 118 Fed. 399, a decree was sought to enjoin the enforcement of an illegal license tax imposed upon complainant's business by a city ordinance, which was being enforced by the arrest of its employés. We held that for jurisdictional purposes the amount involved was the value of complainant's right to conduct its business without being subjected to such a burden, and not merely the amount of the tax demanded. See, also, Railroad v. Ward, 67 U. S. 485, 17 L. Ed. 311; Louisville & N. R. Co. v. Smith, 63 C. C. A. 1, 128 Fed. 1; Texas & P. R. Co. v. Kuteman, 4 C. C. A. 503, 54 Fed. 547; Amelia Milling Co. v. Tennessee, etc., Co. (C. C.) 123 Fed. 811; Humes v. Fort Smith (C. C.) 93 Fed. 857; Railway Co. v. McConnell (C. C.) 82 Fed. 65; Smith v. Bivens (C. C.) 56 Fed. 352; Whitman v. Hubbell (C. C.) 30 Fed. 81; Scott v. Donald, 165 U. S. 107, 17 Sup. Ct. 262, 41 L. Ed. 648.

In the case before us the Board of Trade claims a right of property in the market quotations gathered upon the floor of its exchange, and also the right to control their distribution and use. Upon the faith of the validity of these claims, it entered into a contract with two telegraph companies for the distribution of the quotations to those

approved by it, which yields it an annual revenue of $30,000. The contract obligates the Board of Trade to use all reasonable endeavors to protect its property right in the quotations against purloiners thereof. The contentions of the defendants and their acts are wholly at variance with the existence of any such right of property or control. They assert, somewhat inconsistently, that the quotations are the result of gambling transactions, and therefore not the subject of property, and also that they are affected with a public interest, and the right to the general use by all desiring them cannot be prohibited or restrained by the Board of Trade. It is obvious that, if the position of the defendants be sustained, the rights of the Board of Trade would either cease to exist or become of merely nominal value. The real value of the property claimed arises from the right of selection and exclusion of those desiring the use thereof, and to prescribe terms and conditions; and it is this property and the accompanying right, which, denied by the defendants but yielding the revenue above indicated, are sought to be protected by the bill of complaint. This is a sufficient showing of a jurisdictional amount or value in controversy.

The proof is clear that the defendants were using the quotations of the Chicago Board of Trade, not only those of the opening and closing of the daily markets, but also those intermediate and continuous; that is to say, those whereby the price of a commodity is quoted at intervals of less than 10 minutes. It also clearly appears that they obtained them in an unauthorized and irregular manner. But it is said that there is no evidence that they were used while they were live quotations, and while a property right in them subsisted in the Board of Trade. In effect, counsel contends that, when the quotations were taken off of the wires and posted on the blackboard of the defendants and used in their business, they had been superseded by later ones and had therefore become in a sense surrendered and dedicated to the public, so that anyone might use them without let or hindrance. This position is suggested by the following observation of the Supreme Court in the Christie Case:

"Time is of the essence in matters like this, and it fairly may be said that, if the contracts with the plaintiff are kept, the information will not become public property until the plaintiff has gained its reward. A priority of a few minutes, probably, is enough."

But there was a witness who testified that he went into the office of the Cella Company, and saw that they were posting quotations of the Chicago Board of Trade which were being posted at the same time in the Merchants' Exchange of St. Louis, of which he was a member, and which was authorized to receive them. This was all of the direct evidence upon this particular phase of the case. No witness for the defendants testified that they were not receiving and using them simultaneously with those who were rightfully doing so. Aside from the testimony of the witness, all of the fair inferences are against the defendants in this matter. We cannot believe that they would entertain wagering contracts upon the basis of a quotation of the market price of a commodity which was known to have been super-

seded by a later one. To do so would be betting upon the happening of an event that either had already transpired, or was, to some extent, at least, foreshadowed by the later evidence of the trend of the market. The right of property in the quotations endures for a sufficient length of time to enable the Board of Trade to avail itself of the benefits thereof, and if those who are in the position of the defendants are permitted to operate so closely in point of time that they have practically the same use as one who is authorized to receive them, the right would be of doubtful value.

The decree of the Circuit Court is reversed, and the cause is remanded, with direction to enter a decree in favor of the complainant.

BOARD OF TRADE OF CITY OF CHICAGO v. DONOVAN COMMISSION CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 16, 1906.)

No. 1,993.

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

For opinion below, see 121 Fed. 1012.

Henry S. Robbins, for appellant.

Chester H. Krum, for appellee Donovan Commission Co

Before SANBORN and HOOK, Circuit Judges.

HOOK, Circuit Judge. This case is like that of the Cella Commission Company (just decided) 145 Fed. 28. There appears in the record a stipulation that whatever decree is made in that case shall be made in this. Therefore, the decree of the Circuit Court is reversed, and the cause is remanded, with direction to enter a decree in favor of the complainant.

THE NUGENT. THE S. W. GEE. THE TRENTON.

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

No. 5.

COLLISION—TUG MEETING TOW—MUTUAL FAULT OF TUGS.

The tugs Trenton and Gee both *held* in fault for a collision between the Gee and a canal boat in tow of the Trenton when meeting in the night in the Buffalo ship canal: The Gee because she did not keep a proper lookout and in consequence failed to observe the towing lights on the Trenton and to govern her movements accordingly, and the Trenton for keeping to the left side of the canal in violation of the rules and without giving any signal to warn the Gee of her intention. The canal boat *held* not in fault, although she did not carry the regulation lights; notice of her presence being given by the towing lights of the Trenton.

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

This cause comes here upon appeal from a decree of the District Court, Western District of New York, holding the steam tug S. W. Gee solely in fault for a collision with the canal boat William Nugent in tow of the tugboat Trenton.

Harvey L. Brown, for appellant.
John W. Ingraham, for the Trenton.
Wm. B. Wright, Jr., for the Nugent.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The collision occurred in the City Ship Canal (known also as the "Blackwell Canal") in Buffalo, a little below the drawbridge which crosses the canal at Michigan street. The canal is 197 feet wide. The canal boat William Nugent left her berth above the bridge in tow of the tug Trenton, bound for Peck slip, which enters the canal at right angles about 1,100 feet beyond the bridge, and through said slip, into the Buffalo river. For convenience of description, the ship canal may be considered as running about north and south. Its real course is about northeasterly and southwesterly. The drawbridge turns on a central pier, which leaves an easterly and westerly passage. At the time of the accident a coal scow 30 feet wide and 130 feet long was tied up to the westerly bank of the canal immediately beyond the bridge abutment. The Trenton with her tow proceeded along the westerly (left-hand) side of the canal and when about 300 feet above the bridge perceived the lights of a tug (the Babcock) some 500 feet below the bridge coming up, and apparently making for the westerly passage. For some reason the Trenton wished to keep to the left-hand side of the canal and to that end blew a two-blast signal to the Babcock. The latter promptly answered with a like signal and changed her course so as to go through the easterly passage, passing starboard to starboard. As the Trenton was just entering the draw, she observed the red and white lights of the Gee coming around the corner of Peck slip, and her green light as she got straightened up in the canal. The Gee was bound up above the bridge to take up a tow in conjunction with the Babcock; just before she turned in out of Peck slip she blew a bend signal whistle and as she got into the canal three whistles for the drawbridge. When she turned into the canal, the Gee saw the lights of the Trenton coming through the bridge. She (the Gee) bore over to the starboard, to the west side of the canal, thus keeping to the right and when about halfway between Peck slip and the bridge blew one whistle to indicate that she wanted the starboard side of the canal and expected to pass the Trenton, port to port. None of the whistles of the Gee were heard on the Trenton; and (after her exchange with the Babcock) the latter sounded none, although she continued on the westerly side of the canal, clearing the coal scow by about 10 feet, the Nugent on a short tow-line following 5 or 6 feet behind her. The Gee, after straightening up in the canal, kept over to the westward as her signal indicated she intended to, crossed the bow of the Trenton, and got into the water between the latter and the west bank. There was room for her there, because by this time the Trenton had got some little way beyond the coal scow,

the bow of the Nugent (which boat was 96 feet long) being about half the Nugent's length past the bow of the scow. The Gee did not perceive the canal boat until she was in the pocket formed by the Trenton and Nugent to the east, the bank to the west, and the coal scow to the south. It was while she was there maneuvering that the collision happened.

Various charges of fault are made which need not all be discussed. It is charged that the Nugent did not exhibit the regulation lights and it is conceded that the charge is true. This is a fault and the canal boat would be required to bear her own proportion of the loss, were it not for the circumstance that we are satisfied that her failure to display proper lights did not contribute to the catastrophe. Her lights had she carried them would have given notice to the Gee of the fact that the Trenton had a tow, and it was the Gee's failure to recognize that fact which helped to precipitate the catastrophe. But, as will be seen, we have reached the conclusion that the Trenton, nearer to the Gee than the Nugent was, had already given the same notice. If those on the Gee failed to observe the Trenton's towing light we cannot assume that they would have been any more attentive to lights on the Nugent.

The rule (rule 9 of Pilot Rules for the Great Lakes) required the Trenton at the time to carry "on top of the pilot house a white light * * * and an additional white light hung not less than three feet vertically above the * * * headlight." There is a sharp conflict of testimony on this branch of the case. The captain of the Gee testifies that he saw but one white light, and the captain of the Babcock corroborates him, but four witnesses testify that both lights were burning. Manifestly the district judge, who heard the witnesses, was satisfied that the two white lights were shown or he would not have held the Trenton free from fault. With such a preponderance of testimony in its support we cannot disturb such finding. The Gee therefore is chargeable with knowledge of the fact that the Trenton had a tow, because the Trenton's lights gave her notice of that fact, and her navigation is to be tested in accordance therewith; if failure to keep a sufficient lookout left her without such necessary information such failure is itself a fault. The captain of the Gee says that if he had known the Trenton had a tow he might have gone to the easterly draw; whether or not he did that, he could easily have avoided collision if he had known the tow was there. All he had to do was to move into the water to the port side of the Trenton at such speed as to admit of his holding himself in the pocket until the Nugent had been hauled forward far enough to enable the Gee to slip between her and the coal scow. We find no fault with the Gee for keeping to the starboard side of the canal, even if she knew the Trenton had a tow; it was her rightful place, and in the absence of any signal from the Trenton she had the right to assume that after emerging from the draw the Trenton also would haul over to her proper place. We find the Gee in fault, not for crossing the Trenton's bows—there was sufficient clearance left—nor in going into the water west of the Trenton; but in so executing such maneuver as to continue on and into the canal boat of whose presence she was ignorant because she did not keep a proper lookout.

We also find the Trenton in fault for keeping to the westerly or left-hand side of the canal after passing the draw without signifying by appropriate signal her wish or intention to navigate contrary to the rule which required her to keep to the right. Some testimony was introduced to show that it was the custom for boats coming down the Ship Canal bound into Peck slip to take the westerly side of the draw and keep to the westerly side of the canal on account of making the turn into the slip. But the evidence failed to show more than that a large majority did so navigate, while the witness himself admitted that the custom was in conflict with the rule to keep to the right and that vessels bound up the canal could not tell in advance that vessels coming down were going to keep to the left, instead of to the right unless such vessels indicated their intention by proper signal. The failure of the Trenton to give such a signal was a fault and we cannot say that had she sounded two whistles as she came out of the westerly passage, the Gee would not have laid her course for the easterly passage and so avoided the collision.

The decree is reversed, with costs of this court to the Nugent against the Gee, and to the Gee against the Trenton, and cause remanded to the District Court, with instructions to decree in favor of the Nugent and against both the Gee and the Trenton for damages, interest, and costs—one-half against each.

NATIONAL SURETY CO. v. CINCINNATI, N. O. & T. P. RY. CO.

(Circuit Court of Appeals, Sixth Circuit. April 28, 1906.)

No. 1,506.

WRIT OF ERROR—REVIEW—ACTION TRIED TO COURT.

Where an action at law is tried without a jury under Rev. St. §§ 649, 700 [U. S. Comp. St. 1901, pp. 525, 570], and only a general finding is made, and the ultimate facts are not agreed upon by the parties, there can be no review of the question whether the judgment is supported by the facts found, and, unless exceptions are taken to the rulings made during the trial, there is no question which can be reviewed by the appellate court.

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

Guy W. Mallon, for plaintiff in error.

Harmon, Colston, Goldsmith & Hoadly, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit upon a bond given by the surety company, plaintiff in error, to secure the performance of a contract made by "F. M. Pease, Incorporated," with the railway company, defendant in error, by which the latter agreed to sell, and Pease to buy, 20 old locomotives; 16 at $3,500, and 4 at $3,000 each. Pease took and paid for all of these locomotives except six, which the railway company, after notice to him and the surety company, sold at

public auction, charging them with the difference. The contract price being $20,500 and the proceeds of the sale $11,150, there was a deficiency of $9,350, for which, adding $25, the expense of the sale, making $9,375, with interest, the suit was brought and judgment rendered. By a stipulation in writing filed with the clerk, a jury was waived and the case submitted to the court under sections 649 and 700, Rev. St. [U. S. Comp. St. 1901, pp. 525, 570]. The defense was that the railway company, without the knowledge or consent of the surety company, altered the contract in certain material respects. All the testimony appears in the bill of exceptions contained in the record, but no exceptions to the rulings of the court in the progress of the trial are presented, and no special findings were requested or made. The court, at the conclusion of the evidence and arguments, delivered an opinion in which it gave its general finding in favor of the plaintiff, with the reasons for such conclusion. To this the counsel for defendant excepted, and, upon the strength of such exception, we are asked to review the findings of fact and law which are claimed to be involved in the general conclusion reached.

In our opinion, the record raises no questions which are open to revision by us. The opinion of the court, in the absence of aid outside the record, cannot be treated as a sufficient finding of the facts within the statute to warrant us in reviewing the judgment based upon it. Insurance Co. v. Tweed, 7 Wall. 44, 51, 19 L. Ed. 65. Section 649, under which this case was tried without the intervention of a jury, provides that "the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." Here the finding was general, and, like the verdict of a jury, must be taken as settling all questions of fact; there being no power in this court to review the weight of the evidence. Moreover, section 700 provides that when an issue of fact is tried by the court without the intervention of a jury, under section 649, the rulings of the court in the progress of the trial, if excepted to at the time, may be reviewed, "and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment." In other words, if there be no special finding, as in the case before us, and the ultimate facts are not agreed upon by the parties (Wilson v. Merchants' Loan & Trust Co., 98 Fed. 688, 39 C. C. A. 231, 233), there can be no review of the question whether the judgment is supported by the facts found. Martinton v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862; British Queen Mining Co. v. Baker Mining Co., 139 U. S. 222, 11 Sup. Ct. 523, 35 L. Ed. 147; Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; St. Louis v. Western Union Tel. Co., 166 U. S. 388, 390, 17 Sup. Ct. 608, 41 L. Ed. 1044, and cases cited therein; Ky. Life Insurance Co. v. Hamilton, 63 Fed. 93, 11 C. C. A. 42; Humphreys v. Third Nat. Bk., 75 Fed. 852, 21 C. C. A. 538; Fales v. N. Y. Life Ins. Co., 98 Fed. 234, 39 C. C. A. 38.

Judgment affirmed.

UNITED STATES v. HELMRATH.

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

No. 84.

1. CUSTOMS DUTIES—PROTEST—SUFFICIENCY—OMISSION OF PARAGRAPH NUMBER.
A protest in which an importer claimed a "refund of duty on * * * skins" *held* a sufficient reference to the provision in the free list of the tariff act for "skins of all kinds," and to satisfactorily meet the requirement in section 14, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], that protests must set forth "distinctly and specifically" the grounds of objection.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs Duties, § 237.]

2. SAME—EVIDENCE—SUFFICIENCY.
As to an importation of mixed hides and skins, separation of the pieces weighing less than 12 pounds, which were free of duty, was made by weighers experienced in handling skins, who actually weighed only the pieces as to which they were in doubt. *Held*, that proof of the results by this method was sufficient to show the amount entitled to free entry.

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

For decision below, see 135 Fed. 912, which reversed three decisions of the Board of United States General Appraisers, which had affirmed the assessment of duty by the collector of customs at the port of New York on importations by W. Helmrath. One of the questions involved was whether the importer's protests answered the requirements of section 14, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], wherein it is provided that the grounds of protest shall be set forth "distinctly and specifically." The form of these protests is shown by the following extract from one: "I herwith protest against the liquidation of my entry of hides and skins, * * * each of which weighs under 12 pounds; and looking to you for the refund of duty on these 99 skins, I remain." Another question involved was the sufficiency of the evidence introduced in the importer's behalf. The Board, while expressing a doubt as to the sufficiency of the protests, overruled them on the ground that the evidence did not satisfactorily support the contention made. The circuit court held the protests and the evidence to be sufficient, and sustained the importer's contention, whereupon the United States prosecuted this appeal.

D. Frank Lloyd, Asst. U. S. Atty.

Hatch, Keener & Clute (J. Stuart Tompkins, of counsel), for the importer.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The questions in controversy are fully discussed, and are, we think, correctly decided by the Circuit Court. The protest was sufficient, within the decision of U. S. v. Salambier, 170 U. S. 621, 18 Sup. Ct. 771, 42 L. Ed. 1167, and Shaw v. U. S., 122 Fed. 443, 58 C. C. A. 425. There can be no question that the collector was sufficiently informed by the protest that the importer claimed free entry for his merchandise as "skins." On turning to the free list, the collector there found "skins of all kinds" specifically mentioned. He could not have been misled or confused as to the importer's position. "Hides" are separated from "skins" by weight. If more than 12 pounds in weight, they are known as "hides"; if less, they are known as

"skins." The importations in question were handled by weighers who from long experience were able to tell as to the status of most of the skins by handling and examination. In case of doubt as to their being under 12 pounds in weight, the skins were actually weighed, and we are convinced by the proof that no substantial error was made.

Regarding the protest Exhibit L, Judge Lacombe is of the opinion, assuming that it is correctly stated in the record, that it is too indefinite and uncertain to answer the requirements of the law. In other respects he concurs in the foregoing views.

Decision affirmed.

ILLINOIS CENT. R. CO. v. COUGHLIN.

(Circuit Court of Appeals, Sixth Circuit. June 20, 1906.)

No. 1,528.

1. TRIAL—INSTRUCTIONS—REFUSAL OF REQUESTS.
   The refusal of a requested instruction, although it correctly states the law applicable to the facts, is not error where it is, in substance and effect, covered by the charge given.
2. SAME.
   Upon an issue as to the negligence of a defendant railroad company in failing to properly inspect a car, a defect in which caused plaintiff's injury, it was not error for the court to modify a requested instruction, so so as to confine the consideration of the jury to the inspection of the particular car in question.
3. WRIT OF ERROR—REVIEW—RULING ON MOTION FOR NEW TRIAL.
   The denial of a motion for a new trial is within the discretion of the trial court, and in general will not be reviewed on appeal in the federal courts.

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

C. G. Bond, for plaintiff in error.

J. E. Pope, for defendant in error.

Before LURTON and RICHARDS, Circuit Judges, and EVANS, District Judge.

EVANS, District Judge. The court had this case before it on a former occasion, and the opinion then rendered, and which is reported in 132 Fed. 801, 65 C. C. A. 101, not only explained the nature of the case, but was quite specific in indicating the lines upon which the new trial then awarded should proceed. In disposing of the case now, we are to ascertain whether those directions were followed. Upon the second trial the testimony seems, in all essential respects, to have been the same as upon the first, and its consideration again led the jury to a verdict for the plaintiff.

Numerous errors have been assigned, only a few of which need be noticed.

It is earnestly insisted that there was not sufficient evidence to warrant a verdict for the plaintiff for any amount, and, consequently, that the court should have instructed the jury to find for the defendant. In its former opinion this court did not take that view, and, as there was

testimony upon both sides of the material issues of fact, we think the court properly left to the jury the determination of those issues.

2. The plaintiff in error moved the court to charge the jury as follows:

"(a) The fact that the handhold came loose or that the nut was found off after the accident is not proof and does not raise any presumption on the part of the railroad company that it was negligent either as to the construction of the car or its inspection.

"(b) If you find that the car went south after the accident, and one end of the handhold was found to be off at Chester, this would not be evidence and would not raise the presumption that the railroad company was negligent, or that there was any defect at the time of the accident, and you cannot from this fact infer that the railroad company was negligent in inspecting the car at McCombs."

The court refused to so charge, and this is assigned as error.

It may be conceded that each of these propositions was a proper and accurate statement of the law applicable to the phases of the case to which they referred, but it does not follow that the plaintiff in error was prejudiced by the refusal to give either proposition or both of them to the jury, inasmuch as an examination of the very careful and elaborate charge of the court discloses the fact that in every essential respect each of these propositions was covered by what the court charged, and their repetition was unnecessary. If given in substance and effect, as we think they were, the plaintiff in error was not entitled to have the court below use the exact language proposed.

3. The plaintiff in error also moved the court to charge the jury upon the subject of the car inspection by the employer in this case, but the proposition as submitted referred to the company's practice as to car inspection generally. The court declined to charge as thus requested by the plaintiff in error, but modified the request in such way as to confine consideration of the question to the inspection of the car upon which was the handhold the defect in which caused the injury to the defendant in error. We think the modification was proper, and that the instruction requested by the plaintiff in error was too broad. The modification brought it within the issues made by the pleadings, which related to one car alone, and not to the cars generally used by the plaintiff in error. Indeed, the charge of the court at the trial seems fully and carefully to have conformed to the views of this court expressed in its former opinion, and, without separately noticing other assignments relating to the charge and to refusals to charge, we are content to say that in our opinion the law of the case upon the issues made by the pleadings and upon the evidence heard thereon was accurately and adequately expressed by the court in the charge. This being so, the jury could intelligently apply the evidence, and perform their functions as triers of the facts. Certainly there was no error sufficient to warrant a reversal of the judgment.

4. It remains, however, to consider that assignment of error which insists that the judgment should have been set aside and a new trial granted upon the alleged ground that one of the jury at some time visited a freight yard and saw other cars, and subsequently made statements to his fellow jurors as to the railroad company's manner of attaching the handholds to its cars. It is insisted that this made it pos-

sible for the jury to determine the case upon evidence not delivered in court under oath and with opportunity to cross-examine. The issues as to this alleged occurrence and its effect upon the jury were tried upon evidence which is preserved in the record. Such conduct by a juror as is alleged here might of course work injustice and hardship in a given case. Judge Hammond, who had presided at the trial, died while the motion for a new trial was under submission, but Judge McCall had all the evidence on the subject before him, and after full consideration of it overruled the motion. The granting or refusing a new trial is within the sound discretion of the trial court, and, speaking generally, the exercise of that discretion is not regarded as a proper subject of review by this court. Certainly, we can by no means say that the trial judge abused his discretion in this instance, and there appears to be no reason for departing from the rule of the appellate federal tribunals in such cases.

The judgment of the Circuit Court must be affirmed.

YOUNG v. MERCANTILE TRUST CO.

(Circuit Court of Appeals, Second Circuit. May 2, 1906.)

No. 246.

TRUSTS—JURISDICTION OF EQUITY TO ENFORCE—SUFFICIENCY OF ALLEGATIONS.

A bill for an accounting, which alleges that complainant delivered securities to defendant as trustee and depositary, to hold and thereafter deliver and distribute the same as directed by complainant, but which does not set out such terms and conditions of the deposit as to render it inconsistent with a mere bailment, does not show such an express or implied trust relation between the parties as to confer jurisdiction upon a federal court of equity.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 425, 589.]

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

For opinion below on demurrer to bill, see 140 Fed. 61.

The following is the opinion below of Holt, District Judge, on demurrer to the amended bill:

In my opinion, the ground of action alleged in the amended bill does not differ in any essential respect from that alleged in the original bill. The amended bill alleges that the defendant has delivered to the vendors of the property sold the portion of the securities to which they were entitled. The remaining securities, therefore, are the property of the complainant, and in my opinion are held by the defendant as a mere depositary or bailee, and the complainant has a complete remedy by an action at law to enforce his rights to his property. I concur in the opinion of Judge Hazel that, under the authorities, and particularly under the statute providing that in the federal courts equity has no jurisdiction when there is an adequate remedy at law, this bill cannot be maintained. The demurrer is sustained, and, as the complainant has already once amended the complaint in order to meet the precise objection, I think that final judgment should be ordered in the defendant's favor on the demurrer.

Dittenhoefer, Gerber & James (A. J. Dittenhoefer and David Gerber, of counsel), for complainant.

Alexander & Colby (William F. Goldbeck, of counsel), for defendant.

Before LACOMBE and COXE, Circuit Judges, and THOMAS, District Judge.

PER CURIAM. Decree of Circuit Court affirmed, upon the two opinions in Circuit Court.

MOFFATT v. BLAKE.

(Circuit Court of Appeals, Eighth Circuit. April 6, 1906.)

No. 2,180.

1. APPEAL—FINDINGS OF MASTER CONCURRED IN BY COURT.

The findings of a master, concurred in by the court, are to be taken as presumptively correct, and will be permitted to stand unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4015–4018.]

2. BILLS AND NOTES—EXTENSION OF OVERDUE NOTE—INTEREST.

Where an overdue note is by agreement of the parties indorsed "Extended on or before Oct. 1st, 1902, at 6% interest from Mch. 27, '02," the date of the indorsement, the legal effect thereof is to make 6 per cent. the rate of interest from that time until the time of payment, and not merely until October 1, 1902.

(Syllabus by the Court.)

Appeal from the District Court of the United States for the Western District of Missouri.

Paul D. Kitt, for appellant.

Tom H. Reynolds, for appellee.

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

VAN DEVANTER, Circuit Judge. This is a controversy over the amount due under a mortgage upon property belonging to the estate of a bankrupt. Its proper determination depends upon two questions: (1) Was the note of a third person which was turned over to the mortgage creditor by the mortgagor accepted by the former as a payment and extinguishment pro tanto of the mortgage debt? (2) Was the reduction which was made in the rate of interest on the mortgage debt restricted to the period ending October 1, 1902? The report of the master and the decree of the District Court resolved both questions adversely to the mortgage creditor.

The master recognized the rule of law that the acceptance by a creditor of the note of his debtor or of a third person does not constitute payment unless it is so specially agreed at the time, but found from the evidence that it was so specially agreed in this instance, and his report was approved by the District Court. In this respect the case falls within the settled rule that the findings of a master, concurred in by the court, are to be taken as presumptively correct, and

will be permitted to stand unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence. Furrer v. Ferris, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. Ed. 649; Fisher v. Shropshire, 147 U. S. 133, 146, 13 Sup. Ct. 201, 37 L. Ed. 109; Warren v. Burt, 7 C. C. A. 105, 110, 58 Fed. 101; Cheney v. Bilby, 20 C. C. A. 291, 299, 74 Fed. 52. The record has been carefully examined, and we deem it sufficient to say that there does not appear to have been any error in the application of the law or any serious or important mistake in the consideration of the evidence.

The facts relating to the question of interest are these: The note called for interest at 8 per cent. per annum after maturity. On March 27, 1902, which was after maturity, the interest to that time was paid, and also $6,000 on the principal, and the parties entered into the arrangement evidenced by the following indorsement on the note: "Extended on or before October 1st, 1902 at 6% interest from Mch. 27, '02." The appellant's position is that the reduced rate of interest was operative only between March 27, 1902, and October 1, 1902, and that after the latter date the interest was to be computed at the original rate. We think otherwise, and concur in the District Judge's statement of the legal effect of the indorsement, viz.:

"In effect, it took the place of a renewal note, due October 1, 1902, at 6 per cent. interest. The extension was not at 6 per cent. interest until October 1, 1902, but it was 6 per cent. interest from March 27, 1902, and impliedly until paid, the presumption being, as in all such promissory contracts, that the debt would be paid at maturity, and if not paid the interest specified as a part of the extension agreement would continue until payment was made."

The case of North v. Walker's Adm'r, 66 Mo. 453, relied upon by appellant, is distinguishable from this in that by the terms of the extension agreement there under consideration the reduced rate of interest was to be operative only during the period of the extension.

The decree is affirmed.

WESTERN ELECTRIC CO. v. ROCHESTER TELEPHONE CO. et al.

(Circuit Court of Appeals, Second Circuit. January 17, 1906.)

No. 39.

PATENTS—INVENTION—TELEPHONE SWITCHBOARDS.

The Scribner & McBerty patent, No. 559,411, for a signaling apparatus for telephone switchboards, is void for lack of patentable invention in view of the prior art.

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

This cause comes here upon appeal from a decree of the Circuit Court, Western District of New York, dismissing a bill of complaint in a suit in equity for alleged infringement of United States patent 559,411, granted May 5, 1896, to complainant as assignee of Charles E. Scribner and Frank R. McBerty for improvements in apparatus for telephone switchboard. The opinion of the Circuit Court is reported in 132 Fed. 814.

Edward Rector, for appellant.

C. A. Brown, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. We find it unnecessary to add anything to the very full and careful discussion of the issues and testimony which is contained in the opinion of Judge Hazel, who heard the cause at circuit. While we do not find in any single prior patent a distinct anticipation, we fully concur in his conclusion that the device of the patent "was a mere improvement without involving the exercise of inventive faculty." There is a wide difference and an extended controversy between the experts for the respective sides as to opinions, theories, and deductions, but as to the facts which establish the prior art there is really no conflict, nor, indeed, any ground for conflict, since they are set forth in written documents, the earlier patents which have been put in evidence. Moreover, these patents, or at least the four or five most important of them, are both in specifications and drawings very clearly expressed. When once familiarity with the nomenclature and the elementary features of the art (about which there is no dispute) is acquired, the character and functions of the respective structures are found to be clearly displayed therein. Indeed, they are far more illuminative than are some of the so-called "simplified diagrammatic drawings" which have been put in evidence. If the expert who is called to testify in such causes would only appreciate that he is not addressing electrical engineers, but laymen, and if, when undertaking to describe what some particular patent showed to a man skilled in the art, he would take the specifications and drawings of the patent as his text, instead of some conventional paraphrase of his own devising with its lettering entirely changed, he would materially lighten the labor of the court.

At the close of a very long record one of the patentees finally stated the improvement of the patent to be the devising of a "system of supervisory signals in which the interruption of the talking current in the line circuit is caused to apply the current or power for displaying the positive supervisory signal, which current or power is later withdrawn when the plug is withdrawn from the jack, permitting the signal to disappear." This "system" is brought about by a rearrangement of old parts, and in the literature of the art these parts had already been brought together in such a variety of ways, and there had been so many substitutions of one device for another, so many methods shown of controlling one current by another and of displaying and obscuring signals, such a transposition of parts and shifting of currents that it seems to us entirely clear that the rearrangement of the patentees, clever though it may have been and in its details perhaps novel, was nevertheless one of those minor improvements which was easily within the ordinary skill of the telephone engineer. The case seems to come within the views expressed in Atlantic Works v. Brady, 107 U. S. 199, 200, 2 Sup. Ct. 225, 27 L. Ed. 438, and peculiarly within those expressed in Thomson Houston Elec. Co. v. Western Elec. Co. (C. C.) 65 Fed. 619.

The decree is affirmed, with costs.

ANDREWS et al. v. CONNOLLY et al.

(Circuit Court, D. Colorado. November 7, 1905.)

No. 4,623.

1. CONTRACTS—DURESS—FAMILY SETTLEMENT.
   A written contract made between brothers to settle long standing disputes in regard to their respective rights and interests in mining property will not be set aside on the ground of duress, because one party who was in possession signed it reluctantly, while it was insisted on by the others, when the other parties thereafter made large advances in reliance on it which he received without objection and used in the development of the property during several years.
2. EQUITY—GRANTING RELIEF TO DEFENDANT—NECESSITY OF CROSS-BILL.
   A court of equity, in granting relief to a complainant, may make it conditional on the doing of equity to defendant by paying a sum to which he is justly entitled, although he has filed no cross-bill therefor.

In Equity.

Harvey Riddell, for complainants.
Hugh Butler, for respondents.

RINER, District Judge. It is impossible to gather from the evidence in this case just what the contract or arrangement, under which the mines in controversy were developed, was between the parties in interest, prior to the date of the written contract of August 13, 1900. The evidence shows, without conflict, that at the inception of the mining venture, out of which this controversy arises, the defendant Patrick Connolly had the possessory right to four mining claims at Leadville, referred to in the evidence as the "Dolly B. Group"; that by some arrangement, made with his brother, Nichols K., and a little later with Nichols K. and Michael Connolly, a large amount of money was furnished by the two last-named brothers to develop the property. It is further shown that between June, 1894, and August 13, 1900, the three brothers had acquired interests in other mining properties in Leadville and had purchased a number of shares of the stock of the Big Six Mining Company. The total amount of money furnished by Nichols K. and Michael Connolly, as the record shows, was $114,513.43, over and above any proceeds received by them from the operation of the mine. This money, together with certain of the proceeds of the mine, was used for the development of the mine and for acquiring other properties and the stock of the Big Six Mining Company.

The record shows that there were numerous disputes and disagreements between the brothers in regard to the development and expense of operating the mine; that these differences were of such a character that they seriously interfered with the working and development of the property. Prior to August 13, 1900, there was no written contract showing the interests of the respective parties, but the development of the property had proceeded under some verbal agreement or understanding, and, as already suggested, it is impossible for the court to determine just what that arrangement was, as the testimony of Michael

Connolly and Patrick Connolly, they being the only two parties to the contract now living, is squarely in conflict. But I do not consider it necessary, in the view I have taken of this case, for the court to determine just what that verbal arrangement or agreement was. The record shows that differences and disagreements, in relation to the properties and their development, existed, and that these differences between the brothers amounted, at times, almost to bitterness. It further shows that on the 13th of August, 1900, Michael Connolly and Patrick Connolly met in the city of Leadville, and there entered into a written agreement defining the interest each party had or was to have in all of the property, including the Big Six mining stock. The contract was executed by Michael Connolly, for himself and on behalf of his brother, Nichols K., from whom he held a power of attorney, parties of the first part, and Patrick K. Connolly, for himself, party of the second part. There was inserted in this contract a provision in relation to a claim made by Michael Connolly for a balance alleged to be due from the defendant to the two brothers, parties of the first part to the contract, arising out of some oil deal in Pennsylvania in 1875. This provision of the contract, however, requires no consideration, as it is not supported by proof and counsel for the complainants, in his brief, says: "As that item of $15,000 is out of the case, nothing further need be said of it." This, I take it, to be a confession that the provision of the contract, in relation to this $15,000, could not and ought not to be sustained by the court. We have then to deal with the contract, only in so far as it relates to the rights of the parties, in the mining properties at Leadville and the stock of the Big Six Mining Company. As already indicated, I do not consider it necessary to review the history of the various disputes, disagreements, and annoyances arising between the brothers in relation to the operation of their various mining properties at Leadville; nor do I deem it at all necessary to attempt to fix the blame upon any one of the parties in interest. It is all sufficient, for the purposes of this case, that such disputes and disagreements did, in fact, exist, and that the parties attempted to settle them by the written contract of August 13, 1900, wherein the rights of the parties were defined.

The defendant admits the execution of the contract by him, but seeks to avoid it on the ground, as he alleges in his answer and testified, that he was induced to sign it by the threat that the property would be shut down, and that neither Michael, nor his brother, Nichols, would furnish further money to push the enterprise, and that in consequence of his inability to carry on the enterprise himself, and through fear that his brothers would render the property unavailing to him if he declined to sign the contract, he finally executed it in duplicate, keeping one draft for himself, and his brother, Michael, taking the other. His copy he placed upon record. This, he says, he did upon the advice of their bookkeeper, Martin Patrick Connolly. This statement is, however, denied by Martin Patrick Connolly. But even if it be admitted that the allegations of the answer and the evidence of defendant are true, yet I do not think the admission sufficient to show that the contract was executed under duress. It is not necessary to

enter into an extended discussion to show that a contract procured by means of duress is inoperative and void, both at law and in equity, and that actual violence, even at common law, is not necessary to establish duress, because consent is the very essence of the contract, and, if there be compulsion, there is no actual consent, and moral compulsion, such as that produced by threats to take life, or to inflict great bodily harm, as well as that produced by imprisonment, is everywhere, I think, regarded as sufficient in law to destroy free agency, without which there can be no contract, because in that state of the case there is no consent. In its more extended sense, duress may be said to be that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or in apprehension to overcome the mind and will of a person of ordinary firmness. Decided cases may be found which deny this rule and hold that contracts procured by menace of a battery to the person, or of trespass on lands, or of loss of goods, cannot be avoided on that account. The reason assigned for thus restricting the general rule is that such threats are held not to be of a nature to overcome the will of a firm and prudent man, because it is said, if such an injury is inflicted, adequate remedy may be had at law. But the modern decisions in this country, I think, hold that contracts procured by threats of battery to the person, or of destruction of property, may be avoided on the ground of duress, because in such a case there is nothing but the form of a contract without the substance. Granting this then to be true, still the concession cannot, I think, benefit the defendant in this case, as the proofs contained in the record are not sufficient to bring the case within the rule. The proofs contained in the record do not show that Michael Connolly did any unlawful act to deprive the defendant of his property, or to compel him to do what he acknowledges he did do, yield to the pressure of the circumstances surrounding him and sign the agreement of settlement. I think the signing of the contract, under the circumstances disclosed by the record in this case, must be regarded, both at law and in equity, as a voluntary act, as it was unattended by any act of violence or threat of any kind calculated in any degree to intimidate the defendant, or to force the result, or to compel that consent which is the essence of every valid contract. Suppose he consented reluctantly, as he doubtless did, still the fact remains that he did consent when he might have refused, and, having consented and signed the contract, I think he is bound by its terms. This is especially true, when we come to consider the character of the transaction and the relation of the parties to the contract. It was entered into for the purpose of defining the rights of the parties and putting an end to the disputes and disagreements which had theretofore existed between the brothers. In other words, it was a contract in the nature of a family settlement or compromise, and, as to such contracts, Mr. Pomery says:

"Compromises, where doubts with respect to individual rights, especially among members of the same family, have arisen, and where all the parties instead of ascertaining and enforcing their mutual rights and obligations, which are yet undetermined and uncertain, intentionally put an end to all

controversy by a voluntary transaction in the way of a compromise, are highly favored by courts of equity. They will not be disturbed for any ordinary mistake, either of law or of fact, in the absence of conduct otherwise unequitable, since their very object is to settle all such possible errors without a judicial controversy."

There is another reason why the court feels obliged to sustain this contract. The evidence shows that after the contract was executed the parties of the first part, until Nichols K.'s death, and after his death Michael and Mrs. Andrews, continued to make advances of money for the purpose of developing these properties, and that these advances amounted to many thousands of dollars. The defendant knew that these advances were being made by these parties in reliance upon the terms of the contract, yet he did not protest against their being made, but received and applied the money, and this situation continued for several years after the contract was executed. While it is true the law gives one, who is induced by fraud to make a contract, the option of rescinding it, yet it imposes upon him the duty to exercise that option with all convenient speed, after his discovery of the fraud. He will not be permitted to lie in wait until time and change make his interest plain and then make his choice. Silence, delay, acquiescence, or the retention of the fruits of the agreement for any considerable length of time after the discovery of the fraud, constitute a complete and irrevocable ratification of the transaction. Rugan v. Saben, 53 Fed. 415, 3 C. C. A. 578; Wheeler v. McNeil, 101 Fed. 685, 41 C. C. A. 604. In other words, I do not think the defendant should be permitted to retain the benefits and renounce the burdens of his agreement. The conclusion reached, is that the complainants are entitled to an equitable lien upon the property described in the contract, to secure their claims against it.

There is another feature of this case, however, which must not be lost sight of. The contract provides that the parties of the first part shall, upon the signing of the agreement, take charge of and control the properties mentioned in the contract until they shall have realized the amount which they contributed and furnished for the development of the properties and to obtain title thereto; that, when this amount has been realized, each of the parties shall have a one-third interest in all of the properties, including the Big Six mining stock. Pursuant to this provision of the contract, Michael Connolly and his brother assumed control of the mine and placed in charge a man by the name of O'Brien. The record shows that O'Brien only remained in charge a few days, and then, at the suggestion of one of the brothers, the defendant again assumed charge of the mine and has been in charge of it ever since. Under the terms of the contract, his custody of the property was the custody of the plaintiffs, and, as the amount of his compensation was not agreed upon, I think he is entitled to receive, and to have deducted from the claim made against the property by the complainants, such compensation for his services as the services were reasonably worth. It is true that no affirmative relief is sought by the defendant, but, I take it, the rule is well settled that a court of equity may always condition its grant of relief to those who seek its aid by the requirement that they shall do equity to their oppo-

nents, and I think equity requires that the defendant be allowed a reasonable compensation for his services from and after the date of the contract. If counsel and the parties can agree upon this amount, the court will adopt it; if not, the case will be sent to the master for the purpose of taking proof upon that question.

While the court is of the opinion that the complainants are entitled to have an equitable lien, for their advances, fastened upon this property by the decree, yet it is unwilling to direct a sale of the property under existing conditions, as it is quite evident that, if the property is properly worked, it will more than pay the indebtedness against it. If the plaintiffs desire to proceed with the operation of the mine, rendering their accounts to this court, until their lien is adjusted and paid off, the decree may so provide; otherwise, the court will hear further from counsel as to the advisability of appointing a receiver to take charge of the property.

ANDRUS v. BERKSHIRE POWER CO.

(Circuit Court, D. Connecticut. April 20, 1906.)

No. 1,207.

WATER COURSES—ABATEMENT OF DAM—ESTOPPEL.

The owner of a farm on a river injured by overflow caused by defendant's dam below, built to furnish power for electric light plants, *held* estopped to maintain a suit to enjoin the maintenance of the dam, which would result in at once stopping the operation of such plants, by his acquiescence in the building of the dam and his prior statement to defendant's representative who called on him that he would "wait and see" before determining what he would do in case injury should result to his farm.

Bill for Injunctive Relief. Heard on the merits in open court under stipulation.

C. Walter Artz, for plaintiff.

Gross, Hyde & Shipman, and Henry Stoddard, for defendant.

PLATT, District Judge. The necessity for immediate action prevents anything more than the briefest memorandum.

Jurisdiction is conceded. The plaintiff resides in Sheffield, Mass., and owns a farm on the bank of the Housatonic river. Said farm is adapted to and used for dairy purposes. The defendant has erected a dam across said river in the town of Canaan, Conn., which sets the water of the river back upon said farm, and thereby seriously damages the same. Said damage is such as to practically deprive the plaintiff of the right to use the farm for dairy purposes.

The defendant is a trespasser upon plaintiff's land and will continue to be a trespasser so long as said dam shall be continued in operation. The plaintiff demands mandatory injunctive relief which shall be drastic enough to bring about a discontinuance of the trespass. Such relief would, at the same time, compel the defendant to absolutely stop the use of its dam for any purpose. In the fall of 1904, Mr.

Roraback, acting as a promoter, called upon the plaintiff, and talked with him about the scheme. He told the plaintiff that the building of the dam was not expected to make any appreciable rise in the river as far up as his farm, but as a precautionary measure, he wanted to tell him about it, and ask him what he would do if damage should follow the building of the dam. His answer practically was, "Well, we don't know, we can't tell, let us wait and see." No protest was entered against the work. No intimation that if damage did come there would be an attempt to maintain his strict legal rights to the extent of insisting that the dam should come down, if he were seriously injured. Build the dam, and experience will teach us. This was an invitation to Roraback to organize the defendant as a responsible entity and to lead it to invest its money, long before anything had been done except trifling preliminary engineer work.

Defendant is a public service corporation and is engaged in furnishing electric light and power to the towns of Norfolk, Canaan and Sharon, and to many inhabitants in said towns, and the demand is constantly increasing. If the relief asked for were granted, it would force the defendant to abandon the enterprise, and relegate the people of those towns to kerosene and candles. In such a situation it is not to be presumed that the plaintiff would be a hard taskmaster, but the temptation to use improperly the power bestowed upon him would jar many a conscience. During the building of the dam neither plaintiff nor defendant knew that its erection would cause such serious damage to the plaintiff, or whether it would in fact cause any damage. In the bill the plaintiff charges that the defendant did know it, and fraudulently concealed such knowledge from the plaintiff. If this allegation were supported by proof, it would put a different face upon the matter. During the hearing counsel for the plaintiff was told that it was important to sustain that allegation. He bowed acquiescence, and doubtless appreciated the point, but I can find no scintilla of proof which even glances in that direction. The dam was completed and the gates closed on September 12, 1905, and the damage thereupon became at once manifest. And from then during the fall of 1905, and well into January, 1906, conferences were had between divers parties representing the defendant and the plaintiff regarding his damages. He exhibited the various elements of damage at length, and with considerable force, and at last insisted upon receiving $5,000 in cash therefor, which was far more than defendant felt that it ought to pay. All these negotiations proceeded without any positive demand from the plaintiff to the defendant that the nuisance should be abated. It is true that several times during the different conferences, the plaintiff said that he would rather have the water off his land than to take money for his damage, but such statements appear to have been in the way of trade talk, and to have been put forth as a point upon which to base a demand for larger damages. This does not appear to be a case in which the plaintiff can of right demand that the nuisance shall be abated. His actions estop him from now making such a claim. The plaintiff wishes an early review of this decision, and there appears to be no way to bring that about, except to dismiss the bill.

The situation is not a pleasant one. The only question which appears debatable to the court is this: The plaintiff has come into a court of equity in pursuit of his rights. Others have followed him who do not appear on this record, and still others might intervene. Does not the situation demand that the ordinary methods of chancery practice shall be put into operation, so that equal and exact justice may be done to all parties, whether land owners who have been trespassed upon, or the owners of the dam who have trespassed? If the appellate court differs from me on the main question, the difficulties vanish at once. If, on the other hand, it shall happen to agree with me that the case does not call for an immediate destruction of the water power, it is hoped that before the control of this court over the matter in hand shall have gone forever, it may think it wise to make some suggestions touching this second branch of the inquiry.

Whenever the plaintiff desires to avail himself of his right of review, let a decree be entered dismissing the bill, but let it only be done upon the distinct understanding that an appeal shall be entered at once and prosecuted to effect.

Having this day filed a memorandum showing briefly my reasons for dismissing the bill, it becomes at once important to act upon defendant's motion for the appointment of a master, or of a committee, to assess plaintiff's damages. I am entirely opposed to appointing a committee under defendant's charter. If any action were to be taken, it would seem that the time honored chancery practice should be followed.

To grant the motion, however, will serve to defer for a long time the final settlement of the plaintiff's rights, and during that delay the dairy farm may suffer sadly. I shall deny the motion, and will cooperate in every way with the defendant in its efforts to obtain a review of this order, as I have already done with the plaintiff on the main question.

UNITED STATES v. SANDEFUHR.

(District Court, E. D. Arkansas, W. D. April 27, 1906.)

No. 2,699.

1. INTERNAL REVENUE—SHIPMENT OF LIQUOR—MARKING AND BRANDING.
   Section 3449, Rev. St. [U. S. Comp. St. 1901, p. 2277], applies solely to shipments of liquors under other than the proper name or brand known to the trade, as designating the kind and quality of the liquor, and not to a shipment concealing the name or brands required by the regulations of the Internal Department to be put upon all vessels containing liquors.

2. INDICTMENT—DEMURRER.
   The mere fact that the district attorney makes an indictment as drawn under a certain act of Congress is not sufficient to sustain a demurrer to the indictment, if there is any other statute in force making the acts charged in the indictment an offense.

   [Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 284, 489.]

3. CRIMINAL LAW—CREATION OF OFFENSE.

While Congress may make the violation of a regulation of a head of a department made by its authority, a penal offense, it must be done by a specific act, as penal statutes cannot be made to rest upon presumptions. (Syllabus by the Court.)

William G. Whipple, U. S. Atty.
Morris M. Cohn, for defendant.

TRIEBER, District Judge. The indictment charges the defendant with having knowingly and unlawfully shipped a keg containing 15 gallons of spirituous liquors, the brands and marks thereon not being visible, the same being packed in a barrel, which barrel was not marked and branded as the law requires. On the margin of the indictment the district attorney indorsed, "Section 3449, Revised Statutes" [U. S. Comp. St. 1901, p. 2277], to indicate the statute under which the defendant was indicted. This section provides:

"Whenever any person ships, transports, or removes any spirituous or fermented liquors or wines, under any other than the proper name or brand known to the trade as designating the kind and quality of the contents of the casks or packages containing the same, or causes such act to be done, he shall forfeit said liquors or wines, and casks or packages, and be subject to pay a fine of five hundred dollars."

The government relies upon rulings of the Commissioner of Internal Revenue, reported in 20 Internal Revenue Record, 109, and 30 Internal Revenue Report, 278, in which it was held that the marks, brands, and stamps required by law and regulations to be applied to casks or distilled spirits must not be obscured or covered by encasing the vessel containing the liquor in another, but must at all times be in such condition as to admit of the examination of the marks, brands, and stamps by the revenue officers, and a failure to comply with these requirements, he held, was a violation of this section of the statutes. Judge Caldwell, in delivering the opinion of the United States Circuit Court of Appeals for this (the Eighth) circuit, in United States v. 132 Packages of Spirituous Liquors, etc., 76 Fed. 364, 22 C. C. A. 228, construed this statute to prohibit the placing of false brands or names on any liquors, whether placed in barrels, casks, or bottles. In the course of his opinion he says:

"There is no connection or relation between the marking and branding required in other sections of the law and the requirement of section 3449, that packages shall not be shipped or removed under any other than the proper name or brand known to the trade, as designating the kind and quality of the contents of the package. The name or brand here referred to is not placed on the package by any officer of the government, or under his direction. It is an official name or brand. It is placed there by the distiller or rectifier, who, to prevent frauds on the revenue and facilitate their discovery, is required to make the name or brand under which he removes the package speak the truth."

In this indictment there is no allegation that the liquors were shipped under any false name or brand known to the trade as designating the kind and quality of the contents of the packages. On the contrary, the indictment negatives this fact, as it alleges that "the barrel in which the keg was packed had no marks or brands whatever other than the address."

While the object of the statute is to aid in the collection of the revenue, as stated by Judge Caldwell, it was to be accomplished, so far as this section sought to do so, by preventing misrepresentations as to the kind and quality of the contents of the package. The quality of the liquor may, in many instances, show the proof thereof by which the tax due thereon is determined. There is nothing in the statute which makes the failure to put any visible marks or brands on the package containing the liquor an offense. In United States v. Stege (D. C.) 87 Fed. 553, the identical question was before the court. In that case, as in this, a keg of whisky had been packed inside of a sugar barrel which contained no brands, and it was held that this did not constitute a violation of section 3449. Whether the statute applies only to distillers, rectifiers, and wholesale dealers, as held in United States v. 20 Boxes of Corn Liquor (D. C.) 123 Fed. 135, affirmed in 133 Fed. 910, 67 C. C. A. 214, or applies to all persons shipping liquor, as decided in United States v. Campe (D. C.) 89 Fed. 697, it is unnecessary to determine in this case, as in the opinion of the court the facts charged in the indictment do not constitute a violation of this section.

But the mere fact that the district attorney marked the indictment as having been drawn under section 3449 would not be sufficient to sustain the demurrer if there is any other statute in force making the acts charged in the indictment an offense. Williams v. United States, 168 U. S. 382, 389, 18 Sup. Ct. 92, 94, 42 L. Ed. 509, Mr. Justice Harlan, in delivering the opinion of the court, said on that question:

"It is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment, if the charges made are embraced by some statute in force. The indorsement on the margin of the indictment constitutes no part of the indictment, and does not add to or weaken the legal force of its averments. We must look to the indictment itself, and if it properly charges an offense under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute. * * * The court, therefore, while erroneously adjudging that the prosecutions were embraced by section 3169, Revised Statutes [U. S. Comp. St. 1901, p. 2059] and the act of February 8, 1875 (18 Stat. 307), did not err in overruling the demurrer to the first count of the respective indictments."

The only provision bearing on this subject to which the attention of the court has been called is a regulation made by the Commissioner of Internal Revenue, approved by the Secretary of the Treasury under the powers granted by an act of Congress. That provides:

"The stamps, marks and brands required by law and regulations to be applied to casks and packages of distilled spirits are designed to bear witness to the legality of the spirits which they cover, and they must not be obscured in any manner or covered by encasing the vessel bearing the same in another, but must at all times be in such condition as to admit of ready examination by the revenue officers." Regulations Concerning the Tax on Distilled Spirits (April 15, 1901, Ed.), p. 127.

If Congress has made the violation of this regulation a criminal offense, the indictment could be sustained. This has been the uniform ruling of the courts. United States v. Bailey, 9 Pet. 238, 9 L. Ed. 113; United States v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed.

591; Caha v. United States, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415. In re Kollock, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813; Cosmos v. Gray Eagle Oil Co., 190 U. S. 301, 23 Sup. Ct. 692, 24 Sup. Ct. 860, 47 L. Ed. 1064; Grady v. United States, 98 Fed. 239, 39 C. C. A. 42; Van Lear v. Eisele (C. C.) 126 Fed. 823. But neither the learned district attorney nor the court has been able to find any statute making the violation of this regulation a criminal offense. Penal statutes cannot be made to rest upon presumptions.

As the indictment fails to charge any violation of a statute enacted by Congress or regulation of the head of a department the violation of which is made punishable by any act of Congress, the demurrer must be sustained.

BARBER v. BOSTON & M. R. CO.

(Circuit Court, D. Vermont. April 7, 1906.)

1. REMOVAL OF CAUSES—AMOUNT IN DISPUTE.

An action on the case to recover $2,000 damages for negligence is not removable, although the actual damages are alleged to be greater.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 132.]

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. SAME—TIME FOR FILING PETITION—CHANGE IN PLEADINGS.

The right of removal arises at any time during the progress of a case whenever by a change in the pleadings or proceedings the cause is rendered for the first time removable.

At Law. On motion to remand to state court.

Orion M. Barber, for plaintiff.

George A. Weston, and Eleazer L. Waterman, for defendant.

WHEELER, District Judge. This is an action on the case brought in a state court, and removed here for negligently setting fire to the plaintiff's buildings destroying some, and partly destroying other, property alleged to be of the value with expense of repairs of much more than $2,000 with an ad damnum of that amount. It has now been heard on a motion to remand. The motion would be too late, being after the term at which it was entered, if the ground was not jurisdictional; as it is the motion is in order at any time. The allegations of value and expense are not of sums certain like those in debt or assumpsit on records or written instruments, which must be proved as laid; but evidence of different amounts would be admissible under them, and the limit of recovery on all would be the ad damnum, and so that would govern the amount in dispute. Cole v. Goodall, 39 Vt. 400, 94 Am. Dec. 334; Gordon v. Longest, 16 Pet. 97, 10 L. Ed. 900; Kanouse v. Martin, 15 How. 198, 14 L. Ed. 660; Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729. The case must as it now stands, therefore, be remanded.

It is suggested that the ad damnum may be raised in the state court,

and that the matter in dispute is what it may be raised to; and if not that the right to remove a removable case might be kept away by keeping the ad damnum too small till after the time for removal should elapse. But the right to remove attaches for the first time whenever any change in the proceedings makes it so, and it may then be availed of. No. Pacific R. R. Co. v. Austin, 135 U. S. 315, 10 Sup. Ct. 758, 34 L. Ed. 218; Powers v. Chesapeake & Ohio R. R. Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673.

Motion granted, and cause remanded.

PERCY SUMMER CLUB v. ASTLE et al.

(Circuit Court, D. New Hampshire. April 12, 1906.)

No. 315.

1. EQUITY—JURISDICTION—INADEQUACY OF LEGAL REMEDY.
   A complainant claiming the exclusive right of fishing in a body of water may maintain a suit in equity, in the nature of a bill of peace, to protect such right by restraining other persons from fishing therein, who claim the right under a state statute as members of the general public, and from committing trespasses upon complainant's shore property which are only incidental to such fishing.

2. FISH—RIGHT OF FISHERY—PONDS AND LAKES IN NEW HAMPSHIRE.
   By the ancient common or unwritten law prevailing within the locality now constituting the state of New Hampshire exclusive rights of fishing in lakes and ponds did not vest in the proprietor of the soil as such, but fishing, as well as fowling, was free or subject to public control.
   [Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fish, §§ 3, 16.]

In Equity.

Philip Carpenter, for complainant.

A. S. Batchellor, Henry F. Hollis, Crawford D. Hening and E. G. Eastman, Atty. Gen. of New Hampshire, for defendants.

PUTNAM, Circuit Judge. This is a bill in equity heard on bill, answer, replication, and proofs. The state of New Hampshire was allowed by the court to intervene, and it appeared by its Attorney General. The bill was brought to determine the rights of the complainant in the bed and waters of Christine Lake, formerly North Pond, situated in the county of Coos, containing about 140 acres, and in the fishery therein. It prays a decree adjudging the complainant to be the owner of the lands around and about and under the lake and of the waters thereof, and of the exclusive right of fishing in those waters. It also prays that the respondents named in the bill may be restrained from trespassing upon the complainant's lands around the lake, and from fishing in the lake, or setting up any claim adverse to the complainant in the bed or waters thereof.

The case shows that citizens and residents of the state of New Hampshire claim a public right to enter upon the lake for the purpose of fishing, and to take fish therefrom, and the respondents named in the bill stand upon that alleged right. The case also shows that the

Legislature of New Hampshire in 1887 (Laws 1887, p. 466, c. 86) passed a statute which, no doubt, had special reference to this particular pond or lake, providing that no action shall be maintained against any person for crossing uncultivated land to reach any public waters for the purpose of taking fish, unless actual damage has been sustained thereby, and also providing that, for the purposes of the act, all natural ponds and lakes containing more than 20 acres shall be deemed public waters. This is the only statute ever passed in or with regard to New Hampshire, either before or after the Revolution, expressly declaring by general legislation lakes or ponds, or the fish therein, to be public; but apparently Concord Mfg. Co. v. Robertson, 66 N. H. 1, 25 Atl. 718, 18 L. R. A. 679, decided in 1889, announced that the act is evidence of an understanding that a pond of 20 acres is public waters. Under these circumstances, having in view especially the intervention of the state of New Hampshire in this litigation, it is evident that, although the respondents might ordinarily be regarded as mere trespassers, yet here they may be said to represent a class; that class being all the residents of New Hampshire who may desire to fish in ponds or lakes of the character of that in dispute here. Therefore the case is sufficiently analogous to a bill of peace to justify the intervention of a court of equity, if other things are sufficient therefor, because it is very plain that actions at law would not give the complainant adequate relief. This proposition may well be illustrated by Lockwood Company v, Lawrence, 77 Me. 297, 52 Am. Rep. 763, decided in 1885. Of course, this is not a direct authority in support of the jurisdiction in equity of the federal courts, but we refer to it because it is undoubtedly within the usual rules in regard to the question of jurisdiction. There the bill was sustained against a number of persons, acting independently of each other, depositing refuse material in the Kennebec River, which, by commingling into one mass, seriously obstructed and impaired the wheels of the complainant's mill. No single tort-feasor in that case could be said to have done any material damage, or to be called on to make payment of any substantial amount on that account. Therefore, on ordinary suits at law, the complainant would have been practically without redress; but the results of the action of each tort-feasor combined, when commingled, created a positive and substantial injury which equity justly restrained. So here a tort committed by a single fisherman would be so minute as to be hardly injurious; and certainly it would afford the complainant no substantial basis of relief, while, under the circumstances, the unrestrained acts of numerous fishermen, if they were unauthorized, would destroy the value of the lake as a preserve if the complainant is entitled to hold it as such, so that, as in the case cited, there could be no substantial relief except by a proceeding of the character now at bar. The complainant claims to have expended a very large amount of money, said to be at least $50,000, in preparing, constructing, and maintaining what is necessary to make the lake a private fishery and the incidents thereof, all of which would be of little, if any, value in the event its corporators must share with all the residents of New Hampshire. Therefore we are of the opinion

that, if the complainant is right on the merits, it is entitled to maintain this bill so far as the fisheries are concerned, and incidentally entitled to the same remedies so far as concerns any trespasses which are only incidental to the unlawful fishing.

The complainant's title originated in grants from the crown through the governor and commander in chief of the province of New Hampshire in 1773. At the time the grants were made the locality was a wilderness. The pond contains an outlet connected with the Ammonoosuc river; but the record shows no inlet except ordinary forest brooks. A correct description of the pond is given in State v. Roberts, 59 N. H. 484, 485. In the absence of any evidence to the contrary, we assume that trout, which seem to be the only fish in question, are free to migrate to and from the pond, so that, even though the proprietors of the pond are proprietors of the fishery therein, the fish themselves are within the rule as to animals feræ naturæ. So far as we can discover, this is not disputed with reference to the case before us.

For the case at bar, the complainant, as against mere trespassers, holds sufficiently under the title originally granted by the crown, and also owns and holds sufficient apparent right to the surrounding shores, which are, so far as we are informed, uncultivated and still in the state of nature. It is clear, so far as we are concerned, that the complainant owns the soil under the pond, but, of course, it does not own the fish until captured, nor the water of the pond in its natural condition, so that the substantial question is not as to the shores, nor as to the soil under the pond, nor as to the water, but as to what is ordinarily known as the "fishery"; that is, the exclusive right of taking fish from the pond. The distinctions made in these respects in State v. Roberts, 59 N. H. 484, 486, between the titles to the fish, the water, the soil, and the fishery are correct according to the fundamental principles of the common law. If the complainant is the proprietor of the fishery, then this bill may well be maintained, for reasons we have stated, to restrain trespassers upon its inclosed lands, which are connected with, and incidental to, its fishery. If it has no right to the fishery, then this bill relates to mere trespasses upon uncultivated lands, involving no damage except nominal, and it cannot be maintained according to the rules of equity jurisdiction.

There is no title in the complainant to the fishery, except, or unless, what arises as an incident to the grant of the shores and of the soil of the pond. No special grant, and no legislation brought to our attention, gives it any additional or peculiar right. Therefore the question is whether, with regard to ponds like that in issue, by the ancient, common, or unwritten law prevailing within the locality now constituting the state of New Hampshire, exclusive rights to fisheries vested in the proprietors of the soil as such, or whether, by the same law, fishing, as well as fowling, were and are free, or subject to public usufruct so far as the same can be pursued without injury to inclosed or cultivated lands. While we shall return to this particular topic again in another connection, we have diligently searched the legislation and the ordinances relating to the locality now constituting the state

of New Hampshire, beginning with its settlement and coming down to the present day, and have found nothing bearing on the public rights to fish or to fowl, which go hand in hand to a very considerable extent, except as follows:

Each party has cited numerous statutes which we do not deem it necessary to comment on, because all so cited are reconcilable with either theory as to private rights to the fishery presented to us, having in mind, of course, that these rights, even if exclusive, are clearly subject to certain legislative control, because, with other reasons, fish are classed with other untamed, migratory animals, all as pointed out in State v. Roberts, 59 N. H. 484, already referred to. The only act with reference to fowling which we have found in the whole history of the inhabitancy of the locality of New Hampshire is that of 1862, afterwards enacted in Gen. St. 1867, c. 251, § 4, as follows:

"Any person owning or occupying land may forbid the destruction of the birds on the same, at any season of the year, by public notice in any newspaper published in the county, or by posting notice on the land; and any person taking or destroying birds on said land in defiance of said prohibition shall be subject to a penalty of one dollar for each bird so destroyed, in addition to the penalties named in the preceding section."

This is a recognition of the privilege, universally recognized in the maritime states of New England, of public hunting through the forests and other wild lands until they are inclosed, a privilege which has been generally exercised in the same manner with reference to fishing in the ponds and streams of the same territory, so far as the same have remained unoccupied by structures or inclosures of the owners of the soil. The only other statute having a bearing on this question is chapter 86, p. 466, of the Acts of 1887, approved on October 25th, already referred to, which, omitting the fourth section, of no consequence here, is as follows:

"Section 1. No action shall be maintained against any person for crossing uncultivated land to reach any public water for the purpose of taking fish unless actual damage has been sustained.

"Sec. 2. In all actions brought to recover damage for crossing land to reach any public water for the purpose of taking fish, the costs shall be limited to an amount not exceeding the damages recovered, if such damages do not exceed $13.33.

"Sec. 3. For the purposes of this act, all natural ponds and lakes containing more than twenty acres shall be deemed public waters."

It is true that section 3, declaring ponds containing more than 20 acres public waters, is expressly limited to the purposes of the act, but the purposes of the act concern the very question we have before us; that is, taking fish. Therefore, so far as this proceeding is concerned, the Legislature of New Hampshire has either sought to make this pond public or has declared that it was public by the common law. So far as it constitutionally could, it has either created the pond into a public water or recognized it to be such for all the purposes which we have before us. If it is affirmative legislation, it is limited, of course, to ponds containing at least 20 acres, in which class the pond in question belongs; while, if it is a recognition of what before existed, it is to be construed as remedial only so far as ponds containing 20 acres or more are concerned, while it would not stand in the way of the proposition

that at the common law of New Hampshire ponds of less than 20 acres are public waters. It needs no explanation on our part to establish the proposition that if the Legislature had the power to declare ponds exceeding 20 acres, including the pond in question, public waters, or that, if the statute of 1887 properly recognized a common-law rule in New Hampshire by virtue of which such ponds are public waters, this suit cannot be maintained, because there is no claim on the part of the complainant that there is any exclusive right of fishery if the waters in question are public within the meaning of that word as used in the statute cited. We will only add that, so far as we can discover, this statute remains in full force and unmodified.

Each party claims that he is protected by the judicial decisions of the New Hampshire courts when properly reduced to the elements which they fairly determine. We may observe at the outset that much relied on on this point by the parties, pro and con, is dicta. The complainant begins with State v. Roberts, which came before the Supreme Court twice, each time in 1879. It first appears in 59 N. H. 256, and the second time in the same volume at page 484, 47 Am. Rep. 199. The precise question we have before us was not in issue, and the declarations of the court with reference thereto might have all been passed by and the result of these decisions have been the same, because the only principle applied was that, inasmuch as trout in a pond are migratory, the owners of the soil of a pond and its shores are subject, in common with other persons, to the general laws of the state for the protection and encouragement of the internal fisheries. Nevertheless, at the opening of the opinion at page 257 of 59 N. H. (47 Am. Rep. 199), Mr. Justice Clark observed as follows:

"At common law the right of fishery in navigable waters was public and common to all, and in waters not navigable it was limited to the riparian owner of the soil, and belonged exclusively to him."

But beyond proceeding on the general assumption that such is the rule in New Hampshire, the opinion is of no value to us. When the same topic came again before the court (at page 484 of 59 N. H., 47 Am. Rep. 199) it appeared that the respondent was indicted for catching four trout in a prohibited season, and that he owned the land around the pond, but that the pond was not screened, or otherwise inclosed, to prevent the free passage of fish to and from its waters. The case turned on the last fact, and the indictment was sustained. The common-law rule with reference to rights of fishery in non-navigable waters was assumed, at page 406 of 59 N. H., 47 Am. Rep. 199, to apply to the case; but, as we have already stated, the court found that the defendant had no exclusive property in the four trout before they were caught, so that his rights were controlled by the statutes of the state intended for the preservation and protection of the fisheries.

The question was discussed in Concord Manufacturing Co. v. Robertson, decided in December, 1889, but not reported until 1896, in 66 N. H. 1, 25 Atl. 718, 18 L. R. A. 679. The issue there was entirely aside from the question involved here, because there the boundary was by the pond, which necessarily excludes the title to its soil. State

v. Gilmanton, 9 N. H. 461, 463. In State v. Welch, however, 66 N. H. 178, 28 Atl. 21, also decided in 1889, and not reported until 1896, and a case which also related to this particular pond (Percy Summer Club v. Welch, 66 N. H. 180, 28 Atl. 22), apparently decided at the same time as State v. Welch, the precise issue we have here seems to have been involved, and the court found that Christine Lake was public water. In State v. Welch, 66 N. H. 179, 28 Atl. 22, the point seems to have been stated as follows:

"The bed of the pond was reserved, set apart, and held in trust for the public use. The club could not acquire the title by prescription, or by grant from the king or the executive branch of the provincial or state government."

Then the case of Concord Co. v. Robertson was referred to. These particular propositions, however, were clearly mistaken ones, because in other parts of New England, where the powers vested in the colonial authorities were no larger than those vested in the provincial authorities of New Hampshire, great ponds have been granted, and the title to their soil has been settled by the courts favorably to individuals; and the law throughout all the maritime states is clearly otherwise than thus stated. Commonwealth v. Vincent, 108 Mass. 441, 446; Watuppa Reservoir v. Fall River, 154 Mass. 305, 28 N. E. 257, 13 L. R. A. 255; Gould on Waters (3d Ed.; 1900) §§ 84, 182. In fact, the ordinance of 1641 was necessary to prevent towns from conveying away the soil of great ponds and fisheries therein. In this respect the soil and the fisheries of the nonnavigable rivers and of the great ponds and lakes stood in all particulars the same.

It is claimed that these two decisions in State v. Welch and Percy Summer Club v. Welch are conclusive on the complainant, who is in privity with the Percy Summer Club, which was a different corporation from the complainant here, but the corporation from which the complainant holds title. Of course, there could be no estoppel arising from State v. Welch, both because the result of a criminal proceeding estops neither party on a subsequent civil proceeding, and because, on the ordinary rule with reference to res judicata, there is no estoppel unless both parties are estopped. Percy Summer Club v. Welch was said to have been in the nature of a bill of peace, so that an adverse decision there would operate as an estoppel; but an examination of the record shows that this case was not properly reported. The bill was never dismissed by order of the court, but was finally disposed of by stipulation between the parties. Therefore there was no such solemn adjudication as is necessarily involved in the result of a bill of peace in order to operate as an estoppel. With reference to all three cases reported in 66 N. H., 25 Atl., there are various reasons why they, standing alone, can hardly be accepted as the regular and solemn conclusions of the Supreme Court of New Hampshire on the precise issue we have here; but Dolbeer v. Company, 72 N. H. 562, 58 Atl. 504, decided in June, 1904, must be accepted as construing them as decisive against the complainant, so far as the local tribunals can accomplish that result. But as Dolbeer v. Company merely accepted the apparent reasoning of Concord Manufacturing Co. v. Rob-

ertson, State v. Welch, and Percy Summer Club v. Welch, it becomes incumbent on us to examine those decisions further with reference thereto.

We have already referred to the peculiar grounds stated in State v. Welch, to the effect that the title to the bed of a pond could not be acquired by grant, and that in any event the pond would remain in the public as trustee. We have said that this was not the provincial law, and we believe this is the first time, and the only time, that a suggestion of that character has been made by any of the New England courts. Therefore we pass that by, and turn back to examine the grounds expressed by the Supreme Court of New Hampshire in Concord Co. v. Robertson. So far as we can discover, they are as follows: At page 24 of 66 N. H., page 729 of 25 Atl. (18 L. R. A. 679), the opinion, referring to the Massachusetts ordinance of 1641, cites the expression of Chief Justice Shaw in Commonwealth v. Alger, 7 Cush. (Mass.) 63, 68, as follows:

"The great purpose of the sixteenth article of the Body of Liberties was to declare a great principle of public right, abolish the forest laws, the game laws, and the laws designed to secure several and exclusive fisheries, and to make them all free."

This is undoubtedly true, but the fact that the ordinance was deemed to be necessary for that purpose affords a presumption against the position of the Supreme Court of New Hampshire, if it affords any presumption at all. At page 6 of 66 N. H., page 720 of 25 Atl. (18 L. R. A. 679), the opinion, contrasting conditions in New Hampshire with those in England, uses the following expression:

"Liberties of hunting and fishing, and other common rights, always exercised here in the wild and unoccupied districts of the public domain, and retained in large ponds and tide waters after the adjoining dry land became private property," etc.

There is no question that from the earliest settlement of the country fishers and fowlers have roamed undisturbed forests, lakes, and rivers throughout the maritime provinces and states of New England, with some exceptions. But this fact applies, also, to the nonnavigable rivers, of which the opinion makes no mention. It is also true with reference to Massachusetts and its district of Maine, as to which there is no question, that individuals may acquire title to the bed of nonnavigable rivers, and to the beds of ponds and lakes, and that, when acquired, the right of fishery follows it. The opinion cites no evidence whatever of either historical or legal character that, in this respect, there was any peculiarity as between the province and the state of New Hampshire and other provinces and states, or between ponds and nonnavigable rivers. At page 24 of 66 N. H., page 729 of 25 Atl. (18 L. R. A. 679), the opinion observes as follows:

"In this state free fishing and free fowling in great ponds and tide waters have not needed the aid of a statute for the abolition of written, or for the declaration of unwritten, law. So far as the ordinances of 1641 'meaning those of Massachusetts Bay Colony' introduce or affirm these liberties, it was an enactment of New Hampshire common law."

If this proposition is true, the question is settled adversely to the complainant. But, again, the opinion cites no legal or historical facts sustaining the statement. The difficulty rests at this precise point.

Neither does the Supreme Court of New Hampshire rely on the Massachusetts Bay Colony odinance of 1641, or on the statute of 1887, to which we have referred. To begin with, the court, if correct, is entirely outside of that statute or that ordinance, because the statute and the ordinance relate only to ponds and the shores of the sea, while the proposition which we have cited from page 24 of the opinion is so broad that, though in terms it speaks only of ponds and tidewaters, it necessarily involves the nonnavigable streams, because the practices as to fishing and fowling have been the same with the one as with the other, and the methods adopted by the court for reaching its conclusion prohibit any distinction as between them. There have been several references in the New Hampshire decisions to the ordinance of 1641, but the most that has ever been said in that respect was in Clement v. Burns, 43 N. H. 609, 621. There the opinion observes that, as a rule of positive law, the ordinance is not binding in New Hampshire, but that, in view of the practical union between the colonies for so long a time, it would naturally be expected that the same usages would spring up in New Hampshire under that ordinance with reference to the rights of riparian owners in the shores of navigable waters. This is but little more than was said by the late Chief Justice Smith in Smith's New Hampshire Reports, 503, to the effect that, during the union with Massachusetts, many of the usages and customs which now obtain, and which form a part of the common law of New Hampshire, were formed and originated. However, the manner in which the Supreme Court of New Hampshire distinguishes a great pond demonstrates beyond question that it in no way relies on the Massachusetts Bay Colony Ordinances. It puts the distinction as follows:

"However slight the argument in favor of any particular dimensions in determining whether a pond is public or private property, the law requiring a decision of the question authorizes the adoption of a necessary rule. A standard of size seems to be indispensable, and, if a more satisfactory measure is not found, ponds of more than 10 acres may properly be classed with Sanbornton Bay." Concord Mfg. Co. v. Robertson, 66 N. H. 27, 25 Atl. 719, 18 L. R. A. 679; Dolbeer v. Suncook Waterworks Co., 72 N. H. 564, 58 Atl. 504.

It is possible that the New Hampshire courts might have rested this result on the act of 1887, on the ground that, by ancient usages in the maritime provinces, the right of fishery in the proprietor of the soil was of such a peculiar nature that it might be appropriated by the Legislature. It is true that the courts have never quite gone to this extent, although they have laid down very broad rules as to the powers of the Legislature over internal fisheries. Cottrill v. Myrick, 12 Me. 222, 229; Lunt v. Hunter, 16 Me. 9; Parker v. Cutler Milldam Company, 20 Me. 353, 358, 37 Am. Dec. 56. They have even gone so far as to hold that such fisheries might be destroyed by the Legislature without compensation, if the destruction was incidental to the larger purposes for which nonnavigable rivers and ponds may be improved. However, as we have seen, the court relied on no statutory regulation, either the act of 1887 or the colonial ordinance of 1641.

By the common law of England the right to the soil of ponds and lakes, and the right to the soil of nonnavigable rivers, and the fisheries

in each of them, rested on the same fundamental rules and principles. As to the adoption of the English common law in New Hampshire, there is no doubt in reference to the general rule, as shown by the following expression in State v. Rollins, 8 N. H. 550, 561:

"There seems to be no reason to doubt, therefore, that the body of the English common law, and the statutes in amendment of it, so far as they were applicable to the government instituted here, and to the condition of the people, were in force here as a part of the law of the province, except where other provision was made by express statute or by local usage."

So far as Massachusetts is concerned, and, of course, this involves Maine, it seems to have been held that, from the earliest settlement, the English common-law rule as to the soil of ponds and nonnavigable rivers, and the fisheries therein, was adopted as a part of the common law of the colony. This is demonstrated by the fact that the ordinance of 1641 was deemed necessary in order to save the so-called great ponds from the operation of the English practices. Consequently, from the earliest date of the settlement in Massachusetts, and incidentally in Maine, we find the courts always distinctly and emphatically announcing the English practices in these respects as a part of the common law. On the other hand, in New Hampshire there never was any legislation like the ordinance of 1641, and there never was, as we have shown, any line of judicial decisions like those of Massachusetts to which we have referred. That there was no such ordinance, and that there were no such judicial decisions, afford presumptions either way. One was that the people of that locality were content with the English practices, and the other was that, as the English practices had not been in any way adopted, there was no necessity for an ordinance like that of 1641. The question is what is the evidence, historical or judicial, in regard thereto. From this standpoint, it seems very difficult to separate rights in nonnavigable rivers from rights in ponds and lakes, as the two go together by the English common law, and, so far as we are advised, equally together by the local habits of the residents of the colony, province, and state of New Hampshire. As to this, the complainant says that the court discovered for the first time that in New Hampshire there was one common-law rule as to streams and another as to ponds and lakes. This is correct. Moreover, until the opinion in Concord Co. v. Robertson, the local tribunals of New Hampshire apparently assumed that there was no such distinction. In Greenleaf v. Kilton, 11 N. H. 530, 533, the opinion stated that a boundary by a river above tide water uniformly passed the title to the middle of the stream, including the water and the bed of the river; and this rule has been reiterated many times, and never questioned. Therefore, inasmuch as it is positively declared that the bed of a nonnavigable river may be granted free from a public trust, there would seem to be no reason for the proposition that the bed of a pond might not likewise be so granted. In Bullen v. Runnels, 2 N. H. 255, 258, 9 Am. Dec. 55, decided in 1820, it was said generally that a grant of waters is not void, but passes the right to use it for fishing, relying here on the English rule. In State v. Franklin Falls Co., 49 N. H. 240, 250, 6 Am. Rep. 513, the

court laid aside all question as to the right of fishery; but, in Beach v. Morgan, 67 N. H. 529, 530, 41 Atl. 349, 68 Am. St. Rep. 692, which was decided after Concord Co. v. Robertson was decided, but before the opinion was reported, Mr. Justice Isaac W. Smith, speaking in behalf of the court, states that the stream not being navigable, and, not being public water, "the right of fishing in it is limited at common law to the riparian owner of the soil, and belongs exclusively to him, unless the defendant shows a right acquired and some way recognized by law." It is to be noted that in support of this proposition he cites State v. Roberts, 59 N. H. 256, 47 Am. Rep. 199, thus assimilating the law as to ponds and nonnavigable streams. In Beach v. Morgan the question in issue was the right at the common law of New Hampshire of the proprietor of the bed of a river to an exclusive fishery. This seems to have been positively sustained, and the rule of the opinion in behalf of the court in State v. Roberts was accepted as the ground of the decision; thus, as we say, assimilating ponds and nonnavigable rivers.

Reference has been made to Thompson v. Androscoggin River Imp. Co., 54 N. H. 545, but this classifies itself with other cases to which we have referred, which, after all, are not in point. As to some of the decisions, we should perhaps observe that they relate to Winnepisoegee Lake and Sunapee Lake, which, in light of the practical application of the rules of law in the United States, must be regarded as exceptional. It is true that, in the United Kingdom, no exception is made in behalf of the public in regard to lakes or ponds on account of their size or navigability. The beds of all such lakes or ponds and the fisheries therein, with we think a single exception, are held to be private; but in this country a practical distinction has always been made in favor of certain great rivers, though above the rise and fall of the tide, and therefore in the sense of the common law nonnavigable, and of certain ponds and lakes which may well be regarded as inland seas. Therefore we are not obliged to distinguish the principles applicable to the case at bar on account of such exceptional bodies of water.

We have already observed that various cases have been cited pro and con, which, after examination, are found not to be in point here. So far as we do not make special observations with reference to any cases cited, they classify themselves into this list. We should, however, refer to Angell on Water Courses and Gould on Waters, both of which are works of the highest authority, and each of which, in all their editions, give the common law of the New England maritime states as maintained by the complainant, without the slightest suggestion that the common law of New Hampshire differs in this respect. This has been assumed by the courts of New Hampshire from the beginning until Concord Co. v. Robertson. We have also shown that this and the other cases which led up to Dolbeer v. Suncook Co., 72 N. H. 562, 58 Atl. 504, are inconsistent in not classifying nonnavigable rivers with ponds and lakes, and, also, that they fail to cite any evidence, legal or historical, in favor of the proposition that in New Hampshire "free fishing and free fowling in great ponds and tide-waters have not needed the aid of a statute for the abolition of written, or the

declaration of unwritten, law." We have also shown that Beach v. Morgan, 67 N. H. 529, 41 Atl. 349, 68 Am. St. Rep. 692, which is directly in issue with reference to nonnavigable streams, cites State v. Roberts, 59 N. H. 256, 47 Am. Rep. 199, which related to this particular pond, as authority for the rule with reference to nonnavigable streams, thus indicating that both ponds and rivers are in the same class, and ignoring Concord Co. v. Robertson.

Under these circumstances, according to well-settled rules with reference to the binding effect of the decisions of the local courts, especially where, as in the case at bar, they involve the common law, and not any particular ordinance or statute, there are very strong reasons for holding that we are not bound to follow Dolbeer v. Suncook Co. On the other hand, there are certain fundamental facts which are not to be ignored. Some are indicated from the citation from Chief Justice Shaw, at page 24 of 66 Atl., page 729 of 25 Atl. (18 L. R. A. 679), of Concord Co. v. Robertson. There is no question that at the date of the settlement of New England the "forest laws, the game laws, and the laws designed to secure several and exclusive fisheries," as existed and practiced in England, were regarded here as oppressive. Also, one of the most prominent facts in connection with the early settlers is the draft they constantly made on fish and game for the ordinary support of life, so that accordingly the general practice all through the maritime states for the first two centuries was that of free fishing and free fowling. As we have said, everybody roamed the forest, the rivers, the lakes, and the ponds at will, for whatever could be obtained. The common law of England in this respect is contrary to the fundamental rules of law, because, as the proprietor of the soil has only the usufruct of water, and only a right to appropriate the fish therein when caught, there would seem to be no reason for excluding the rest of the community therefrom so long as it can share without trespassing, whether by passage through the forests or by canoes or boats up the rivers and streams. The underlying principles of law in this respect are illustrated by the Roman law, and also by the early English law, as stated in Hunter's Roman Law (2d Ed.; 1885) 310, 312, 313, and as explained in Gould on Waters (3d Ed.; 1900) 108. One very significant fact is the deed from Passaconnaway and other sagamores to John Wheelwright and others of May, 1629, which covered the whole of the southern part of New Hampshire, and which has always had a certain recognition without regard to the legal questions which it involved. By this deed the sagamores not only reserved free liberties of fishing, fowling, and hunting for themselves and their subjects, but they also, describing the appurtenances of the lands conveyed, enumerated with the rest as follows: "With all the freedom of fishing, fowling, and hunting as ourselves." The habendum, also, was to Wheelwright and the other grantees named in the deed, and to "other the English that shall inhabit there." Belknap's New Hampshire, appendix to volume 1. It is also of some consequence that a thorough examination of the ordinances and statutes of the New Hampshire colony and province fails to show any legislation whatever in the line of the English legislation with reference to poachers, or to

prohibiting fishing or fowling, except some legislation during the early part of the eighteenth century for the preservation and increase of deer, which was in the interest of the public at large, and not of any individual proprietor.

Therefore, looking at all these considerations, the natural presumption would be in favor of free fishing and free fowling in the nonnavigable rivers, ponds, and lakes in New Hampshire, and in the forests so long as they remain forests. In Concord Co. v. Robertson the opinion of the court at page 24 of 66 N. H., page 729 of 25 Atl., 18 L. R. A. 679, stated positively, as we have said, that free fishing and free fowling in great ponds did not need "the aid of a statute for the abolition of written, or the declaration of unwritten, law." It is true, as we have said, that the opinion does not sustain these statements by any citations or proofs of any nature. Neither are we able to sustain the opposite proposition by any positive citations or proofs, and, as against the direct decision on the issue before us in Dolbeer v. Suncook Co., we are not able to produce any prior or subsequent direct decision to the contrary. Therefore, notwithstanding our adverse suggestions with reference to the declarations and decisions of the Supreme Court of New Hampshire which were postponed to so late a date, and notwithstanding the difficulties in the way of accepting their propositions, we believe ourselves obligated to dispose of the issue before us in harmony with them.

Let there be a decree in accordance with rule 21 dismissing the bill, with costs for the respondent, the same to be without prejudice as to any question as to the title to the soil of Christine Lake or to the lands about the same.

THE J. R. LANGDON. THE F. R. PRINCE. THE WILLIAM A. HASKELL. THE HENRY R. JAMES. THE GOVERNOR SMITH. THE WILLIAM J. AVERILL. THE WALTER L. FROST. THE A. McVITTIE.

(District Court, N. D. Ohio, E. D. March 1, 1906.)

Nos. 2,305–2,312.

JUDGMENTS—RES JUDICATA—INTERVENERS.

Where, in a creditor's suit in a Circuit Court against a corporation vessel owner, in which defendant's vessels had been taken possession of through a receiver, claimants of maritime liens on such vessels intervened, asserting their liens and asking their adjudication and payment, and their right to such liens was tried and determined adversely to them, both by the Circuit Court and on appeal, such adjudication is conclusive, and the interveners cannot thereafter maintain a suit in rem in a court of admiralty to establish and enforce the same liens against the vessels in the hands of a purchaser under the equity decree.

In Admiralty.

Goulder, Holding & Masten, for libelants.
Roger M. Lee, for respondents.

TAYLER, District Judge. A statement of the facts, so far as they relate to the particular question now to be considered, may be briefly

made as follows: On the 15th day of May, 1899, a bill of complaint was filed in the Circuit Court of the United States for the District of Massachusetts by Frederick H. Prince against the Ogdensburg Transit Company, in the nature of a creditors' bill. This was consolidated with the case of Carlton and others against the same defendant. There were many creditors of the defendant, as well as a mortgage on its property, including several vessels engaged in transportation on the Great Lakes. In response to the prayer Percival W. Clement was appointed receiver of the defendant; and thereafter, in the course of the litigation there which concerns us here, the title of the controversy was Loftus Cuddy and Martin Mullen against Percival W. Clement, receiver, etc. On the 9th day of September, 1899, Cuddy and Mullen, the libelants in this case, intervened in the Massachusetts case, by summary petition, claiming maritime liens on the other vessels owned by the transit company covered by the mortgage. The liens claimed in that intervening petition are the same liens which the libelants seek to enforce in this action.

After setting out in detail their claim, the intervening petitioners (the libelants here) prayed as follows:

"That the receiver appointed in the above-entitled cause be directed to pay your petitioners' claims in full, as preferred liens against said steamers, or that an order be entered requiring said receiver to pay to your petitioners the earnings of said steamers over and above the cost of operating them until said several liens have been satisfied in full; and that said receiver may, in that event, be also required to insure said steamers in some good and responsible insurance companies against the perils to which said property is being subjected by such use, with loss payable to your petitioners and other holders of maritime liens as their interests may appear, and for such other and further orders as may accord with justice and petitioners' rights under the circumstances."

On the 20th day of September, 1899, the receiver filed his answer to this intervening petition, denying that the petitioners had a maritime lien against the vessels described in their petition. To the same effect the trustees of the mortgage answered. On the same day, which was 11 days after Cuddy and Mullen had intervened and become parties to the suit, a decree of foreclosure and sale was entered, which contained, among other findings, the following:

"The purchaser or his assigns shall, as part consideration for the steamboats, properties, and franchises purchased, and in addition to the sum bid therefor, take the same and receive deeds or bills of sale therefor upon the express condition that to the extent that the assets or the proceeds of assets in the hands of the said receiver, Percival W. Clement, not subject to any other lien or charge, shall be insufficient for that purpose, such purchaser, his successors, or assigns shall pay, satisfy, and discharge all indebtedness, obligations, or liabilities which shall have been contracted or incurred by the receiver before delivering possession of the property sold in the management, operation, use, or preservation thereof; and also all maritime or statutory liens upon the said steamboats or any of them which this court shall hereafter allow and order to be paid and which shall not have been paid by the receiver. * * * And the purchaser and his successors and assigns, respectively, shall thereupon be entitled to have and to hold the premises so conveyed free and discharged from the lien and incumbrance of such mortgage and of the claims of all other parties to this suit and those claiming under them, save only as herein expressly reserved, but subject to all other reservations herein contained."

Thereafter the property was sold under this order for a less amount than the aggregate of the bonds against it; so that, if the contention for a lien was not sustained, nothing would be left to apply on the indebtedness to the interveners. In the decree confirming the sale, entered December 18, 1899, appear the following provisions:

"Subject, however, to all equities reserved and to all and singular the terms and conditions of purchase as provided in said decree, which terms and conditions are by reference thereto hereby incorporated in this decree with the same force and effect as though set forth at length, and subject also to the sums hereinafter required to be paid by said purchasers, Will Lawrence Sargeant and Berton Allen Aikens, and to all and singular the terms and conditions hereinafter contained. And this court expressly reserves and retains jurisdiction of this cause and power to enforce all the provisions of said decree of foreclosure and sale entered in this court, and also all provisions of this decree, including the right to retake and resell any of the property sold in case said purchasers, their successors, or assigns, shall fail to comply with any order of this court in respect to the payment of any of the prior indebtedness, obligations, or liabilities required in said decree or in respect of any other of the terms or conditions of said decree or of this decree, within thirty days after the service of a copy of such order. * * * And also all maritime or statutory liens upon said steamboats or any of them, which this court shall hereafter allow and order to be paid, and which shall not have been paid by the receiver. * * *"

On the same day an order of reference was made of the controversy arising out of the intervening petition of Cuddy and Mullen, as follows:

"And now, to wit, December 18, 1899, upon consideration thereof, it is ordered by the court that the petition of Loftus Cuddy and Martin Mullen, filed in this cause, be and the same is hereby referred to Frederic Dodge, Esq., a master of this court, to ascertain and report to the court whether or not a maritime or other lien exists against the steamers lately belonging to the Ogdensburg Transit Company. The master is not limited to finding questions of fact, but may state his conclusions of law in reference thereto."

The master thus appointed heard the proof and reported in favor of the petitioners there, the libelants here, finding that they were entitled to a maritime lien. This finding was excepted to, and on hearing before the Circuit Court was reversed (107 Fed. 978); the court holding that, under the facts as proved, the cross-petitioners were not entitled to a maritime lien for the coal supplied to the several vessels. The case was appealed to the Circuit Court of Appeals for the First Circuit, which affirmed the decision of the Circuit Court. The opinion of the court will be found in 113 Fed., at page 454, 51 C. C. A. 288. Application was made to the Supreme Court of the United States for a writ of certiorari, and was denied.

On the 12th day of July, 1901, libels were filed in this court by the same parties who had intervened in the Massachusetts case, seeking to enforce their claimed maritime lien against the vessels formerly belonging to the Ogdensburg Transit Company for supplying coal, being the same vessels upon which they sought to assert a maritime lien in the Massachusetts case. These eight cases were later, by stipulation of the parties, consolidated and heard together as one cause. Some new testimony has been taken, bearing upon the right of the libelants to have the lien on the vessels which they claim were supplied; but, in view of the conclusion to which I have arrived, that

the rights of these parties have already been adjudicated and determined, it is not necessary to refer further to this new testimony, or to any of the evidence in the case.

The respondents insist that the claim here made has already been adjudicated in the case just referred to; and it seems impossible to escape the conclusion that that position is sound. The chief grounds upon which the libelants base their claim that there has been no conclusive adjudication of their rights are that the Circuit Court for the District of Massachusetts had no jurisdiction to finally determine their rights, that their intervention in that case was necessary to protect their rights, and that their right to a maritime lien was a positive right which they might enforce in an appropriate jurisdiction, in rem; but that, the res having passed into the custody of a court of equity, no proceeding in rem could be prosecuted while the equity court had possession of the property. Some persuasive force may be conceded to this argument. For practical purposes, however, it is answered by an examination of the method in which, and the purpose for which, these libelants intervened in the equity case. They did not intervene merely for the purpose of having their rights as maritime lienholders protected. They did not merely ask for a preservation of the property, or that it be insured. They submitted the entire controversy to the court, asked a final adjudication, and sought an order directing the payment to them of the full amount of their claim.

The prayer of the intervening petition contemplated the doing of one of two different things: either (1) the payment of their "claims in full, as preferred liens" against the steamers; or (2) the payment of "the earnings of the steamers" until the liens were satisfied, and incidental to this that the steamers be insured for the benefit of the petitioners. This was a submission of the entire controversy to the court. In addition to this, they must have acquiesced in the order of sale, for they were in court, and on the same day procured an order in their own interest. That order of sale contained many provisions inconsistent with the view that the intervening petitioners could appeal to any other court if they were not satisfied with the relief obtained in that case. Similar provisions appear in the decree confirming the sale, which was entered on the day when the libelants' claim to a maritime lien was referred to the master. Now, summing this all up, we find that the libelants here did enter a court of equity voluntarily. They did set up therein their maritime lien. The court took cognizance of the claim. The other side contested. A full hearing was had. The Circuit Court and the Circuit Court of Appeals passed upon the right to a maritime lien without limitation of their power, or qualification as to the scope of the inquiry.

What question can be here litigated? Nothing but the question of a maritime lien. But that question, at the instance of the libelants, was fully tried in a court having jurisdiction of the subject-matter and of the parties, and decided on its merits. Indeed, so far as the libelants were interested in the property, it was the only question litigated. The trial was ancillary and interlocutory, as regards the main case, but it was original as regards the parties to this case. The

United States court in Massachusetts, having lawful possession of the property, had jurisdiction to sell it and dispose of the proceeds, subject, we may assume, to the rights of others who were not, or could not be, brought within the jurisdiction of that court. Subject to that assumed qualification, which concedes the libelants all they could possibly claim, the Circuit Court had unqualified jurisdiction and dominion over the subject-matter. If it had, and could acquire, no jurisdiction over the libelants against their will, that difficulty is removed by their voluntary entrance into the case and the court. If, even then, any question of jurisdiction could be raised, it could be raised only by the defendants, or by some one claiming adversely to the voluntary interveners. But no such question was ever made; and it results, therefore, that all the elements necessary to clothe a court with full jurisdiction over the parties and the subject-matter were there present. Estoppel could have no more significant or illustrative example.

It would be idle and unprofitable to endeavor to finely distinguish the various cases on the subject of res judicata as they are sought to be applied here. This case presents none of the usual difficulties where that doctrine is applied. Here were the same parties, agreeing to submit their controversy to the jurisdiction of a court which had jurisdiction of the property. The question was identical with the question here. The testimony upon it was only such testimony as would be competent here. The relief sought for was precisely the relief sought here. All of the incidents which are used to define a typical and uncomplicated case of res judicata are indisputably present. If the controversy here presented has not already been fully and finally litigated, it is difficult to conceive how an end may come to litigation.

The libels will be dismissed, at the costs of the libelants.

In re EASTLACK.

(District Court, D. New Jersey. April 6, 1906.)

1. BANKRUPTCY—ELECTION OF TRUSTEE—SETTING ASIDE.

The right to elect a trustee for a bankrupt being given to the creditors by Bankr. Act July 1, 1898, c. 541, § 44, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438], their election should be permitted to stand, unless it clearly appears that in conducting it some principle of law intended to secure the administration of the bankrupt's estate in the interest of his creditors has been violated.

2. SAME—INFLUENCE OF BANKRUPT IN SELECTION OF TRUSTEE.

A debtor stated at a meeting of his creditors that he intended to file a petition in bankruptcy as the best way of liquidating, and that if a person whom he desired could be elected trustee he thought his estate would pay in full and leave a surplus for himself, and he asked his creditors present to support such person, to which they agreed. After his petition had been filed, a movement having been made by certain creditors to elect a different trustee, and letters having been sent out to creditors in that behalf, a letter was prepared by the bankrupt's attorney which was signed and sent out by a large creditor advocating the election of the bankrupt's candidate. At the creditors' meeting a very large majority of the creditors both in number and in amount of claims voted for such person; so far as appeared without further solicitation on

the part of the bankrupt or his attorney, about half of them in number, and three-fourths in amount of claims, being present and voting in person. *Held*, that the facts stated did not justify the referee or court in refusing to approve the election, in the absence of anything showing that it would be detrimental to the interest of any creditor.

In Bankruptcy. On petition to review order of referee.

French & Richards and W. T. Read, for petitioners.

Wilson, Carr & Stackhouse, for respondents.

LANNING, District Judge. At the first meeting of the creditors of the bankrupt, 32 creditors, holding claims aggregating the sum of $19,136.41, voted in person for Dr. Harry H. Grace as trustee. Atmore & Sons, creditors to the amount of $160.90, by their attorney W. T. Read, and Barber & Perkins, creditors to the amount of $674.72, by their attorney J. E. Borton, and 32 other creditors, whose claims aggregated $4,135.45, by their attorney W. E. French, voted for the same trustee. The total number of creditors voting for Dr. Grace was 66, and the total amount of the claims held by these creditors was $24,107.48. Twenty-four other creditors owning claims to the amount of $2,851.71, by their attorney H. F. Carr, voted for John C. Danenhower as trustee. As the creditors who voted in person did so, they left the referee's office. After they had left, and no one remained in the office except the referee and the attorneys above mentioned, Mr. Carr, as the representative of the creditors whose proxies he held, objected to the approval by the referee of the election of Dr. Grace, on the ground that his election had been brought about wholly by the efforts of the bankrupt and his attorneys. No proofs were taken on this point, but Mr. Carr made a statement, the substance of which the bankrupt's attorney admitted to be true. The referee's certificate concerning this statement is as follows:

"That Mr. Carr stated in the presence and hearing of all of the attorneys above named that he (Carr) was present at a meeting of the creditors of the said Eastlack, held January 6, 1906, at the office of J. Willard Morgan, 207 Market Street, Camden, New Jersey. That the meeting was called by William Early, as one of the attorneys for the said Eastlack; that at the said meeting the said Eastlack was represented both by the said William Early and by J. Willard Morgan. That a statement was submitted purporting to show the assets and liabilities of the said Eastlack, and that such statement purported to show an excess of assets over liabilities of about $23,000. That, in response to an inquiry of one of the creditors as to what Eastlack desired to do in the premises, the said Eastlack stated to the creditors present, who were about 65 or 70 in number, that he had determined to file a voluntary petition in bankruptcy, that it had been determined that this was the most feasible means of liquidating the estate of the said Eastlack. That the said Eastlack then personally stated that he had but one favor to ask of his creditors, and that was that he be permitted to name the prospective trustee in bankruptcy; that he desired some one who would work in harmony with him in winding up the estate; and that he believed that, if this were done, there would be some part of the estate coming to him after the creditors had been paid. In response to an inquiry of a creditor as to the name of the person suggested, Mr. Eastlack said that his name was Dr. H. H. Grace, of Camden, N. J. That Dr. Grace was thereupon named by one of the creditors, and that the creditors then present voted for Dr. Grace as trustee, and a number of the creditors were asked to sign, and did sign, a paper for the purpose of signifying such intention.

"Mr. Carr further stated that he had in his possession a letter, of which the following is a copy:

"'Phila., Pa., Jan. 15, 1906.

"'Dear Sir: As you may already know, we are one of the creditors of Mr. J. E. Eastlack, who has just filed his petition in bankruptcy; his indebtedness to us amounting to over $5,100. A meeting of his creditors was held on the 6th inst., which was largely attended and at which time Mr. Eastlack made a very clean and impressive statement of his affairs and expressed his belief that if he were permitted to nominate the trustee in bankruptcy whom he could assist in perfect harmony, that he believed he could pay dollar for dollar to his creditors. His nominee is Henry H. Grace of Camden, and all his creditors seemed to be thoroughly satisfied with this selection. It is understood that an effort is being made to oppose the selection of Henry H. Grace by controlling the votes of a number of small creditors. To this end, we are informed certain attorneys have sent out a letter stating that the majority of unsecured creditors are opposed to Mr. Grace. Such a statement we believe to be without foundation, and only written for the purpose of controlling the trusteeship and the fees incidental thereto. Certainly the meeting of the 6th inst. was made up almost exclusively of unsecured creditors, and not a dissenting voice was heard from any of these. The largest creditors are strongly in favor of H. H. Grace for trustee.

"'Who the nominee of the opposing attorneys might be we are not aware, but the gentleman named by Mr. Eastlack is one who stands highly in the city, whose integrity is beyond question, who is a personal friend of Mr. Eastlack, and has absolutely no other end in view except to pay the creditors in full and to leave something to the credit of the bankrupt. In fact, we understand that he expects to ask no compensation for his service. We are strongly impressed that the selection of Mr. Grace as trustee will be of the greatest advantage to all concerned, but the only way you can participate in his selection is by filing your claim at the next meeting of the creditors, of which notice will be given you, and being represented personally by some attorney instructed by you to vote for Mr. Grace. If your claim is prepared in legal form, you are entitled to vote without an attorney. If your claim is already in the hands of an attorney, will you not kindly instruct him to vote for Mr. Grace and notify us that you have done so? If you have no attorney, we can recommend to you Thomas E. French, of 106 Market Street, Camden, whom we have named because of his long practice and high standing in that city, and who will vote your claim for Henry H. Grace.

"'Yours very respectfully, W. F. Drennan, 37 So. Water St.'

"Mr. Carr stated that he was credibly informed, and believed it to be true, that exact copies of the said letter had been forwarded to all of the unsecured creditors of the said bankrupt, and that he (Carr) was likewise informed, and believed it to be true, that the said letter had been drafted by one of the attorneys for the bankrupt. Mr. Carr then offered to substantiate all of these statements by sworn testimony, if the referee and attorneys present so desired. In response to this Mr. Early stated that the statements made by Mr. Carr as to what occurred at the said meeting of the creditors, held January 6, 1906, were substantially true. Mr. Carr then inquired of Mr. Early whether the said Mr. Early was willing to answer such questions as Mr. Carr should propound with reference to the letter dated January 15, 1906. Mr. Early signified his willingness so to do. Thereupon Mr. Early stated in response to the questions of Mr. Carr that he drafted the letter dated January 15, 1906, and that the said Mr. Early was responsible for the statement that, if the claims of the unsecured creditors were sent to Mr. French, Mr. French would vote the said claims for the said Henry H. Grace. That the letter was signed by Mr. Drennan at his Philadelphia office and forwarded by him from there to substantially all the creditors, and that the letter was written to offset a letter sent out to creditors. The referee thereupon inquired whether the parties present required actual proof to be produced of the facts above stated. The attorneys present made no objection to the referee determining the question of the approval of the election of Dr. Grace upon the statements of fact made by counsel, and did

not require formal proofs thereof to be made, and argued the question fully upon its merits without objection to the form of proof. All of the creditors who voted in person left the meeting as they voted and were not present at the time Mr. Carr made the objection nor at the argument."

After hearing argument, the referee made the order now under review, bearing date February 2, 1906, whereby he disapproved the election of Dr. Grace as trustee and continued the meeting of the creditors to a future day for a new election. The question now to be decided is whether the referee erred in making the order.

The bankruptcy act of 1867 contained a provision that:

"All elections or appointments of assignees shall be subject to the approval of the judge, and when, in his judgment, it is for any cause needful or expedient, he may appoint additional assignees or order a new election." See Rev. St. § 5034.

Controlled by the rule thus established by Congress, the election of a trustee by two creditors, brought to the register's office by the solicitor of the bankrupt, was set aside in the Bliss Case, reported in Fed. Cas. No. 1543. The court said:

"It is certainly against the policy of the act that a bankrupt should select his assignee, as, by electing a fraudulent person or a person disposed to favor him, the rights of the creditors might suffer. It is true that, if the creditors do not care sufficiently for the matter to attend the meeting, they ought not to complain. But still the law is no less brought into contempt. A fraudulent discharge of a debtor, or the discharge of a debtor who does not surrender all his assets, is precisely what those charged with the execution of the law are bound to guard against. If the court could be advised that in any particular case the bankrupt had brought in one or more of his friends, although bona fide creditors, and had by them chosen an assignee who was also his friend and in his interest, it is clear that the court would withhold its approval."

And in the Wetmore Case, Fed. Cas. No. 17,466, the assignee chosen by the creditors of the bankrupts had been for several years the bookkeeper of one of the bankrupts. This one of the bankrupts and his attorney attended the meeting of the creditors and voted under powers of attorney received from some of the creditors.

The court set aside the election, saying:

"While the choice of an assignee is vested by law in a majority in number and amount of the creditors, it is subject, nevertheless, to the approval of the district judge—a provision which implies a discretionary power to disapprove a choice so made. While the judge ought not arbitrarily, capriciously, or from dislike or partiality, to overrule the decision of the creditors, he is bound to see that the rights of the minority are properly protected, and to refuse confirmation, where he has good reason to suspect the assignee had been chosen in the interests of the bankrupts."

The present bankruptcy act contains no provision like the one above quoted from the act of 1867, but the Supreme Court has promulgated an order (General Order 13 [32 C. C. A. xvii, 89 Fed. vii]) reading as follows:

"The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only."

It is evident that the Supreme Court intended by this order to establish a rule concerning the approval or disapproval of elections by creditors similar to that which existed under the act of 1867. The

decisions under the present law on this point show that such has been the understanding of our federal courts.

In Falter v. Reinhard (D. C.) 104 Fed. 292, the votes of certain creditors were challenged on the ground that the letters of attorney to the person representing them had been procured through the influence and efforts of the bankrupts for the purpose of controlling the election of the trustee. After hearing the evidence in the matter, the referee sustained the challenge. The opinion in that case shows that a plan for the election of the bankrupts' candidate was conceived and carried out in the bankrupts' place of business, and that the bankrupts themselves had by preparing the proofs of claims for creditors without expense to them, and by the solicitation of creditors at their place of business to give their proxies to one of the bankrupt's clerks, attempted to direct and control the proceedings looking to the election of a trustee. The referee disapproved this action, and, on petition for review, the court affirmed the order of the referee. This decision was affirmed by the Circuit Court of Appeals. 106 Fed. 57, 45 C. C. A. 218.

In the Rekersdres Case (D. C.) 108 Fed. 206, an attorney representing the bankrupt and her regularly appointed attorney, who also held letters of attorney from three creditors, nominated a certain person for the trusteeship of the bankrupt. Objection being made in behalf of another creditor to the nomination, the referee sustained the objection because the business association of the proposed trustee with the regularly appointed attorney of the bankrupt raised a presumption that the person nominated for trustee was nominated in fact by the bankrupt or her attorney, and was therefore not a suitable person to act in the interest of creditors. The District Court approved the referee's action.

In the Henschel Case, 6 Am. Bankr. R. 25, upon the election of a trustee, it was objected that the attorney by whose vote the trustee was elected held proxies obtained from creditors who were acting in combination with the bankrupt, and that the trustee was in fact the choice of the bankrupt and had announced in advance that, if elected, he would not prosecute certain actions which some of the creditors thought should be prosecuted. On a trial of the merits of the objection, the attorney refused to answer certain relevant questions, and this fact, together with the fact that a large number of the claims represented by the attorney were proven, and that the letters of attorney to him were executed before adjudication in bankruptcy, led to the disapproval of the election of the trustee.

In the Dayville Woolen Company's Case (D. C.) 114 Fed. 674, the attorney of certain creditors was asked whether any of the claims intended to be voted by him had been assigned to any person or corporation in the interest of the bankrupt. He refused to answer the question. Notwithstanding this refusal, and the fact that he had acted as counsel for the bankrupt during the proceedings in insolvency, the referee permitted him to vote and approved the election. On these facts the court set aside the order of approval made by the referee.

In the Blue Ridge Packing Company's Case (D. C.) 125 Fed. 620, there were objections that the trustee elected by the creditors had

previously advised the assignment for the benefit of creditors under the state law, which was the act of bankruptcy complained of, he being also the assignee, and that he was intimately associated with the attorney of certain stockholders of the bankrupt corporation who claimed also to be creditors. But the court held that these mere facts did not make the election an improper one, but called only for a close scrutiny of it. In passing on the point, the court said:

"It is to be remembered in all such cases that the choice of a trustee is lodged by the law with the creditors constituting a majority in number and amount, and that their selection is not to be interfered with, unless it clearly imperils the fair and efficient administration of the estate."

In the Machin Case (D. C.) 128 Fed. 316, it was held that votes of creditors for a trustee could not be rejected, on the mere ground that the candidate voted for had formerly been the attorney of the bankrupts.

In the Gordon Supply & Manufacturing Company's Case (D. C.) 129 Fed. 622, the trustee elected was not only a stockholder in the bankrupt corporation, but had been associated closely as attorney and legal adviser with those who had theretofore been in control of the corporation. Inasmuch as their management appeared not only to be the subject of criticism, but might call for action on the part of the trustee to hold them personally responsible, it was held that the election could not be approved.

In the Cooper Case, 14 Am. Bankr. R. 320, 135 Fed. 196, it was held that the attorney who had been employed by the bankrupt to file his petition, and whose obligation as attorney ceased at that point, and who had received no fee therefor, was not disqualified from voting on claims afterwards received from creditors without his own solicitation or the procurement of the bankrupt.

These cases establish the rule that the election of a trustee by the creditors is not to be disapproved, unless there is good reason for believing that the election has been directed, managed, or controlled by the bankrupt or his attorney or by some influence opposed to the creditors' interests. The proofs in this case show that at a large meeting of the creditors of Mr. Eastlack, called by him before he filed his petition in bankruptcy, he told them of his intention to file such petition, and of his belief that his assets, if wisely disposed of, would exceed his liabilities, and then expressed the hope that he might be accorded the privilege of naming his trustee. On being asked whom he would suggest, he named Dr. Grace, who was thereupon nominated by one of the creditors and to whom no objection was made. After he had filed his petition, his attorney, learning that some of the creditors were endeavoring to secure the election of another person as trustee, prepared a draft of the letter set forth in the referee's certificate. This letter was sent, it is true, "to substantially all the creditors," but not by the bankrupt or his attorney, but by and over the name of one of the creditors. The letter speaks, indeed, of Dr. Grace as the bankrupt's nominee. But neither the bankrupt nor his attorney attempted directly to control or influence the election. All that the bankrupt did, to which any objection is made, was to say in a public meeting of his creditors, and not privately to a limited

number of friendly creditors, that he would like to have Dr. Grace as his trustee. And all that his attorney did was to prepare a draft of a letter which one of the creditors—a large creditor, having a claim exceeding $5,100—sent to the other creditors recommending the election of Dr. Grace.

Section 44, Bankr. Act July 1, 1898, c. 541, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438] gives to the creditors the right to elect a trustee, and their election should be permitted to stand, unless it clearly appears that in conducting it some principle of law intended to secure the administration of the bankrupt's estate in the interest of the bankrupt's creditors has been violated. In this case 32 creditors, holding claims to the amount of $19,136.41, being a majority in number and amount, voted in person for Dr. Grace. There is no evidence whatever tending to show that any one of these persons was influenced in his vote either by the bankrupt or his attorney. It is true that, as the letter set forth in the referee's certificate was sent "to substantially all the creditors," some, and possibly all, of these 32 creditors received copies of it. But not one of them was called as a witness on the question as to whether he was influenced by it. For aught that appears in the case, they may have made inquiry concerning Dr. Grace and, independently of the letter they received, have satisfied themselves that he was the best available man for the trusteeship. The situation was altogether different from what it would have been had these 32 creditors, or any considerable portion of them, been brought to the referee's office by the bankrupt or his attorney. In fact, the case is utterly barren of any evidence tending to show that any one of the creditors who voted for Dr. Grace represented any interests other than his own. If the creditors had confidence in Dr. Grace's integrity and in his ability and determination to administer the trust in their interest, the fact that he was acceptable to the bankrupt would very naturally lead to his election. Harmony of action between an honest bankrupt and an honest trustee tends to promote creditors' interests, and there is no law against the election of a person as trustee merely because he is acceptable to the bankrupt.

I think the proofs are not sufficient to lead to a disapproval of the action of a majority in number and amount of the creditors, and that the order of the referee should be set aside and the election approved.

UNITED STATES v. THOMAS et al.

SAME v. CROSBY et al.

(District Court, W. D. Missouri. April 19, 1906.)

Nos. 2,533, 2,539.

1. INDICTMENT—MOTION TO QUASH—LACK OF EVIDENCE.

A court cannot set aside an indictment for lack of evidence to support it, even in those jurisdictions where such a motion may be entertained, when there was any evidence before the grand jury on which to base it.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 483.]

2. CONSPIRACY—FEDERAL STATUTE—OFFENSE AGAINST UNITED STATES.

Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676] which makes it a misdemeanor to "conspire either to commit any offense against the United States or to defraud the United States," when any act is done to effect the object of the conspiracy, must be construed as standing alone, and covers all conspiracies to commit an act which is made a criminal offense by the laws of the United States; and the fact that the overt act charged to have been committed may constitute a substantive offense on the part of one or more of the accused under the statute which they conspired to violate does not relieve them from liability to prosecution for the conspiracy, at least where such offense is also a misdemeanor.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Conspiracy, § 70.]

On Motions to Quash Indictments.

A. S. Van Valkenburg, U. S. Atty. and Leslie J. Lyon, Asst. U. S. Atty.

O. M. Spencer, Hale Holden, W. D. McLeod, and H. C. Timmonds, for defendants.

McPHERSON, District Judge. These two cases were recently submitted on the same arguments, and being alike, will be ruled on at the same time.

1. The indictments are under section 5440 of the Revised Statutes, as amended [U. S. Comp. St. 1901, p. 3676]. Each of defendants, in each case, moves to quash the indictment. One ground is that there was not sufficient evidence to warrant the return of the indictments. In many jurisdictions, a motion like these would not be entertained. And in those jurisdictions where allowed, it is wholly discretionary. Of course that does not relieve the court from deciding the matter according to the very right. But under the showing made, by oral testimony, assuming, that such evidence is competent, it appears that the grand jury had some evidence on which to base the indictment. I express no opinion as to how much evidence there was; but much or little, there was evidence. And evidence having been presented, the question is at an end. If this were not so, then the court would be reviewing the action of the grand jury, and this cannot be done.

2. The question calling for more consideration is as to the construction to be given to section 5440 of the Revised Statutes, as amended [U. S. Comp. St. 1901, p. 3676], under which the indictments were returned, and what kind of conspiracies the statute denounces. The conspiracy charged is that the defendants Thomas and Taggart, were allowed large commissions from the Chicago, Burlington & Quincy Railway Company, operating a line of railway from Kansas City to Chicago, for all freight from certain Atlantic seaboard cities, to Kansas City, routed over that railway, and that defendant Crosby was general freight agent of the road, and it is charged that the three, with certain merchants of Kansas City, conspired to defeat the provisions of the statute of February 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154] commonly called the "Interstate Commerce Act," and the statute of February 19, 1903, c. 108, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599], commonly called the "Elkins Act." These statutes were to be circumvented, by routing the freight over said line of road, and the Kansas City merchants were to pay the regular and tariff rates. Then out of the large commissions allowed Thomas and Taggart for

thus routing the freight, they were to pay back to certain Kansas City merchants, a part of said commissions, which, in effect and in fact, were rebates, and crimes under the two statutes referred to. The conspiracy charged is followed by allegations of certain overt acts in which rebates were paid out of the commissions received by Thomas and Taggart. And the argument of defendant's counsel is that as such acts, if true, were completed offenses under those statutes, that prosecutions therefor must be under those statutes. And it is earnestly contended that section 5440, as amended does not cover a conspiracy for the violation of the Interstate Commerce and the Elkins Acts. That is to say, it is contended by counsel for defendants, that if the things complained of in the indictments were done, then under the statutes of 1887 and 1903, indictments could be sustained, followed by the imposition of fines. And that being so, it is contended that section 5440 cannot be resorted to, to be followed, if convictions are obtained by judgments of either a fine or imprisonment simply because of concerted actions from unlawful agreements to violate the statutes of 1887 and 1903.

The history of 5440, as I understand it, is as follows: The act of March 2, 1867, entitled "An act to amend existing laws relating to internal revenue and for other purposes" is one of 34 sections, and covers many phases of the Internal Revenue Laws. Section 30 thereof provides:

"That if two or more persons conspire either to commit any offense against the laws of the United States, or to defraud the United States in any manner whatever * * * the parties to said conspiracy shall be deemed guilty of a misdemeanor"—

The punishment for which was fixed at both fine and imprisonment. 14 Stat. 471–484, c. 167 [U. S. Comp. St. 1901, p. 3676].

That section was the basis of 5440 of the Revised Statutes [U. S. Comp. St. 1901, p. 3676]. But by the same Congress (Thirty-Ninth for the years of 1866 and 1867) by an act approved June 27, 1866, it was provided for a commissioner to be appointed by the President, to codify all laws which should be in force at the date of completion of the codification. Two things were requisite for the codification: (1) It was to be more than the usual codification. All obsolete and redundant statutes and parts thereof were to be omitted, and such omissions were to be supplied with additions and corrections, changes of sections, chapters, and classifications, as would make it a harmonious whole; (2) when such codification and such changes were made, and printed, it then had to receive the approval by an enactment by Congress. 14 Stat. 74, c. 140 [U. S. Comp. St. 1901, p. 3755]. So that by section 30 of the act of March 2, 1867, above noticed, and the work of the commission under the statute of June 27, 1866, and possibly changes by Congress, we have section 5440 of the Revised Statutes of 1873, pursuant to an act of December 1, 1873. Congress in adopting the Revised Statutes placed all the Criminal Statutes under title 70, entitled "Crimes," and in 9 chapters [U. S. Comp. St. 1901, p. 3619]. Section 5440 was placed in chapter 5, entitled "Crimes against the operation of the government," a chapter of more than 60 sections, covering a great variety of crimes, the subject of internal revenue being but a small part. And thus the section (5440) has remained until the present time as a law, except by an act of May 17, 1879, the minimum fine was stricken out,

and giving the court the power to inflict either a fine or imprisonment, or both. 21 Stat. 4, c. 8 [U. S. Comp. St. 1901, p. 3676].

It is conceded by defendant's counsel that the statute is not alone directed against offenses concerning the internal revenue, because of the case of Clune v. United States, 159 U. S. 590, 16 Sup. Ct. 125, 40 L. Ed. 269. In that case the indictment was under 5440 for a conspiracy to do an act which was a crime by interfering with the mails. And in view of that decision, the contention is narrowed to the claim that the unlawful act or crime must be one against the operation of the government, or some department thereof. And it is true that chapter 5 of title 70 [U. S. Comp. St. 1901, p. 3660], in defining special acts as crimes, is largely, if not entirely, devoted to acts against the operation of the government, such as counterfeiting the currency, forgeries of public documents, interfering with the public lands, the postal system, and so on. No one denies but that it is within the power of Congress to denounce as a crime, an act which effects but a single individual, save as all immoralties effect good government and society. Therefore we have federal statutes against assaults, robberies, larcenies, and so on. And such a crime is an "offense against the United States," adopting the first sentence of section 5440, because that section in part recites "if two or more persons conspire either to commit any offense against the United States" shall be punished as for conspiracy, as well as those who conspire "to defraud the United States." In other words, the statute covers cases against two classes of conspirators: (1) Those who conspire to commit any offense against the United States. (2) Those who conspire to defraud the United States, whether such frauds are of themselves indictable or not.

It must be kept in mind that a crime covered by section 5440 is a misdemeanor, and that a violation of the act of 1887, and the amendments thereto, is but a misdemeanor, and the argument that the one is merged in the other is without force. Whether the conviction or acquittal of the one could be pleaded in bar as to the other is a question not before the court. But the violation of the commerce statutes being an offense, it can only be an offense against the United States. And being an offense, why it is not covered by section 5440, I am unable to see. It follows that the only remaining question is, what have the courts held as to the proper construction of the statute? The holdings are not uniform. As against the foregoing are the following cases: United States v. Clark (D. C.) 121 Fed. 190, by Archibald, District Judge; United States v. Fehrenback, 2 Woods, 175, Fed. Cas. No. 15,083, by Judge Woods; United States v. Dennee, 3 Woods, 52, Fed. Cas. No. 14,948 by Judge Woods; Curley v. United States, 130 Fed. 1, 64 C. C. A. 369, by the Circuit Court of Appeals of the First Circuit, but in dictum only. But the weight of the authorities is to the contrary.

In the case of In re Coy (C. C.) 31 Fed. 794, was decided by Mr. Justice Harlan on the circuit, and was an application for a writ of habeas corpus. The prisoner, with others, was under indictment under section 5440, the alleged conspiracy being to violate certain state statutes, and section 5511 of the Revised Statutes with reference to the election of representatives in Congress. The writ was denied. And the judgment of Mr. Justice Harlan was affirmed in 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274.

The case of United States v. Owens (D. C.) 32 Fed. 534, decided by Deady, District Judge, was an indictment under the second clause of section 5440, for a conspiracy to defraud the government of part of the public lands. While the question before this court was not before that court, yet Judge Deady said:

"For the demurrer it is argued that section 5440 applies only to a conspiracy to defraud the revenue of the United States. The reason given is that the section being taken from section 30 of the act of March 2, 1867, c. 169, 14 Stat. 471 [U. S. Comp. St. 1901, p. 3676] entitled, 'An act to amend existing laws relating to internal revenue, and for other purposes,' the words 'to defraud' must be limited to the subject-matter of the act—the internal revenue. The subject of the act is not limited by its title to revenue of any kind, but expressly includes 'other purposes' or subjects. The language of the section gives no evidence that it was the intention of Congress to limit its operation to frauds upon revenue. Taken in its natural sense, the language includes a conspiracy to commit 'any' crime against the United States, or to defraud it in any manner; and there is nothing in the circumstances of the case which ought to prevent it from having effect accordingly. As found in the Revised Statutes, there are some verbal changes in the section which only emphasize the general purpose and character of the statute. It is a wholesome and much needed act; and it is difficult to assign any reason compatible with the public good, or the protection of the public property or dues, why any conspiracy to commit a fraud thereon or thereabout should be excluded from its operation."

In the case of Mackin v. United States, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909, the charge was under 5440 for a conspiracy in tampering with the returns of an election of a representative in Congress. The point decided in the case was that the accusation should have been by indictment instead of by information. But inferentially it can be said that had the accusation been by indictment, that it would have been within the statute.

Section 5358 of the Revised Statutes [U. S. Comp. St. 1901, p. 3639] denounces as a crime the act of stealing from a vessel in distress. And in the case of United States v. Sanche (C. C.) 7 Fed. 715, Judge Hammond, District Judge, held that an indictment for conspiracy against two or more for the violation of section 5358, could be sustained under section 5440. In the opinion he said:

"I am of opinion, therefore, that we cannot, on the principle of that case (United States v. Fehrenback, 2 Woods, 175, Fed. Cas. No. 15,083), be required to restrict section 5440 to such offenses as operate to injure the government itself, but that it covers every conspiracy to commit an act made an offense or crime by any law of the United States, as well as an act that may defraud the United States in any manner whatever."

In the case In re Wolf (D. C.) 27 Fed. 606–611, Parker, District Judge, said:

"It is manifest that to constitute a criminal offense under this section (5440), the object of this conspiracy must be to commit some offense against the United States; that is, to do some act made a crime by the Laws of the United States, or to defraud the United States."

The indictment charged a conspiracy to defraud the Cherokee Nation. Section 5132 of the Revised Statutes denounces as a crime an act of a bankrupt in concealing and disposing of his assets of the estate. By so doing the creditors only are injured. And for the violation of that section by conspiring to so do, Judge Dillon, in United States v. Bayer, 4 Dillon 407–410, Fed. Cas. No. 14,547, after discussing other questions said:

"But if it be true that none but the bankrupt can be indicted under section 5132, still it is clear that other persons can combine and confederate with him to commit the acts therein made offenses against the United States. By section 5440, conspiracies to commit any offense against the United States are made punishable, provided some act is done to effect the object of the conspiracy. The statute is based upon the common-law principle that conspiring to commit a crime is of itself criminal, but adds the requirement of an overt act, and the fact that one of the conspirators could not himself commit the intended offense neither relieves him of guilt nor disables him from co-operating with another person who is able to commit it."

And the motion to quash the indictment was denied.

The subject of conspiracy, both at common law and under section 5440, is elaborately discussed by the Circuit Court of Appeals for the Ninth Circuit in the case of United States v. Benson, 70 Fed. 591, 17 C. C. A. 293. While the indictment was under the second clause of the section, the court said:

"What facts are necessary to be alleged in the indictment in order to constitute an offense punishable under the provisions of section 5440? It will be observed by reference to the language of this section that it embraces two separate and distinct offenses, viz.: First, a conspiracy to commit an offense against the United States; second, a conspiracy to defraud the United States in any manner or for any purpose."

The case of Stokes v. United States, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667, was an indictment under section 5440 charging a conspiracy to unlawfully use the mails under section 5480 [U. S. Comp. St. 1901, p. 3696]. The government was in no sense defrauded, nor was the operation of the government interferred with, unless carrying forbidden letters was an interference. The recipients of the letters were the persons wronged, and the judgments of conviction were sustained.

The case of United States v. Cassidy (D. C.) 67 Fed. 698, was a case heard by Morrow, District Judge. The indictment was under the statute in question and the conspiracy was to do two unlawful things, viz.: (1) To impede the mails; (2) To impede commerce between the states. And the latter was given as much prominence as the first.

Reilley v. United States, 106 Fed. 896, 46 C. C. A. 25, the Circuit Court of Appeals for the Sixth Circuit sustained a conviction for conspiracy under section 5440, the unlawful thing agreed upon being to distribute lottery tickets, partly by mail, and partly by carriers from one state to another.

The original statute of March 2, 1867, as has been stated, was of 34 sections, and all but section 30 was with reference to the internal revenue. But section 30 was with reference to conspiracies and the language was "to commit any offense against the laws of the United States." For some reason not disclosed, so far as I am advised, when the section was carried forward into section 5440 of the Revised Statutes, it was changed to read "to commit any offense against the United States." But it was only a change of phraseology, and not of meaning, because there is not, and cannot be, any offense against the United States, that is not against the laws, for the reason declared over and over again, until it is now commonplace, that we have nothing but statutory crimes. And if an act is against the law, it is against the United States, and if against the United States, it is because it is against the laws, and by "laws" is meant "statutory laws."

Our Criminal Code is in one title (70). And that title is subdivided into 9 chapters. And because section 5440 is within chapter 5, entitled "Crimes against the operations of the government," it is urged that the section must be limited to acts against the operations of the government. But Justice Miller said in United States v. Hirsch, 100 U. S. 35, 36, 25 L. Ed. 539, that as to a crime committed before the adoption of the Revised Statutes, that section 30 of the original act, now section 5440, should be considered as though an independent statute. And whether section 5440 was properly classified and made part of chapter 5 of title 70 is of no consequence. Title 74 of the Revised Statutes [U. S. Comp. St. 1901, p. 3750] is upon the subject of construction of the statutes. Section 5595 [U. S. Comp. St. 1901, p. 3750] is to the effect that the preceding 73 titles contain all the laws of the United States then in force.

And section 5600 [U. S. Comp. St. 1901, p. 3751] is as follows:

"Sec. 5600. The arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the title, under which any particular section is placed."

Most of the cases are of those where the conspiracy was to defraud the government, or against the operations of the government, but that is no argument against the scope of the statute. And if it were, it is by no means certain that the Interstate Commerce Commission is not a department of the government, and all statutes upon the subject of commerce, to an extent at least, are to be enforced by that commission. The holding is that section 5440 must be interpreted as though standing alone. It covers all conspiracies. And the subject of the conspiracy may be any act covered by any criminal statute; in any event that which is a misdemeanor. Of this conclusion I am not in doubt. But if in error, it can be corrected, but could not be if I were to otherwise hold. Of course no judge would decide against a defendant, and for the government, on the ground that a defendant only can have the decision reviewed, nor would he decide against the government to cut off a review. But all judges are pleased when these rulings, and especially in cases of public interest, can be and are reviewed, as can be done in the cases now before the court.

The motion to quash in both cases will be denied. And in so ruling, it is deemed proper to state: (1) The two questions covered by this opinion only are decided. Other assignments of motions to quash were not discussed. The others can be considered later, provided they are such objections as could then be first urged. (2) In case No. 2539, a ruling is not made as to whether the indictment charges defendant Crosby with the alleged conspiracy, or only in committing overt acts. The indictment is peculiar, and somewhat unusual in that respect. It must be kept in mind that defendants are charged with the crime of conspiracy, and for no other crime.

But that question was only alluded to in argument, and it calls for more consideration than was given to it by counsel, and more by the court than can now be given.

GRUNBERG v. UNITED STATES. BAITLER v. SAME. TRAFTON v. SAME. SHEDD v. SAME.

(Circuit Court of Appeals, First Circuit. April 27, 1906.)

Nos. 598–601.

1. INDICTMENT—CONSPIRACY OF OFFICERS TO DEFRAUD UNITED STATES.

Officers in the revenue service, who conspire with others to defraud the United States, may be prosecuted therefor, under Rev. St. § 3169 [U. S. Comp. St. 1901, p. 2059], or they may be joined with the individual conspirators in an indictment under section 5440 [U. S. Comp. St. 1901, p. 3676].

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 327–333.]

2. SAME—TRIAL—MATTERS DISCRETIONARY WITH COURT.

The taking of a plea of guilty from one of a number of defendants jointly indicted for conspiracy, in open court, and in the presence of the jury panel, is a matter within the discretion of the trial court, and does not constitute error for which a judgment of conviction against the other defendants will be reversed.

3. SAME—INSTRUCTIONS.

On the trial of members of a partnership charged with conspiracy to defraud the United States by obtaining the entry of imported goods at less than their true valuation, a refusal to charge that the failure of defendants to produce invoices of the goods on notice by the United States, or to produce their employés as witnesses, could not be considered against them, and the giving of a contrary charge that the jury might consider such facts *held* not reversible error, in view of the condition of the record.

4. CUSTOMS DUTIES—UNDERVALUATION—CONSPIRACY—PROSECUTION—EVIDENCE.

On an issue as to the contents and value of certain cases of imported goods which defendants were charged with having secured the entry of at an undervaluation through a conspiracy, the testimony of a witness who assisted in the selection and packing of the goods by the foreign seller was not inadmissible, because he did not take part in nor witness all of the steps taken from the selection of the goods for shipment to the closing of the cases and their shipment, and consequently could not testify from his own knowledge to the ultimate fact; but his testimony is admissible, so far as it relates to pertinent facts within his knowledge, to be considered in connection with that of other witnesses and the established course of business in the establishment.

5. CRIMINAL LAW—APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In the absence of more specific exceptions than appears in the record, the admission in evidence of a general statement by such a witness of the contents of a particular case, made on reference to an invoice made at the time, was not prejudicial error, where the jury were instructed to consider his evidence only in relation to facts within his personal knowledge, and from his entire evidence the jury could readily determine what facts were so within his knowledge.

6. WITNESSES—REFRESHING MEMORY FROM BOOKS—CONTEMPORANEOUSNESS OF ENTRY.

Ledger entries in the books of a large mercantile partnership, showing the gross amounts of invoices of goods sold to a customer, and payments received thereon, posted at the close of the calendar month in which the sale was made, are sufficiently contemporaneous that they may be referred to by a partner for the purpose of refreshing his memory as to such facts, where they were examined by him at or near the time of their entry and then known by him to be correct.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 881, 882, 887, 888.]

7. CUSTOMS DUTIES—UNDERVALUATION—CONSPIRACY—INDICTMENT—VARIANCE.
Where an indictment charged a conspiracy to defraud the United States of moneys thereafter to become due from a certain mercantile firm as customs duties, proof that the merchandise in question was consigned to a firm of customs brokers, who paid the duties thereon, was not a variance; the goods being owned by the mercantile firm, and so consigned only for convenience of entry.

8. SAME—TRIAL—EVIDENCE.
A defendant, who was an examiner in the customhouse, was charged with conspiracy with his codefendants to permit the entry of goods subject to an ad valorem duty at an undervaluation. It was shown that two cases of goods passed by him were throughout of much higher grade than shown by the invoices, and that each contained a number of inclosed packages, and on cross-examination that he examined only one package out of the two cases. *Held*, that evidence offered by him to show that it was his custom, with respect to the goods of all importers, to examine one package only of a case in which the goods were all of one kind, and that it was not unusual for him to pass two cases on examination of one, was properly excluded as immaterial on the question of his fraudulent intent, since under the facts shown the examination of the single package was sufficient to have shown the fraudulent character of the entry.

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

See 131 Fed. 137.

Boyd B. Jones (Marshall P. Thompson and Horatio N. Allin, on the brief), for plaintiffs in error Samuel Grünberg and Charles A. Baitler.

Everett W. Burdett (Joseph H. Knight, on the brief), for plaintiff in error John W. Trafton.

Charles K. Cobb, for plaintiff in error James A. Shedd.

William H. Garland, Asst. U. S. Atty., and John H. Casey, Special Asst. U. S. Atty.

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

PUTNAM, Circuit Judge. These writs of error represent a joint indictment under section 5440 of the Revised Statutes [U. S. Comp. St. 1901, p. 3676], alleging a conspiracy to defraud the United States, with certain overt acts stated in the indictment in connection with certain importations alleged to have been made at the port of Boston. The parties indicted were Grünberg, Baitler, and Burman, copartners, doing business in Boston under the style of the "Glasgow Manufacturing Company," who were the importers, Munroe, who represented the customhouse brokers, and Trafton and Shedd, who were officers in the customs service, and examiners of merchandise at the port named. There were pleas and a demurrer, which were overruled, raising certain questions, some of which we will consider. Subsequently, Burman pleaded guilty, and, after verdict against all of the other persons charged, except Munroe, who was acquitted, he was on the 28th day of December, 1904, sentenced to pay a fine. Subsequently, on the 18th day of April, 1905, Grünberg was sentenced to imprisonment for 20 months in the jail at East Cambridge, Baitler for 12 months in the same jail, Trafton for 20 months in the jail at Dedham, and Shedd also

for 20 months in the same jail; each of course being, according to the usual practice, separately sentenced.

The indictment alleges that the Glasgow Manufacturing Company was engaged in importing into the port of Boston from Switzerland certain merchandise, subject to ad valorem, duties, from the 1st day of September, 1901, until the 18th day of October, 1903. The merchandise is described as cotton embroideries, cotton handkerchiefs, mull handkerchiefs, cotton lace curtains, cotton insertions, cotton edgings, cotton shirt fronts, white mull handerchiefs, cotton shams, cotton scarfs, and embroidered handkerchiefs. The conspiracy is alleged to have been formed under date of the 1st day of November, 1901, and its purpose is alleged to have been to defraud the United States of divers large sums of money thereafter to become due to the United States from Grünberg, Baitler, and Burman, as copartners, as customs duties on the importations from Switzerland of large quantities of merchandise of the kinds named. The indictment then proceeds to state the manner in which the conspiracy was to be effectuated, in substance as follows: That Grünberg, Baitler, and Burman, as copartners, were to purchase, near St. Gallen, in Switzerland, from time to time, large quantities of merchandise and cause the same to be packed in packages, the contents of each of which should exceed the sum of $100, but to be exported to Boston and be entered as having little or no commercial value, namely, as clippings of edgings, sample handkerchiefs, discards, designs, cotton sample strips, lace sample corners, and lace samples. The indictment further alleges that the foreign market values of each package imported were to be declared to be less than $100, and, when more than one package was entered, the total market value of all so entered to be included in one entry were to be declared to be less than such sum of $100, so that the whole would apparently be entitled to entry without the production of a consular invoice. The indictment further alleges that it was a part of the conspiracy that Trafton and Shedd, as such examiners, should neglect to do their duty in reference to the examination of the imported merchandise, and, among other things, they were willfully to neglect to truly inform the appraiser concerning the same, and willfully to neglect to make complaints to the collector of the violations of law by Grünberg, Baitler, and Burman. The indictment further alleges the part agreed to be done by Munroe, as customhouse broker, to which we need not refer particularly. Then the indictment proceeds to charge various overt acts covering packages numbered 110, 121, 149, 150, 151, 152, 175, 179, 211, 212, 223, 224, 225, 228, 231, 232, 263, 264,, 339, 340, 344, 371, 372, 373, 377, and, perhaps, some others, all of which we understand did pass the customs and went beyond the custody, and control of the United States, authorities. In addition to the above, the indictment specifies two packages, numbered 271 and 272, which, we understand, did not pass the customs, but were seized, produced at the trial, and examined by the jury. Grünberg, Baitler, Shedd, and Trafton each sued out a writ of error, according to the rules which are supposed to apply here, on the ground that the sentences were several and distinct. Cox v. United

States, 6 Pet. 172, 182, 8 L. Ed. 359; Germain v. Mason, 12 Wall. 259, 20 L. Ed. 392; Wharton's American Criminal Law, § 2347.

In addition to the particular importations which are set out in the indictment, as overt acts, the United States proved other importations, making in all 90 cases of merchandise, all occurring within the stated period within which the alleged overt acts occurred. The purpose in adducing these additional importations was only on the issues of knowledge and intent. The jury was impaneled on October 4, 1904, and the verdict was rendered on December 22, 1904. A great many exceptions were taken, and 141 errors were assigned. Considering the length of the trial, and the volume given to it by the method in which the United States introduced proof of so many importations, the assignment of so large a number of errors might well have been expected. No comment is made on that account, beyond the fact that the multiplicitly of alleged errors has unavoidedly disclosed some which, after full investigation, the plaintiffs in error concluded not to rely on, and has disclosed others which, on account of their minor importance, have not been fully developed in the arguments before us. In view of the fact that so many errors were assigned, we have not felt called on to discuss those which were not fully developed at the trial before us. So far as we fail to allude to the propositions of the parties, it will be understood, therefore, that the omission, for the reasons which we have explained, is either because the propositions have not been urged on us or because the failure to develop them fully has been of such a character, and under such circumstances, that we did not feel called on to investigate the record or the authorities for ourselves.

The first proposition to which we give our attention is an alleged repugnancy on the face of the indictment. It is not specifically set out in any error assigned, but it is claimed to be covered by a long series of alleged errors assigned in a more or less general manner. As this proposition is brought to our attention, we are unable to perceive any repugnancy, while to us the indictment is expressed in this particular in the usual and customary manner. We would hardly know how to express it other than as we find it.

The next point is to the effect that, inasmuch as section 3169 of the Revised Statutes [U. S. Comp. St. 1901, p. 2059] provides a different penalty for an officer of the United States conspiring from that imposed by section 5440 on individuals other than officers, officers cannot be joined in this indictment with individuals. The offense alleged, however, is as expressly stated in each section of the Revised Statutes, namely, as conspiracy "to defraud the United States." Section 5440 follows these words with the words "in any manner or for any purpose," which words do not appear in section 3169. These, however, are mere surplusage. Section 5440 requires a proof of some overt act, which is not required under section 3169; but the offense is the same, and the result will be only that, if the United States joins both officers and individuals in the same indictment, they may be required to prove more than if they proceeded against the officers alone. Were it not for the requirement of section 5440 of an overt act, there would therefore be no difficulty whatever, where both officers and individuals were connected

with the same conspiracy, in charging both in the same indictment with conspiracy "to defraud the United States," if that was the nature of the conspiracy, as it is in the case at bar, and in then proceeding to a joint verdict, to be followed by different sentences; the one for the individuals conforming to section 5440, and the one for the officers to section 3169. The offense with regard to each would be the same, and only the penalties would be different. There could be no more practical difficulty in thus awarding different penalties than there is in the ordinary cases where different penalties are awarded against several individuals found guilty of the same joint offense. It may not, however, be safe to say that this can be done here, on account of the requirement under section 5440 of the overt act in connection with the individuals, while, as we have said, an overt act is not required under section 3169, in connection with the officials.

It is true that section 5440 arose out of the act of March 2, 1867, c. 169, § 30, 14 Stat. 484, while section 3169 arose out of a later act, namely, that of July 20, 1868, c. 186, § 98, 15 Stat. 165. Of course, the incorporation of each in the Revised Statutes leaves each to stand precisely as it did before the revision was enacted. Such is the general rule applicable to the interpretation of revisions, and such is the effect of the act of June 27, 1866, providing for the revision of the statute laws of the United States (14 Stat. 74), in that Congress directed the commissioners to note proposed amendments, while, as to these two sections, the report of 1872 shows no change intended. The act of 1868, now section 3169 of the Revised Statutes, is not to be assumed tc have repealed any part of the act of 1867, now section 5440, except so far as the presumption of repeal is unavoidable. Pooler v. United States (opinion passed down on January 21, 1904) 127 Fed. 509, 513, 62 C. C. A. 307. If the act of 1868 imposed a lighter penalty than the act of 1867, this might afford a presumption that, so far as the act of 1868 applied, it superseded the act of 1867; but the penalty under the later act is accepted as being more strenuous than that under the previous act. In the present case, however, the act of 1868, now section 3169, omitted an element not found in the earlier statute, namely, the overt act; so that they do not run in parallel lines, and both enactments should be held to be in full force as to everybody, and the United States are at liberty to proceed under section 5440, proving an overt act, or to proceed as against an officer under section 3169, without the burden of proving any such act. Thus the two may stand together, and the United States may proceed under either without being embarrassed by the other.

No difficulty in reaching this result arises out of the usual method of criminal procedure or the usual rules for construing statutory enactments, and any supposed difficulty is purely fanciful.

The parties pro and con have cited three decisions on this question, which are not at all binding on us because they are from Circuit Courts, and they have only such weight as attaches ordinarily to such names as those of the learned judges who rendered them, but more particularly to the methods in which the respective judgments were considered. The plaintiffs in error cite United States v. McKee, Fed.

Cas. No. 15,683, decided by Judge Dillon on April 8, 1876. His opinion was oral, on a motion for a new trial, without anything to indicate that he gave the matter any special consideration. He probably followed Mr. Justice Miller and Judge Treat in United States v. McDonald, decided in 1875, 3 Dill. 543, Fed. Cas. No. 15,670. Here, without any special consideration being given to the question so far as the opinion shows, it was merely observed that the indictment was good under section 3169, or under section 5440, but not good as against both officers and private individuals. After this opinion was pronounced, the district attorney discontinued as to the private individuals, and the case went to trial against the officers. That these decisions on which the plaintiffs in error rely were somewhat hasty appears from the fact that the carefully considered opinion of Judge Lowell, in United States v. Boyden, 1 Low. 266, 269, Fed. Cas. No. 14,642, supporting the present contention of the United States, decided in July, 1868, and reported in a volume published in 1872, three years before the decisions on which the plaintiffs in error rely, was in no way noticed. This was a thoroughly reasoned opinion, so that, if the citations made pro and con were at all authoritative so far as we are concerned, and we were bound by the weight of authority, we might justly say it was with United States v. Boyden. However, for the reasons we have stated, it seems clear to us that this proposition of the plaintiffs in error cannot be sustained.

The next point taken by the plaintiffs in error is with reference to the plea of guilty by Burman in open court. As we have said, Burman was one of the Glasgow Company, indicted with Grünberg, and Baitler, and pleaded guilty. His plea was taken in the presence of the panel, before the jurors were called, against the objection of the plaintiffs in error. We can, however, hardly regard this as prejudicial, because it is impossible to escape the belief that the fact that Burman had pleaded would come out in the course of the trial, and, also, that it would become a matter of common knowledge about the courtroom, which the entire panel would inevitably be affected by. Moreover, it was the right of the United States to have Burman separately plead guilty, and then to call him as a witness against the other persons indicted, if it so desired. On his pleading guilty, his constitutional protection against self-incrimination ceased. Benson v. United States, 146 U. S. 325, 333, 13 Sup. Ct. 60, 36 L. Ed. 991. This greater right clearly covers the lesser right involved in disposing of Burman in the way in which it was done. Indeed, in the course of its charge, the court informed the jury that Burman had pleaded guilty, as it was proper and right that it should. The true answer to the whole is that this was one of the ordinary incidents of a trial which is within the discretion of the court, and which we cannot revise.

The next topic is stated by the plaintiffs in error in the following manner:

"Did the District Court err in refusing to instruct the jury that no inference of guilt could be drawn from the failure of Grünberg and Baitler to produce, on the notice of the district attorney, or to introduce in evidence any books or invoices of the defendants relating to the crime charged which the jury might believe to be in their personal possession, and in instructing them

that such inference could be drawn from a failure to produce the books and invoices?

"Did the District Court err in instructing the jury that they might draw an inference of the guilt of the defendants Grünberg and Baitler from their failure to call their employés?"

This is really three points, one relating to invoices, one to books, and one to employés as witnesses. As to the invoices: It appeared that true invoices were sent to the Glasgow Company; so that the jury might well find that the Glasgow Company had such invoices. There were, of course, false invoices on which the goods were entered, and some of these false invoices also came from the clerks of the house in Switzerland through whom the goods were purchased. However, no point in this direction was made by the plaintiffs in error. It also appeared that the United States gave Grünberg and Baitler notices to produce the original invoices, and also their books of account. The notices are not in the record; but they are put, so far as the books are concerned, in the following language: "The books of account of the Glasgow Manufacturing Company kept during the period charged in the indictment." That this was too broad a form, so far as the books were concerned, is a rule of practice indirectly applied in Ballmann v. Fagin, 200 U. S. 186, 26 Sup. Ct. 212, 50 L. Ed. ——, and asserted in Hale v. Henkel (in an opinion passed down by the Supreme Court on March 12, 1906) 26 Sup. Ct. 370, 50 L. Ed. ——. However, the notices, too, are of no consequence, because the United States, in their efforts to support the rulings of the trial court, do not rely on them, and the court evidently did not rely on them.

One of the employés of the Glasgow Company was called by the United States and examined as a witness. The United States have not called our attention to anything in the record showing that there were any other employés of the Glasgow Manufacturing Company who knew anything about the matters in question. However, no point of this nature was made by the plaintiffs in error.

This topic comes up in two ways: First, on a request of the plaintiffs in error for an instruction to the jury, and, second, on an instruction which was given. The request was to the effect that the fact that Grünberg and Baitler did not produce at the request of the United States the alleged original invoices was not evidence against any of the respondents. This was refused. We note that this is limited to the invoices. It says nothing about any books. The record exhibits a like request with reference to books of account, but it is admitted that this was an inadvertence, and it is not necessary to refer to it further.

Notwithstanding the request about the invoices, the court authorized the jury to consider whether an innocent man, placed in the position of Grünberg and Baitler, would not have introduced his books, with his employés, and shown that the goods were not of the value alleged by the United States. Plaintiffs in error rely on Boyd v. United States, 116 U. S. 616, 620, 6 Sup. Ct. 524, 29 L. Ed. 746, but that case related entirely to a question of the constitutionality of a statute which provided that, in a procedure which the court held to be a criminal one, if the party defending failed to produce, after notice from the United States to produce, certain allegations stated by the United States should

be taken as confessed, unless the failure to produce was explained. The court held that this was in violation of the fourth and fifth amendments to the Constitution. The question here, however, relates merely to what has long been recognized by the settled rules of practice with which Boyd v. United States had nothing to do; that is to say, that effect may be given to the voluntary acts and omissions of a person charged with an offense, of which the simplest illustration is the failure or the refusal of a man found in possession of stolen goods to make any explanation in reference thereto. That Boyd v. United States does not supersede the usual rule is apparent from the discussion in the later case of Graves v. United States, 150 U. S. 118, 121, 14 Sup. Ct. 40, 37 L. Ed. 1021.

It is doubtful whether the rules relied on by the United States apply to books of account, and whether they are not limited to what persons charged with an offense might put in evidence if produced, and their books of account they could not usually put in evidence. To apply the rules to such books would be to subject a person charged with an offense to a burden on the one hand which could not be of any avail to him on the other. However, this point was not made by the plaintiffs in error.

These rules never have been carried so far as to imply anything against a person charged with an offense by reason of his not calling witnesses, unless witnesses who were presumed to have special knowledge, and as to whom the alleged criminal may be presumed to have had special information or peculiar control, while the prosecuting authorities had neither. The record shows nothing about this, and, in addition thereto, a peculiar inappropriateness arises from the fact that our attention is called to no evidence that there were any employés, except the one who was called by the United States, who had any knowledge on the matter. This point, however, was not made by the plaintiffs in error. We have already said that no point has been made to us with reference to the subordinate propositions we have named, and, as the record fails to state that there were no books or employés to which the ruling in question might relate, we are justified in assuming that the only points intended to be raised are those which we will now state. This is made clear by the supplemental brief in behalf of the plaintiffs in error, containing the last statements of the aspects of this topic so far as they intend to present them to us. It is true it is said generally that the United States could have called employés as well as could the plaintiffs in error. Here again, however, the plaintiffs in error fail to call attention to any statement in the record with regard to the status of the employés in the particulars to which we have referred. We may further observe that the ruling of the Circuit Court excepted to was, so far as the record shows, at the suggestion of the court itself, and there is nothing to indicate that the United States asked for such a ruling, or that it may not have been one of those academic propositions into which the court sometimes slips in a long trial. At any rate, in view of what we have stated, in view especially of what we have quoted from the record as to what the record contains, and in view also of the fact that the record does not show that the United States

asked for this ruling or insisted on it, so that there is no presumption in favor of the plaintiffs in error in that direction, it rested on the plaintiffs in error to make the record plain and full.

Under the circumstances, we are justified in concluding that, on this topic, the case raises to us only two points, as follows: First, that the rules involved do not apply to employés, and, second, that the proceeding is within Boyd v. United States. We have already shown that Boyd v. United States does not apply. The rule does relate to employés, as stated in Commonwealth v. Clark, 14 Gray, 367, 373, which case may properly be cited here as the trial was in the Massachusetts District, and it also relates generally to witnesses peculiarly within the power of the alleged criminal to produce. Graves v. United States, 150 U. S. 118, 121, 14 Sup. Ct. 40, 37 L. Ed. 7021. While, therefore, it may well be questioned whether the rulings and refusal to rule were correct in all respects and from every aspect, yet they were correct so far as concerns any objections properly raised before us.

The plaintiffs in error object that the court allowed the United States to introduce evidence tending to show that the Glasgow Company made importations of other merchandise than that described in the indictment, and, also, that such merchandise was entered at the custom house at an undervaluation. The difficulty here is that the plaintiffs in error have discussed this proposition as though it concerned additional overt acts in the proper sense of the term, but it related entirely to the intent and knowledge of the persons charged. The evidence was clearly admissible for that purpose.

Another proposition of the plaintiffs in error is covered by the following question which they put:

"Was it error to exclude the evidence offered by the defendant Trafton to the established good reputation, as importers, of Grünberg and the Glasgow Manufacturing Company, entertained by himself and, to his knowledge, by other customs officials, and also the evidence offered by him concerning the threat of one Porter and his belief that the complaints against the Glasgow Manufacturing Company emanated from business rivals, and were in part in execution of the threat of said Porter?"

If this involved simply a purpose of proving the established good reputation of the importers, the evidence offered would clearly have been admissible; but the plaintiffs in error state that Trafton had "testified," or "offered to testify," in regard thereto. We do not understand that any issue was made on that topic pure and simple. It is to be seen that the offer was coupled with certain proposed proofs as to the threats of one Porter, who was not connected in any way with the transactions in issue here. It is plain, under the peculiar circumstances, that this was wholly irrelevant matter, or, at least, so remote that it was within the discretion of the court to exclude it. Therefore, as the offer stood, we cannot take cognizance of it.

With regard to the cases of merchandise numbered 271 and 272, which we have said were seized by the United States, and which were produced at the trial and examined by the jury, the plaintiffs in error make certain propositions which we understand are to the effect, that the testimony was so defective as to Trafton that he could not have been properly charged with reference to them. Both Shedd and

Trafton, however, testified in regard to these cases, and, so far as we understand their testimony, there was sufficient incompatibility between them to require the court to submit to the jury that particular topic.

We now come to a series of topics which connect with each other, and yet, to a very considerable extent, must be treated separately. They are called to our attention by the plaintiffs in error by the following interrogatories:

"Did the court err in admitting in evidence the testimony of one Hans Leumann regarding the character, weight, number, and price of the goods contained in certain cases?"

"Did the court err in allowing the witness Leumann to use certain so called invoice books for the purpose of refreshing his recollection in testifying to the number, weight, character, and price of the contents of certain cases?"

"Did the court err in admitting in evidence the testimony of one Herman Schlaepfer regarding the character, number, and price of the goods contained in certain cases?"

We must also, at the outset in this connection, refer to the charge of the court to the jury as follows:

"In the first place, there is the evidence of the witness Leumann and of the witness Schlaepfer. Leumann testifies, as you remember, what went into those cases. Of course, if Leumann's testimony is to be believed, then as to the question of undervaluation there is an end of it. No one will dispute that. The testimony of the witness Leumann has been attacked. In the first place, it is said that he was testifying to things that he did not personally know. Now, a witness is not allowed to testify to matters which are outside of his personal knowledge. He is allowed, however, in testifying, to refresh his memory by memorandum made in certain ways. I permitted the witness Leumann to refresh his memory by referring to certain books. I did that on his statement as to how he examined those books. I deemed the evidence admissible. I permitted it to go in. I refused to strike it out. You will weigh his evidence. So far as he was not speaking of things of which he knew, you need not regard his evidence. So far as he was speaking of things of which he did know, things which were within his knowledge, you are entitled to attach to his testimony such weight as you think it should have."

Although the learned judge did not expressly repeat to the jury in connection with Schlaepfer's testimony all he thus said with reference to the testimony of Leumann, the way in which he connected Schlaepfer's testimony with Leumann shows that the observations made by him with regard to Leumann applied also to Schlaepfer. Indeed, he afterwards made this clear by the following:

"Then we come next to the witness Schlaepfer, as you will remember. Well, his testimony was attacked in somewhat the same way, and you yourself know how much knowledge he had of the goods which were put into the cases, and you will remember how he testified about that, at least, in a general way, and you will remember how he also was limited to what he knew, and you will attach to the testimony, as to the contents of those cases, such weight as you think should be given to it."

Leumann was the head of the partnership of Leumann, Boesch & Co., of St. Gallen, Switzerland, and the Glasgow Company purchased of Leumann's partnership, or through it, all the goods in question here. The transactions originated during a visit by Mr. Grünberg at St. Gallen and in personal interviews between him and Leumann. Leumann, as the representative of his partnership, received the orders,

and saw to it that they were properly filled, and that the goods were properly packed and shipped, so far as it is possible for the head of a concern to do all this. It appeared that the business of Leumann, Boesch & Co. was extensive, and that they occupied a large establishment of seven stories. The merchandise alleged to have been shipped to the Glasgow Company was laid out by Schlaepfer on the fourth floor, packed in subpackages, and arranged to be shipped to the United States in the cases already referred to; the subpackages being numbered, or containing other directions, so that they would go into the proper cases suitable for shipment, each corresponding to the genuine invoices indicating what goods were shipped in each. Being thus prepared for casing, the goods were sent by Schlaepfer to the basement, where they were intended to be put into the proper cases according to the numbers already referred to. Leumann was frequently every day inspecting the goods as packed in subpackages by Schlaepfer, and prepared by him to go to the basement, and was also daily and frequently in the basement observing the final disposition of the goods there. Whoever inclosed the goods in the basement in the cases described in the indictment, and in the evidence, delivered them to the carter, who transferred them to the forwarder at St. Gallen. From that point the record loses all trace of the goods until they were received at the port of Boston. From the nature of the situation, which was not peculiar to this particular proceeding, but inherent in all like situations where there are dealings by large houses in the shipment of goods, or by large manufacturing establishments or financial establishments in reference to their affairs, it is inherently impossible that any one person should follow of his own absolute knowledge every step with reference to each particular item of merchandise or other property involved. It is also very frequently the fact that it is inherently impossible that any person should know, of his personal knowledge, exactly what goods went into the larger packages for shipment, because the general superintendent of shipments, whose duty it is to see that the goods are put into the subpackages, has, by the nature of the business, no opportunity of knowing that those particular subpackages are shipped, or in what general packages they are shipped, while the packer in immediate charge of arranging the larger packages handles what is concealed from his sight by being inclosed in smaller packages, and therefore he can have no personal knowledge of what in fact passes his hands. Here, therefore, come in the ordinary rules with reference to the presumptions arising from the course of business, which we may refer to later. At present we have no occasion to touch on them, except to explain in this general way the inherent impossibilities involved in supporting alleged facts if the presumptions arising from the ordinary course of business may not, under some circumstances, be accepted to supply what it is inherently impossible for any person to testify to from actual, specific, detailed knowledge. We are now only pointing out that, in these particulars, the United States were, at least, entitled to prove their allegations by summoning Leumann to testify so far as he had personal knowledge, by summoning Schlaepfer to testify so far as he had personal knowledge, and by summoning the packer, if they saw fit to do so, to testify so far as he had personal knowledge,

supplementing the direct proofs, if the United States deemed proper to do so, by presenting to the jury testimony or presumptions showing or suggesting that the goods which Leumann purchased for the Glasgow Company, or sold to it, were in fact received at Boston. Certainly, in order to make out a chain of events more or less complete, Leumann and Schlaepfer were each entitled to testify, and the United States were entitled to the testimony of each of them, so far as they had any personal knowledge in reference to any of the links thereof. It is plain that each of them had a very considerable amount of personal knowledge of that kind.

The charge of the court as to each expressly limited the jury to the facts that were thus within the personal knowledge of each of these witnesses. How far either of the witnesses had personal knowledge would ordinarily be a question for the jury to determine, so that, unless the record is made specific, no exception will lie with reference to this particular topic. Insurance Company v. Weide, 9 Wall. 677, 681, 19 L. Ed. 810, involved the determination of the details of a large stock of goods destroyed by fire, where the witnesses testified with the aid of what was left by the fire of the books of the insured. The testimony related to a great mass of property, involving a multitude of items, and covering a very considerable number of years, and it is given somewhat at length at page 679 of 9 Wall. [19 L. Ed. 810]. It was to the effect that the witness identified the books, that he testified that they were kept by him and his partner, that they were correct, but that he could not state from recollection the amount or value of the stock on hand at the time of the fire; and thereupon he was cross-examined. When we examine in detail the testimony of Leumann and the corresponding testimony of Schlaepfer, it will be found that any objections which can be made as to the extent of their personal knowledge are no more efficient than the objections made as to the personal knowledge of the witness in Insurance Company v. Weide. In each case the natural presumption is, as claimed by the plaintiffs in error, that there must have been a great many details as to which, in the ordinary course of business, the witness testifying could not have had personal knowledge. Nevertheless, the admission of the testimony in Insurance Company v. Weide was sustained for the reasons given by the court at page 681 of 9 Wall. [19 L. Ed. 810]. The court, referring to the point that the witness testified generally as to the correctness of the facts stated in the memorandum which he produced, observed that, if the evidence of the witness had not been satisfactory, his cross-examination should have been placed on the record. In view of the instructions to the jury to which we have referred, and in view of the fact that Leumann and Schlaepfer each testified positively that they knew certain important matters as to which they testified, it seems impracticable for an appellate court, on such a statement as we have here, to sift out the record and reverse the judgments because of a possible difference of opinion between the appellate tribunal and the trial court as to how far the evidence should have been submitted to the jury for it to determine to what extent the testimony of the witnesses in question should be accepted in accordance with the instructions we have cited. As each of the witnesses plainly had knowledge

of a part of a chain of events, and as the court had clearly instructed the jury to accept their testimony only to the extent of that personal knowledge, whatever else they apparently testified to might, unless the record was full, be taken from our consideration.

These propositions are made evident by the fact that the interrogatories which we have cited, and which, so far as we are concerned, represent the objections taken by the plaintiffs in error so far as the matter of personal knowledge is involved, cover everything in sweeping terms "regarding the character," etc., of the goods contained in the various packages. But each witness certainly knew something "regarding the character," etc., so this is so sweeping as to include facts which were clearly within the personal knowledge of the witnesses in question, even if it did include facts which were not so. These objections, therefore, are, on their face and on this record, too broad for this court to consider. The plaintiffs in error, however, undertake to illustrate, define, and limit them by referring to Schlaepfer's testimony in regard to case 111, given in the record, as illustrative of the entire class of testimony to which these objections refer on the point of knowledge. As to case 111 Schlaepfer testified that Leumann sometimes came into the shipping room once or twice a day, sometimes oftener, that he passed through and looked at the goods and looked at a dozen pairs of curtains on a piie, and inquired for whom they were; and that he had seen Leumann examine goods concerned with the Glasgow Company. He testified further as to case 111 as follows:

"Q. Now, will you tell me, looking at your memorandum to refresh your recollection, what the contents of case 111 were? A. The contents of 111—there is one lot of 106 6/10 dozens of scarfs from Mrs. Frank, bought in St. Gaul, and the others are shams, scarfs and tidies."

After he gave these details the district attorney read from the invoice copybook which was used by Schlaepfer, and which we will come to again, the detailed contents of case 111, and the record says this agreed with the contents as read by the witness from the shipping book. The district attorney then proceeded to question the witness as follows:

"Q. Did you check the page at all? Did you compare them with the actual goods? A. Oh, yes; I did.

"Q. And where were the goods that are entered on that page got together? A. In the shipping room.

"Q. Who took them down to the cellar? A. The packer.

"Q. Under whose direction? A. Under my direction.

"Q. Did you see the goods when they were piled up in the shipping room? A. Yes, sir.

"Q. Did you put a slip on the goods? A. Yes, sir.

"Q. What sort of a slip was it? Describe the slip. A. A small slip, maybe about four or five inches wide and four inches high, and just the mark of the case and the number of packages. It had on it the number of the case, No. 111, and also had upon it the initials of the consignee, 'S. & D. C.,' when delivered."

Leumann testified as follows:

"A. I saw, as I stated before, in the embroidery department, all the goods, and I saw how they were put up, and how they were marked, and how they were to be packed; but I did not state, or I would not state, that I was beside the cases when these goods were packed in."

The only point the United States make in reply to the position of the plaintiffs in error as to this class of testimony is that it was for the "jury to decide how far an absolute statement in a direct examination shall be cut down by any qualification or contradiction elicited by the other side." The United States also affirm that Leumann testified that "he saw all the cases, and knew what was in the cases." If these two propositions of the United States were correct, the plaintiffs in error would never have submitted this question to us; but this proposition of law is too broad to meet the case, and this proposition of fact is misleading, because, almost in the same breath in which Leumann testified that he knew what was in the cases, he added that he could only tell what was in them when he saw the invoices, and then, referring to the invoice books, he added: "I guessed these goods were in." And again, immediately after: "These goods must have been in, as we entered them in our ledger, and got the money for them."

The shipping room where Schlaepfer did his work was in the fourth story, as we have said, from which the goods were sent down into the cellar to be packed in the cases in which they were forwarded to Boston. In view of the express and clear explanations made by Schlaepfer and Leumann as to the extent of the personal knowledge of each, the jury could not possibly have misunderstood the questions or answers put to and given by them in regard to the contents of case 111. As we have already said, Schlaepfer knew in detail exactly what was intended for that case, and what was sent to the cellar for that purpose, and that everything was marked so as to be correctly packed as intended. If Leumann did not know everything in detail as Schlaepfer did, he knew generally what was intended for case 111, and what was prepared therefor on the fourth floor, and he might have had some further knowledge in regard thereto by reason of his occasional visits to the cellar, about which he testified. Therefore, as we have said, each of them had personal knowledge of the facts to a certain extent, which so far was clearly admissible in evidence, and, with the explanations made by each of them, it is impossible that the jury could have mistaken them on that particular topic, and is quite difficult to see how the jury could have been prejudiced so far as the mere letter of their testimony went further. Of course, there may be conditions where a mass of testimony is, as a whole, so clearly prejudicial, that a sweeping objection should be accepted; but, under the existing circumstances, if the plaintiffs in error deemed themselves prejudiced by some of the sweeping statements of these witnesses, they ought to have indicated specifically, first to the trial court and then to us, what portions of the evidence should have been refused or stricken out, and wherein it was prejudicial, and in absence of their doing so, for the reasons we have given, there is no question which an appellate court can understandingly revise. This is sufficient to end this topic, so far as it relates to the proposition of the plaintiffs in error that these witnesses were permitted by the court to testify as to matters not within their own knowledge; but it may be beneficial to take later an outlook from their precise standpoint.

With reference to the objection to the use of the so-called invoice

copybooks, in the way this is presented to us it connects with the proposition which we have already discussed. To put this more definitely, it is claimed that the matters entered on them were never within the personal knowledge of Leumann, so that he could never have had any recollection in reference thereto, and therefore could not refresh his recollection by the use of those books. But it is plain, from what we have already said, that some of the things to which the invoice copybooks related were within the personal knowledge of Leumann in the strictest sense of the expression. Therefore this question is purely incidental to the one we have already discussed, and goes out from under our consideration with it.

In this connection we may refer to the following additional proposition of the plaintiffs in error, namely:

"Did the court err in allowing the witness Leumann to use a ledger for the purpose of refreshing his recollection in testifying to the number, weight, character, and price of the contents of certain cases?"

It is submitted to us that the use of the ledger was objected to because it did not appear that the entries were examined contemporaneously with the matters to which they related. Apparently what is referred to here is the fact that Leumann finally testified that the entries on the ledger were posted on the last days of the several calendar months in which the transactions occurred, so that he was refreshing his recollection from entries some of which were made nearly a month after the occurrences of the transactions. On the other hand, the United States claim that, while this objection was made at the trial, it was not covered into any assignment of error; but the assignments seem to us both broad and specific enough to reach this point.

The ledger was used for the purpose only of showing the gross prices and the payments received. It did not purport to show the character, quantity, or quality of the goods in the various packages. When the ledger was first used in connection with Leumann's testimony, a considerable number of objections was made without there being reported in the record a particle of evidence to enable us to determine the pertinency of any of them as the case then stood, The court at that time permitted the witness to refresh his recollection from the ledger, reserving to the plaintiffs in error the right to renew their objections and exceptions after cross-examination, and then to have the testimony of the witness stricken out "so far as it appeared that his testimony was not based on personal knowledge." That part of the record states that the court found that the witness examined the ledger at least once a week, which time the court deemed sufficiently near the dates to which the entries related. Then the plaintiffs in error again noted several objections, among which were the following: That the book was not shown to be of a nature competent to be used for refreshing the recollection of a witness, that it does not appear that it was kept by the witness, that it does not appear that the entries were examined contemporaneously with the matters to which they refer, and that it does not appear that the witness had personal knowledge of the entries which were made in the book.

Thereupon, the court asked one further question of the witness, whether the entries on the ledger were always made within a day or two of the transactions entered, to which the witness replied affirmatively. Later in the record follows the cross-examination of the witness, by which it appears that the witness was mistaken with reference to this particular ledger, and that the entries in it were made at the close of each calendar month. Subsequently, the ledger itself was offered in evidence, but, on objection by the plaintiffs in error, it was withdrawn. No trace is found of any renewal of any request that the testimony of the witness based on refreshing his recollection by the ledger be stricken out, and the whole about this ledger is left in such a condition that it is impossible for an appellate court to revise the action of the trial court in finding on the voir dire that the witness could not satisfactorily, and with propriety, refresh his recollection from an examination of the ledger on the only points to which it referred, namely, the gross amounts of the invoices and the fact that payments had been received.

The law in Massachusetts on this topic, which is correctly represented by Greenleaf's Evidence (section 436), is accepted in Putnam v. United States, 162 U. S. 687, 694, 16 Sup. Ct. 923, 40 L. Ed. 1118. In the case at bar, the invoice books and ledger were offered simply for the purpose of refreshing the recollection of the witnesses. So far as the method of making the entries, the time when they were made, and the use of copies are concerned, there is a broad distinction between entries which are themselves evidence and entries which are used only for the purpose of refreshing recollection. The rules as to the former are more strict in every particular. With reference to the use of the invoice copybooks and the ledger in question, the rules as laid down by Greenleaf, and as practiced in the federal courts, are stated simply and correctly in Chase's Stephen's Digest of the Law of Evidence (2d Ed. 1898) 341 as follows:

"A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the judge considers it likely that the transaction was at that time fresh in his memory. The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.'

This contains everything essential to the use of entries for the purpose referred to. They are equally sufficient whether original, or whether, in the event of the original being destroyed or unreachable, a copy is used. The rules fix no relative dates arbitrarily, although, of course, there may be extreme instances, like that of the 20 months in Maxwell v. Wilkinson, 113 U. S. 656, 658, 5 Sup. Ct. 691, 28 L. Ed. 1037, where, under peculiar circumstances, the intervening length of time is too great to permit the trial court, even in its discretion, to allow any attempt to refresh the recollection of the witness. The rules were laid down very broadly in Insurance Company v. Weides, 14 Wall. 375, 380, 20 L. Ed. 894. There a copy was allowed to be used for the purpose of refreshing the memory of a witness, and the general proposition was stated broadly, as follows:

"If, at the time when an entry of character, quantities, or values was made, the witness knew it was correct, it is hard to see why it is not at least as reliable as the memory of the witness."

It appeared at page 377 of 14 Wall. (20 L. Ed. 894) that the entries in question were first entered on the fly-leaf of an exhausted ledger, and were afterwards transferred to the fly-leaf of a new ledger. The exhausted ledger had been destroyed, and the circumstances leave a strong implication that the date of the transfer to the new ledger was a considerable time subsequent to the original entry on the exhausted ledger. However, under the circumstances, the lapse of time, whatever it was, was not regarded by the court as important. Therefore, for this case, taking all the authorities together, the practical rule of the federal courts is simply this: Were the entries, at the time they were made, and by whomsoever made, within the cognizance of the witness under such circumstances that, when he took cognizance of them, he knew that they were correct?

Here, inasmuch as the plaintiffs in error did not avail themselves of the opportunity given them to obtain a new ruling after their cross-examination, the case stands in the way we have shown; but, even if the point had been renewed, there is nothing in the record to justify us in finding that the trial court could have held that entries, made on the ledger at the close of the month during which the transactions involved occurred, were so disconnected in time with the transactions themselves that it could have found on the voir dire that Leumann, who was the moving party in all of them, failed to recognize the truth of the entries on his ledger on account of the lapse of a period of less than a calendar month. In any view, therefore, of the question about the ledger, there is no apparent ground which would justify an appellate tribunal in holding that that court was not justified in submitting to the jury the entire matter, including the weighing of all questions about the reliability of Leumann's recollection as to the correctness of the entries which he used in support of his testimony.

On the whole, it was inherent in the circumstances, precisely as it is inherent in the circumstances of all large business transactions of mercantile houses, manufacturing houses, or financial houses, that no person, and no series of persons, could testify from personal knowledge as to all the links in the chain. Unless, therefore, testimony of the kind we have here, so far as within the knowledge of witnesses, might be sufficient, there would be an inherent impossibility in proving for any purpose the facts of any transactions with reference to merchandise or assets of any kind going through the various stages of the business of an extensive dealer or manufacturer. In practice it never has been maintained that the law is so strict as to leave no remedy under such conditions. It cannot be questioned that, under such circumstances, if the jury took cognizance of the facts proved to be within the actual knowledge of the witnesses who testified to them, they would be justified in presuming that the various links of the transactions connected themselves with each other. This is the ordinary case which the authorities hardly deem necessary to discuss, and

which is going on every day in the eyes of numerous courts. It is illustrated by Dana v. Kemble, 19 Pick. (Mass.) 112, where the jury was authorized to find that the resident of a hotel received a letter deposited in an urn kept for the purpose at the bar of the hotel, from whence the letters were sent at frequent intervals throughout the day to the rooms of the different guests. Even in the ordinary instance where one individual testifies that a copy is a correct copy of another paper, basing his testimony on the fact that he compared it with another person holding the other, the evidence is admissible, although the person testifying might not have personally known the contents of the duplicate. It is absolutely common to bridge over such a gap.

Of course, under many circumstances, the court might be required to instruct the jury that proofs, which did not supply all the links, did not put the case beyond a reasonable doubt, especially where, otherwise than as in the proceeding at bar, the question related to a single article instead of a whole class of articles as here. That, however, is not before us at the present time. In all respects the case at bar, with reference to the testimony of Leumann and Schlaepfer, ran in the ordinary, natural course. They testified as to the details of the merchandise in question, but, at the same time, they explained why and how they believed that it was distributed between the packages shipped to the Glasgow Company in the manner claimed by the United States, and this in the way we have pointed out. The court, also, was careful to instruct the jury particularly as to the rule with reference to facts within the knowledge of each of the two witnesses. From the facts which were within their knowledge, testified to by them as such, and from the other facts appearing in the case, the jury were authorized to find, if they deemed it proper so to do, that the merchandise ordered by the Glasgow Company, and of the qualities and values as ordered by them, was the merchandise which was entered at the customs at Boston. The fact that they testified that they knew in certain particulars more than they could possibly have known in the strict sense of the term "personal knowledge," was only the natural expression of witnesses under all like circumstances, as we have seen it was explained by the witnesses themselves, and as to which the court so cautioned the jury that they must have understood in reference thereto. All this clearly meant only that the witnesses only assumed to know what, after hearing the facts within their personal knowledge, the jury knew in the same way that the witnesses knew it; that is to say, that the presumptions that the merchandise followed along in the natural business channels were so strong that they were prima facie sufficient to take the place of actual knowledge. There is nothing in all this which could have improperly influenced the jury or prejudiced the plaintiffs in error. Of course, our observations are mostly limited to cases where, from the nature of things, it is impracticable to offer better evidence according to the inherent impossibility which exists at bar. They relate especially to the writs of error at bar, however, because they illustrate the peculiar necessity, resting on the plaintiffs in error under the special circumstances, of first pointing out specifically to the trial court the particulars in regard to which

they claim the witnesses in question failed of personal knowledge, and of bringing before us these particulars as they had presented them below, with the specific rulings thereon.

One other point remains to be considered which affects all of the plaintiffs in error, that is to say: The indictment alleges that the conspiracy was to defraud the United States of moneys thereafter coming due from the Glasgow Company. The merchandise in question was consigned to the Stone & Downer Company, the customs brokers, and they entered the goods at the customs and paid what duties were paid; but they were consigned to them only for that purpose, and the goods unquestionably belonged to the Glasgow Company. It is said that there is a variance from the indictment, because the funds to come due for the customs were to come due from the Stone & Downer Company and not from the Glasgow Company. In the eyes of the law, however, as the moneys to be paid the customs were in truth the moneys of the Glasgow Company, the allegation in the indictment is consistent with the facts as proven, although it quite likely would have been sufficient if the funds had been described as coming due from the customs brokers.

This leaves only one point which we deem it necessary to consider, and that affects only Shedd and Trafton. It is presented by the plaintiffs in error under the following phases:

"Did the District Court err in excluding the evidence on cross-examination of one George W Green, a witness called by the United States, to the effect that it was the ordinary course of business with respect to the goods of all merchants examined by the defendant Shedd for Shedd to examine one package only of a case in which the goods were all of one kind?"

"Did the District Court err in excluding the testimony of the defendants that the defendant Shedd made as careful an examination of the goods of the Glasgow Manufacturing Company as of the goods of other merchants?"

"Did the District Court err in refusing to allow the defendants to prove that it was not at all unusual for an examiner to cross off two cases of goods as indicating that the examination thereof had been made when only one case had been examined?"

These interrogatories connect with the twenty-eighth, twenty-ninth, and thirtieth alleged errors as assigned by the plaintiffs in error. The first two interrogatories explain themselves, but the third one is said to have grown out of the following circumstances:

Green was called by the United States. He testified that he was the opener and packer for Shedd as an examiner. In regard to cases 271 and 272, Green testified that, at the direction of Shedd, he opened only one, but chalked both with the mark that they had been examined and passed. On cross-examination he testified that he was not surprised because Shedd told him to cross off both cases. Then was put the further question as follows: "That was not at all unusual, was it?" This was objected to by the United States and ruled out. After it was ruled out, counsel stated that he expected to prove by Green that this was not at all unusual in a case of importations for any person whomsoever. The court then said: "So I suppose. I think your rights are fully protected, and your exception is noted." The proposition as now put by the plaintiffs in error in regard to these two packages 271 and 272 used the expression "an examiner." This ex-

pression is not found in the record or in the assignment of error, which was No. 30. Neither states specifically whether the inquiry concerned examiners generally or was limited to Shedd, and, as Green's testimony is put into the record by piecemeal without regard to the order in which it was drawn out, it is impossible for us to ascertain certainly what the court understood in regard to this particular. If the record had taken the trouble to state why the question was objected to, and why it was ruled out, we would have been exactly informed, as we should have been, what was intended. We also understand that it developed that Green had no knowledge of the practice of examiners generally, so that all attempted proof by him in that direction was necessarily excluded. Consequently, we must conclude to regard alleged error 30 as in line with alleged errors 28 and 29, and therefore we will leave the three grouped as we have put them.

The record with reference to the other two questions, representing the twenty-eighth and twenty-ninth errors assigned, is confused. The testimony of Green, on which these questions turn, appears three times. Apparently, to some considerable extent, it is the same evidence repeated. Green had testified on cross-examination that Shedd always made a thorough examination. Then, so far as we understand, the record followed on cross-examination what will be hereinafter stated. As first printed, no objections appeared, there were no rulings of the court, and the questions seem to have been put and answered. The brief of the United States refers to this part of the record by page, but it does not refer to the second portion where the same matter seems to have been reprinted more fully. Thereupon, the United States say that it appears from the record that the question and answer alleged in the twenty-eighth error, assigned to have been excluded, were asked and given twice, that the answer desired went to the jury and could have been argued, and that it was not error to refuse to allow the witness to answer anew a question which had been put to him and answered before. This is all that is said by the United States about either the twenty-eighth or the twenty-ninth errors assigned, and all we have from them about the thirtieth is to the effect that the evidence offered had no tendency to rebut the inference of fraud, but tended to confirm it.

Green testified on cross-examination as we have already said. Then counsel for Shedd observed that this was not exactly what he wanted to know, and that he wished it a little more definite. Then the following occurred:

"Q. How many packages, in the ordinary course of business, does he examine in that case? A. If the whole case is of one kind of goods, all he would need to see would be one package, if the count was right, if the right number of packages was there.

"Q. All he does, in the ordinary course of business, if the goods are all of one kind in a case, is to examine one package? A. Yes, sir.

"Q. And that is the ordinary course of business with respect to the goods of all merchants? A. Yes, sir."

The district attorney then said: "I submit that that is immaterial." The court replied as follows: "It seems to me that it is. What is the usual course of business—what has that got to do with the issues that we are trying?" Then counsel for Shedd replied as follows: "The

main question in this case is Mr. Shedd's good faith. If in this case he made as careful an examination as he made with reference to the goods of all the other merchants of Boston, that certainly has some bearing on his good faith." Then the court said as follows: "I think I must exclude the question and save your exception." No question was then pending, so that this, of course, referred back to those already answered, and amounted to striking out the questions and answers. If this was in the presence of the jury, as no doubt it was, the jury must have so understood it. Thereupon, Mr. Jones, who was particularly the counsel for the Glasgow Company, said that this was a matter in which he had an interest, and, after having an exception saved for his clients, he developed the proposition more fully. He called the attention of the court to the fact that the United States had put in the routine of business at the customhouse, which was the fact. He observed that the case involved a conspiracy between Shedd, Trafton, and other parties, an element of which was a corrupt failure on the part of Shedd to do his duty. Then the counsel continued: "Now, that being so, if it should appear in this case that the goods were subjected to the usual examination in which the goods of all the importers under similar circumstances were subjected, it seems to me that the inference is not only material, but important." The court replied: "It does not seem to me so, so far as Mr. Shedd's method of examination goes." It is important to notice that the court thus sharply brought back the issue to Mr. Shedd's methods as distinguished from the issues just stated by Mr. Jones, which might or might not be understood as relating to examiners generally. Thereupon the district attorney observed that he did object to the question. Then the matter was restated quite fully by Mr. Jones, with a full explanation of the evidence expected to be drawn out, claiming that it related to the routine of business. Thereupon the court again made it clear that it understood the testimony offered related to the method pursued by Mr. Shedd. The court said: "I do not conceive that this is much of an offer, to begin with. This is an offer to show how one particular examiner was in the habit of examining goods. That is not the routine of business in the ordinary sense of the words." That conversation was ended by the court's saying: "I will exclude it and save your exceptions." Then some questions followed of a broader character with reference to the practice of examiners generally, which were ruled out on the ground that the witness had not sufficient personal knowledge in reference to the matter to testify in regard thereto. The record does not show that any exceptions were saved on the particular point as to the practice of examiners generally.

There seems to be no fair question on the substantial point as to which the exceptions were reserved; that is, whether the court erred in excluding testimony tending to show that Shedd proceeded with the merchandise in question according to his usual methods with merchandise generally. It all comes down to the matter of Shedd's usual or frequent method of conducting examinations of merchandise, though, as we will see, the result would be the same even if the question was that of the usual method of examiners generally. It should, however, be said, as bearing on this question to some extent, that Shedd

testified that Grünberg represented that he was in a great hurry for cases 271 and 272, and it also appeared that the number of cases of merchandise examined by Shedd and Trafton ran into many thousands: Shedd testifying that he examined in nine months 10,447 packages. Shedd and Trafton both testified as witnesses, and, of course, denied all unlawful intent, although none of the members of the Glasgow Company took the stand.

In view of the fact that the issue in regard to Shedd and Trafton was of the kind which we have said, that is, one of intention, and not one of negligence, and in view, also, of the fact of the great number of packages which they examined, it is true that, under many circumstances, everything tending to show that they were usually negligent, or that they practically and usually construed their duties as requiring them to do what they did with reference to the goods in question as proposed to be shown, or tending to show that their usual methods were hasty or insufficient on account of the immense amount of merchandise required to be examined, or for any other reason, would have been of the utmost importance for the defense of those two men, and so important that it might have been the only way of showing that, after all, there was no guilty intent. But the plaintiffs in error have failed to bring to our attention here any circumstances which show that the question proposed to Green was material. They say that it was material because, as Green had testified that Shedd only examined one package in a large case of goods, the jury might well infer that an examination of such a perfunctory character was fraudulent, and that therefore Shedd had a right to rebut this inference. This testimony, however, was not a part of the case of the United States, or relied on by them, but was called out by Shedd himself on cross-examination, as we have shown. Of course, none of the plaintiffs in error could raise a presumption for the sake of rebutting it. It is true there often are circumstances under which a party, who, on cross-examination, has brought out an unexpected fact, may be allowed to rebut it, and should be allowed to do so; but an instance of this character should not be permitted to jeopardize a verdict unless the grounds therefor are fully stated. As this proceeding stands it is not in that condition. The plaintiffs in error have not shown us that the question whether or not Shedd might examine more than one package out of one of these cases was, at the stage of the trial when this topic arose, at all material. On the other hand, to the extent disclosed to us by the record, it was not material. One package would have shown as much as an examination of the entire case in which the goods were shipped would have shown, and vice versa. As we stated at the outset, the claim made by the United States was not that there was an intermixture of honest and fraudulent goods in the same shipping case, which could be sifted out only by a complete examination; but it exhibited a uniformity of high grades throughout imported, with a uniformity of invoicing throughout as of low grades, so that an examination of a single package would have developed the nature of the fraud as conclusively as an examination of the entire contents of any case in which the goods were shipped. However this may be, the plaintiffs in error have failed to develop to us such a condition of materiality, as under the circumstances they

were clearly bound to do, as would justify us in reversing the trial court because it did not authorize them or either of them to follow up this matter incidentally developed by their own cross-examination of a witness of the United States.

This same general line of observation disposes of alleged error 30 as to cases 271 and 272, as the plaintiffs in error have failed to make clear that it is material. There is no claim on the part of Shedd that the fact that he examined only one case was other than exceptional, and he explains this fact because, as he says, Grünberg was in haste for both of them. The evidence offered might have been of importance if it had transpired that the case which was examined corresponded with the invoices, while the case which was not examined did not; but, inasmuch as neither so corresponded, the fact that circumstances induced him to omit the examination of only one case becomes wholly unimportant, and has no probative force.

On each writ of error the judgment will be the same, as follows: The judgment of the District Court is affirmed.

McCOURT et al. v. SINGERS-BIGGER.

SINGERS-BIGGER v. McCOURT et al.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1906.)

Nos. 2,283, 2,284.

1. CORPORATIONS—DIRECTORS—RELATIONSHIP TO STOCKHOLDERS.

The directors and officers of a corporation stand in a strictly fiduciary relation toward its stockholders, and are accountable to them on the principles governing that relationship.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 1350, 1351.]

2. LANDLORD AND TENANT—RENEWAL OF LEASE—RIGHT OF TENANT AS AGAINST THIRD PERSONS.

A tenant under a lease, while having no absolute right to a renewal as against the landlord, in the absence of provision therefor, has a reasonable expectancy of renewal which is regarded in equity as property, and, if one standing in a fiduciary relation to him secures a renewal to himself, a court of equity will treat him as holding the new lease in trust for the original lessee.

3. CORPORATIONS—BREACH OF TRUST BY OFFICER—SUIT BY STOCKHOLDER.

Complainant and one of the defendants owned practically all of the stock of a corporation, which for a number of years successfully and profitably conducted two theaters held under leases for terms of years. Complainant resided in a foreign country, and the business of the corporation was managed by the resident defendant, who was president and an agent appointed by complainant to represent her interests, who was given a share of stock and elected an officer and director. Complainant reposed the utmost confidence in both of such managers and relied on them to protect the interests of the corporation in all respects. A year or two before the expiration of the leases, such defendant, without complainant's knowledge, organized a new corporation in his own interest and procured a renewal of the leases to such corporation. *Held*, that such action was a clear breach of his duty to the old corporation and to complainant, and the new corporation was properly decreed to hold the renewal leases in trust for the old company and required to transfer them to it.

4. PRINCIPAL AND AGENT—ESTOPPEL BY ACQUIESCENCE OF AGENT—FRAUD OF AGENT.

The fact that complainant's agent had knowledge of the purpose of the president of the company to secure the renewal of the leases for his own benefit, and acquiesced therein, did not work an estoppel upon either the company or complainant; it being shown that he studiously concealed his knowledge from complainant, and that such bad faith and fraudulent conduct toward his principal was known to and participated in by the defendant who obtained the renewals.

5. APPEAL—QUESTIONS PRESENTED FOR REVIEW—STATEMENT OF ACCOUNT BY MASTER.

A statement of account between parties, made by a master by direction of the court, and approved by it, cannot be reviewed by an appellate court, where the master was not required to report all of the evidence taken before him, and it affirmatively appears that he did not.

6. CORPORATIONS—BREACH OF TRUST BY OFFICER—ACCOUNTING.

Where the president of a corporation operating leased theaters wrongfully secured a renewal of the leases to a new corporation organized by him, which thereafter operated the theaters until they were recovered by the old company, on an accounting for the profits of such operation he is not entitled to charge the old company with an increased salary paid him by the new company which he controlled.

7. SAME—STOCKHOLDERS' SUIT—ALLOWANCE OF EXPENSES FROM FUND RECOVERED.

A stockholder of a corporation, who by a suit instituted in its behalf recovers a fund which had wrongfully been diverted by its officers, is entitled to be reimbursed therefrom his reasonable attorneys' fees and expenses paid by him in the prosecution of the suit; but other stockholders and officers who resist such recovery, although defending in the name of the company, are not entitled to such allowance.

8. SAME—SALARIES OF OFFICERS.

Where the stockholders of a corporation, on the death of its president, elected other stockholders officers to manage its business, reasonable salaries paid them for services so rendered cannot be recovered in a suit by a stockholder, although no formal resolution was adopted fixing the amount of their salaries.

9. SAME—ACCOUNTING BY AGENTS.

Where, in a suit by a stockholder, a corporation recovered the profits realized in the operation of certain theaters, on the ground that the leases thereof in equity belonged to the corporation, and that they were operated by defendants as its agents, defendants are entitled to a deduction for losses incurred in the operation of one of the theaters in the summer, where such operation was undertaken in good faith, as within the legitimate scope of the corporation's business, although when previously conducting the theater it had not been opened during the summer season.

10. SAME—INTEREST.

On an accounting in favor of a corporation for profits realized by defendants from a business which in equity belonged to the corporation, interest is not recoverable on the sum so recovered, where the conduct of the business required reserve capital, and it does not appear from the evidence when such profits would properly have been applicable to the payment of dividends.

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

This was a suit in equity brought by Marie Antoinette Singers-Bigger, a citizen of Great Britain, as complainant, for and on behalf of the Colorado Amusement Company, a Colorado corporation of which she was a stockholder, and which had refused to bring the suit, against the defendant, the Consolidated

Amusement Company, a corporation of Colorado, its officers and others, to impress certain leasehold estates held by the latter corporation, with a trust in favor of the former, for an accounting concerning the profits made by the latter in the operation of the leasehold estates, and for other relief.

There is little, if any, dispute about the facts important in the consideration of the main question of liability. William H. Bush and Peter McCourt, prior to 1897, were copartners in the theatrical business, conducting two theaters in Denver known as the "Broadway Theater" and the "Tabor Grand Opera House." In 1897 they organized the first-mentioned corporation with a capital of $50,000, divided into 50,000 shares of $1 each, with a board of directors to consist of three persons with powers adequate for conducting a general theatrical business, and transferred to the corporation the two leases under which they had held the two mentioned theaters, in full payment of the capital stock of the company. By their direction all the stock, with the exception of one share each for themselves and two other shares reserved to qualify others from time to time as directors, was issued, share and share alike, to their wives; 24,998 shares to Eleanor Bush, and the same number to Emma F. McCourt. Mr. Bush was chosen president, Mr. McCourt vice president and secretary, and one Mays, to whom one share of stock was issued, treasurer. With this executive organization the corporation, in March, 1897, entered upon the conduct of the business of the two theaters and continued so to do until Mr. Bush's death, in October, 1898. Soon thereafter, in November, 1898, Mrs. Bush caused one share of her stock to be issued to Frank C. Young, of Denver, and about the same time appointed him as her agent and attorney to represent and conserve her interests in the amusement company. He was, by appropriate action soon after, made a director and vice president of the company, and remained so until the institution of this suit. Mrs. Bush died in April, 1899, leaving her stock to her daughter, the complainant in this cause, who, in February, 1900, secured a certificate transferring it to her. Mr. Young thereafter continued to represent the complainant in the same way and with the same powers with which he theretofore represented her mother. The evidence shows that she imposed implicit confidence in him; that the business of the company was good, making net earnings sufficient to pay large dividends on the capital stock; and that such dividends were frequently declared and paid. Such was the condition of the company and its business in 1899. It was under the exclusive management of Mr. McCourt and Mr. Young, who represented practically all the stock. They agreed upon a salary of $100 a week for Mr. McCourt and of $25 a week for Mr. Young, and worked under this arrangement until February, 1900, when at a special meeting of the board of directors they fixed their salaries at $600 per month for Mr. McCourt and $1,300 per year for Mr. Young, and ordered that the same should be paid from and after September, 1899. Correspondence between complainant and Mr. Young during the year of 1899, and later, discloses a condition of perfect confidence and trust on her part towards him. The operations of the company consisted almost exclusively in conducting the theatrical business in the two theaters mentioned. The terms for which they were leased to the company expired in April and September, respectively, in 1901. Young, as well as McCourt, knew that fact. There was no covenant for renewal in either of the leases.

Some time about July, 1899, when McCourt was acting as president and general manager of the company, Young, as its vice president, and both as practically the whole board of directors, McCourt had a conversation with Young in which he disclosed his purpose to secure renewals of the leases to the theaters whenever they should expire, for his own benefit, to the exclusion of the old company and the complainant. Young assented to the execution of this purpose by McCourt. Although the leases did not expire until about two years thereafter, McCourt proceeded immediately to carry out his purpose. He, with his wife and attorney, on August 19, 1899, organized the defendant corporation, the Consolidated Amusement Company, and on that day secured the execution of a lease from the owner of the Tabor Grand Opera House to the new corporation for a term of four years, commencing April 5, 1901, the date of the expiration of the existing lease, and at a later date, November 2,

1900, secured a like lease from the owner of the Broadway Theater, for a term of four years, commencing September 21, 1901, the date of the expiration of the existing lease on that theater. During the time intervening between the execution of these leases and the expiration of the old ones, the theatrical business seemed to proceed much as before. The complainant had no actual knowledge of either the organization of the new corporation, McCourt's purpose as disclosed to Young, Young's assent thereto, or the execution of the leases to the new corporation. On the contrary, the proof shows that in the summer of 1899, while this purpose was being conceived and executed by McCourt and Young, Mr. Bigger, the husband of the complainant, came from England to this country, and, representing his wife for that purpose, had a conversation with McCourt and Young separately, concerning the renewals of the two leases when their respective terms should expire. No information was given him concerning McCourt's purpose. On the contrary, upon his expression of anxiety concerning the renewals of the leases, he was assured that McCourt would do his best to obtain the same for the company. In fact, knowledge of McCourt's purpose or Young's acquiescence in it was not brought home to complainant until some time in the summer of 1901, a long time after the organization of the new corporation and the execution of both leases to it.

Complainant contends that the taking of those leases by McCourt, while acting as a director and president of the old company, for his own benefit, was in fraud of the rights of the old company and in fraud of her rights as a stockholder therein. Defendants contend to the contrary and claim affirmatively that Young's acquiescence in McCourt's conduct estops complainant from questioning the transaction. Some other special features are raised by the pleadings which will be sufficiently noticed in the progress of the opinion.

The cause was finally submitted to the court on the pleadings with voluminous testimony taken before an examiner. A decree followed, finding the equities in favor of the complainant, and that defendants Young and Billings, who each held one share of complainant's stock, assign and deliver the same to her; that the officers of the new corporation assign the new leases taken by them in its favor to the old company; that the new corporation, its officers and Young, account to the old company for all moneys earned in the operation of the two theaters by or in the name of the new corporation; that the officers of the old company likewise account to it for moneys received by them belonging to it, and the cause was referred to a master to take and state an account. In due time defendants performed the parts of the decree requiring the assignment of the stock by Young and Billings and the assignment of the new leases to the old company, and the last-named company was let into full and complete possession and enjoyment of the new leaseholds. This was done, however, under a stipulation providing: First, for the reorganization of the board of directors of the old company; and, second, that both the Broadway Theater and the Tabor Grand Opera House should be operated under the direction of the old company "pending a final determination by the entry of a final decree in the Circuit Court and the decision of the Circuit Court of Appeals thereon and any subsequent proceedings that may be necessary to a final adjudication of the rights of the parties." In due time the master reported that there was due from the new corporation, its officers and Young, to the old company, on March 7, 1903, the sum of $52,788.44, and that some other smaller sums were due from certain of the defendants to the old company. Upon the coming in and confirmation of this report, a final decree was entered accordingly. Both sides appeal, raising questions which we consider in their order.

W. H. Bryant, for appellants in No. 2,283 and for appellees in No. 2,284.

T. J. O'Donnell, for appellee in No. 2,283 and for appellant in No. 2,284.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

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

Before disposing of the main question, a preliminary consideration of the obligations and duties imposed by law upon directors of a corporation may not be unprofitable. Whatever may be the technical relation between them and the corporation itself, its creditors, or the public, they are, in a general and universal sense, trustees for the stockholders. They are chosen to represent them in the enterprise upon which they mutually embark. Their duty is to use and employ the corporate assets and all corporate facilities and privileges, within the limits of powers conferred upon the corporation by law, for the ultimate benefit and advantage of the shareholders. They have no rights in such assets or facilities or privileges superior to those of their principals. They occupy toward them strictly fiduciary relations and are accountable to them on principles governing that relationship. Any action by them impairing corporate rights or sacrificing corporate interests is regarded as a flagrant breach of trust on their part. Thompson's Commentary on the Law of Corporations, vol. 3, § 4009 et seq., and cases cited.

In Ward v. Davidson, 89 Mo. 445, 458, 1 S. W. 846, Black, Judge, speaking for the court, says:

"Directors and officers of corporations occupy a position of trust and must act in the utmost good faith. They will not be allowed to deal with the corporate funds and property for their private gain. They have no right to deal with themselves and for the corporation at the same time, and they must account for the profits made by the use of the company's assets, and for moneys made by a breach of trust" citing 1 Morawetz on Priv. Corp. (2d Ed.) § 243, 245; Field on Corp. 174; 1 Perry on Trusts (3d Ed.) § 429.

To the same effect is Wardell v. Railroad Co., 103 U. S. 651, 658, 26 L. Ed. 509.

Applying this principle, which only needs mentioning to gain unqualified assent to the case before us, how does it stand?

For years McCourt and Bush had owned and enjoyed the right to operate the theaters in question. After organizing the old company their business was conducted much as before, under the management of both Bush and McCourt as chief officers of the company. In about a year Bush died, and later Mrs. Bush, in whose name one-half of the capital stock stood, also died; and the share of the theatrical business represented by that stock descended to their daughter, the complainant in this cause. At the time she acquired her interest McCourt was a director and president of the company, and charged with all the duties and obligations imposed upon him as such. They included, as already seen, a high degree of fidelity and loyalty to complainant as a stockholder holding one-half of the stock of the company. His duty was to do all things reasonably within his power, to promote the business, and enhance the profits of the company. What could he have reasonably done? Clearly that which ordinarily prudent persons under like circumstances would do for themselves. The company was in a flourishing condition. It had an assured corporate existence of many years, and established business with a good will of great value, two leasehold estates with unexpired terms of about two years each, and, with them, all the advantages incident to such conditions. An ordinarily prudent person would undoubtedly have

bethought himself to secure an extension of such leases and thereby conserve and preserve the good will and integrity of the business. The likelihood of being able to secure such an extension under like circumstances is so great that it has come to be recognized as a valuable incident to the tenant's estate, a species of property which the law protects. McCourt clearly did not take this view of the matter, but, on the contrary, soon after the death of Mrs. Bush, deliberately devised a scheme to appropriate the business to himself. He caused the defendant corporation to be formed for his own benefit and practically destroyed the profitable business of the old company by acquiring leases of the theaters in which it had built up its business, for his new corporation. In many ways he made use of his position and powers in the old company and consumed his time which belonged to it to enhance the value and attractiveness of the theaters when they should come under the new leases. His conduct was inequitable, obviously dictated by considerations of personal interest, and far below that high degree of fidelity which the law imposed upon him as agent and trustee of the complainant.

The general rule, as declared in the American and English Encyclopedia of Law (volume 18, p. 696), is as follows:

"Though a tenant may not have any absolute right to a renewal against the will of his lessor, courts of equity recognize his reasonable expectancy of renewal as a property or asset, and if one standing in a fiduciary or quasi fiduciary relation to a lessee secures a renewal of the lease to himself, a court of equity will treat him as holding the lease in trust for the original lessee."

The principle so declared is supported by abundant authority.

In Davis v. Hamlin, 108 Ill. 39, 48 Am. Rep. 541, the Supreme Court of Illinois considered a similar question. In that case the managing agent of the owner of a theater, who by reason of his employment had learned the methods of conducting the business and had become familiar with its value and future possibilities, at the expiration of a lease in the name of his principal, privately secured a renewal thereof to himself. The court held him to be trustee with respect to that lease for his principal. Amongst other things, it said:

"The obtaining of the lease by Davis amounted to a virtual destruction of his employer's whole business at the termination of the old lease, under which the latter was holding. * * * There was a good will attached to it, which was valuable. * * * If a manager of a business were allowed to obtain such a lease for himself, there would be laid before him the inducement to produce in the mind of his principal an underestimate of the value of the lease, and to that end, may be, to mismanage so as to reduce profits, in order that he might more easily acquire the lease for himself. * * * Although there was here no right of renewal of the lease in the tenant, he had a reasonable expectation of its renewal, which courts of equity have recognized as an interest of value. * * *"

This principle was early declared by Chancellor Walworth in Phyfe v. Wardell & Woolley, 5 Paige (N. Y.) 268, 28 Am. Dec. 430. He there lays down the doctrine in these words:

"If a person who has a particular or special interest in a lease obtains a renewal thereof from the circumstance of his being in possession as tenant, or from having such particular interest, the renewed lease is, in equity, considered as a mere continuance of the original lease, subject to the additional

charges upon the renewal, for the purpose of protecting the equitable rights of all parties who had any interest either legal or equitable in the old lease."

To the same effect are Gibbes v. Jenkins, 3 Sandford, Ch. (N. Y.) 130, 134; Mitchell v. Reed, 61 N. Y. 123, 129, 19 Am. Rep. 252; Johnson's Appeal, 115 Pa. 129, 133, 8 Atl. 36, 2 Am. St. Rep. 539; Hannerty v. Standard Theater Company, 109 Mo. 297, 19 S. W. 82; Cushing v. Danforth, 76 Me. 114; Bennett v. Vansyckel, 4 Duer (N. Y.) 462, 472.

In the case of Robinson v. Jewett, 116 N. Y. 40, 51, 22 N. E. 224, the Court of Appeals of that state well expresses the doctrine and reasons for it. It there says:

"Those who are in possession of lands under a lease have an interest therein beyond the subsisting term, usually called the tenant's right of renewal. Between the landlord and tenant this interest cannot strictly be denominated a right or estate, but is merely a hope or expectation; there being, in the absence of contract, no way, legal or equitable, of compelling a renewal. But, as between third persons, the law recognizes this interest as a valuable property right, and the renewal as a reasonable expectancy of the tenants in possession. * * * It [the rule] is appropriately applied to a trustee of a corporation taking in his own name a renewal lease of the premises in possession of the corporation. Every consideration, legal or moral, requires that the trustee should protect the corporation and its property and see that the interest of other stockholders suffer no loss from his default. * * * Between the trustee and the corporation the right of renewal of the lease is a property right, and, if the lease is renewed in the name of the officer, it enures to the benefit of the corporation."

Citation of further authorities seems unnecessary. The principle declared in the cases already referred to are clearly applicable to the relation shown to exist between McCourt and the old corporation and its stockholders.

We have carefully examined the authorities relied upon by defendant's counsel and find nothing inconsistent with the principles announced. McCourt's relation to the stockholders of the old company was as much that of an agent as one partner is the agent of another. He was so, not only theoretically, but in fact. The complainant resided in London and had little, if any, actual knowledge of the conduct of the business of the old company. She, inspired so to do by the known confidential relations existing between her father and mother and McCourt, imposed implicit confidence in him. She, in fact, reposed in him all the confidence and trust with which the law theoretically charged him in her favor. His conduct in securing new leases to another corporation for his own benefit was a clear breach of his duty to her and the old corporation.

But it is contended that McCourt informed Young of his purpose to take new leases for his own benefit and exclude Mrs. Bigger from any interest in them, and that Young acquiesced therein; that this is the equivalent of consent by Mrs. Bigger, for whom Mr. Young was acting as agent. It is not necessary to place our answer to this contention on the technical ground that Young had no power to bind the old company, whose rights would be destroyed by the threatened action of Mr. McCourt, even if he was Mrs. Bigger's

agent. Young was not only agent for Mrs. Bigger by virtue of his contract of agency, but, as director and vice president of the old company, was by law trustee and agent for her, and thus doubly bound to promote and conserve her interests. He not only did not object to McCourt's proposition to sacrifice the rights of the old company in which she was so largely interested, but, although he subsequently had much business correspondence with her and knew that she was depending largely upon the income from the theatrical business for many of her own necessities, he made no reference to McCourt's avowed purpose. Not only so, but we are satisfied from the evidence that when Mr. Bigger, the husband of complainant, was in this country in the summer of 1899 making inquiries of both McCourt and Young concerning the prospect of renewal of the leases, information concerning McCourt's proposition was studiously withheld from him. If Young had been faithful to his duty and to the high trust he had undertaken, he would have denounced McCourt's declared purpose with indignation. Certainly, if for any reason it was embarrassing for him to act against McCourt, he should have informed his principal of McCourt's purpose in order that she might take appropriate steps for her own protection. He knew that execution of McCourt's purpose would have the effect to destroy the right of property resting in the reasonable expectancy of renewal of the old leases—put the Colorado Amusement Company wholly out of business and deprive her of much needed income. His consent to or acquiescence in that destructive purpose was far outside the scope of his agency. He was employed, as he says, "to serve her interests to the best of his ability," not to sacrifice them or deliberately give away or destroy her property. On the whole, we are impressed, from a careful consideration of all the proof, that the secrecy preserved by Young, when he should have spoken, especially the failure to disclose McCourt's purpose either to Mr. or Mrs. Bigger when opportunity by personal interview or correspondence offered, and the manifest partisanship on his part in favor of McCourt when the disclosure of his breach of trust was made, in 1901, evince bad faith and a fraudulent purpose on his part, and one known to and participated in by McCourt. Such bad faith and fraudulent conduct on the part of the agent, participated in by the wrongdoer, cannot form the basis of an estoppel against the principal's asserting its rights against the wrongdoer.

Conceding the proposition urged upon us by counsel for defendants that no trust relationship exists between stockholders as such, we are unable to perceive its application to facts of this case. McCourt voluntarily, and for compensation satisfactory to himself, assumed duties of care and management, which, as a stockholder, did not belong to him, and were not cast upon him. The assumption of those duties brought with it a burden of trust and responsibility towards shareholders which we have already sufficiently considered.

There was, in our opinion, no error in holding the new corporation to be trustee for the old company so far as the new leases were concerned, or in the provisions of the decree requiring their transfer to the old company, or in the order for an accounting.

Before considering other assignments of error founded on the master's report, certain facts relating to the report and conclusions of law thereon should receive attention.

By the interlocutory decree passed March 13, 1903, after ordering the immediate assignment of certain two shares of stock to complainant and also the leases to the old company, and after making provision for putting the old company into full possession and enjoyment of the theaters as the equitable owner of the leases made to the new corporation, the cause was referred to a master of the court to take and state an account: (1) Showing what money came into the hands of defendants, Peter McCourt, Emma F. McCourt, and Frank C. Young, belonging to the old company and not accounted for by them; (2) showing the gains and profits resulting from the operation of the two theaters from and after the beginning of the new terms under the leases to the new corporation; (3) showing the reasonable value of the services of complainant's solicitor and any other costs and expenses incurred by her in bringing and maintaining this suit. On June 6, 1904, he made and filed his report, stating the accounts, as ordered, for the approval of the court. Many assignments of error are predicated upon the action of the trial court in sustaining and overruling exceptions to this report, but complainant's counsel insists that we cannot review the facts found by the master and approved by the court because of the condition of the record. There was no order requiring the master to report evidence or procedure before him, and no report of that kind was made. Before the interlocutory decree and before the case went to the master, much evidence relevant to the issues submitted to him had been taken. The order of reference leaves it uncertain whether that evidence went to the master or not, but we assume it did. From the nature of the duties imposed upon the master, as well as from the facts disclosed by the record, it appears that he heard and considered evidence not reported by him to the court and not filed in the case before the order of reference was made to him. (How much or how little we are unable to ascertain and do not know.) On the existence of this fact one of the defendant's assignments of error is predicated that "the court erred in permitting the master to take evidence and render any accounting whatsoever in the cause." The master states at the end of his report that:

"The transcript of the evidence produced in these proceedings, the brief and transcript of the argument of counsel, and the exhibits received in evidence, are filed herewith, excepting such exhibits as by consent of counsel are in possession of the parties."

Counsel for defendants contend that his certificate shows that the master sent to the Circuit Court all the evidence, whether heard before him or which he had considered. Such, in our opinion, is not the meaning of the language employed. He nowhere states that he returns any evidence taken before him. The certificate admits of a construction to the effect that he returned the evidence which had been taken in the case before it was referred to him, and this is probably true; for it clearly appears that he did not, in fact, return some

evidence which his report, as well as the assignment of error in the case, says he considered. Not having before us all the evidence upon which the master acted, it is impossible to review any question of fact determined by him and approved by the court.

Mr. Justice Clifford, when holding the Circuit Court in Massachusetts, in the case of Greene v. Bishop, 1 Cliff. 186, Fed. Cas. No. 5,763, quoting from Judge Story in Donnell v. Columbian Ins. Co., Fed. Cas. No. 3,987, says:

"When exceptions are taken to the report of a master in chancery, the evidence which furnishes the ground of the exception should be required by the party excepting to be stated by the master, and in effect declared that, unless it be done the court will not enter at large into the evidence in order to ascertain whether or not the master was wrong in his conclusion. Masters are required, in a case like the present, to report conclusions, and, in general, it is irregular for them to incorporate the details of the evidence into their reports, without the direction of the court. They should, however, especially when it is requested by either party, specify and identify the evidence, and refer to it in such a manner as to inform the court on what state of facts their conclusions are based."

The rule is firmly established that reports of masters appointed to take and state accounts depending as they do upon examination of books, oral testimony of witnesses, and perhaps expert testimony, have "every reasonable presumption in their favor and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part." Camden v. Stuart, 144 U. S. 104, 118, 12 Sup. Ct. 585, 36 L. Ed. 363. "As every presumption is in favor of the referee's report, the court will, in reviewing the judgment upon appeal, intend that the referee did find such further fact in favor of the party recovering, as essential to support it." Meyer v. Lathrop, 73 N. Y. 315, 321. See, also, Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289.

In Sheffield, etc., Railway Co. v. Gordon, 151 U. S. 285, 293, 14 Sup. Ct. 343, 38 L. Ed. 164, the Supreme Court, in considering exceptions to a master's report, says:

"There is another objection, however, to our examination of the facts in this case. The order referring the case to the special master, though minute in its details, did not require him to send up the testimony; neither does he purport to do this in his report; and, while a number of depositions taken before him are filed, there is nothing to indicate that these were all the testimony in the case. * * * In the absence of any certificate that the entire evidence taken by the master was sent up with his report, it is impossible to impeach his conclusion in this particular. Scotten v. Sutter, 37 Mich. 526; Nay v. Byers, 13 Ind. 412; Fellenzer v. Van Valzah, 95 Ind. 128. There is no presumption that all the testimony was sent up."

The court then, referring to a certain finding made by the master, says:

"And there is no evidence to impeach his finding in that particular, and no objection or exception taken to the want of proof upon this point. There would appear to have been, from a memorandum we find in the testimony, a mechanic's lien introduced in evidence as an exhibit; but, as it is not attached to the record, it is impossible to say that it does not bear out the finding of the master."

The case before us falls fairly within the principles announced in the last-mentioned one, and we are constrained to hold that for want of any showing that we have before us the evidence which was before the master, and especially in the light of the affirmative showing that we have not before us all the evidence which was before him, it is impossible to review any of the findings made by him which from their nature may be affected one way or the other by evidence. Certain of his conclusions raise questions of law only, and these will now be considered.

The first assignment of error predicated upon the findings of the master relates to the charge allowed by the master and approved by the court of $2,972.22 as net profits made in operating the so-called Silver Circuit, which Mr. McCourt appropriated to his own use. This Silver Circuit was the name of an agency by which theatrical attractions were booked for theaters in smaller towns in Colorado. Complainant claims that the business of the agency was transacted by the employés of the Colorado Amusement Company for its account, and that it was entitled to all the net profits realized. McCourt claims that the agency was an outside venture of his own, and that the profits made belonged to him. The master, as it affirmatively appears from his report, heard evidence on this item which is not before us, particularly the testimony of Richard B. Mays. It is therefore impossible for us to review his conclusion.

It is next contended that the master improperly disallowed a claim made by McCourt against the funds of the old company for increased salary for the period between April 5, 1901, when the consolidated company first took possession of the Broadway Theater, to March 7, 1903. Before April 5, 1901, McCourt, by resolution of the old board, had his salary fixed at $600 per month. After he had, as he supposed, banished complainant from participation or representation in the business, he secured a resolution from his new board increasing his salary to $200 per week; the increase amounting for the period mentioned to $4,060. Some evidence may have been heard by the master concerning this item which does not appear in the record, and which would have fully justified his finding; but, if there was no such evidence, we think he did not err in disallowing the claim. It cannot be true that McCourt, after unlawfully despoiling the old company, could arbitrarily and without authority transfer its assets to a new one owned, managed, and controlled practically by himself, and substantially enlarge his compensation for services and make the same a charge against the old company. This would reward disloyalty in a way shocking to a court of conscience. Moreover, there is no evidence in the record except that of McCourt himself that the increase was reasonable, and this we regard as quite insufficient to overcome the presumption that the salary fixed for the same services by the board of directors of the old company, shortly before it was despoiled, was reasonable.

The next assignment challenges the ruling of the trial court approving the action of the master in allowing, against the fund recovered, attorney's fees and other expenses paid by complainant for

the prosecution of the action, and in disallowing like fees and expenses paid by defendants in defending the action. Complainant claims that, as she undertook the burden and bore the expense of restoring to the old company property and funds which had been taken from it, it should first repay to her out of the funds restored what she had paid for its benefit, before dividing the same between others, including those whose conduct rendered the outlays and expenses necessary. This claim is equitable and just and supported by abundant authority.

In Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157, our Supreme Court makes an exhaustive review of the English and American authorities on this subject, and, on pages 532, 533, and 536, 105 U. S. (26 L. Ed. 1157), makes use of the following language:

"It is also established by sufficient authority that, where one of many parties having a common interest in a trust fund at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his effects. * * * It has been the common practice, as well in the courts of the United States as in those of the states, to make fair and just allowances for expenses and counsel fees to the trustees, or other parties promoting the litigation and securing the due application of the property to the trusts and charges to which it was subject. * * * Allowances of this kind, if made with moderation and a jealous regard to the rights of those who are interested in the fund, are not only admissible, but agreeable to the principles of equity and justice."

To the same effect are the following cases: Central Railroad & Banking Co. v. Pettus, 113 U. S. 122, 124, 126, 5 Sup. Ct. 387, 28 L. Ed. 915; Hobbs v. McClean, 117 U. S. 567, 582, 6 Sup. Ct. 870, 29 L. Ed. 940; Dodge v. Tulleys, 144 U. S. 457, 12 Sup. Ct. 728, 36 L. Ed. 501; Central Trust Co. v. Condon, 14 C. C. A. 314, 67 Fed. 84, 110; Burden Central Sugar Ref. Co. v. Ferris Sugar Mfg. Co., 31 C. C. A. 233, 87 Fed. 810; 2 Perry on Trusts, § 894 et seq.; In re Weed's Estate, 163 Pa. 599, 602, 30 Atl. 272, 278; White v. University Land Co., 49 Mo. App. 450.

The same reasons which justify an allowance out of the fund in favor of complainant for expenses incurred in restoring it require us to approve of the disallowance of such items in favor of the defendants. They did nothing to recover or save a trust fund, or to prevent its waste or dissipation, but everything in their power to prevent its recovery or restitution to its original owner. Their proceedings, while in the name of the old company, which was made a defendant, were adversary to its equitable rights. Instead of being rewarded by an allowance of costs and expenses, they should pay all the statutory costs taxable against them.

No authorities are cited by counsel or found by us sustaining defendants' claim, and we certainly shall not be the first to reward obstructionists out of a restored fund in proceedings necessarily and vigorously prosecuted to regain that fund.

The next item of charge against the old company disallowed by the master and Circuit Court is $2,678.04, loss said to have been incurred in 1902 and 1903, in operating a third theater called the Empire Theater, in Denver. Whether the venture was reasonably

within the scope of the business of the old company, or undertaken prudently by defendants, or whether the business was so managed as to subject the old company to liability for its loss, all depend largely upon the attendant facts. The record fails to disclose what they are, and we must necessarily indulge the presumption that the master and trial court were correct in disallowing them.

By the appeal of complainant she challenges the action of the master and trial court in allowing McCourt $5,200 and Young $1,175, as salaries for services rendered the old company between October 12, 1898, the date of the death of Mr. Bush, and September 1, 1899, the date when the new schedule of salaries fixed February 5, 1900, went into effect. Following Bush's death McCourt was made president and treasurer of the company, and Young was made vice president. Both had duties to discharge for and on behalf of the company, and there is no proof that they failed to discharge them. The contention that, because, prior to Bush's death, neither Bush nor McCourt drew any salary, does not justify the conclusion that the changes wrought by his death did not entitle his successors to compensation. Neither does the fact that, during the period in question, no resolution was formally adopted fixing their salaries, justify a disallowance of compensation taken by them during that period for services actually rendered. For reasons already stated we cannot inquire into the facts showing the reasonableness or unreasonableness of the amounts allowed by the trial court.

Complainant also assigns as error the allowance by the Circuit Court to the defendants of the sum of $2,909.64 for loss sustained in the operation of the Broadway Theater in the summer of 1902. The contention is that, because the old company had never before opened the theater in the summer time, the new corporation should not have done so; and that any loss sustained by it in so doing is not chargeable against the old company in this accounting. We cannot agree with this contention. The theory of complainant's bill and of the decree rendered thereon is that the new leases belonged in equity to the old company, and that the individual defendants were at all times, although the leases stood in the name of the new corporation, carrying on the theatrical business as agents for the old company. The opening of one of the theaters in the summer season was clearly within the general scope of the business of the old company, and its results, whether profitable or unprofitable, in the absence of bad faith, enure to the advantage or disadvantage of the principal, as the case may be. The evidence before us fails to disclose any bad faith in the matter of conducting the summer theater, and the trial court did not err in allowing the defendants a credit for the loss sustained in the venture.

Complainant's next assignment is as follows:

"That the court below erred in overruling complainant's sixth exception to the report of the master, because it appears from the record that the respondents Peter McCourt, Emma F. McCourt, Frank C. Young, and the Consolidated Amusement Company wrongfully withheld and detained the moneys of the respondent the Colorado Amusement Company, after demands for the same were made both by the institution of this suit and otherwise, and in-

terest should be allowed for the period of such detention by way of compensation, or by way of damages."

This exception relates to interest for detention of the sum of $52,788.44, found by the master to have been earned in the two years prior to the interlocutory decree as a result of the operations of the two theaters. There are two reasons why we cannot sustain this assignment. The first is that it is impossible to ascertain from the master's report at what times the sum in question, or any of its constituent parts, so accrued as to be available for distribution. The master's report shows that from April 5, 1891, to March 7, 1903, when the interlocutory decree made provisions for the future, the Tabor Grand Opera House received the total sum of $342,314.08, and expended $300,100.86; and that during practically the same period the Broadway Theater received $335,255.17, and expended $316,762.94. The business appears to have been one requiring large capital and in which large amounts of money were actually employed. Considerable money was necessarily required to be kept on hand to meet the current and incidental expenses. Common prudence dictated that a further sum should be kept on hand to meet possible exigencies of the business. How much should have been reserved for these purposes was a matter for the board of directors to determine from time to time in the exercise of good judgment. It is impossible, so far as this record discloses, to say that $52,000 was too much for such purposes, and it is certainly impossible to say how long before March 7, 1903, the $52,000 was on hand, or at what particular time any part of it was available for dividends. In the light of these uncertainties we cannot interfere with the conclusion of the master and the trial court which had before them all the facts, agreements, and stipulations of the parties.

We recognize fully the doctrine laid down by this court in New Dunderberg Min. Co. v. Old et al., 38 C. C. A. 89, 97 Fed. 150, wherein it is said:

"When property or money has been wrongfully appropriated or converted by a defendant, interest should be given as damages to compensate the complainant for the loss of the use of the proceeds of his property or his funds."

That case came from the district of Colorado, and considered and construed the statutes and decisions of the Supreme Court of that state, and with its doctrine we make no question. Our ruling on this assignment rests exclusively upon the grounds above mentioned.

The action of the lower court with respect to some other small items is complained of; but, after a careful consideration of them, we find no reason for disturbing the conclusion reached.

The decree as rendered was substantially correct, and is accordingly affirmed.

PABST BREWING CO. v. THORLEY.

(Circuit Court of Appeals, Second Circuit. April 18, 1906.)

No. 96.

1. EMINENT DOMAIN—PROPERTY IN STREETS—CANCELLATION OF LICENSE.
Where a city granted defendant permission to construct a vault in front of his premises within the street, subject to revocation at any time thereafter by the commissioner of highways when in his judgment the space occupied, or any portion thereof, should be required for any public improvements, or on any violation of any of the terms and conditions of the license, the termination thereof and the city's resumption of possession for the purpose of constructing a rapid transit railway in the street did not constitute a taking of the property by the exercise of the city's power of eminent domain.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 221.]

2. COURTS—FEDERAL COURTS—RULES OF DECISION—REAL PROPERTY LAW—WHAT LAW GOVERNS.
In an action for breach of a covenant of quiet enjoyment in a lease of property in New York City, whether the eviction was by virtue of the act of the holder of a paramount title, for whose acts defendant was responsible, was a question relating to the rights and title to real estate located in New York, and was determinable by the decisions of the courts of last resort of that state.

[Ed. Note.—State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

3. LANDLORD AND TENANT—COVENANTS—QUIET ENJOYMENT—BREACH.
Defendant, for the purpose of improving certain property by the erection of a hotel, obtained permission from the city of New York to construct a vault in the street in front thereof, subject to revocation when the space occupied was required for any public improvements. Defendant executed a lease to plaintiff, describing the land by metes and bounds "with the appurtenances thereunto belonging, together with the building now in course of erection," according to plans and specifications, and containing a covenant that on payment of the rent reserved the lessee should enjoy the demised premises without let, suit, trouble, or maintenance from the grantor or any other person. The property demised could not be used for the purposes intended without the vault, and prior to the termination of the lease the license to maintain such vault was canceled by the city, because the space was required for subway construction. *Held*, that the covenant covered the property held under the license, and that defendant was liable for a breach thereof.

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

Writ of error to review judgment of the United States Circuit Court for the Southern District of New York, sustaining demurrer to amended complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

For opinion below, see 127 Fed. 439.

A. S. Gilbert, for plaintiff in error.

Joseph Fettretch, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. It appears from the amended complaint that the defendant, in January, 1899, being the lessee of a cer-

tain piece of land situated at the intersection of Forty-Second street, Broadway, and Seventh avenue, and having procured a permit from the city of New York to use the subsurface of the highway adjacent thereto, subject to revocation whenever such subsurface should be required for any public improvements, had erected a building upon the entire premises, and leased the land and building to the plaintiff for a term of about 19 years. The lease was of the land by metes and bounds—

"With the appurtenances thereunto belonging, together with the building now in course of erection upon said plot of ground, which said building is being erected and is to be erected in accordance with plans and specifications therefor heretofore submitted by the party of the first part to the party of the second part, and which said plans and specifications have been agreed upon by the parties hereto; such agreement being evidenced by their respective signatures upon the same."

The covenant in the lease was as follows:

"The said party of the first part doth covenant and agree to and with the party of the second part that, upon its paying the yearly rent above reserved and performing the covenants and agreements herein contained on its part, it shall and may at all times during the said term hereby granted peacefully and quietly have, hold, and enjoy the said demised premises, without any manner of let, suit, trouble, or hindrance of or from the party of the first part, his heirs, executors, administrators, or assigns, or any other person."

The material portions of the form of permit issued to defendant are as follows:

"Department of Highways, Borough of Manhattan, New York.

"No. ——. Permission is hereby given to ——— to construct a vault in front of premises known as ————, used for ———; said vault to be ——— feet in width and ——— feet in length outside measurements. ———, and to occupy ——— square feet, subject to obligation to construct recess or chamber for existing hydrant or stopcock, as per annexed plan, and upon condition that the person or persons to whom this permit is granted will in all respects comply with the corporation ordinances relative to 'vaults, cisterns, and areas.' * * * This permit is issued subject to revocation thereof at any time hereafter by the commissioner of highways when in his judgment the space occupied by said vault or any portion thereof may be required for any public improvements, or upon any violation of any of the terms or conditions hereof."

It further appeared that in April, 1902, the parties were notified by the city of New York that it would require the portion of the property below the highway for the Rapid Transit Railroad, and that thereafter the city revoked said permit, and took possession of said portion. The plaintiff, being thus actually evicted therefrom, abandoned the whole premises, and brought this action for damages for such eviction.

Under the original complaint it was argued, and upon the facts therein stated the court held, that the only question was whether the covenant protected the plaintiff against the exercise of the power of eminent domain. The court held that it did not, but said as follows:

"The argument for the plaintiff has assumed that at the time when the lease was made the defendant had an uncertain and determinable right to use the land owned by the city upon which a part of the building was constructed, and that the city could at any time revoke the license, and repossess itself of the property. If the complaint had set forth facts showing that the part of the premises owned by the city was at the time of the making of the

lease occupied by the defendant under some determinable title from the city which the city subsequently lawfully terminated, and that the city entered and evicted the plaintiff under its paramount right as owner, a different case would be presented. But such facts are not alleged, and the case presented depends upon the question whether the covenant protects the plaintiff against the exercise of the power of eminent domain. Reaching the conclusion that it does not, the demurrer is sustained."

The questions presented, as stated by plaintiff, are:

"Whether the action of the city in repossessing itself of the highway property which it had previously permitted the parties to this action to use was a taking under its right of eminent domain, or simply a retaking of property which rightfully belonged to it? If the taking was under its right of eminent domain, then the plaintiff cannot succeed upon this appeal, but if, on the other hand, the taking was, as we claim, not under its right of eminent domain, but under its title of paramount owner, then we respectfully submit to this court that the plaintiff must succeed upon this appeal."

That the city is the owner in fee of the subsurface portion; that defendant leased and plaintiff occupied said portion by virtue of a license or permit from the city; that the defendant had the right to make this covenant for quiet enjoyment; that the city had the right to revoke said license; that this revocation might be through the agency of the Rapid Transit Commission; and that said revocation resulted in an actual eviction from part, and a constructive eviction from all, of the premises—is admitted.

Defendant claims as follows:

"The eviction of plaintiff, if any, was pursuant to authority conferred by the Legislature in the exercise of the right of eminent domain. * * * A complete and perfect indemnity for plaintiff for all damage it has suffered by reason of the building of the subway has been provided in the legislative acts themselves."

Defendant further claims that the covenant for quiet enjoyment does not apply to land embraced within a highway; that it only covers the land leased and such rights as are appurtenant thereto, and that this mere license was not an appurtenance to the land leased; and that, as the demised premises are described by metes and bounds, the covenant does not apply to the portion outside thereof.

The argument as to eminent domain proceeds upon a misconception of the situation. If this were a case of taking by eminent domain, plaintiff would be remediless, because, as was said by the court below in its opinion on demurrer to the original complaint:

"The exercise of that right by the state is an incident of the tenure of all real property, and both of the parties to the deed or lease must be presumed to have taken it into consideration at the time. Brimmer v. City of Boston, 102 Mass. 19, 22; Folts v. Huntley, 7 Wend. (N. Y.) 210."

A taking by eminent domain is excepted from the operation of the covenant for quiet enjoyment, because, furthermore, it is an exercise of the sovereign power of the state in acquiring title to property according to the constitutional injunction of compensating every man whose property is taken for the public use. If such taking were to be held to be a breach of the covenant, the covenantee would be entitled to be paid the value of his loss by the party evicting him, and might also recover from his covenantor for breach of the covenant. Frost v.

Earnest, 4 Whart. (Pa.) 86, 90; Folts v. Huntley, 7 Wend. (N. Y.) 210. But here there was no exercise of sovereign power. The city, having the title and the right to possession upon the happening of a certain contingency, has merely exercised its right to terminate the license and resume possession. There is no taking of title, no acquisition of property, no obligation arising out of the lawful resumption of possession to make compenation for any loss, because the loss is a damnum absque injuria, the result of the action of the city, provided for by it in its permit, and assented to by the defendant when he obtained the license. The argument, therefore, based upon the provisions of the Rapid Transit Acts, for compensation to owners of property taken or extinguished for the purpose named in the act, has no bearing on the issues herein.

The question here at issue was suggested by Judge WALLACE in his opinion disposing of the case on demurrer to the original complaint, where, as stated above, he said as follows:

"If the complaint had set forth facts showing that the part of the premises owned by the city was at the time of the making of the lease occupied by the defendant under some determinable title from the city, which the city subsequently lawfully terminated, and that the city entered and evicted the plaintiff under its paramount right as owner, a different case would be presented."

In the view which we have taken it is immaterial whether there is a distinction between a determinable right and a determinable title. The decision in McLarren v. Spalding, 2 Cal. 510, cited by the court in its opinion on the demurrer to the amended complaint, and chiefly relied on by counsel for the appellee, is only remotely relevant to the issue herein, for the reason that there was there no covenant for quiet enjoyment. The single question here is whether the eviction was by virtue of the act of a holder of a paramount title, for whose acts this defendant should be held responsible. Inasmuch as the question presented relates to the rights and title to real estate and things having permanent locality, it is to be determined by the decisions of the courts of last resort of the state of New York, so far as they determine the questions herein. Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. Ed. 865; Baltimore & Ohio Railroad v. Baugh, 149 U. S. 368, 372, 13 Sup. Ct. 914, 37 L. Ed. 772; Van Etten v. Westport (D. C.) 60 Fed. 579.

The argument of defendant that the covenant for quiet enjoyment does not apply to land embraced within a public highway has no application to the facts of this case. The defendant cites Wilson v. Cochran, 46 Pa. 229, and quotes from the opinion therein. But he fails to show that in the next paragraph of the opinion the court expressly disapproves the doctrine quoted, and refers to the case from which it is taken as an "ill-considered case." See, also, Rawle on Covenants for Title, § 79, note 1. So far as the Pennsylvania cases cited hold that the existence of an easement consisting of a highway is no breach of the covenant, they merely illustrate the exception to the general rule pointed out in Huyck v. Andrews, 113 N. Y. 81, 20 N. E. 581, 3 L. R. A. 789, 10 Am. St. Rep. 432. There, the court, referring to the reasons given by the court in Whitbeck v. Cook, 15 Johns. (N. Y.) 483, 8 Am. Dec. 272, why in such a case the purchaser has no ground to

complain "of the existence of what he saw when he purchased, and what must have enhanced the value of the farm," says:

"These reasons are not applicable to other easements, and the rule of that case has not been applied to any other."

The court then discusses and cites with approval a number of cases holding that the existence and exercise of private rights constitute a breach of covenant against incumbrances or for quiet enjoyment, irrespective of whether the covenantee knew of them or not, and, citing and expressly disapproving the decisions which hold to the contrary, says as follows:

"We think the safer rule is to hold that the covenants in a deed to protect the grantee against every adverse right, interest, or dominion over the land, and that he may rely upon them for his security. If open, visible, and notorious easements are to be excepted from the operation of covenants, * * * it should be incumbent upon the grantor, if he does not intend to covenant against such defects and incumbrances, to except them from the operation of his covenants."

The opinion of Judge, now Mr. Justice Brewer in Barlow v. Delaney (C. C.) 40 Fed. 97, is to the same effect.

In Hymes v. Estey, 133 N. Y. 342, 31 N. E. 105, the court, referring to its former decision in the same case, said as follows:

"It was held that the case was taken out of the ordinary rule that the existence of a public highway at the time of the conveyance of lands with covenant for quiet enjoyment or against incumbrances is not a breach of such covenant. It was there declared that such rule was limited to cases where the public easement was open and visible and in actual use, and had no application to cases like the present, where, if the plaintiff's contention is true, there was at the time of the purchase no indication of the existence of a highway. That decision proceeded upon sound and just principles, and we see no occasion to restrict or modify it in any respect."

In the former decision in Hymes v. Estey, 116 N. Y. 501, 22 N. E. 1087, 15 Am. St. Rep. 421, the court had said that the exemption from the warranty in the case of a public highway rested upon the motion derived from its apparent existence or use, because the grantee gets all the rights which, in view of the apparent situation, the deed purports to convey; but that without such notice it cannot be said that the purchaser gets "all the proprietary right in the premises which he is permitted to assume was assured to him by the covenant of his grantor." The same view is taken in the decision in Wilson v. Cochran, supra.

The subsurface in the case at bar is neither within the definition nor reasoning of the court in these cases. It was not technically or actually a public highway. It was not used or adapted to be used as a public highway, and, except under the extraordinary exigencies of subway construction, it could not have been used for that purpose. Under the sidewalk there was no highway, either "open, visible, or in actual use," or even in existence. On the contrary, although the plaintiff knew that the city was the owner of the portion of land leased to him under the public highway, he knew that it was closed and occupied by a portion of the building leased to him by defendant, under a permit from the city, which deprived the city of all right to its actual

use until either it was "required for any public improvements, or upon any violation of any of the terms or conditions thereof." The questions of eminent domain and of notice of sovereign rights by reason of the existence of a highway as an incumbrance upon an estate may therefore be eliminated from the case.

It is further argued that the covenant for quiet enjoyment is limited to the land leased or some portion thereof, or to rights appurtenant thereto, and that, as this subsurface was held under a mere determinable license or right which was not an appurtenance of the land, the covenant does not apply thereto. A person who is lawfully dispossessed by reason of want of title is evicted by title paramount. Day v. Chism, 10 Wheat. 449, 6 L. Ed. 363; 8 American & English Encyclopædia of Law (2d Ed.) 102.

"It may be stated as a general rule that any right which, commencing before the deed, is not passed by, but exists independently of the conveyance, and can be asserted with the effect of rightfully evicting the tenant under the deed, is a superior or paramount right. The legal implication of the covenant for quiet enjoyment is that the landlord has an adequate title to the estate created by the lease, and that he will permit the tenant to enjoy, without disturbance or interruption, the interest, title, or privilege demised, subject to all such rights as are expressly or by natural implication reserved to the lessor." Jones on Landlord and Tenant, § 352.

"The covenants of warranty and for quiet enjoyment extend to everything that is appurtenant or incident to the grant to which they relate, and are broken by the loss of any incorporeal right annexed or incident to the land conveyed. In order that the loss of such a right may amount to a breach of these covenants, it must, however, appear that it was a legal appurtenance to the land within the meaning of the deed." 8 American & English Encyclopædia of Law (2d. Ed.) 121.

The general rule which determines the character and extent of the covenant of warranty as applied to rights and licenses relating thereto is well illustrated by the following decisions:

In Green v. Collins, 86 N. Y. 246, 40 Am. Rep. 531, the defendant sold to plaintiff a dwelling house "with the appurtenances," the deed containing a covenant for quiet enjoyment. There was a water-closet in the dwelling, the discharge pipe from which emptied through pipes into a sewer on the adjoining premises, owned by a third party. Defendant had no right to use this sewer, and the third party, after the conveyance, obtained an injunction restraining the plaintiff from using it. Plaintiff having sued defendant for breach of warranty, the court held that the action was not maintainable, and said as follows:

"The language of the deed, of itself, does not convey to the plaintiff a right to use her premises in such manner as would create a nuisance upon the land of the adjoining proprietor. The words 'with the appurtenances' cannot affect the rights of the parties, or enlarge the scope of the deed, as the appurtenances would pass without such words; for it is a general rule that whatever is in use for the land as an incident or appurtenance is conveyed by the deed. Huttemeier v. Albro, 18 N. Y. 48. If the right of the defendant to use the adjoining land was an easement attached to or constituting a part of the

land, it was transferred by the deed. Such right did not exist, however, in fact, and therefore it could not and did not pass to the plaintiff. * * * The right to drain upon the adjoining land would, at least to some extent, involve a right to inflict a burden which, unless protected or provided for, might constitute a nuisance, and such a result cannot be accomplished without proof of the existence of the right claimed, or express words showing that it was the intention of the grantor to confer it. And, although an existing easement, as a matter of legal right, passes with the thing granted, yet, where a grantor conveys without any interest or title whatever, an easement does not pass to the grantee."

In Adams v. Conover, 87 N. Y. 422, 428, 41 Am. Rep. 381, defendant conveyed to plaintiff certain premises, including within its bounds a mill and dam with sufficient water power, with covenant for quiet enjoyment. The plaintiff was compelled to tear down the dam, because the water flooded adjoining property. The court held that thereby plaintiff was evicted by paramount title from the right to use said water power as it existed at the time of the conveyance, and that this was a breach of the covenant of warranty, and said as follows:

"The case, therefore, does not come within the rule of Green v. Collins, nor is it like Burke v. Nichols, 2 Keyes (N. Y.) 670. In neither of these cases was the grantee evicted from anything which passed by the grant. That plain line of distinction separates both from a case like the present, where the thing lost was covered by the conveyance, and embraced within its description, and the deed both conveyed, and, as we construe it, purported to convey, the identical thing destroyed by a paramount title. The justice of the rule is entirely clear. It does not permit the vendor of an apparent water power to get a price for what he does not own, or indulge him in a palpable fraud upon his vendee. It rests upon the general principle that the covenants in a deed are designed to protect the grantee in the enjoyment of his property, in the manner and for the particular purpose intended by the parties at the time of executing the deed. Comstock v. Johnson, 46 N. Y. 615; Voorhees v. Burchard, 55 N. Y. 102."

In Scriver v. Smith, 100 N. Y. 471, 3 N. E. 675, 53 Am. Rep. 224, the court says:

"Suppose one takes a deed with a covenant for quiet enjoyment of land with a house thereon. * * * If, in the case supposed, the house is three stories high, and in consequence of covenants with adjoining landowners there is no right to maintain more than two stories, so that the grantee is obliged to remove the third story, would there not be a dispossession and eviction of so much of the premises conveyed, and thus a breach of the covenant?"

See, also, Peters v. Grubb, 21 Pa. 455; Mayor of New York v. Mabie, 13 N. Y. 151, 64 Am. Dec. 538; Cronkhite v. Cronkhite, 94 N. Y. 323; Spencer v. Kilmer, 151 N. Y. 390, 45 N. E. 865; Burke v. Tindale, 12 Misc. Rep. 31, 33 N. Y. Supp. 20; affirmed 155 N. Y. 673, 49 N. E. 1094; Uihlein v. Matthews, 172 N. Y. 154, 64 N. E. 792; Kramer v. Carter, 136 Mass. 504.

Bearing in mind the distinction indicated in these decisions, we are brought to a consideration of the scope of the warranty in the case at bar. This question is to be determined by the construction of the lease and the intention of the parties as shown therein. But the defendant not only leased said land, but also—

"The building now in course of erection upon said plot of ground, which said building is being erected in accordance with plans and specifications therefore heretofore submitted by the party of the first part to the party of

the second part, and which said plans and specifications have been agreed upon by the parties hereto; such agreement being evidenced by their respective signatures upon the same."

The covenant for quiet enjoyment covered, in terms, the whole of said leased property.

The demurrer admits the following allegations of the complaint:

"That for the purpose of using said premises for a hotel, café, and restaurant, as hereinbefore stated, there was laid out upon the plans and specifications, and, pursuant thereto, was constructed in the cellar floor of the premises leased to the plaintiff, and particularly in the portion thereof which was built and constructed outside of the house line, and extending to the curb line of Broadway, Forty-Second street, and Seventh avenue, pursuant to said license or permit, certain refrigerating and ice plants, hot water supply and pump rooms, engine rooms, boiler rooms, engines, wine rooms, ice box, store rooms, and closets. * * * That the said building, so leased to this plaintiff by this defendant, as aforesaid, could not be used for the purpose for which it was designed, and in the manner designed, to wit, as a hotel, café, and restaurant, after taking away that portion thereof used or to be used for the purposes of the Rapid Transit Railway."

That, as already shown, plaintiff expended large sums of money in fitting up the building leased, relying upon the covenants of defendant, and with his knowledge and consent. The demurrer, therefore, admits that the property leased did in fact include the portion taken, the lease being not only of the land described by metes and bounds within the portion taken, but also of the building to be erected in accordance with plans agreed upon by the parties, and that the building so constructed did in fact cover, not only the land described by metes and bounds, but also the land not so described, and which was taken by the city.

In these circumstances, we think the lease must be construed as a lease of the building as a whole, and that therefore the covenant for quiet enjoyment applied to the part thereof which was constructed under the highway. If the words of the lease describing the building as being erected in accordance with agreed plans and specifications, which plans and specifications covered the subsurface of the highway, are to prevail, then the portion of the building occupying the subsurface of the highway was a portion of the demised premises. But it may, perhaps, be argued that the words in the lease referring to the building as one "now in course of erection upon said plot of ground" limit it to the plot by metes and bounds, and that, therefore, the covenant for quiet enjoyment does not apply, because such a mere license to use property outside of the plot either is not an appurtenant to the land, or, even if appurtenant, is only so until revoked, and no right is transferred by the lease. The objections to such a construction have been already pointed out. It may be true that a covenant for quiet enjoyment does not necessarily cover a mere easement in property not comprehended within the limits of the property leased, and in which the vendor or lessor has no right or interest, because in such cases there is nothing to be granted or leased. But, assuming the correctness of the assumption that the covenant may be limited to the land exclusive of the building, the case is one where a lessor, having a present interest in property occupied by him under a

license, has entered into a covenant, which is capable of a construction which might or might not have included the portion held by virtue of said license, and has elected to erect a building on said portion, and has leased the whole for a term of years to the plaintiff, with a general covenant for quiet enjoyment. Said building could only be occupied by the plaintiff for the purposes for which it was designed by the use of the licensed portion. In these circumstances, upon the construction most favorable to the plaintiff, there is an ambiguity in the lease, which must be resolved by determining the intention of the parties, if possible, from all the terms of the lease, from the situation of the parties, the objects they respectively had in view, and the acts done in pursuance of the contract. That the parties understood that the covenant applied to the whole building leased appears from the following facts: The lease was for a term of about 20 years, for an annual rent of $25,000, without any provision for apportionment in case of eviction from any portion of the leased property. The building was so constructed upon the whole property in accordance with agreed plans that it could be used for the purposes for which it was designed only in its entirety; the construction and fixtures in the subsurface portion being a necessary part of the complete plant. The plaintiff, relying on the covenant of defendant, expended large sums of money in fitting up the building. There was, furthermore, no provision for the protection of the defendant from liability in case of an eviction. As was said in McLarren v. Spalding, supra, the case chiefly relied on by defendant:

"The defendant here might have protected himself by a clause defeating the lease in case of the removal of the stand; and, as he knew that it was subject to removal, and did not do so, the presumption is that he assumed the risk, and must bear the loss."

We are brought, then, to the question whether the covenant herein covers the property held under the license. Whether the defendant would have been liable for the eviction in the absence of any such covenant is a question which is not before us, and as to which we express no opinion.

Here, the eviction was by the covenantor's licensor, the one through whom the covenantor acquired such right of occupancy as he undertook to lease to the plaintiff, and as to which he made the covenant, upon the faith of which the lessee entered, occupied, and improved the leased property.

Upon the facts admitted by this demurrer, we think it is clear, therefore, that the parties understood that this was a covenant for quiet enjoyment against eviction by the city or its representatives. The covenant, in terms, was a warranty against the acts of any other person. The lessor derived his sole right to the occupancy of these premises from the city, and therefore might reasonably be presumed to warrant against the lawful acts of his own licensor. The plaintiff must have understood this covenant to apply to the enjoyment of the property beneath the highway, or otherwise he would not have taken a lease of the property for 19 years. If there might otherwise be any question as to the understanding of the plaintiff, there can be none

when it is admitted that under said lease, and relying on said covenant, he went ahead and personally expended a large sum of money in fitting up the premises.

In these circumstances, we think this question must be determined by the ordinary principles applicable to the construction of a written instrument. As already shown, the demurrer admits that the leased building, constructed pursuant to plans and specifications agreed upon between the parties, was built in part below the public highway on land held under a license; that, pursuant to said license and permit, certain refrigerating plants, hot water supply and pumping rooms, engine rooms, boiler rooms, engines, etc., were constructed under the highway, for the purpose of using the whole premises for a hotel, café, and restaurant; that the rent to be paid was a total sum, without any provision for apportionment in case any portion of the property should be rendered unavailable; that the portion of the highway thus occupied by the building was a substantial and important part thereof, and that the building could not be used for the purpose for which it was designed without said portion; and that the plaintiff—

"Relying upon the covenants of the defendant above set forth, and with the knowledge and consent of this defendant, and for the purpose of making the said premises better adapted to the use for which it was designed, to wit, as a hotel, restaurant, and café, this plaintiff expended large sums of money in improving and decorating the building so leased to it as aforesaid by this defendant, and expended large sums of money in the purchase of fixtures, furnishings, and appurtenances for the improvement and decoration of said building, all of which improvements, fixtures, decorations, and appurtenances are and have become useless and valueless to this plaintiff in connection with the use and enjoyment of said premises by reason of the eviction of this plaintiff from the said building and premises, as aforesaid."

The lease was tendered by the lessor and accepted by the lessee, and, in case of doubt, the construction contra proferentem is to be adopted. Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. Ed. 773, 938; Folts v. Huntley, supra.

We conclude that the covenant of the grantor must be construed to extend to and to cover the whole of the leased building as an entirety, including the portion constructed on the land under the public highway.

The decision of the court below is reversed, and the case is remanded to the court below, with instructions to enter an order in accordance with this opinion, with leave to the defendant to answer over.

UNITED STATES v. W. N. PROCTOR & CO.

(Circuit Court of Appeals, First Circuit. January 25, 1906.)

No. 609.

1. CUSTOMS DUTIES—CLASSIFICATION—EXTRACT OF NUTGALLS.

Paragraph 1, Schedule A, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626], providing for tannic acid and tannin, does not include extract of nutgalls, consisting of a mixture of powdered nutgalls and water, which contains some tannin, and from which tannic acid may be produced.

2. SAME—SIMILITUDE—RESEMBLANCE IN MATERIAL.
Extract of nutgalls, containing a considerable percentage of tannic acid, which can be obtained therefrom in its commercial form only by a long series of chemical combinations and precipitations, *held* not to be sufficiently "similar in material" to tannin or tannic acid as to be dutiable at the rate applicable to those materials, by virtue of the similitude clause in section 7, Tariff Act July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693].

3. SAME—STATUTORY CONSTRUCTION—SETTLED CUSTOMS PRACTICE—CONGRESSIONAL ADOPTION.
A settled practice of the Treasury Department in construing a series of tariff acts during the period of 26 years furnishes a rule of statutory construction of the highest authority; and the rule applied that a practical construction given any provision in a tariff act may be construed as accepted by Congress, and re-enacted into law in subsequent acts containing the same phraseology.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs Duties, § 10.]

4. SAME—FINDINGS OF GENERAL APPRAISERS—REVIEWABILITY.
The contention that the findings of the Board of United States General Appraisers as to matters of fact are not reviewable by the courts on appeal from the Board's decisions, and are not to be disturbed where there is evidence to sustain them, *held* not to be supported by the authorities.

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

For decision below, see 139 Fed. 586, reversing a decision of the Board of United States General Appraisers, G. A. 5,333 (T. D. 24,395), which had affirmed the assessment of duty by the collector of customs at the port of Boston.

W. Wickham Smith, Special Asst. U. S. Atty. (William H. Garland, Asst. U. S. Atty., on the brief).

J. Stuart Tompkins (Hatch, Keener & Clute, on the brief), for appellee.

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

PUTNAM, Circuit Judge. This appeal relates to customs duties under the act of July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626]. The several importations were described in the various protests as "extract of nutgalls," as "tanning extract," and as "extract of nutgalls." The collector, in transmitting the protests to the board of General Appraisers, described them as "certain extract of nutgalls." The opinion of the Board described the merchandise as "extract of nutgalls," and it appears by that opinion that it was described in the invoices as "tanning extract." The duty was assessed at 50 cents per pound under paragraph 1 of the act of 1897 (chapter 11, § 1, Schedule A, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626]), which provides for certain acids, and contains the following with the rest, "tannic acid or tannin fifty cents per pound." The importer thereupon applied to the Circuit Court under section 15 of the customs administrative act, approved on June 10, 1890 (chapter 407, 26 Stat. 138 [U. S. Comp. St. 1901, p. 1933]). That court filed an opinion in which the learned judge expressed the conclusion that the merchandise should have been as-

sessed under paragraph 20 of the act of 1897 (chapter 11, § 1, Schedule A, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1628]). The decree merely reversed the decision of the Board of General Appraisers, and no question as to its form is made before us. Thereupon the United States appealed to us.

In the protests the importers made several alternative claims under various provisions of the statute, among the rest paragraph 22 (30 Stat. 152 [U. S. Comp. St. 1901, p. 1628]), and paragraph 20 in connection with similitude section 7 (30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]).

Paragraph 20 reads as follows:

"Drugs, such as barks, beans, berries, balsams, buds, bulbs, bulbous roots, excrescences, fruits, flowers, dried fibers, dried insects, grains, gums and gum resin, herbs, leaves, lichens, mosses, nuts, nutgalls, roots, stems, spices, vegetables, seeds (aromatic, not garden seeds), seeds of morbid growth, weeds, and woods used expressly for dyeing; any of the foregoing which are drugs and not edible, but which are advanced in value or condition by refining, grinding or other process, and not especially provided for in this act, one-fourth of one cent per pound, and in addition thereto ten per centum ad valorem."

Paragraph 22 reads as follows:

"Extracts and decoctions of logwood and other dyewoods, and extracts of barks, such as are commonly used for dyeing or tanning, not specially provided for in this act, seven-eighths of one cent per pound; extracts of quebracho and of hemlock bark, one-half of one cent per pound; extracts of sumac, and of woods other than dyewoods, not specially provided for in this act, five-eighths of one cent per pound."

The essential portion of similitude section 7 reads as follows:

"Each and every imported article, not enumerated in this act, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned."

The United States still adhere to the classification under paragraph 1. Their assignment of errors covers alleged errors alike of fact and law. The only alleged errors of fact to which we need refer are the following:

"(3) The court should have found that extract of nutgalls was more nearly similar in material, character, and uses to tannic acid than to any other article mentioned in the tariff act of July 24, 1897.

"(4) The court erred in finding that the term 'tannic acid,' as used in the trade and commerce of the United States, does not include extract of nutgalls.

"(5) The court should have found that the term 'tannic acid,' as used in the trade and commerce of the United States, includes extract of nutgalls.

"(6) The court erred in finding that extract of nutgalls is not known in the trade and commerce of the United States as liquid tannin or liquid tannic acid.

"(7) The court should have found that extract of nutgalls is also known in the trade and commerce of the United States as liquid tannin or liquid tannic acid."

On the various questions of fact, the Circuit Court expressed an opinion adverse to the contentions of the appellants with reference to alleged errors 4, 5, 6, and 7. In speaking of the propositions to which they relate, the learned judge referred to the fact that there were proofs in the record additional to what were before the Board, and concluded:

"Upon the whole, the testimony regarding commercial nomenclature now presented to the court makes for the importers rather than for the United States." We are satisfied with this conclusion.

The alleged errors of law assigned by the United States are as follows:

"(1) The court erred in holding that the merchandise in controversy was dutiable under paragraph 20 of the tariff act of July 24, 1897 (chapter 11, § 1, Schedule A, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1628]), as nutgalls advanced in value by refining, grinding, or other process, at one-fourth of one cent per pound and ten per cent. ad valorem.

"(2) The court should have held that the merchandise in controversy was dutiable under paragraph 1 of said tariff act (30 Stat. 151 [U. S. Comp. St. 1901, p. 1626]) as tannic acid, or tannin, at fifty cents per pound.

"(3) The court erred in reversing the decision of the Board of United States General Appraisers.

"(4) The court should have affirmed the decision of the Board of United States General Appraisers, and should have dismissed the petition."

It will be noticed that these alleged errors strictly involve only one proposition, and that is that, as between paragraph 20 and paragraph 1, the classification should have been as determined by the Board of General Appraisers, under paragraph 1; in other words, the substance is merely that the Circuit Court erred in reversing the decision of the Board. The importers assigned no errors, and took out no writ of error. Therefore, we have no call in their behalf to consider whether, as between paragraph 20 and paragraph 22, the opinion of the learned judge of the Circuit Court would have been prejudicial to them if carried into the decree. On the whole, we conclude that, as we are not called on to go beyond the consideration of the final decree in its formal shape, it would be unwise and unsafe for us to attempt to review all the questions of law and fact involved in the decision of the Board of General Appraisers. Therefore, aside from certain incidental observations which we cannot well avoid, the only question we pass on is whether the importations were properly classified under paragraph 1.

Aside from the fact or suggestion that a chemical was added for the mere purpose of preventing the extract from moulding, which, as stated by the Board of General Appraisers, apparently not disputed, worked no chemical change, so that it is not material in this case according to our opinion in Brennan v. United States (C. C. A.) 136 Fed. 743, 747, 748, passed down on April 12, 1905, the importations were described by the board as a simple product of powdered nutgalls and water "filtrate." By this word "filtrate" we suppose the board intended that the liqueous mixture had been filtered. Certainly, the record shows that the importations were merely a mixture of ground or powdered nutgalls and water which had been, as we say filtered. The learned judge of the Circuit Court found this filtrate contained about 25 per cent. of tanning matter (tannic acid chiefly), more than 50 per cent. water, volatile matter, and a large organic mineral residue.

Nutgalls are a morbid growth on the surface of the oak, and contain, of course, a considerable percentage of the elements of tannin, or tannic acid, as does the bark of that tree. They subserve no use other than as a basis for the manufacture of extract of nutgalls, and as a further resultant of tannic acid. The various resultants of nutgalls

are used for tanning leather, dyeing, and mordanting, and also for calico printing; in other words, for all purposes for which "extracts and decoctions of logwood and other dyewoods and extracts of barks" named in paragraph 22 are commonly used. As said by the Board of General Appraisers, tannic acid may be produced from the extract of nutgalls as follows:

"The extract is decanted or filtered, and acetate of lead added to the filtrate. The lead from the acetate of lead combines with the tannic acid to form tannate of lead, which is precipitated. The acetic acid from the acetate of lead is left in solution with impurities from the nutgalls, and is poured off. The precipitated tannate of lead, which is insoluble in water, is suspended in water by agitation, and hydrogen sulphide, or some substance which will combine chemically with lead, is passed through it. The sulphur of the hydrogen sulphide combines with the tannate of lead, and forms a precipitate of lead sulphide, setting free tannic acid, which immediately dissolves in water. The solution of tannic acid is then poured off and boiled down, leaving the tannic acid in the form of a powder. It is admitted on all sides that the powder obtained by the above process is commercially tannic acid, and is the chemical product known as such."

The record shows that there are other processes of producing tannic acid from extract of nutgalls. Some methods are said to be still secret, but all known involve several steps and several chemical reactions. The Board concludes: "It is thus clear that extract of nutgalls, when considered chemically, is not tannic acid."

Under paragraph 548 of the act of July 24, 1897 (chapter 11, § 1, Schedule A, 30 Stat. 197 [U. S. Comp. St. 1901, p. 1683]), crude nutgalls are expressly put on the free list. Mr. Rau, an eminently intelligent witness for the United States, engaged commercially in manufacturing and dealing in tannic acid, as well as to a certain extent educated in chemistry, speaking of the very meager cost of producing extract of nutgalls, testified:

"There is so little labor connected with the mixing of nutgalls with water in the whole or crushed state that it would naturally be done in this country, as water and nutgalls are both free."

In reply to an inquiry about the cost of grinding nutgalls and mixing with water, he said: "The cost on this side to a manufacturer regularly engaged in the business is probably merely nominal." Rau makes the price of the technical tannic acids, such as he says are used in dyeing, tanning, calico printing, and the weighting of silk, from 30 to 40 cents a pound, with special kinds running to, perhaps, 60 cents. Liquid tannin is spoken of in the testimony, but the parties have not very clearly explained what it means. It is apparently a dilution of tannic acid or tannin. It certainly is not extract of nutgalls, because extract of nutgalls contains many ingredients which liquid tannin does not contain, and cannot contain. Liquid tannin is said to sell at from 12 to 20 cents per pound, according to its density. On the other hand, the only direct evidence in the record as to the marketable value of extract of nutgalls is that the very merchandise in dispute here was sold to the calico printing trade at 16½ cents per pound in 1900, but in 1902 the extract was selling at 9½ cents per pound.

The importers computed that this particular merchandise cost them from 12½ to 13 cents per pound delivered, so that the duty claimed

by the United States of 50 cents per pound would be substantially equivalent to 400 per cent. ad valorem. In view of the facts we have stated, to advance nutgalls to be classified as claimed by the United States, when merely ground and mixed with water at a nominal expense, would be a tremendous leap, such as could hardly be expected to be within the intention of Congress. We cannot suppose, in the absence of forcible facts, deducible from the federal legislation or from the proofs in the record, both of which are absent, that Congress had any such intention.

We are unable to perceive any natural similitude whatever in the direction claimed by the United States; that is, between extract of nutgalls and tannin or tannic acid. It is true that one of the component parts of the extract of nutgalls is tannin, and this probably not in chemical combination, but only as a component; but, in order to obtain from that extract the tannic acid of commerce, or tannic acid as it is chemically known, a long series of chemical combinations and precipitations, such as we have described, is necessary. It may be dangerous to attempt to illustrate this proposition by specific analogies. It is perhaps mainly a matter of common sense perception. Although the tannic acid sought as the result of such processes as the Board of Appraisers described exists in combination in the original mixture, yet that result is, for practical purposes, and, alike in popular and commercial phraseology, a new thing. For illustration, steam, or the vapor resulting from steam, is only water evaporated or sublimated; and yet neither in popular phraseology nor by the law of the courts is either regarded as water. So alumina is the characterizing ingredient of common clay, and yet in no fair sense of the English language are they the same, either actually or by similitude, although by an expensive process alumina and its metal, aluminum, are derivable from the clay. Indeed, we may go further, and say that the United States answer their own proposition on this particular. In speaking of the alleged similitude to "nutgalls advanced in value," the Board of General Appraisers said that it must be borne in mind that "nutgalls extract has entirely lost its character as nutgall." So at bar, referring to the alleged similitude to "nutgalls advanced in value," the United States urge that, if the position of the Circuit Court is correct in that particular, the provisions of the tariff acts in reference to berries could be applied to all sorts of fluids made from berries in combination with other articles, and those for fruits to all sorts of preparations made from fruits, and, likewise, the provisions for flowers, leaves, herbs, grains, vegetables, and aromatic seeds. Here are, in effect, clear statements that, by the mere changes to which they have referred, from nutgalls, berries, and the like, the originals have entirely lost their character as such. All this illustrates perfectly the proposition which we make that, by the change, involving various processes, from extract of nutgalls to tannic acid, the original extract of nutgalls has also, in every proper sense, entirely lost its character as such. Indeed, as between extract of nutgalls and tannic acid, in view of the explanations we have made, it violates every sensible rule of the use of the English language, and speaks only with refined ingenuity, to assert similitude on account of

some similarities "in material, quality, texture, or use," as spoken of by section 7 of the act of July 24, 1897 (chapter 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]). By necessary implication, as well as by the force of the lines of decisions of the Supreme Court, customs legislation speaks in a natural voice to the persons or classes to whom it is addressed, according as those persons or classes are laymen, merchants, or men of science; and the attempt here to classify the mere filtrate of nutgalls as tannic acid or tannin is only one of the too numerous instances in which either the United States or importers undertake to twist what is plainly written, contrary to this rule of construction, for the purpose of obtaining special results, in the interest of one or the other. Therefore, we are compelled to reject the claim of the United States that the importations in question on this appeal should be classed as tannin or tannic acid by either direction or by similitude.

The result we reach is supported by the uniform, practical, departmental construction given the customs legislation for many years. There is a long and well-known series of decisions by the Supreme Court, holding that a settled practice of the Treasury Department under the circumstances before us, where originally there might have been a doubt, affords a rule of statutory construction of the highest authority. This applies, also, to some extent, to the construction of other statutes, and is not even limited to domestic statutes. We have no occasion to go through this line of decisions, because we have lately sufficiently referred to them in United States v. Swift (C. C. A.) 139 Fed. 225, 230, decided on June 15, 1905, and especially in Brennan v. United States (C. C. A.) 136 Fed. 743, 749, decided on April 12, 1905, and directly applicable to cases of the class of this appeal. We may, however, refer to the latest statement of the general rule with reference to one of its limitations in Hackfeld v. United States, 197 U. S. 442, 451, 25 Sup. Ct. 456, 49 L. Ed. 826.

Not only the true force of this rule, but especially the necessity of abiding by it in order to prevent injustice, are exhibited in the present case in a marked manner. We will see as we go along that never in the history of the importations of merchandise of the class in question, until the letter of the acting Secretary of the Treasury to the collector of customs at New York of October 9, 1900 (T. D. 22,529), vol. 3, p. 831, was it ever held that extract of nutgalls should be classified, either by direction or by similitude, with tannin or tannic acid. On June 11, 1900 (T. D. 22,278, G. A. 4,716), vol. 3, p. 504, a decision of the Board of General Appraisers classified importations of the class in question here as was done in the opinion of the learned judge of the Circuit Court in this case. The first of the importations before us was entered on October 10, 1900, the next day after the letter of the acting Secretary of October 9, 1900, and the remainder between that date and November 27th. Consequently, it is apparent that the importers purchased and imported this merchandise relying upon the practice of the Treasury Department, which we will explain, thus making probable a safe business venture; but, by the letter of October 9, 1900, supported by the ruling of the Board of General Appraisers, the United States seek, not only to confiscate under the form of duties the entire im-

portation in question, but to add thereto the loss of 200 or 300 per cent.

Extract of nutgalls does not appear to have ever been expressly named in any customs statute. Tannin or tannic acid seems to have been first assessed specifically in the act of July 29, 1846, and from that time until the present one or both have appeared in every succeeding statute. This is made clear by the valuable Congressional publication, Tariff Compilation, 1891, 51st Cong. (2d Sess.) Senate Report, 2,130. Never from 1846 until the letter of October 9, 1900, was any attempt ever made to classify extract of nutgalls as either tannin or tannic acid. The result of the various rulings will be found in Heyl's United States Import Duties (1874), a very careful compilation, in Adams' New United States Tariff (2d Ed., 1890), and in Morgan's Digest (1895), also a work which, in its various editions, has been marked by extraordinary accuracy. We cite these manuals because, on account of their differing dates, they epitomize a continuous line of decisions. None of them exhibits any suggestion of a classification of extract of nutgalls as tannin or tannic acid.

The first ruling of the Department brought to our attention as having any relation to this question, although only an indirect one, is the letter from J. F. Hartley, Assitant Secretary of the Treasury, to the collector at Boston, of February 4, 1875 (2,095), Synopsis of Decisions, Treasury Department (1875), 22, relating to extract of sumac. It appeared that the importers claimed that the article was free of duty as an "extract of dyewoods." On the ground that the small amount of woody fibre in sumac did not warrant the importers' claim, the collector was directed to assess duty at 20 per cent. ad valorem, being at that time the rate for manufactured goods not enumerated. This was stated to have been an affirmation of the ruling of the Department of November 2, 1874. This stood until the letter of H. F. French, Assistant Secretary of the Treasury, to the collector at New York, of January 18, 1877 (3,079), Synopsis of Decisions, Treasury Department (1877), 23. Therein, with reference to the extract of Persian berries, as to which the importers claimed a similitude to extracts of dyewoods, it was ruled that, in accordance with the letter of February 4, 1875, this importation, also, was liable to 20 per cent. duty as a nonenumerated article. The letter observed that, as the extract was obtained from berries, it could not be assimilated to extracts from plants and woods. Then came the letter of April 26, 1878, from H. F. French, Assistant Secretary, to the collector of customs at New York (3,553), Synopsis of Decisions, Treasury Department (1878), 472, assessing the duty on extract of nutgalls at 20 per cent. ad valorem, still on the ground that it was a manufactured article not otherwise provided for.

The next was a letter from the same Assistant Secretary, H. F. French, to the collector at New York, dated on January 11, 1879 (1,384), Synopsis of Decisions, Treasury Department (1879), 11. This acquiesced in a decision of the United States Circuit Court for the Southern District of New York, which held that extract of sumac was extensively used for tanning and dyeing purposes, and, "like extract of dyewoods, valuable for dyeing purposes on account of its mordant

properties." Also, it pointed out further details establishing a similitude between extract of sumac and "extracts and decoctions of logwood and other dyewoods." The latter were specifically provided for in the then existing tariff, but extract of sumac was not. The letter thereupon accepted the similitude claimed by the importers, and, as held by the court, to extracts and decoctions of logwood and other dyewoods. We refer to this decision merely because it bears on the next one, which is directly pertinent to this appeal.

On March 5, 1879 (3,898), Synopsis of Decisions, Treasury Department (1879), 58, Mr. French wrote again to the collector of customs at New York a letter relating expressly to extract of nutgalls and some other matters not of importance here. He referred to the letter of January 11, 1879, and reaffirmed it as bearing on the similitude between extract of sumac and extract of logwood and other dyewoods, and directs a classification of extract of nutgalls in favor of the importer, as the letter shows, "by reason of the similarity which exists between such extract and the extract of dyewoods." It should be noted that this letter is carefully reasoned out, and it shows that its conclusions were reached with due consideration. It is also to be noted that the Department in 1874 and 1875 had classified all these importations as subject to a rate of 20 per cent. ad valorem as nonenumerated articles, and that the only variation in its rulings was that, pursuant to the decision of the Circuit Court, it concluded to accept, without appeal to the Supreme Court, the similitude to extracts of dyewoods, with a duty of 10 per cent. ad valorem. Nowhere did any one maintain that there was any similitude with tannic acid or tannin, both of which, as we have shown, were specifically provided for by the existing customs acts. The letter of March 5, 1879, refers to the fact that it would be "extremely doubtful" whether the United States would be successful if it should appeal; thus admitting that this is of the class of cases to which the practical construction by the Department has very pertinent reference.

The result of these decisions was to establish a similitude between extract of nutgalls and extracts of dyewoods, which latter were, as we have said, then specifically provided for, and which still remain provided for specifically in paragraph 22 of the statute before us. Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1628]. The fact that extract of sumac has since been specifically provided for does not affect the application of these decisions, because, as we have said, the similitude established by them was to extracts of dyewoods, and extract of sumac was only indirectly referred to so far as extract of nutgalls is concerned.

On January 12, 1883 (5,529), Synopsis of Decisions, Treasury Department (1883), 23, Mr. French again, in a letter to the collector at Boston, referred to a question arising as to extract of myrobalans, and affirmed and applied the ruling of March 5, 1879, on the express basis that the article then in question was used by tanners and dyers on account of the tannic acid it contained, and that it was similar in its character, and uses to which applied, to the extracts of nutgalls, Persian berries and sumac. It appears from the letter of W. B. Howell, As-

sistant Secretary of the Treasury, to the collector at New York of March 7, 1898 (19,052), Synopsis of Decisions, Treasury Department (1898), vol. 1, p. 365, that the classification of extract of nutgalls, according to the ruling of March 5, 1879 (3,898), had been followed by the Department until that time. It further appears that the appraiser at New York at that time expressed the opinion that the extract was a nonenumerated manufactured article, and dutiable at the rate of 20 per cent. ad valorem, and that it did not assimilate to dyewood extracts. This arose under the act of 1897. The Assistant Secretary expressed no opinion on the matter, but simply directed that the extract should be classified accordingly, "leaving the importers to their remedy by protest." There had appeared in the act of 1883 (Act March 3, 1883, c. 121, 22 Stat. 488 [U. S. Comp. St. 1901, p. 2247]) a provision for "nutgalls" "advanced," which disappeared in the act of 1894 (Act Aug. 27, 1894, c. 349, 28 Stat. 509), but which now appears in paragraph 20 (30 Stat. 152 [U. S. Comp. St. 1901, p. 1628]), as we have fully explained. This made no change in the practical construction of the statute until the letter of March 7, 1898, and the decision of the Board of General Appraisers of July 11, 1900 (22,278, G. A. 4,716), Treasury Decisions, vol. 3, 504, where it was ruled that extract of nutgalls was to be classified as excrescences or nutgalls advanced, either by direction or under the similitude clause.

Meanwhile, there came the decision of the Board of General Appraisers of July 3, 1896 (17,354, G. A. 3,574), Synopsis of Decisions, Treasury Department (1896), 633, to the effect that a certain importation known as "Keller's Tannin Powder" was dutiable as tannin or tannic acid. The decision remarked that tannin and tannic acid may be regarded as synonymous terms. This was shown to be a powder produced from nutgalls, and the Board observed that it was conceded "to be something more than nutgalls simply powdered, which, as it said, would contain woody fibre and other matter insoluble either in alcohol or water." It was stated that the importation contained 85.30 per cent. tannic acid, more than three times as much as extract of nutgalls. It was also said that, being imported and sold by only one importer, it had no general commercial designation. The Board thought it was tannin, and assessable as such, and this without any reliance on the similitude clause. It seems to have been supposed that this reversed the former rulings which we have cited, but there is no indication of any such intention. The former rulings were not even referred to, and the decision of the Board of General Appraisers of June 11, 1900, made no reference to this decision of July 3, 1896, but continued to refuse to classify extract of nutgalls as tannin or tannic acid. Indeed, it went so far in this direction as to close its last opinion with the following positive phraseology:

"We deem it advisable to admonish classifying officers to exercise great care in order that this article, nutgall extract, shall not be confounded with concentrated solution of tannin or tannic acid."

Pending all these decisions, there had been no change in the statutes which could affect the present claim of the United States that the importations to which this appeal relates should be classified as tannin

or tannic acid, either by direction or similitude. The specification of "nutgalls advanced," etc., so far from strengthening the case in favor of a classification as tannic acid or tannin, only weakened it by adding to the range of possible similitudes. Thus, by an unbroken practice of 26 years, from 1874 to 1900, with customs acts always specifically providing for tannin and tannic acid, and none specially providing for extract of nutgalls, the rulings of the Department, so far as any supposed similitude between these two kinds of importations is concerned, were firmly consistent in rejecting it, and were intensified at the last by the cautionary observation which we have already quoted from the Board of General Appraisers of June 11, 1900. That they were firmly consistent against classifying as tannin or tannic acid is all that is required for this case, although they fluctuated in other directions.

This consistency of rulings continued until October 9, 1900, after, as we have said, the present importers, undoubtedly relying on the previous classifications, ordered the merchandise in question, when the Treasury addressed the letter to the collector at New York already explained, directing the assessment of 50 cents per pound. We are of the opinion, therefore, that the views which we have expressed, covering the natural and sensible reading of the statute, find reliable support in the long-continued practical construction given similar phraseology in previous acts, and to the present statutes until October, 1900; and we may go further, and add that this practical construction has been accepted by Congress, and re-enacted into law in the tariff acts of March 3, 1883 (chapter 121, 22 Stat. 488 [U. S. Comp. St. 1901, p. 2247]), October 1, 1890 (chapter 1244, 26 Stat. 567), August 27, 1894, (chapter 349, 28 Stat. 509), and July 24, 1897 (chapter 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626]).

The tariff legislation re-enacted in the Revised Statutes conceived that there was a distinction between tannic acid as such and tannin as such. We have not been advised on what theory this distinction was made. However, the conditions at the dates involved in this appeal, as said in the decision of the Board of General Appraisers with reference to Keller's Tannin Powder, which we have cited, were such that tannin and tannic acid must be regarded as synonymous terms. The only possible question on that point which can arise in this case comes from the fact that the record speaks of liquid tannin, which we have already referred to, without clearly showing what it is. Buhl, a witness called by the United States, testified that his partnership made tannic acid in the form of powder and also in liquid form. He added, what bears on another part of the case, that there is no difference between extract of nutgalls and the liquid tannic acid "except in name." But names, it is always conceded, are important under customs statutes; and, moreover, as was well said by a witness for the importers, tannin and tannic acid can be produced from extract of nutgalls, but extract of nutgalls cannot be produced from either tannin or tannic acid. Therefore, they are in no way convertible terms. Rau, a witness for the United States, whom we have already referred to, testified that "the word, 'tannin' as used in commerce is identical with the words 'tannic acid' as used in commerce." Therefore, all our discussion with regard

to the claimed classification with tannic acid applies also to the word "tannin" found in paragraph 1 of the act of 1897 (chapter 11, § 1, Schedule A, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626]).

Only one topic remains to be considered. The United States maintain that, under the circumstances, the findings of the Board of General Appraisers are, on matters of fact, not reviewable by us; and they cite a number of decisions which they say sustain their proposition that such findings are not to be disturbed where there is any evidence to sustain them. It is not necessary to discuss in detail the decisions cited. So far as we have examined them, they fail to support the United States on this proposition; and, while we are constantly administering this law, we have never been aware that we were bound by any such rule. Section 15 of the customs administrative act of 1890, (chapter 407, 26 Stat. 138 [U. S. Comp. St. 1901, p. 1933]) expressly provides that the Circuit Court shall review the questions of law and fact involved in any decision of the Board of General Appraisers with reference to which application is made to it. The rule, as now expressed by the Supreme Court, is that, where there have been decisions by two tribunals below, as to which it classifies masters in chancery and other like representatives of the courts as standing for one tribunal, the result should have especial weight on appeal; but here we have an entirely different condition—a decision of the Board of General Appraisers in favor of the United States and a decision of the Circuit Court against them.

As we have already said, we have no occasion to determine any proposition except that expressed in the final decree—that the decision of the Board of General Appraisers assessing duty at 50 per cent. on the imports in question should be reversed. Therefore, we have no occasion to determine the proper rate of duty to be assessed; and we are not bound by any incidental expressions in reference thereto which may have occurred in this opinion. Especially we guard ourselves from any implication in connection with the protests of the importers, which, as we have said, contain a number of alternative propositions as to classification, to the effect that the United States may or may not elect out of the same such classification as they deem most favorable, and thus finally avoid any determination herein which would bind the court as to any future importation.

The judgment of the Circuit Court is affirmed.

CHICAGO, M. & ST. P. RY. CO. v. RILEY.

(Circuit Court of Appeals, Seventh Circuit. April 10, 1906.)

No. 1,223.

1. MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS—APPLIANCES—ENGINEERING SCHEME.

The location of a switch stand in a railroad yard by a railroad company between two tracks, so close to one of them that the switch handle would strike the steps of passenger cars on another track, was a part of an engineering scheme in the construction of the railroad, and, in the absence

of manifest errors in construction patent to an ordinary observer, did not involve a question of negligence, to be passed on by a jury in an action for injuries to a switchman while using the switch.

[Ed. Note.—Duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

2. SAME—SAFE PLACE OF WORK—ASSUMED RISK.

A switchman in the employ of a railroad company was entitled to assume that the latter would use due care to furnish him with a reasonably safe place in which to do his work and to furnish suitable appliances in the operation of the business, and did not therefore assume the risk of the railroad company's negligence in performing such duties.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 547–555.

Assumpsit of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

3. KNOWLEDGE OF DEFECTS—FAILURE TO WARN.

Where defendant railroad company located a switch stand as a part of its prearranged plans for the construction of its yards in such a position between two track leads that under certain conditions likely to arise the handle of the switch would come in contact with the steps of passenger cars passing the stand, but such danger was neither obvious nor known to plaintiff, a switchman, who was injured by having his hand crushed between the switch handle and a car step, defendant was guilty of negligence in failing to warn plaintiff of the danger.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 315–316½.]

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

The defendant in error brings this suit to recover damages for personal injuries received on or about June 1, 1904. Riley had been in the service of the Chicago, Milwaukee & St. Paul Railway Company about nine years at different places in its Western avenue switch yards, and for two months he had been foreman or conductor in charge of the switch crew, operating, among other switches, switch known as No. 3, by means of which he alleges the accident occurred. He worked from 7 in the morning until 6 o'clock in the evening, and in the discharge of his duties threw said switch very frequently. The switch stand was of the kind known as a "ground switch." Immediately preceding the accident, the handle or arm depended from the stand on the east side thereof, and hung practically perpendicularly, resting in a slot, and hugging the switch stand. To throw the switch, defendant in error stood on the east side of the switch stand, reached down and seized the handle, raised it until it stood at a right angle to the switch stand, and then pushed it horizontally towards the north, 90 degrees. When the desired switch connection is made, the handle, released from the grasp of the operator's hand, drops again into a perpendicular position at that place, and is thereby set. The switch stand is one of a series of seven stands controlling several lead tracks. The switch stands were situated between two tracks, one known as the "rip lead track" on the south, upon which, with its connecting side tracks, defendant in error was employed as foreman of a switching crew engaged in sorting and distributing freight cars to the different side tracks, and the other or northern track known as the "passenger yard lead," over which passenger trains were moved to and from the storage yard lying to the west. The switch stands were used in connection with the rip lead track and its branches, and in the sorting of said cars, defendant in error had occasion to throw some one of said switches as often as one in each 10 minutes during the day. The distance between the passenger lead and the rip lead at switch No. 1 was 7 feet 10¾ inches; at switch 2, 7 feet 8 inches; at No. 3 (here involved), 7 feet 9 inches; and at No. 4, 8 feet 4¾ inches. At the other three switches the distance was much greater, owing to the curving of the track. The center of switch stand No. 1 was 4 feet 3 inches from the nearest rail of the passenger

lead, and 3 feet 8¾ inches from the nearest rip lead rail. The center of switch stand No. 2 was 3 feet 1 inch from the nearest rip lead rail, and 4 feet 7 inches from that of the passenger lead. The center of switch stand No. 3 was 3 feet 9 inches from the nearest rail of the passenger lead, and 4 feet from the rip lead rail. The center of switch stand No. 4 was 4 feet 7½ inches from the nearest passenger lead rail, and 3 feet 9¼ inches from the rip lead rail. The switch handle extended 21 inches from the center of the stand, and when raised was 14 inches above the base of the stand. This switching device had been in operation at that point for more than eight years, and no accident had theretofore occurred from its use. On the day in question, the switch engine under the charge of defendant in error and one car were upon the rip lead track at switch stand No. 1, about 30 or 40 yards distant from stand No. 3, moving to the west and toward switch stand No. 3. At the same time the coaches of the Elgin accommodation train were being backed westward and toward switch stand No. 3 on the passenger lead track. Defendant in error was desirous of setting the one car from the rip track onto side track 3. Standing on the east side of switch stand 3, he raised the switch handle, which was 1½ or 2 inches in diameter, until perpendicular to the switch stand, taking hold of the end of it with his thumb and forefinger so that they extended beyond the end of the handle half a finger's length or width (plaintiff uses both terms). By the time he had moved the handle 90 degrees, or until it extended directly to the north, the Elgin train had backed up, and was passing from behind him to the westward, opposite the end of the extended switch handle. In some way, as he says, his hand was caught between the handle and one of the car steps of the Elgin train. The back of his hand, his forefinger, and his second finger were crushed. The thumb was not injured. He knew that the passenger train was approaching, but did not, he says, know that it would come near enough to the handle end to strike it or touch his hand. There is no evidence tending to show that plaintiff in error or any of its servants knew from observation that the handle and steps of any of the cars would collide in passing. Some of the witnesses who had operated the switch had observed that the steps came very close to the handle, and had been careful to throw the switch handle, which was the act of a moment, while the body of the car between the steps was passing, to avoid the steps. Trains were passing on the passenger lead at short intervals all day long. There was a slight northward curve in the passenger lead at or near switch stand No. 3. Assuming this to be so, defendant in error says there would be a lateral swaying or side motion, tending to throw the end of the car nearer the switch. The car which caused the accident cannot be identified. After the accident, the yardmaster of plaintiff in error, Costello, caused three passenger coaches to be pulled to the switch stand in suit and stopped. The steps of the second car from the engine, when thus standing, would not clear the handle. The first car did clear. The cars used varied considerably in width, the latest patterns being the widest. By stipulation of the parties, four photographic views of the tracks and switch stands in the immediate vicinity of switch stand 3 were introduced, and are part of the record on review. In his declaration defendant in error plaintiff below, charged negligence on the part of the plaintiff in error in placing and maintaining the switch, and in failing to give notice to him that the same was too close to the passenger lead. No question is raised as to the pleadings. At the close of the evidence, plaintiff in error requested the court to direct a verdict for the defendant, which request the court refused, and exceptions were taken, which are now before this court, numbered 1 to 4, inclusive. Other exceptions were taken to the ruling of the trial court in giving and refusing instructions. Exceptions 14, 15, and 16 refer to the admission of certain evidence. There was a verdict and judgment for the plaintiff below, and the case is brought here for review.

Chas. B. Keeler, for plaintiff in error.
James C. McShane, for defendant in error.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

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

It is contended by plaintiff in error that the location and maintenance of switch stand No. 3 was an engineering problem, and that therefore the question as to whether plaintiff in error was negligent in that respect should not have been submitted to the jury.

It appears that the accident occurred in what are known as the "Western Avenue Yards" of the plaintiff in error; that these yards consist of a network of tracks, switches, and other appurtenances to railroad yards. It is manifest that, in order to secure the best results, there must be as great economy of space as is consistent with a reasonable regard to the convenience of business, such as the handling and storing of cars and locomotives, as well as to the reasonable safety of the employés. It cannot be said that a railroad company is required to arrange its tracks and yards mainly with a view to protect its employés. The object of railroad yards is to transact the business of the company. Employés should knowingly be subjected to no greater hazards, however, than are reasonably essential to the reasonable use of the yards. It is a matter of common knowledge that these places are very dangerous, and require the exercise of great caution on the part of those there employed. Defendant in error undertook and assumed all such hazards as were reasonably incident to his work. This doctrine is well stated in Randall v. B. & O. R. Co., 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003. The court says:

"A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another, and any one who enters the service of a railroad corporation, in any work connected with the making up or moving of trains, assumes the risk of that condition of things."

Was the location and maintenance of the switch in question an engineering problem—one which was arrived at as the result of engineering skill? In the case of Tuttle v. D., G. H. & M. Ry. Co., 122 U. S. 194, 7 Sup. Ct. 1168, 30 L. Ed. 1114, the court uses this language:

"We have carefully read the evidence presented by the bill of exceptions, and, although it appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved; much less that it should be left to the varying and uncertain opinions of juries to determine such an engineering question. For analogous cases as to the rights of a manufacturer to choose the kind of machinery he will use in his business, see Richards v. Rough, 53 Mich. 212, 18 N. W. 785; Hayden v. Smithville Man. Co., 29 Conn. 548, 558. The interest of railroad companies themselves is so strongly in favor of easy curves as a means of facilitating the movement of their cars that it may well be left to the discretion of their officers and engineers in what manner to construct them for the proper transaction of their business in yards, etc. It must be a very extraordinary case, indeed, in which their discretion in this matter should be interfered with in determining their obligations to their employés. The brakemen and others employed to work in such situations must decide for themselves whether they will encounter the hazards incidental thereto; and, if they decide to do so, they must be content to assume the risks. For the views of this court in a cognate matter, see Randall v. Baltimore & Ohio Railroad, 109 U. S. 478, 482, 3 Sup. Ct. 322, 27 L. Ed. 1003."

The same doctrine was laid down in regard to a guard rail and blocking by the Court of Appeals for the Eighth Circuit in Morris v. D., S. S. & A. Ry. Co., 108 Fed. 748, 47 C. C. A. 661, and by the same court in regard to an unblocked frog in Gilbert v. B., C. R. & N. Ry. Co., 128 Fed. 531, 63 C. C. A. 27. Also by the Supreme Court of Illinois with regard to a butting post at the end of a stub track in Railroad Co. v. Driscoll, 176 Ill. 334, 52 N. E. 921. Also by the Appellate Court of Illinois with reference to the close proximity to each other of two side tracks in Railroad Co. v. Healy, 109 Ill. App. 531, and in St. Louis, etc., Yards v. Burns, 97 Ill. App. 178. And by the same court with reference to the manner in which handholds were placed upon freight cars in Railway Co. v. Armstrong, 62 Ill. App. 233. The rule was applied to the construction of a bridge in Illick v. Railroad Co., 67 Mich. 637, 35 N. W. 708.

The Supreme Court of Pennsylvania in the case of Boyd v. Harris, 176 Pa. 484, 35 Atl. 222, discussing an injury caused by a cattle chute placed in close proximity to a side track, says:

"This case presents a question, the importance of which extends far beyond the present parties, and the judgment to be entered herein. It is whether the location of the permanent structures along a line of railroad, necessary to accommodate its business, is to be determined by the railroad company or by a petit jury. If by the former, they may be located with reference to the convenient and economical use of the railroad, and the accommodation of its traffic. If by the latter, these considerations will be lost sight of, and the proper location will be a shifting one, to be settled by each successive jury in accordance with its own notions and the peculiar features of the case on trial. One jury may hold a given location to be safe and proper; the next jury may hold it to be unsafe, and therefore improper. There are many such structures necessary to the operation of a line of railroad. Among the more important of them may be mentioned the bridges, station houses, grain elevators, warehouses, water tanks, coal chutes, cattle chutes, signal stations, and tool houses. The position of these buildings with reference to the track of the railroad, their size, the mode of construction, must be determined with reference to their purpose, and their convenient use as a necessary part of the physical plant of the railroad company. Where they shall be placed, and how they shall be arranged, are questions that belong to the railroad company, as truly as the location of the switches and sidings, or of the track itself; and the discretion of its officers is no more under the control of a petit jury in the one case than in the other."

The holding of the courts in all these cases is that they are questions which belong to the railroad companies to decide, and cannot be submitted to a jury. It may then be assumed for the purposes of this hearing that the switch stand in question was part of an engineering scheme, and therefore, in the absence of those manifest errors in construction, which would be patent to an ordinary observer, did not involve a question of negligence to be passed upon by a jury.

There is nothing in the record, so far as it sets out the physical situation at the time of the accident, which would justify the court in finding, as a matter of law, that there was such an obvious and patent adjustment of the relative positions of the switch handle and the steps of the coaches running on the passenger lead as would charge either party to the suit with constructive knowledge of their dangerous relation to each other. The switch stand had been maintained eight years without accident. It lacked 1½ inches of standing in the middle of the 7 feet

9 inch space between the rip and passenger leads. As said by the court in the case of Wood v. Louisville & Nashville Railroad Co. (C. C.) 88 Fed. 46:

"The fact that no accident of this kind had happened before upon the railroad, and that trains were constantly passing this chute without the development of this danger, brings it directly within the class of what we may call 'concealed dangers.' This danger was lurking for years without its being known. The constituent element of it was a matter of mere inches, and that, in the very nature of things, could not be detected by ordinary observation."

If, however, the location and maintenance of the two was an engineering question, it follows that plaintiff in error knew the exact position of the two with regard to each other. The railroad company built, located, and maintained the switch stand. It built and operated the passenger lead track. It constructed the cars. They were all, it insists, parts of its yard plant. The whole situation was the result of a carefully devised plan, based upon scientific engineering principles applied to the needs of the railroad. There is no claim here that anything was out of order, or that the accident was occasioned by any defect in the switch or passenger lead not embraced within the prearranged plans of construction and maintenance. We are unable to see how plaintiff in error can escape the conclusion that it knew of the fact that the switch handle and car step would come into contact under certain conditions likely to arise. Under the facts of this case, defendant in error had a right to assume that the railroad company would use due care in furnishing him a reasonably safe place in which to do his work. This rule of law is well established. In the case of Choctaw, Oklahoma & Gulf R. R. Co. v. McDade, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96, the court says:

"The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employer's negligence in performing such duties."

The case of Texas & Pacific Railway Company v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188, is very emphatically in point. The court says on page 672 of 170 U. S., page 779 of 18 Sup. Ct., 42 L. Ed. 1188:

"But no reason can be found for, and no authority exists supporting, the contention that an employé, either from his knowledge of the employer's methods of business or from a failure to use ordinary care to ascertain such methods, subjects himself to the risks of appliances being furnished which contain defects that might have been discovered by reasonable inspection. The employer, on the one hand, may rely on the fact that his employé assumes the risks usually incident to the employment. The employé, on the other, has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business, or because by ordinary care he might have known of the methods, and inferred therefrom that danger of unsafe appliances might arise. The employé is not compelled to pass judgment on the employer's methods of business, or to conclude as to their adequacy. He has a right to assume that the employer will use reasonable care to make the appliances safe, and to deal with those furnished relying on this

fact, subject, of course, to the exception which we have already stated by which, where an appliance is furnished an employé in which there exists a defect known to him or plainly observable by him, he cannot recover for an injury caused by such defective appliance if, with the knowledge above stated, he negligently continues to use it. In assuming the risks of the particular service in which he engages, the employé may legally assume that the employer, by whatever rule he elects to conduct his business, will fulfill his legal duty by making reasonable efforts to furnish appliances reasonably safe for the purposes for which they are intended; and, while this does not justify an employé in using an appliance which he knows to be defective, or relieve him from observing patent defects therein, it obviously does not compel him to know or investigate the employer's methods of business, under the penalty, if he does not do so, of taking the risk of the employer's fault in furnishing him unsafe appliances. * * * 'Those [hazards] not obvious assumed by the employé are such perils as exist after the master has used due care and precaution to guard the former against danger. And the defective condition of structures or appliances which, by the exercise of reasonable care of the master, may be obviated, and from the consequences of which he is relieved from responsibility to the servant by reason of the latter's knowledge of the situation, is such as is apparent to his observation. Kain v. Smith, 89 N. Y. 375; McGovern v. Central Vermont Railroad, 123 N. Y. 280, 25 N. E. 373.' In Missouri Pac. Railway v. Lehmberg, 75 Tex. 61, 67, 12 S. W. 838, 840, the court considered a refusal to give a requested instruction, that if there were 'any patent defects in the engine or tank, and deceased knew, or might by ordinary diligence have known, of same, and said defects caused or contributed to the injuries complained of, the jury should find for the defendant.' The court said: 'Without now considering the question whether the rule in this respect charges an employé with knowledge of defects, except with regard to such appliances or instruments as he is engaged himself in using, we think it sufficient to say that the law does not, under any circumstances, exact of him the use of diligence in ascertaining such defects, but charges him with knowledge of such only as are open to his observation. Beyond that he has the right to presume, without inquiry or investigation, that his employer has discharged his duty of furnishing him with safe and proper instruments and appliances.'"

The evidence shows that defendant in error never was told of the danger that existed in throwing the switch, that he did not know of the same, and that the same was not open and obvious. The rule rule of law which requires a servant to exercise diligence and care to discover dangers does not apply here. "Upon this question," says the court in Choctaw, O. & G. R. R. Co. v. McDade, supra, "the true test is not in the exercise of care to discover danger, but whether the defect is known or plainly observable by the employé." It being clear that defendant in error did not know and was not chargeable with knowledge of the danger involved in working the switch, it follows that plaintiff in error was guilty of negligence in not advising defendant in error thereof, thus putting him upon notice. If this be true, then it is a matter of no consequence that the trial court may have overstated the duty of plaintiff in error toward defendant in error, or, indeed, as is insisted, that an engineering question may have been erroneously submitted to the jury. The duty of plaintiff in error towards defendant in error could be discharged only by the communication to defendant in error of its knowledge of the situation, and, upon its failure so to do, a legal conclusion of negligence on the part of the railroad company arises, which entitles defendant in error to recover for the injury unless the jury finds that he has been guilty of contributory negligence, or that the danger

was so open and obvious as to charge defendant in error with constructive knowledge. These matters were properly submitted to the jury by the court under proper instructions, and the finding of the jury upon them in favor of defendant in error is borne out by the evidence.

Further discussion of the other assignments of error raised by plaintiff in error is not necessary. No prejudicial error appearing upon the record, the judgment of the lower court is affirmed.

UNITED STATES FIDELITY & GUARANTY CO. v. BOARD OF COM'RS OF WOODSON COUNTY, KAN.

No. 2,298.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1906.)

1. COURTS—CIRCUIT COURT—JURISDICTION—PROPER DISTRICT—WAIVER OF OBJECTION.

When the jurisdiction of the Circuit Court is based solely upon diversity of citizenship, the suit may be maintained in the district in which either the plaintiff or defendant resides.

The removal from state to national court or joinder of objection to district with general demurrer waives the objection that the suit is pending in the wrong district.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 811, 815.

Waiver of right as to district in which suit may be brought, see note to Memphis Sav. Bank v. Houchens, 52 C. C. A. 192.]

2. SAME—COURT MAY PERMIT AMENDED PETITION AND SUMMONS THEREON AFTER QUASHING SERVICE OF ORIGINAL SUMMONS.

After the removal of an action from a state court to a Circuit Court of the United States, and the avoidance of the service of summons by the latter court upon the motion of the defendant, that court may lawfully permit the plaintiff to file an amended petition and may order a summons to issue thereon.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 250.]

3. PRINCIPAL AND SURETY—SURETYSHIP—CONTRACT OF SHOULD RECEIVE RATIONAL INTERPRETATION.

A surety is a favorite of the law and never liable beyond the strict terms of his obligation.

But his contract is nevertheless but an agreement, and like all other agreements it must receive a just and rational interpretation.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Surety, §§ 103, 108.]

4. CONTRACTS—CONSTRUCTION—ACTUAL INTENTION PREVAILS OVER INAPT OR CARELESS EXPRESSIONS.

The actual intent and meaning of the parties when the agreement was made, deduced from the entire contract, from its subject-matter, from the purpose of its execution, and from the situation and circumstances of the parties when they made it, must prevail over the dry words of the instrument, inapt expressions, and careless recitals therein, unless that intention runs counter to the plain sense of the binding words of the agreement.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 730.]

5. SAME—INTERPRETATION WHICH EFFECTUATES PREFERRED TO THAT WHICH ANNULS A CONTRACT.

That construction which sustains and vitalizes an agreement should be preferred to that which strikes down and paralyzes it.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 734.]

6. INDEMNITY—CONTRACT—FACTS—CONCLUSION.

A county board designated a private bank, the Toronto Bank, a depository of the funds of the county on condition that an approved bond should be furnished. The cashier of the bank filed with the board, and the latter approved, a bond signed by the bank and by the fidelity company, as surety, which recited the designation and was conditioned, among other things, that the obligors would indemnify the board against any losses it should sustain by reason of the designation. But it contained recitals that the corporate body, the Toronto Bank, Toronto, Kan., was the principal, and that this corporate body executed the bond, and it contained a condition, among other things, that the obligors would indemnify the board against the defalcations of this corporate body. The board deposited the funds of the county with the private bank which it had designated, and that bank defaulted. *Held*, the bond shows that the intention of the parties was that the obligors should bind themselves thereby to indemnify the board against the defalcations of the designated bank, whether it was a private or a corporate institution, and the surety is bound to do so.

7. TRIAL—PRACTICE—DEMURRER TO PLAINTIFF'S CASE WAIVED BY SUBSEQUENT EVIDENCE FOR DEFENDANT.

A defendant waives a demurrer to the plaintiff's evidence or a motion for judgment because it establishes no cause of action by the subsequent introduction of evidence to the merits on his own behalf.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 981–983.]

8. APPEAL—TRIAL BY COURT—ISSUES OF FACT NOT REVIEWABLE AFTER GENERAL FINDING.

Where a jury is waived, and an action at law is tried by a national court which makes a finding or renders a judgment, no question of fact and no question of mixed law and fact, except those questions of law which have been reserved by exception, motion, or request, are reviewable in an appellate court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3388.]

9. TRIAL—TRIAL BY COURT—SUFFICIENCY OF EVIDENCE—HOW REVIEWED.

The question whether or not at the close of the trial there is substantial evidence sufficient to sustain a finding for either party is a question of law.

Any question of law is reviewable in a trial before a court without a jury, which is reviewable in a trial before a jury.

This question is reviewable when the trial is by the court without a jury upon a motion for judgment, a request for a declaration of law, or any other action which fairly presents this issue of law to the trial court for determination before the trial ends.

The trial ends when the finding is filed, or, if no finding is filed before, when the judgment is rendered.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 330, 339.]

(Syllabus by the Court.)

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

This writ of error was sued out to reverse a judgment of $5,000 upon a bond of the United States Fidelity & Guaranty Company, a corporation, as a surety of the Toronto Bank of Toronto in the state of Kansas. The board of county commissioners of Woodson county, Kan., the obligee in the bond, brought the action in the district court of Woodson county in the state of Kansas, and the defendant removed it to the United States Circuit Court for the District of Kansas upon the ground of the diversity of the citizenship of the parties. The fidelity company then appeared specially for that purpose, and upon its motion the service of the summons was set aside. Thereafter upon a motion of the plaintiff the court permitted it to file an amended peti-

tion and ordered that a summons should issue against the defendant thereon. This summons was duly served upon the defendant, which demurred to the amended petition on the grounds: (1) that the court had no jurisdiction of its person; (2) that it had no jurisdiction of the subject-matter of the action; and (3) that the petition did not state facts sufficient to constitute a cause of action. At the same time it made a motion to dismiss the action upon the ground that the federal court had acquired no jurisdiction by reason of the service of the summons issued by it, and the court denied this motion and overruled the demurrer. The fidelity company then answered, the case was tried by the court without a jury, and a judgment was rendered against the company.

A. J. Jones, A. M. Keene, and Edward C. Gates, for plaintiff in error.

J. C. Culver and A. F. Florence (W. R. Biddle, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

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

The jurisdiction of the court below is challenged by counsel for the fidelity company upon the sole ground that after that corporation had removed this action from the state court, and the federal court had set aside the service of the summons upon the motion of the defendant, it permitted the plaintiff to file an amended petition and ordered the issue of a summons thereon which was subsequently properly served upon the defendant. The Circuit Court had jurisdiction of the subject-matter of the action because the citizenship of the parties was diverse and the amount involved in the controversy exceeded $2,000. Where the jurisdiction of the Circuit Court is founded solely upon the fact that the parties are citizens of different states, the action may be brought in the district in which either the plaintiff or the defendant resides, and the plaintiff in this action resided in the state of Kansas. Act Aug. 13, 1888, c. 866, 25 Stat. 434 [U. S. Comp. St. 1901, p. 508]; McCormack v. Walthers, 134 U. S. 41, 43, 10 Sup. Ct. 485, 33 L. Ed. 833; Wilson v. Western Union Tel. Co. (C. C.) 34 Fed. 561. Again, by its removal of the action from the state to the federal court (Memphis Sav. Bank v. Houchens, 52 C. C. A. 176, 182, 115 Fed. 96, 102), and by its joinder in its demurrer of its objections to the jurisdiction of the court with its objection that the amended petition did not state facts sufficient to constitute a cause of action (St. Louis, etc., Ry. Co. v. McBride, 141 U. S. 127, 131, 11 Sup. Ct. 982, 35 L. Ed. 659; Southern Express Co. v. Todd, 56 Fed. 104, 106, 5 C. C. A. 432, 434), the defendant waived its objection that the action was not brought or pending in the proper district.

The removal of the case did not estop the defendant from assailing and avoiding the service of the summons; but, when that service had been quashed, the jurisdiction of the federal court over the subject-matter of the suit and its power to proceed by the issue of the usual process to acquire jurisdiction of the person of the defendant remained unimpaired. The plaintiff had the right to file a new and original petition in that court and to cause the issue of a summons thereon against the defendant as a matter of course. The receipt of the court of an

amended petition and the issue of a summons upon that petition deprived the defendant of no right or privilege which it would have had if the summons had been issued upon a second original petition, and the conclusion is unavoidable that a Circuit Court of the United States has plenary power to permit the filing of an amended petition and to issue a summons against the defendant thereon in an action which the latter has removed from the state court and in which, upon the defendant's motion, the federal court has set aside the service of the summons which had been issued in the state court. The Circuit Court lawfully acquired jurisdiction of the subject-matter of this action and of the person of the defendant, and the objection of counsel for the defendant to the power of that court to proceed in this case was properly overruled.

The next contention is that the court should have sustained the demurrer to the petition because it did not state facts sufficient to constitute a cause of action. Under the statutes of Kansas, individuals and parnerships are permitted to conduct the business of banking under certain legal restrictions and are called private banks. Gen. St. Kan. 1901, §§ 473, 452, 408, 415, 416. Five or more persons are authorized to form themselves into a banking corporation, and such corporation is empowered to carry on the business ordinarily transacted by banks. Section 407. Banking corporations are required, and private banks are forbidden, to embody the name of the state in their respective names. Sections 408, 452. The material facts set forth in the petition are these: The Toronto Bank was a private bank. On January 14, 1902, the board of county commissioners designated it by the name "Toronto Bank" to receive the funds of the county after it should furnish an approved bond. The fidelity company as surety executed, and the cashier of this bank filed, the bond in suit, and it was approved by the board on February 3, 1902. Thereafter the bank received deposits of the plaintiff's funds during the term of the bond and failed to pay them back on demand. A copy of the bond was attached to the petition. The argument of counsel for the defendant is that the undertaking of the obligors in this bond was to indemnify the plaintiff not against the defalcations of the private bank, which was designated to receive, and which did receive, the deposits of the county, but against the defalcations of the corporation the "Toronto Bank, Toronto, Kan.," which was not designated to receive, and which never secured any of the plaintiff's deposits or made any default in their payment. This proposition is founded upon these recitals in the bond:

"Know all men by these presents that the body corporate, the Toronto Bank, Toronto, in the state of Kansas, as principal" and the fidelity company as surety are bound, etc.

"Whereas, the said board of county commissioners of Woodson county, has designated the said the Toronto Bank, which is located at Toronto, Kan., as a county depository for the funds and moneys of whatever kind that shall come into the possession of the treasurer of said Woodson county by virtue of his office: Now, therefore, the condition of the above obligation is such that if the body corporate, the Toronto Bank, Toronto, Kan., shall during the period from the 30th of January, 1902, to the 30th of January, 1903, well and faithfully perform the said trust reposed in it by such designation, * * * and shall well and truly indemnify the said board of county commissioners of Woodson county from any and all loss which it may suffer or sustain during

the period aforesaid, by reason of the designation of the said the Toronto Bank, Toronto, Kan., as such depository as aforesaid, then this obligation to be void, otherwise to remain in full force and virtue. In testimony whereof, the said body corporate, the Toronto Bank, Toronto, Kan., has caused this bond to be signed by its president and cashier and the corporate seal to be affixed hereto," etc.

"[Signed] The Toronto Bank, W. P. Dickerson, Cashier."

The question is whether this bond was a contract to indemnify the plaintiff against the losses it might suffer by the default of a corporation which it had not designated to receive its deposits, or against the losses it might sustain by reason of the defalcations of the private bank which it had designated for that purpose. A surety is a favorite of the law, and he is never liable beyond the strict terms of his obligation. But his contract is, after all, nothing but an agreement, and, like all other agreements, it must have a just and rational interpretation. The purpose of every written contract is to express the intention of the parties. The object of all construction of agreements is to ascertain that intention to the end that it may be enforced. The court should, as far as possible, put itself in the place of the parties when their minds met upon the terms of the agreement, and then from a consideration of the writing itself, its purpose, and the circumstances which conditioned its making endeavor to ascertain what they intended to agree to do—upon what sense or meaning of the terms they used their minds actually met. Accumulator Co. v. Dubuque St. Ry. Co., 12 C. C. A. 37, 41, 42, 64 Fed. 70, 74; City of Salt Lake v. Smith, 104 Fed. 457, 462, 43 C. C. A. 637, 643; Fitzgerald v. First National Bank, 52 C. C. A. 276, 284, 114 Fed. 474, 482. That intention must be deduced not from specific provisions or fragmentary parts of the instrument, but from the entire agreement, because the intent is not evidenced by any part or provision of it, nor by the instrument without any part or provision, but by every part and term so construed as to be consistent with every other part and with the entire contract. Jacobs v. Spalding, 71 Wis. 177, 189, 36 N. W. 608; Boardman v. Reed, 6 Pet. 328, 8 L. Ed. 415; Canal Co. v. Hill, 15 Wall. 94, 21 L. Ed. 64; O'Brien v. Miller, 168 U. S. 287, 297, 18 Sup. Ct. 140, 42 L. Ed. 469; Pressed Steel Car Co. v. Eastern Ry. Co., 57 C. C. A. 635, 637, 121 Fed. 609, 611; Uinta Tunnel, etc., Co. v. Ajax Gold Min. Co. (C. C. A.) 141 Fed. 563. The actual intent of the parties when thus ascertained must prevail over the dry words, inapt expressions, and careless recitations in the contract, unless that intention is directly contrary to the plain sense of the binding words of the agreement. Pressed Steel Car Co. v. Eastern Ry. Co., 57 C. C. A. 635, 637, 121 Fed. 609, 611; Uinta Tunnel, etc., Co., v. Ajax Gold Min. Co. (C. C. A.) 141 Fed. 563; Wilson v. Bevan, 62 Eng. Com. Law, 684; Lewis v. Tipton, 10 Ohio St. 88, 90, 75 Am. Dec. 498. Let us apply these familiar rules of interpretation to the bond in suit. On the one hand, this instrument recites that the body corporate, the Toronto Bank, Toronto, Kan., as principal, is bound. It contains the condition, among other things, that, if that body corporate shall make default, the surety will pay, and it recites that the body corporate executes the bond. On the other hand, before the bond was executed the plaintiff had designat-

ed the Toronto Bank, a private bank, as the county depository. This designation distinguished this depository from any banking corporation by the fact that the name of the state was not a part of the name of the bank which was designated. The bond recited that this designation had been made and distinguished the depository thus designated from a corporate bank in the same way. This bond was conditioned, among other things, that the obligors would indemnify the board against any loss it should sustain by reason of that designation. And while the bond recited that it was executed by the corporation as principal, the signature of the principal to the bond was that of the private bank, and not that of a corporation. Moreover, the purpose of the execution of this bond was not to guaranty the corporate or the private character of the Toronto Bank, but to indemnify the plaintiff against losses that might result from its selection of that bank as a depository of the county funds.

The situation of these parties at the time this contract was made, the previous designation of the private bank as the depository of the funds of the county, the object of the execution and acceptance of the bond, the signature to it of the private bank as the principal, and a thoughtful study of all the terms and conditions of the contract itself, converge with persuasive force to forbid the conclusion that the court below was in error when it found that the real intention of the parties expressed by this contract was that the obligors should bind themselves thereby to indemnify the plaintiff against the defalcations of the designated depository, regardless of the question whether that depository was a private or a corporate institution.

There are other considerations which impel to the same conclusion. Sureties are estopped from denying the truth of recitals in the bonds they execute. Brandt, Suretyship and Guaranty (3d Ed.) § 816. The defendant is therefore estopped from denying the truth of the recital in its bond that the private bank and not the corporation was selected by the plaintiff as well as by the condition contained in the bond that the surety would indemnify the plaintiff against losses which resulted from that designation.

Finally, the interpretation for which counsel for the defendant contend would render the bond ineffective and useless at the time it was executed by the obligors and accepted by the plaintiff and ever since. The board never designated the corporation, the Toronto Bank, Toronto, Kan., as a depository of its funds, and indemnity against losses resulting from such a designation was neither useful nor desired. That construction which sustains and vitalizes an agreement should be preferred to that which strikes down and paralyzes it. "Such a construction should be placed upon the contract as will prevent its failure, and will give effect to the obligation of each of the parties appearing upon it at the moment the contract itself takes effect—'ut res magis valeat quam pereat.'" Greenough v. Smead, 3 Ohio St. 415, 421; Lewis v. Tipton, 10 Ohio St. 88, 75 Am. Dec. 498; Archibald v. Thomas, 3 Cow. (N. Y.) 284, 290; Phipps v. McFarlane, 3 Minn. 109 (Gil. 61), 74 Am. Dec. 743. The result is that this bond shows that the intention of the parties was that the obligors should bind themselves thereby to

indemnify the plaintiff against the defalcations of the bank designated by the board of county commissioners, whether that bank was a private or a corporate institution. The statements in the bond of the corporate character of the principal were but careless recitals and inapt expressions inconsistent with the intention of the parties, and the latter must prevail over these dry words of the instrument. Kauffman v. Raeder, 47 C. C. A. 278, 282, 108 Fed. 171, 175; Tillitt v. Mann, 43 C. C. A. 617, 619, 104 Fed. 421, 423; Accumulator Co. v. Dubuque St. Ry. Co., 12 C. C. A. 37, 43, 64 Fed. 70, 76; Rockefeller v. Merritt, 22 C. C. A. 608, 614, 76 Fed. 909, 915. The demurrer to the petition was properly overruled.

It is specified as error that the court overruled the defendant's demurrer to the evidence at the close of the plaintiff's case in chief. But the fidelity company subsequently introduced evidence upon the merits of the issues in this controversy, and a defendant waives his demurrer to the plaintiff's evidence by the subsequent introduction of evidence to the merits in his own behalf. Barnard v. Randle, 49 C. C. A. 177, 178, 110 Fed. 906, 907; Insurance Co. v. Frederick, 58 Fed. 144, 147, 148, 7 C. C. A. 122, 126; Insurance Co. v. Heiserman, 67 Fed. 947, 15 C. C. A. 95; Jefferson v. Burhans, 85 Fed. 924, 927, 29 C. C. A. 487, 490; Railroad Co. v. Mares, 123 U. S. 710, 713, 8 Sup. Ct. 321, 31 L. Ed. 296; Insurance Co. v. Crandal, 120 U. S. 527, 530, 7 Sup. Ct. 685, 30 L. Ed. 740.

Counsel for the defendant have assigned as error the rendition of the judgment against it upon the grounds: (1) That the amended petition stated no cause of action; (2) that the judgment was contrary to the evidence, and was not supported thereby; and (3) that the judgment should have been in favor of the defendant. The first reason for this specification of error has been considered and overruled. The second and third grounds present the single question whether or not the judgment is supported by the weight of the evidence. They do not assert that there was no substantial evidence to sustain the judgment, but that the evidence does not support it. In actions at law this is a court for the correction of the errors of law committed by the trial court and for the correction of these errors only. The acts of Congress provide that "there shall be no reversal in the Supreme Court upon a writ of error * * * for any error in fact" (Rev. St. § 1011 [U. S. Comp. St. 1901, p. 715]); and this provision of the statute governs the Circuit Court of Appeals (Hall v. Houghton, etc., Co., 60 Fed. 350, 8 C. C. A. 661); that issues of fact in civil cases may be tried by the court without a jury; that "the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury" (Rev. St. § 649 [U. S. Comp. St. 1901, p. 525]); and that, "when an issue of fact in any civil cause in a Circuit Court is tried and determined by the court without the intervention of a jury, * * * the rulings of the court in the progress of the trial of the cause, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal" (Rev. St. § 700 [U. S. Comp. St. 1901, p. 570]).

The verdict of a jury concludes all issues of fact and of mixed law and fact save those questions of law which have been reserved for review by demurrer, motion, request, or exception. A finding of the court without a jury has the same effect, with the single exception that when the finding is special the question whether the facts found sustain the judgment is open to review. In the trial of an action by the court without a jury the rulings of the court in the progress of the trial, and those only, are open to review. The true test for determining whether or not a question or ruling in a trial by the court without a a jury is reviewable is the answer to the question whether or not it would have been open to review if the trial had been to a jury.

The question whether or not at the close of a trial there is substantial evidence to sustain a finding in favor of a party to the action is a question of law which arises in the progress of the trial. In a trial to a jury it is reviewable on an exception to a ruling upon a request for a peremptory instruction. In a trial by the court without a jury it is reviewable upon a motion for a judgment, a request for a declaration of law, or any other action in the trial court which fairly presents this issue of law to that court for determination before the trial ends. The trial ends only when the finding is filed, or, if no finding is filed before, when the judgment is rendered. Clement v. Insurance Co., 7 Blatchf. 51, 53, 54, 58, Fed. Cas. No. 2,882; Merchantile Trust Co. v. Wood, 60 Fed. 346, 348, 8 C. C. A. 658, 659; St. Louis v. Western Union Tel. Co., 148 U. S. 92, 96, 13 Sup. Ct. 485, 37 L. Ed. 380; Ward v. Joslin, 186 U. S. 142, 147, 22 Sup. Ct. 807, 46 L. Ed. 1093; The Francis Wright, 105 U. S. 381, 387, 26 L. Ed. 1100; The City of New York, 147 U. S. 72, 76, 77, 13 Sup. Ct. 211, 37 L. Ed. 84; Laing v. Rigney, 160 U. S. 531, 540, 16 Sup. Ct. 366, 40 L. Ed. 525; Martinton v. Fairbanks, 112 U. S. 670, 672, 673, 5 Sup. Ct. 321, 28 L. Ed. 862; Dooley v. Pease, 180 U. S. 126, 131, 21 Sup. Ct. 329, 45 L. Ed. 457; Insurance Co. v. Folsom, 18 Wall. 237, 252, 21 L. Ed. 827; Hathaway v. Cambridge National Bank, 134 U. S. 494, 498, 10 Sup. Ct. 608, 33 L. Ed. 1004; Runkle v. Burnham, 153 U. S. 216, 225, 14 Sup. Ct. 837, 38 L. Ed. 694; Case Mfg. Co. v. Soxman, 138 U. S. 431, 438, 11 Sup. Ct. 360, 34 L. Ed. 1019. No motion, request, or act of this nature is recorded in the case in hand, so that the question of the sufficiency of the evidence to sustain the finding and judgment is not open for consideration in this court. Martinton v. Fairbanks, 112 U. S. 670, 672, 673, 5 Sup. Ct. 321, 28 L. Ed. 862; Dooley v. Pease, 180 U. S. 126, 131, 21 Sup. Ct. 329, 45 L. Ed. 457; Wilson v. Merchants' Loan & Trust Co., 183 U. S. 121, 127, 22 Sup. Ct. 55, 46 L. Ed. 113; Hoge v. Magnes, 85 Fed. 355, 358, 29 C. C. A. 564, 567; Barnard v. Randle, 49 C. C. A. 177, 180, 110 Fed. 906, 909; York v. Washburn, 129 Fed. 564, 566, 64 C. C. A. 132, 134.

The finding of the court was general and was in favor of the defendant. Like a verdict of a jury it concludes all issues of fact and all mixed questions of fact and law save the questions of law reserved by demurrer, motion, request, or exception. No questions of law were reserved which have not been considered and decided.

The judgment below must therefore be affirmed, and it is so ordered.

ADAMS, Circuit Judge (concurring). I concur in the conclusion reached in the foregoing opinion, but am not prepared to assent to the rule announced that "the true test for determining whether or not a question or ruling in a trial by the court without a jury is reviewable is the answer to the question whether or not it would have been open to review if the trial had been to a jury." The issues in this case require no expression of opinion as to the rule, and for that reason I do not now approve or disapprove of it.

LEVI v. MATHEWS.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1906.)

No. 644.

1. ACTION—EQUITABLE DEFENSE IN ACTION AT LAW—RULE OF FEDERAL COURTS.
In an action at law in a federal court to recover money due on a contract, an allegation of fraud in procuring the contract, made in the answer, states an equitable defense, which the court is without jurisdiction to entertain, nor can such jurisdiction be acquired by waiver or consent of parties.

2. VENDOR AND PURCHASER—TITLE OF VENDOR—FAILURE TO RECORD DEEDS.
Under the statutes of North Carolina, title to realty passes by the delivery of a sufficient deed, and the failure to record such deed does not render the grantee's title unmerchantable nor affect its validity, except as against subsequent purchasers from or creditors of the grantor.
[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 246–248.]

3. WRIT OF ERROR—REVIEW—INSTRUCTIONS.
An assignment of error with respect to the charge of the trial court will not be considered by the appellate court unless the objection made was covered by an exception duly taken at the trial.

4. ADVERSE POSSESSION—TITLE ACQUIRED—EFFECT OF ACCEPTANCE OF DEED.
A title to land acquired by adverse possession is not vitiated by the subsequent acceptance by the person so in possession of a deed thereto from a third person, nor is he estopped by such acceptance to deny that the title was in such third person, but he may rely upon either or both sources of title.
[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 262, 263.]

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

John A. McRae (C. D. Bennett, on the brief), for plaintiff in error.
Charles W. Tillett (Frank I. Osborne and S. Gallert, on the brief), for defendant in error.

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

PURNELL, District Judge. Julius Mathews, the defendant in error, plaintiff below, instituted an action at law against Meyer Levi, the plaintiff in error, in the Circuit Court of the United States for the Western District of North Carolina, at Charlotte, on the 20th of May, 1901, for the recovery of the purchase money for land sold by Julius

Mathews, defendant in error, to Meyer Levi, plaintiff in error, under a contract. On March 18, 1901, Julius Mathews, the defendant in error, tendered to the plaintiff in error here a deed for the greater part of the lands contracted to be conveyed. Plaintiff in error refused to accept deed and pay the purchase money for the reasons stated in his answer. The answer admitted all the allegations of the complaint, except as set forth in paragraphs 4, 5, 7, and 8 thereof, as follows:

"(4) The defendant admits that the plaintiff, by his attorney, tendered him a deed about the date mentioned, purporting to convey the lands therein described: but defendant avers and alleges that he is informed and believes that plaintiff's title to said lands is imperfect and invalid, and therefore denies that plaintiff tendered him a perfect deed to said lands, or to any part or parcel thereof. Defendant, on information and belief, denies that plaintiff complied with his contract by tendering a good and lawful deed to said lands, and avers that he was not bound in law to accept the imperfect and invalid deed offered by the plaintiff.

"(5) Defendant admits that part of paragraph five of the complaint which refers to the number of acres contracted for and the purchase is correctly stated. Defendant also admits that demand was made for the purchase money and notes for deferred payments at the time the aforesaid purported deed was tendered, but denies that he wrongfully failed and refused to pay over the purchase money and make and execute notes and deed of trust. The reasons for defendant's refusal to pay the purchase money and execute deed of trust and notes will more fully appear in his further answer below."

"(7) Paragraph seven of the complaint is denied. Plaintiff is unable to perform his contract.

"(8) Paragraph eight of the complaint is denied."

Paragraphs denied are:

"(7) That plaintiff is now and has been at all times ready, able, and willing to comply in all respects with the said contract with the defendant, and hereby offers to execute title to the defendant in accordance with the terms of the said contract whenever the defendant complies with his part of said contract.

"(8) That plaintiff is informed and believes that the defendant had unjustly repudiated his said contract, and has refused to comply with the same or any part thereof; that by reason of the failure and refusal of the defendant, as aforesaid, and by reason of the other facts hereinbefore set forth, the plaintiff has been damaged in the sum of $3,186.25, with interest thereon from the 18th day of March, 1901, and the plaintiff is entitled to recover of the said defendant said purchase money which defendant contracted to pay the plaintiff, to wit, the sum of $3,186.25, with interest thereon from the 18th day of March, 1901."

The "further defense," referred to in the fifth paragraph of the answer, was admittedly an equitable defense, setting up fraud and deception on the part of the defendant in error in obtaining the contract of purchase. This counsel contends may be done, and cites state decisions as authority. To that part of the answer setting up an equitable defense defendant in error filed a replication denying the allegations of fact, and this answer counsel contends gave jurisdiction. On the trial the "further answer" of plaintiff in error setting up the equitable defense was stricken out by the court after the pleadings were read, and the court refused to entertain or submit issues raised by the said "further defense" and replication thereto. This action on the part of the court is the basis of the first two exceptions and assignments of error. This action was cognizable in a court of law. It was for the recovery of an amount claimed to be due on a contract. Of this a court of law alone had jurisdiction.

There was no error in striking out the "further defense," the same being cognizable in equity. That court is by statute always open, and defendant below was not without remedy therein when properly sought. Equity has always jurisdiction of fraud, misrepresentation, and concealment, and this does not depend on discovery. Where an agreement against which a complainant asks relief is perpetual in its nature, and the keeping of it on foot is a fraud against the party complaining, so that the only effectual relief against it is to have it annulled, the case is one for equity, not for law. Jones v. Bolles, 9 Wall. 364, 19 L. Ed. 734; Craig v. Leitensdorfer, 123 U. S. 210, 8 Sup. Ct. 85, 31 L. Ed. 114; Tyler v. Savage, 143 U. S. 95, 12 Sup. Ct. 340, 36 L. Ed. 82; Buzard v. Houston, 119 U. S. 352, 7 Sup. Ct. 249, 30 L. Ed. 451. The only fraud permissible to be proved in law is fraud touching the execution of the instrument. George v. Tate, 102 U. S. 564, 26 L. Ed. 232. This action was instituted at law for the purpose of recovering money due on contract. A court of law alone had jurisdiction. Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451; Loud v. Land Co., 153 U. S. 564, 14 Sup. Ct. 928, 38 L. Ed. 822. The distinction between legal and equitable defenses, whatever may be the rule in other jurisdictions, in the courts of the United States are always recognized and jealously guarded. They cannot be mixed. Equitable suits must be on the equity side of the docket, and actions at law on the law side. No principle is better settled in these courts. Burnes v. Scott, 117 U. S. 582, 6 Sup. Ct. 865, 29 L. Ed. 991. Nor can this distinction or jurisdiction be waived by consent of parties, but can and should be enforced by the court of its own motion. It is statutory. Thompson v. R. R., 73 U. S. 134, 18 L. Ed. 765; Lewis v. Cocks, 90 U. S. 466, 23 L. Ed. 70; Oelrichs v. Spain, 82 U. S. 211, 21 L. Ed. 43; Lindsay v. Bank, 156 U. S. 485, 15 Sup. Ct. 472, 39 L. Ed. 505. The claim of defendant below, plaintiff in error here, therefore, that the filing of the replication traversing the allegations of the complaint gave the court jurisdiction, and made it the duty of the trial judge to submit the issues thus raised and tendered, is without force. Consent cannot confer jurisdiction. The court of law was without jurisdiction of an equitable defense, and nothing the parties could do could endow it with jurisdiction. This is fundamental as to United States courts. Whatever the practice may be in state courts, in many of which the Code practice obtains, the distinction between actions at law and suits in equity, together with legal and equitable defenses, being abolished, the same court administering both law and equity, such practice does not obtain in the courts of the United States. Exceptions 1 and 2 are therefore overruled.

The equitable defense set up being thus eliminated, the execution of the contract and its breach admitted, the question then reverted to the issues as to the title of defendant in error as raised by the fourth, fifth, seventh, and eighth allegations of the answer, before recited. If plaintiff below, defendant in error here, was vested with a good legal title, and tendered a good and sufficient deed, was able and did perform his part of the contract, the breach being admitted, then he was entitled to recover at law.

The third exception is thus stated and allowed:

"(3) The court erred in the general charge severally in the following instances in using the words: 'Therefore, gentlemen, as to the first tract of four acres, the court charges you to find upon this evidence, which is incontrovertible, that the plaintiff tendered the defendant a sufficient deed under this contract.'"

In his assignment of errors on this exception, plaintiff in error says the grounds of this error is as follows:

"The deed conveying this land from Ervin to Smith, which was one of the mesne conveyances and links in the title introduced by defendant in error, was not registered until 1904, and the deed from Smith to defendant in error conveying this same land was not recorded until the 22d day of March, 1901, and that this was subsequent to the tender of title to plaintiff in error by defendant in error."

The court had previously charged the jury as to this link in the chain of title that if the deeds referred to were executed and delivered at the time they purported to have been executed the title vested in the grantee. There seems to be no foundation in law for this exception. Title passes by the execution and delivery of the deed. There are statutes regarding the registration of deeds in North Carolina, but the provisions of those statutes do not seem to apply. There had been no other deeds by the grantors, and it was sufficient to perfect title by the registration of this deed at any time. Hobson v. Buchanan, 96 N. C. 444, 2 S. E. 180, and cases cited. The failure to register a deed under the laws of the state does not void it except as to subsequent purchasers and creditors. Laws N. C. 1885, p. 233, c. 147; Utley v. Railroad Co., 119 N. C. 720, 25 S. E. 1021. As to these, deeds are put on the same plane with mortgages.

The fourth exception as stated and allowed is that:

"The court erred in its general charge to the jury by using the following language in reference to the second tract: 'I charge you that if from the evidence you are satisfied that this interlineation—this addition—was in that deed at the time of its execution by Ervin and his wife, and was there at the time he recorded it upon the books in Rutherford county, that although it is in a different handwriting from the body of the deed, yet that in law would make it a sufficient and perfect deed; and in passing upon that question, gentlemen, you may consider the fact that the maker of the deed was himself the register who made the entry upon the book; and the court charges you further, gentlemen, that the fact that the deed is presented here as having been executed under the forms of law with that interlineation upon its face, and it appearing further that that interlineation is upon the record book of Rutherford county, the law presumes it is properly there, and it will be your duty to find that it is properly there and a part of the deed, unless there is evidence outweighing that presumption which would rebut it, and the court charges you such evidence has not been produced in this trial. Therefore, the court charges you, as a matter of law, to find that that presumption is still existing unrebutted, and that the deed with the interlineation was entered upon the record of Rutherford county at the date evidenced by the certificate.'"

This is the statement of plaintiff's assignment upon the grounds and evidence as follows:

"The question of this interlineation and the identity and the sufficiency of the description of the land in this deed is a question for the jury, and not entirely a question of law for the court."

The record does not disclose any evidence introduced by plaintiff in error to show the interlineation was not in this deed at the time it was

executed, nor was any such issue raised by the pleadings, but the evidence did tend to show such interlineation was in the deed at the time it was probated and recorded.

Counsel argues other questions, but those questions do not properly arise on the exception. There is no merit either in the exception or the assignment of error as presented by the record. It is the exception as taken under the rules and allowed by the trial judge which this court considers, not the assignment of counsel, not based on any exception so taken and allowed.

Counsel argue the question of identity and sufficiency of description, but there is no reference to either in the exception. This is not an uncommon error where there is a different method of taking an appeal. Where a case on appeal is frequently made up by consent of counsel, sometimes presenting to the appellate court a case which is novel to the trial judge, or a statement of a case on appeal is made by the court which is equally novel to counsel. Here the rules are fixed, and must be complied with. Rule 11 (90 Fed. cxlvi, 31 C. C. A. cxlvi): "Error not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned." The only error assigned in the exception and allowed by the court was as to the interlineation, and as to this there was no error.

The fifth exception was abandoned in this court, not pressed.

6. The court erred in using the following words in the general charge:

"Now, gentlemen, the last tract about which there is contention is tract No. 8. The defendant says that plaintiff's title to that tract is not good for the reason that plaintiff in the course of his testimony offered a certified copy of a paper purporting to be a deed made by a firm in Rutherfordton known as Simpson, Miller & Co., in the year 1877, to Frank Walton, anterior to the deed. The plaintiff also introduced as a link in his chain of title a deed from Morris to Robert Simpson, James A. Miller, and C. E. Guthrie, who are shown to have composed the firm of Simpson, Miller & Co. The paper purporting to be a deed from Simpson, Miller & Co. is signed in the firm name with a seal, and therefore defendant says that it is not a deed, and for this reason he insists that there was no conveyance of the title to Simpson, Miller & Co. derived from Morris to Frank Walton. On the other hand, the plaintiff has shown that Walton went into possession of this tract of land in the year 1842, and that he held it, claiming it adversely, until the year 1884, when he executed a deed for it to McIntyre; McIntyre being the source from which the plaintiff derived his title. Another contention here is that, although this evidence may satisfy you that Walton was in this possession from 1842 to 1884, yet his acceptance of this paper from Simpson, Miller & Co. is an admission of ownership on their part, or interest in the land on their part, which would rebut the presumption which arises in law by reason of the uninterrupted continuance of this adverse possession, and upon that, gentlemen of the jury, the court submits this issue: 'Did Frank Walton enter into actual possession of tract No. 8, and did he remain in possession of same, claiming it adversely until 1884, when he conveyed to McIntyre?' Now, there is no dispute as to the testimony of Harris that Walton was in possession in 1842, and that his possession continued until 1884, but, as stated by the court, the defendant insists that by the acceptance of this paper from Simpson, Miller & Co. in 1877, he admitted, although he was in possession, that he was not the sole or exclusive owner. Upon that proposition the court charges you that the continuous adverse possession of Walton from 1842 to 1873, when the Morris deed was made, being more than 30 years, presumes a grant from the state which would perfect the title; that his continuance in the actual possession after that from 1873 to

1884 confirms and strengthens this presumption and title, unless in law the acceptance of this paper from Simpson, Miller & Co. had the effect of weakening or destroying that presumption, and as to that paper the court charges you that it is immaterial, and does not affect the title derived to Walton from this continuous adverse possession, and you will find this issue in the affirmative, and upon it the court will hold the law to be that in 1884, when Frank Walton conveyed to McIntyre by deed, he had a perfect title, which has not been interrupted since; the title of plaintiff being directly traced by a deed and other competent evidence of title to Frank Walton."

In response to the issue submitted, the jury found that Frank Walton had been in adverse possession of the tract of land (No. 8) from 1842 to 1884—42 years. Thirty years' adverse possession or 21 years under colorable title would confer legal title even against the state or one claiming under a grant from the state. Code 1883, §§ 139, 140; Code Civ. Proc. §§ 18, 19; Rev. Code, c. 65, § 2. The argument that the acceptance of the deed from Simpson, Miller & Co. vitiated this title is without merit. Nor is there any merit in the question that this deed could act as an estoppel on Walton to deny the title of Simpson, Miller & Co. The contrary was held by the Supreme Court of North Carolina (and as to rules of property in North Carolina the decisions of that court are conclusive) in a recent case (Smith v. Ingram, 130 N. C. 100, 40 S. E. 984, 61 L. R. A. 878, and Drake v. Howell, 133 N. C. 162, 45 S. E. 539), wherein the court says that an estoppel by deed cannot arise until the instrument which it is claimed creates the estoppel has become effective as a deed. The adverse possession of Walton had ripened into a good title at the time the deed from the Rutherford firm was executed. We are not informed why this deed was accepted. Suppose it was to stop threatened litigation, and to prevent this, at best expensive, Walton bought off the claimant, although his title was good, and he knew he had a good defense to any action claimant might commence, to hold with plaintiff in error would be to say such action on his part was a surrender of the title he had acquired by long years of adverse possession, under colorable title, good against the state. Such is not law, or reason, which is the life of the law. A grantee is not estopped to deny a grantor's title when such grantee also claims title from other sources, to set up an adverse superior title. Robertson v. Pickrell, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049. If the deed was defective, as argued by counsel for plaintiff in error, then, of course, it could not act as an estoppel. We are putting it in the strongest light for plaintiff in error.

There is no merit in either of the exceptions. The judgment must therefore be affirmed. Affirmed.

CHICAGO & A. RY. CO. v. COX.

(Circuit Court of Appeals, Eighth Circuit. April 6, 1906.)

No. 2,301.

1. RAILROADS—ACTION AGAINST FOR NEGLIGENCE—PLEADING.

A petition in an action against a railroad company, based on Rev. St. Mo. 1899, § 2864, which makes such companies liable for damages caused by the negligence of "any officer, agent, servant, or employé * * * whilst running, conducting or managing any locomotive, cars,"

etc., need not allege in terms that the negligence was that of an officer, agent, or servant, but is sufficient where it alleges that the negligence was that of the company in running a locomotive or cars.

2. SAME—EVIDENCE—DECLARATION OF AGENT.
In an action against a railroad company to recover for the death of a person who was struck and killed by an engine while at work at a station at night unloading bedding into stock cars from a wagon, a statement made by defendant's station agent, in response to an inquiry by a fellow workman with deceased, that there was no train coming, and that they could go ahead and bed the cars, was admissible as a declaration made in the course of his duty as defendant's agent, both as evidence of a license or permission to go upon the tracks to do the work, and as bearing upon the issue of contributory negligence, and was sufficient to require the submission of such issue to the jury.

3. TRIAL—INSTRUCTIONS—REFUSAL OF REQUEST.
Where the petition in an action against a railroad company for the negligent killing of plaintiff's minor son alleged two statutory grounds of recovery, and evidence was introduced in support of both, but it was conceded that as to one no right of recovery was proved, it was error tending to mislead the jury to refuse an instruction definitely withdrawing such issue and the evidence offered in support thereof from their consideration.

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

W. C. Scarritt (J. K. Griffith and Elliott H. Jones, on the brief), for plaintiff in error.

John T. Harding (R. B. Ruff and W. C. Todd, on the brief), for defendant in error.

Before SANBORN, HOOK and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This action was instituted by defendant in error to recover damages occasioned by the death of her minor son, Syburt Cox. She alleges in her amended petition that the railway company, the plaintiff in error, negligently operated one of its engines and tenders, and that as a result thereof her son, while working for an outside contractor, but with the license and permission of defendant, in bedding live stock cars standing on defendant's tracks at Marshall, Mo., was struck and killed. Defendant, by its answer, denies the alleged negligence, and pleads contributory negligence by decedent. Plaintiff recovered a judgment in the Circuit Court for $5,000. Defendant by this writ of error seeks to reverse the judgment, because, as appears by the assignment of errors, the trial court erred: (1) in holding that the amended petition stated a cause of action; (2) in refusing to peremptorily instruct the jury in favor of the defendant: (3) in admitting certain testimony over defendant's objections; and (4) in refusing to give instructions to the jury requested by defendant, and also in some other respects. These will be briefly noticed.

It is contended that plaintiff's petition is founded upon either sections 2864 or 2865 of the Revised Statutes of Missouri of 1899. The first-mentioned section subjects defendant, as the owner of a railroad, to liability for the negligence of its officers, agents, servants, or employés while running, conducting, or managing any locomotive, etc.,

in the fixed sum of $5,000; the second subjects it to liability for any wrongful act, neglect, or default in a sum not exceeding $5,000. The petition, when carefully examined, discloses averments apparently asserting a right of recovery under either of those sections. It is averred with much particularity that defendant in the nighttime negligently ran its engine and tender at an excessive rate of speed, without either a warning whistle, bell, or light, against the wagon from which decedent, with the knowledge and permission of defendant, was pitching straw or hay into freight cars, and thereby caused his death. It is also alleged that it was the duty of defendant to provide and maintain suitable, convenient, and safe means of access to cars furnished by it for transportation of live stock, so that they could be bedded and prepared for the reception of live stock. A breach of this duty is then pleaded, and finally, by way of summing up the actionable conduct of defendant, plaintiff avers that the excessive speed, failure to ring a bell, sound a whistle, or carry a light, or otherwise warn decedent of his danger, and "failure of defendant to construct and maintain a convenient, suitable, and safe means of access to said cars, so that the same could be used in bedding the same, were all and singular reckless, careless, and negligently done by the said defendant, and in utter disregard of the safety and life of the said Syburt Cox." Then, after pleading a certain ordinance of the city of Marshall limiting the rate of speed for engines and cars in the limits of that city to six miles per hour, the petition closes thus:

"Plaintiff further states that by reason of the said recklessness, carelessness, and negligence of the defendant herein, the said Syburt Cox was killed, and this plaintiff injured and damaged in the sum of five thousand dollars ($5,000.00)," for which she prays judgment.

Much evidence was offered and received at the trial tending to show the impossibility of unloading hay or straw into the stock cars from the north side, where there were no tracks, and the consequent necessity of driving along the passing track on the south side of the line of stock cars, and stopping on the track at the side doors of each car for that purpose. By motion for an instructed verdict at the close of all the evidence defendant challenged plaintiff's right to recover on the pleadings and evidence adduced. Its counsel now urge that the petition was insufficient (1) because it contained no averments that the actionable negligence was that of "any officer, agent, servant or employé of defendant whilst running, conducting or managing any locomotive, cars," etc., within the letter of section 2864, supra, and (2) because the petition and proof show that there was no liability against defendant for failure to use ordinary care in providing a reasonably safe place for employés other than its own to work in.

The petition was not obnoxious to the first objection. If it charged only that the defendant itself committed the negligent acts complained of, without averring that it acted through its officers, agents, servants, or employés in running or conducting the engine, it would be sufficient, certainly, as against a general demurrer. A corporation can act only through its officers, agents, servants, or employés, and a railroad company cannot run an engine except by an officer, agent, servant, or em-

ployé. If it was negligent in the operation of its engines or cars, some of its officers, agents, or employés were necessarily the persons guilty of the negligence. But in view of the averments of the petition the objection is not in fact well taken. It charges specifically enough that the defendant was on the night in question acting through its officers, agents, and employés, and that the actionable negligence was that of its officers, agents, and employés. It is not required even in ideal pleading to repeat an averment once sufficiently and clearly made.

It is conceded by plaintiff's counsel that the petition was obnoxious to the second objection; but, notwithstanding that concession, the case could not have been taken from the jury, as the other ground of negligence and proof tending to support it remained.

It is next contended that the trial court erred in admitting evidence of witness Brown concerning declarations made by Mr. Cornette, the station agent of the defendant at Marshall, Mo., to Jake Williams, a colored man who was working with decedent, as the two last-named persons drove past the depot on the night in question on their way to bed down the cars. It appears that the company had for many years maintained stock pens at Marshall, and permitted shippers to bed cars there before cattle were put in them, substantially as done on the occasion in question. It appears further that decedent and Jake Williams, on the occasion in question, entered upon defendant's right of way immediately west of the depot, of which Cornette had charge. As they passed the depot, Williams, who was driving, jumped off, leaving decedent in charge of the team, and went up to the window of the office where Cornette was, and had a conversation with him, returned to the wagon, and drove on with decedent. They soon made their way, whether directly on the railroad track or circuitously does not appear, to the south side of the stock cars, stopped on the passing track, and busied themselves in pitching the bedding from their wagon into the cars. At this juncture the collision occurred. Witness Brown was asked if he heard the conversation between Williams and the station agent, and he said he did, and, on being asked to state it, said:

"The nigger asked Cornette if there was any trains coming, and Cornette told him no, there was no trains coming; to go on down to the cars; said he could have been there an hour ago and bedded them; said the cars was in an hour."

There was no error in admitting this declaration of the station agent. He was there as the agent of the defendant at that station. This much his title and conduct clearly indicate. He was held out as defendant's agent, was in charge of its place of business, was approached and questioned as its representative concerning its current business under his immediate charge and coincident with its transaction. From these facts it appears, prima facie, at least, that he was a special agent of defendant, and as such his declaration in the line of his duty and while discharging it bind the defendant. St. Louis & S. F. Ry. Co. v. McLelland, 10 C. C. A. 300, 62 Fed. 116; Rosenthal v. St. Louis, I. M. & S. Ry. Co., 40 Mo. App. 579; Bachant v. Boston & Maine Railroad, 187 Mass. 392, 73 N. E. 642, 105 Am. St. Rep. 408. The declaration was admissible for two purposes—as evi-

dence of a license or permission to decedent and his working mate to enter upon the track of the defendant to perform the work of their master in bedding the cars, and as information touching the running of trains bearing upon the issue of contributory negligence.

There was no error in refusing to give the instruction asked by defendant that decedent was guilty of such contributory negligence as precluded recovery by plaintiff. There was evidence tending to show that he did not go upon the track as a trespasser, heedless of imminent danger, as disclosed in cases cited by defendant's counsel, (Missouri Pac. Ry. Co. v. Moseley, 6 C. C. A. 641, 57 Fed. 921); but rather as a licensee, with the assurance given by defendant's managing agent of no present peril.

Defendant's counsel requested the court to charge the jury that plaintiff was not entitled to recover any damages, under section 2865, Rev. St. Mo. 1899, i. e., for the consequence of any "wrongful act, neglect or default of defendant" as distinguished from the consequence of the negligence of its "officers, agents, servants or employés whilst running, conducting or managing any locomotive, car," etc. After careful consideration of the pleadings, evidence, and proceedings below, we are of opinion that that request should have been granted. It is conceded by plaintiff's counsel that the only right of action she had was predicated on the provisions of section 2864; in other words, that no right of action arose to her by reason of the failure of defendant to provide and maintain a suitable, convenient, or safe means of access to the cars which required bedding. We have already observed that plaintiff's petition asserted a right of recovery for such failure, and that there was much evidence before the jury tending to show facts from which they might have believed that defendant failed to do its duty in that respect. The court's charge ignores the phase of the petition and the evidence last referred to, and properly treats the case as if predicated on section 2864 alone; but in no part of its charge is the jury advised that they must disregard such evidence as proof of any dereliction or wrongful act of defendant entitling plaintiff in this case to recover. In harmony with that theory of the law, the court properly charged the jury that the measure of damages was $5,000, fixed in the event they found for the plaintiff. In this condition of the pleadings, evidence, and charge, it is obvious that the jury, unless properly instructed, might have considered the evidence before them concerning the unsafety of the place sufficient to warrant a finding for plaintiff, and that the evidence of negligence in running the locomotive was not sufficient; and, although the statute in the former case warrants recovery of only compensatory damages not to exceed $5,000, the jury were required by the charge to fix the damages at $5,000, however much that sum might exceed compensatory damages. To obviate this possible and quite probable confusion, the court should have given the instruction requested by defendant's counsel, and should have advised the jury that the evidence concerning the unsafety of the place would not, in itself, justify a verdict for plaintiff. This would have limited the jury's consideration to the issue of negligence on the part of defendant's officers, agents, and ser-

vants while operating the engine and tender. If they found for plaintiff on this issue, the recovery would have been for $5,000, if against the plaintiff, there would have been no recovery at all.

Plaintiff's counsel earnestly contend that the charge given by the court to the jury substantially covers the proposition involved in the instruction requested by defendant's counsel, and sufficiently clears up the confusion that might have resulted from the evidence before the jury; but after a careful consideration of it we are unable to think so.

Some other assignments of error relating to the admission of evidence and charge to the jury have been carefully considered, but we discover nothing in them prejudicial to defendant. For failure to give the instruction requested by defendant or its equivalent, and for that reason only, the judgment must be reversed, with directions to grant a new trial.

FLICKINGER v. FIRST NAT. BANK OF VANDALIA, ILL., et al.

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

No. 1,496.

1. BANKRUPTCY—APPEALS—ASSIGNMENTS OF ERROR.
   Rule 11 of the Circuit Court of Appeals, (90 Fed. cxlvi, 31 C. C. A. cxlvi), requiring assignments of error to point out the particular errors relied on, is applicable to appeals in bankruptcy, and assignments not conforming thereto are not entitled to be considered; but where a general assignment is made the court is not without jurisdiction, and may permit an amendment.
   [Ed. Note.—Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. SAME—APPEAL BOND.
   The fact that the bond given by an alleged bankrupt on appeal from an order of adjudication runs only to the original petitioners, and does not name other creditors, who by intervention joined in the petition, does not affect its sufficiency.

3. APPEAL—INCOMPLETE RECORD.
   That the transcript filed on an appeal does not contain all of the evidence upon which the order appealed from was made is not ground for striking it from the files; the proper procedure for the appellee being to suggest a diminution of the record.

4. BANKRUPTCY—WHO MAY BE ADJUDGED BANKRUPT—PERSONS ENGAGED IN EXCEPTED OCCUPATIONS—CONSTRUCTION OF STATUTE.
   The exception of persons engaged chiefly in certain occupations from involuntary proceedings in bankruptcy, contained in Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], relates to their occupation at the time the alleged act of bankruptcy was committed, and a person who owned and conducted a farm, and prior to the making of a general assignment, which constituted the alleged act of bankruptcy, had gone out of any other business, is not subject to adjudication as an involuntary bankrupt, although his farm had been sold by the assignee before the filing of the petition against him.

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

T. E. Powell and E. T. Powell, for appellant.

Van Deman, Burkhart & Shea, Cobb, Howard & Bailey, L. C. Barker, W. J. Geer, J. W. McCarron, and C. H. Henkle, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This cause comes here on an appeal from an order of the district court adjudging Flickinger a bankrupt. Two preliminary motions are made in behalf of the appellees, which were ordered to be argued with the merits. The first is a motion to dismiss the appeal upon these grounds: (1) It is urged that there is no specific assignment of errors. There is but one assignment, which is as follows:

"Now on this 13th day of July, A. D. 1905, came Edward Flickinger, by his attorney, Thomas E. Powell, and says that the judgment in said cause adjudicating said Edward Flickinger an involuntary bankrupt is erroneous and against his just rights, and he assigns the judgment of said district court adjudicating him a bankrupt as manifest error. Wherefore, the said Edward Flickinger prays that the said judgment may be reversed, and said petition in involuntary bankruptcy against him be dismissed."

This is not in compliance with rule 11 of this court (90 Fed. cxlvi, 31 C. C. A. cxlvi), and does not sufficiently indicate the particular error complained of to entitle it to be considered on the appeal. We held in Deering Harvester Co. v. Kelley, 103 Fed. 261, 43 C. C. A. 225, that assignments of error in such general form were insufficient, and we declined to take cognizance of them. But we do not think the court is without jurisdiction of the appeal because of the generality of the assignment. It is not the case of an entire failure to file any assignment, and we think the court has power to allow an amendment when the special circumstances justify it, and the application is promptly made on discovery of the mistake. The appellant makes a counter motion for leave to amend by filing more specific assignments, and shows that in making the former assignment he relied upon and followed a precedent contained in an approved book of forms. We think the motion to amend should be allowed.

The second ground for the motion to dismiss the appeal is only an enlarged statement of the first.

The third ground for the motion is that the bond on the appeal does not run to all of the petitioners for the adjudication. After the original petition was filed, two other creditors filed an intervening petition, having the same object, and the bond makes only the original petitioners obligees. But as all the petitioners make common cause and not separate controversies, and the benefits of the bond will practically come to all, it would seem to be sufficient. The motion to dismiss the appeal is therefore denied.

The appellees moved also that the transcript be stricken from the files. The only ground to which the attention of the court is directed is that it was not submitted to counsel for the appellees, and that none of said counsel for appellees had notice of the filing thereof, and it is urged that the record is imperfect in that it does not contain all the evidence on which the cause was decided, and that what is given is stated in a narrative form, without giving the questions put to the

witnesses. But, supposing there are such defects, and what is omitted is necessary to a proper understanding of the evidence, the remedy proposed is not appropriate. The third paragraph of rule 14 (90 Fed. clvii, 31 C. C. A. clvii) of this court is that:

"No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court shall be filed."

The appellees should in such case have suggested to the court the defect complained of, and have applied for a certiorari to send up the missing matter. Hudgins v. Kemp, 18 How. 350, 15 L. Ed. 511, 514; United States v. Gomez, 1 Wall. 690, 17 L. Ed. 677; Missouri K. & T. R. R. Co. v. Dinsmore, 108 U. S. 30, 2 Sup. Ct. 9, 27 L. Ed. 640. This motion is also denied.

Upon the merits, the first question arises upon the contention that Flickinger was exempt from bankruptcy proceedings under section 4b of the act of July 1, 1898 (chapter 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]), because he was a person chiefly engaged in farming. The evidence shows that for some years prior to August, 1903, Flickinger resided at Galion, Crawford Co., Ohio, and was actively engaged in the business of the Flickinger Wheel Company, a manufacturing corporation employing a great number of men, and located at that place, of which he was a stockholder, director, the president, and general manager. He had also owned and cultivated a farm in Logan county, which with the implements and stock upon it was sold by the assignee for $21,000, and which was managed by him, or under his direction, and on which he had a house, which was occupied by him and frequently by his family when he visited it for the purpose of giving direction to the cultivation and management of the farm. He went there once or twice a week, and telephoned his orders when he was otherwise engaged. He bought whatever was bought upon the farm, and sold all its products. In August, 1903, the wheel company went into the "Wheel Trust," so called, after which he was not actively occupied in its affairs. In January, 1904, the wheel company went into the hands of a receiver appointed by the court of common pleas of Crawford county. On May 3, 1904, he made a general assignment for the benefit of creditors. The petition in bankruptcy was filed September 2, 1904. Down to the time when he made his assignment, he had made occasional visits to his farm in Logan county, and gave direction regarding its management, much as he had done while managing the business of the Flickinger Wheel Company. He says that he had no other business than farming after his company went into the hands of the receiver, and that he had the sole and exclusive management of the farm thereafter. His statement is not contradicted and is confirmed by other witnesses, and it does not appear that he intended to engage in any other business. It is difficult to see how, after he made a general assignment on May 3, 1904, which, of course, conveyed his farm, he could properly be said to be chiefly engaged in farming. Four months passed before the petition in bankruptcy was filed. We think it could not be held that he was engaged in farming when the petition was filed. The farm was sold on July 17,

1904, by the assignee, who at that time was in control of it. We think the fair conclusion from the facts shown would be that prior to the time when the business of the wheel company went into the hands of the receiver (January, 1904), Flickinger was engaged in two kinds of business—manufacturing and farming—of which the former was the chief; that after that time he was not engaged in that business, and that farming became his chief, in fact his only, occupation, and continued such until his assignment in May, 1904.

The decisive question would therefore seem to be whether section 4b refers to the time when an act of bankruptcy is committed for the purpose of determining the occupation, as some of the courts in bankruptcy have held, or to the time of filing the creditors' petition, which seems to be the natural meaning of the words employed. It was held In re Luckhardt (D. C.) 101 Fed. 807, and In re Mackey (D. C.) 110 Fed. 355, that the time referred to by this exception in the act is the time when the act was done which was the ground of the adjudication. This construction was adopted, because it was thought necessary in order to defeat attempts which bankrupts might make to escape the consequences of their acts by running under the shelter of an excepted occupation. If the language used is fairly susceptible of this interpretation, the argument from inconvenience would justify the proposed construction. This question was presented in the case of In re Pilger (D. C.) 118 Fed. 206, before Judge Seaman, who expressed doubt about it, but passed it by, holding that it was unnecessary to decide it in that case. In the case entitled In re Matson (D. C.) 123 Fed. 743, Judge Archbald, in deciding whether the respondent should be adjudged bankrupt, referred the question of occupation to the time when he was passing upon it; but we do not know whether the question was debated before him or not. Judge Brown, in construing the words in section 4b, which include certain corporations and exclude others from the operation of the law, said:

"These words must be interpreted in the sense in which they are commonly used and received, and not in any strained or unnatural sense, for the purpose of including or of excluding particular corporations."

In re N. Y. & W. Water Co. (D. C.) 98 Fed. 711, 713.

A majority of the court is inclined to think that the statute should be regarded as having reference to the conditions existing at the time when the act of bankruptcy is committed. Upon this construction, the facts would require a finding that the respondent was within the exception.

There are no other questions which require consideration. The order must be reversed, with costs to the appellant.

KARRAN v. PEABODY et al.

(Circuit Court of Appeals, Second Circuit. March 14, 1906.)

No. 137.

1. SHIPPING—CHARTER PARTY—OPTION TO CANCEL.
A general provision in a charter party, excepting "all and every the dangers and accidents of the seas," has no application to a prior specific provision giving the charterers the right to cancel should the vessel not arrive in good order at the port of loading on or before a specified date, so as to extend such date in case arrival is delayed by sea perils.

[Ed. Note.—Cancellation, surrender, or rescission of charter of vessel, see note to McNear v. Leblond, 61 C. C. A. 569.]

2. SAME—TIME FOR EXERCISING—WAIVER.
A charterer, given the right by the charter party to cancel in case the vessel does not arrive at the loading port by a specified date, is not required to exercise his option until her arrival, and his right to cancel is not lost by his refusal to state his election on request of the owners, after such date had passed, and when the vessel was in a distant port, and the time when she would arrive was unknown.

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

On appeal from a decree of the District Court for the Southern District, sustaining exceptions and dismissing the libel filed by the owner of the ship Macdiarmid, to recover damages for an alleged breach by the charterers, appellees herein, of a charter party of said ship, dated September 22, 1902.

A. Hickox, for appellant.

Charles C. Burlingham, for appellees.

Before LACOMBE and COXE, Circuit Judges.

COXE, Circuit Judge. The principal controversy arises over the following clause of the charter party:

"Should the vessel not arrive at New York in good order on or before sunset February 1st, 1903, charterers have the option of canceling the charter."

The vessel did not arrive in New York until March 3d, a month later, when the charterers declined to load her.

It is manifest that if nothing had occurred between the parties prior to the arrival of the vessel in New York the charterers' right to cancel on March 3d would be unquestioned. But the libel alleges that "while on her way to the port of New York, the vessel was obliged by stress of weather and perils of the sea to put into the port of Barbadoes, where she arrived about February 12th, 1903." It is further alleged that on February 13th a cable was sent to appellees by the agents of the appellant asking, "Do you want to cancel?" and on the same day the following reply was received: "Charterers refuse to say at present if they cancel or not." On February 14th a second cable was sent insisting upon a definite answer to the appellant's question and the reply of the appellees was a duplicate of the cable sent the day previous. So that on February 13th the appellees, knowing that the

Macdiarmid was at the Barbadoes, declined to say whether, if she arrived at New York, they would take her or not.

It is argued that the clause quoted, giving the charterers an option to cancel after February 1st, is qualified by a subsequent provision excepting "all and every the dangers and accidents of the seas." The appellant construes this language to mean that the charterers were to have the option of canceling the charter if the ship failed to arrive at the loading port by February 1st unless her arrival were prevented by the perils of the sea. He insists further that the libel alleges and the exceptions admit that her arrival was prevented from this cause.

We are unable to accede to either proposition. Although the provision excepting the "dangers of the seas," etc., follows the clause giving the charterers the option of canceling, it has no relation whatever to that clause so far as extending the canceling date is concerned. It is no part of the printed charter blank but was stamped in subsequently and follows the option clause for no other reason, apparently, than that this was the most convenient place to insert it. The date after which the option to cancel may be exercised is fixed and unqualified. If the vessel fails to reach New York by February 1st the charterers need not take her unless they wish to do so. If the appellant's construction be correct the Macdiarmid, after being shipwrecked for a year in Arctic seas, might, in February, 1904, have sailed into the part of New York and compelled the appellees to load her.

In Smith v. Dart & Son, L. R. 14 Q. B. Div. 105, Mr. Justice Mathew said:

"It is clear that the clause giving the option would be practically struck out of the charter if it were to be construed 'the vessel must be ready to load by the 15th unless prevented by dangers of the sea.'"

Mr. Justice Smith, concurring, used the following language:

"The ship owner does not contract to get there by a certain day but says 'If I do not get there you may cancel,' it is an absolute agreement that if he does not get there the charterers may cancel."

But were the law as contended for by appellant he could not succeed for the reason that there is no allegation, and, therefore, no admission, that the vessel was prevented by perils of the sea from arriving in New York on or before February 1st, 1903. The only averment of the libel bearing on the subject, quoted supra, is very far from an assertion that she was prevented by a sea peril from arriving in New York. How a storm at the Barbadoes on February 12th prevented the vessel from arriving at New York on February 1st it is difficult for the court to understand. The only inference to be drawn from the libel is that on February 1st she was so far distant from New York that her arrival there on that date was impossible and there is absolutely no averment from which it can be inferred that this condition was brought about by perils of the sea.

The only question, therefore, is whether the refusal of the charterers to exercise their option of cancellation on February 14th was a waiver of their right to do so subsequently.

Were we in the forum of ethics much might be said in criticism of the appellees' conduct; undoubtedly it was harsh, discourteous and inconsiderate, but we are permitted to consider the situation only in its strict legal aspects; the golden rule is not one of the rules in admiralty. That the charterers were justified in insisting upon the performance of the charter according to its strict letter cannot be successfully disputed.

The libel demands damages "owing to the fall in charter rates of hire." Parties to these agreements undoubtedly take into consideration the fluctuation in ocean freights and contract in reference thereto. It is a risk which they assume. If, in the present case, the charter rates had risen the cancellation of the charter would have been advantageous to the appellant.

When the charterers were asked to exercise their option the vessel was at the Barbadoes and they had no means of knowing when she would arrive in New York or what would be the state of the market when she did arrive. The charter might then be very valuable and it might not—they could not tell. Certainly they could not be compelled in advance to relinquish a right which might be of great value.

Owners need not charter their vessels with the option clause inserted unless they wish to do so. Having done so, however, they should abide the consequences. The law as understood throughout the commercial world should not be altered or relaxed because of the peculiar hardship of a particular case.

We understand the law to be as contended for by the appellees and although the decisions may not be controlling upon us we regard them as based upon sound reasoning. The rule that the charterer cannot be required to exercise his option to cancel prior to the arrival of the ship at the loading port is so clearly established and well understood, that an attempt at modification is, to say the least, inexpedient.

The case of the Progresso (D. C.) 42 Fed. 229, affirmed 50 Fed. 835, 2 C. C. A. 45, is, we think, directly in point.

The Circuit Court of Appeals, speaking of a canceling option similar to the one at bar, say:

"The obligation of that contract was inviolable. It could neither be altered nor amended save by mutual consent of the parties interested. The demand made on behalf of the ship while she was lying in the port of Boston upon the charterers, to declare, then and there, their option, was wholly unwarranted by the contract. To have yielded to such demand, and to have declared their option, would have been an assent by them to a material and substantial alteration of the contract in an important particular. They were clearly justified in refusing such assent, and in standing by the terms of the charter party. That charter party was still in force, and the only legitimate act for the ship was to proceed under it to Charleston, and tender herself, on arrival, ready to load. Nothing short of that would excuse."

The foregoing is, we think, a clear exposition of the law and fully coincides with our views.

See, also, The Samuel W. Hall (D. C.) 49 Fed. 281; Carver on Carriage by Sea, § 222.

The decree is affirmed.

DANIELS v. TAYLOR.

(Circuit Court of Appeals, Eighth Circuit. April 6, 1906.)

No. 2,187.

1. DOWER—ADULTERY OF WIFE—STATUTE OF WESTMINISTER II IN FORCE IN THE INDIAN TERRITORY—CONSTRUCTION.

Under the statute of Westminster II, 13 Edward I, c. 34, adopted in Arkansas as part of the common law, and extended over the Indian Territory by Congress, a wife who willingly separates from her husband and lives in adultery with another, without being thereafter reconciled with her husband, forfeits her right of dower in his lands, and also the interest in his personalty given to her by Mansf. Dig. § 2591 (Ind. T. Ann. St. 1899, § 1879), "as part of her dower."

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dower, § 100.]

2. EXECUTORS AND ADMINISTRATORS—SPECIAL ALLOWANCES TO WIDOW.

Mansf. Dig. §§ 62, 63 (Ind. T. Ann. St. 1899, §§ 119, 120) providing special allowances for the widow, contemplate the case of a widow who in the lifetime of her husband lived with him as a member of his family and performed the duties of that relation, and not one who willingly separated from him, performed none of the duties of a wife, and by her gross misconduct disqualified herself from succeeding him as the head of the family.

(Syllabus by the Court.)

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

For opinion below, see 82 S. W. 727.

W. H. Kornegay, for plaintiff in error.

John B. Turner, for defendant in error.

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

VAN DEVANTER, Circuit Judge. The questions presented in this case arise under such of the statutes of Arkansas, published in Mansf. Dig. of 1884, as have been extended over and put in force in the Indian Territory by Congress (Act May 2, 1890, 26 Stat. 94, c. 182, § 31), and are: (1) Is Ellen Taylor entitled, under Mansf. Dig. § 2591 (Ind. T. Ann. St. 1899, § 1879) to one-third of the personal estate of her deceased husband, George W. Taylor? (2) Is she entitled to receive out of said estate the allowances named in Mansf. Dig. §§ 62, 63 (Ind. T. Ann. St. 1899, §§ 119, 120). The trial court answered the first question in the affirmative and the second in the negative, and upon cross-appeals to the Court of Appeals that court answered both questions in the affirmative. 82 S. W. 727.

The record discloses that Ellen Taylor and George W. Taylor were lawfully married in 1884 in the Cherokee Nation; that they lived together as husband and wife for about three years when upon her particular insistence they separated under written articles of separation; that she did not thereafter live in his home or as a member of his family, but lived entirely separate and apart from him, and in confessed and open adultery with another by whom she bore children; that this adulterous relation continued after the statutes of Arkansas

became applicable to the Cherokee people, and that subsequently George W. Taylor died intestate in the Cherokee Nation without being reconciled to his wife or condoning her adulterous relation.

The statutes of Arkansas extended over the Indian Territory, in addition to declaring that a widow shall be endowed of the third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, and that she shall be entitled, "as part of her dower," to one-third part of the personal estate whereof he died seised or possessed, adopt in the usual form the common law of England, and all statutes of the British Parliament in aid thereof or to supply defects therein made prior to the fourth year of James I. Mansf. Dig. §§ 2571, 2591, 566 (Ind. T. Ann. St. 1899, §§ 1859, 1879, 465q). One of these British statutes is that of Westminster II, 13 Edward I, c. 34, by which it was enacted:

"That if a wife willingly leave her husband, and go away and continue with her advoutrer, she shall be barred forever of an action to demand her dower that she ought to have had of her husband's lands, if she be convicted thereupon; except her husband willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him, in which case she shall be restored to her action." 2 Co. Inst. 435.

This statute has been substantially re-enacted in several of the states, and in others, when not inconsistent with the legislation of the state, is regarded as in force as part of the common law. 1 Washburn, Real Property, *196. The statute is sometimes spoken of as barring dower only where there is an elopement and adultery, but its true effect in this respect is that there must be a concurrence of voluntary separation and adultery, that is, the adulterous relation must exist while the wife is willingly living separate and apart from her husband, not in his home or as a member of his family. Reynolds v. Reynolds, 24 Wend. (N. Y.) 193; Cogswell v. Tibbetts, 3 N. H. 41; 1 Washburn, Real Property, *195; 1 Cruise, Digest, *174; Co. Litt. 32a, 32b, note 195; 2 Bacon, Abr. "Dower," F; 3 Id. "Marriage & Divorce," E; 2 Bl. Com. *130. Thus Lord Coke says of the statute, 2 Inst. 435:

"Albeit the words of this branch be in the conjunctive, yet if the woman be taken away, not sponte, but against her will, and after consent and remain with the adulterer without being reconciled, etc., she shall lose her dower; for the cause of the bar of her dower is not the manner of the going away, but the remaining with the adulterer in avoutry without reconciliation, that is the bar of dower."

And in Hethrington v. Graham, 6 Bing. 135, where the husband and wife separated by mutual consent and she thereafter lived in adultery with another, it was said by Tindal, C. J., in denying her right to dower:

"We hold the proper construction of the statute to be what the words still will warrant, that if a woman leaves her husband with her own free will, and afterwards lives in adultery, the dower is forfeited."

We think that the statute of Westminister II, adopted in Arkansas as part of the common law, and extended over the Indian Territory by Congress, covers the present case, and bars the widow's right to dower. True, that statute in terms relates to the widow's dower "in her hus-

band's lands," but as the Arkansas statute, in entitling her to one-third part of his personal estate, declares it shall be "as part of her dower," we think it is reasonably plain that this right in the personalty is intended to stand or fall with the right to dower in the realty.

It is urged that the right is not barred in the present case because no decree of divorce convicting the wife of adultery was obtained by the husband, and in support of the contention reference is made to the words of the statute of Westminster II, "if she be convicted thereupon," and to Mansf. Dig. § 2578 (Ind. T. Ann. St. 1899, § 1866) providing: "In case of divorce, dissolving the marriage contract for the misconduct of the wife, she shall not be endowed." Of the reference to the British statute, it is sufficient to say that under it the adultery of the wife could be shown in the action for the recovery of dower and a divorce was not necessary to bar the right. 1 Washburn Real Property, *195; Hethrington v. Graham, 6 Bing. 135; Reynolds v. Reynolds, 24 Wend. (N. Y.) 193. And of section 2578, it is enough to observe that we see nothing in it inconsistent with the statute of Westminster II, or which evinces a purpose to cover the entire subject of what will bar the right to dower. In Wood v. Wood, 59 Ark. 441, 27 S. W. 641, 28 L. R. A. 157, 43 Am. St. Rep. 42, relied upon by counsel, the Supreme Court of Arkansas speaks of the section as a peculiar one, describes it as borrowed from New York without the other New York statutes "which explained and gave it validity and effect in that state," and holds that with it, as well as without it, a divorce a vinculo by the laws of Arkansas, as at common law, puts an end to the right to dower, whether the divorce be granted for the misconduct of the wife or that of the husband. The case does not indicate that the statute of Westminster II was not adopted in Arkansas as part of the common law, or that section 2578 makes divorce a prerequisite to the barring of dower in the instance of adultery committed by a wife when willingly living apart from her husband.

Sections 62 and 63, under which allowances are claimed by the widow, are as follows:

"62. In addition to dower, a widow shall be allowed to keep as her absolute property all the wearing apparel of the family, her wheels, looms and other implements of industry; all yarn, cloth and clothing made up in the family for their own use; such grain, meat, vegetables, groceries and other provisions on hand as may be necessary for the subsistence of the widow and her family for twelve months, and as many beds, with bedding and such other household and kitchen furniture as shall be necessary for herself and the family of the deceased residing with her and under her control; nor shall any property acquired by the widow be sold to pay any debts of her husband contracted before marriage, nor shall such property be embraced in the schedule of the effects of his estate, should the same be deemed insolvent.

"63. In addition to the property specified in the preceding section, the widow, when the estate is not insolvent, may take such personal property as she may wish, not to exceed the appraised value of one hundred and fifty dollars, and the executor or administrator shall deliver to the widow such articles as she may select, not exceeding the value aforesaid, and shall take her receipt therefor, which shall be a good voucher in the settlement of his accounts."

These sections quite plainly contemplate the case of a widow who in the lifetime of her husband lived with him as a member of his

family, and performed the duties of that relation, and not one who willingly separated from him, performed none of the duties of a wife, and by her gross misconduct disqualified herself from succeeding him as the head of the family. Odiorne's Appeal, 55 Pa. 175, 93 Am. Dec. 683; Speidel's Appeal, 107 Pa. 18.

It follows that the judgment of the Court of Appeals must be reversed, that the judgment of the trial court must be reversed in so far as it sustained the widow's claim to dower in the personalty, and that the case must be remanded to the latter court for such further proceedings as may not be inconsistent with this opinion.

It is so ordered.

NEELY et al. v. BOYD et al.

BOYD et al. v. NEELY et al.

(Circuit Court of Appeals, Eighth Circuit. April 16, 1906.)

Nos. 2,164, 2,188.

1. TRUST—EVIDENCE TO ESTABLISH.

The evidence should be very clear and satisfactory to establish that the title to real property purchased by one with his own funds, in his own name, and ostensibly for his own benefit, is held in trust for the benefit of another to whom the purchaser in respect of the transaction sustains no fiduciary relation.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 66–68.]

2. SAME.

Evidence considered, and *held* insufficient to establish a parol agreement by a purchaser of land at an execution sale to hold the title for the benefit of the judgment defendant and to permit the latter to redeem at any time.

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

This was a suit by Lipscomb against Irby Boyd and Irby Boyd & Co., to set aside two deeds to lands in Crittenden county, Ark., for an accounting between the parties and for a decree permitting redemption from the liens of the defendants, if any balance was found to be due upon the accounting. During the pendency of the suit Lipscomb died, and it was revived in the names of Neely, as administrator, and Mary L. Miller, as sole heir at law. Both deeds sought to be set aside ran to Irby Boyd as grantee. One of them was executed by the sheriff of Crittenden county pursuant to an execution sale on a judgment against Lipscomb in favor of a third party, and the other was executed by the trustee in foreclosure of a deed of trust by way of mortgage given by Lipscomb to Boyd & Co. Both deeds were attacked because of alleged defects in the proceedings culminating in the sales. It was also claimed that by parol agreement Boyd was to hold his title acquired by the sheriff's deed for the use, benefit, and protection of Lipscomb subject to the obligation of the latter to reimburse Boyd for the amount paid at the sale. Boyd represented his firm in the transactions.

The Circuit Court held that the purchase at the execution sale under the judgment was for the benefit of Lipscomb; that Boyd therefore held title under the sheriff's deed as trustee; that the subsequent sale under the deed of trust should be vacated because of irregularities in the proceedings; and that complainants, as the successors of Lipscomb, were entitled to a transfer of the title upon payment of all sums found due, including the amount paid by Boyd at the sheriff's sale. An interlocutory decree to this effect was entered, and the cause was referred to a master for an accounting. Upon the coming in

of the master's report, a final decree was passed adjudging that, all things considered, there was due to Boyd & Co. $21,309.54 for which they had a lien upon the lands in controversy, and providing for the sale thereof to satisfy the lien, if redemption was not made within a time specified. Both parties have appealed from this decree. The defendants contend that error was committed in holding Boyd as trustee under the sheriff's deed and in setting the other deed aside, and both parties contend that there is error in the amount found due to Boyd & Co.; the complainants saying that it is too large, and the defendants that it is too small.

F. G. Taylor, for Neely, administrator, et al.

Charles T. Coleman (A. B. Shafer and Percy Finlay, on the brief), for Boyd et al.

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

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

If the proceedings resulting in the sheriff's deed to Boyd were regular, and the purchase at the execution sale was made by Boyd for himself or for his firm, and not for the use and benefit of Lipscomb, complainants' bill should have been dismissed. In other words, if the sheriff's deed is valid, and the conveyance was not taken in trust for Lipscomb, it affords a sufficient independent source of title that makes immaterial in this case all questions as to the validity of the other deed held by Boyd and the accounting.

Two objections are urged to the validity of the sheriff's deed: (1) That the levy of the execution and the sale were not in the manner required by law; and (2) that the sale was not properly advertised. It is said that the entire body of land was levied on and sold as one tract, and not in separate tracts of 40 acres or less, as prescribed by the Arkansas statute. But it is held that this statute is directory, and, when the owner of the lands is present and fails to demand compliance with its requirements, he waives it. Reynolds v. Tenant, 51 Ark. 84, 9 S. W. 857. Lipscomb was not only present at the sale, but he affirmatively assented to the way it was made. It is also said that there was no such advertisement of the sale as is required by section 3274 of Kirby's Digest. But the evidence does not sustain the contention. In Arkansas sheriff's deeds of real estate sold under execution, regular in form, are evidence of the legality and regularity of the sales until the contrary is made to appear. Kirby's Dig. § 760. The sheriff's deed in this case is regular in form and it recites that the time, place, and terms of sale were advertised in the manner required by law. The only evidence offered to dispute the regularity of the proceedings was the return on the execution, and, though it is in very general terms, it supports the recitals of the deed and the evidential presumption created by the statute. There was no other evidence upon the subject. In the case of Russell v. Williamson, 67 Ark. 80, 53 S. W. 561, cited by counsel, the recitals of the sheriff's deed excluded one of the two methods of advertisement prescribed by the law as essential, and therefore the case is not in point. As already observed, the return upon the execution involved in this case is quite

general, but in substance and effect it recites full compliance with the law. The decree of the Circuit Court was not predicated upon defects in the sheriff's proceedings. The court concluded from the evidence that Boyd, the grantee in the sheriff's deed, purchased and held his title as trustee for Lipscomb, the judgment debtor; and this must have been upon the theory, as there could be no other, that there was an agreement between Boyd and Lipscomb that the former should purchase at the sale, should hold title for the benefit of Lipscomb, and allow him ultimately to redeem. We therefore proceed to the consideration of this feature of the case.

It is a salutary rule that evidence should be very clear and satisfactory to establish that the title to real property purchased by one with his own funds, in his own name, and ostensibly for his own benefit, is held in trust for the benefit of another to whom the purchaser, in respect of the transaction, sustains no fiduciary relation. Muniments of title should not be lightly destroyed or brushed away by loose and inconclusive evidence. Moore v. Crawford, 130 U. S. 122, 134, 9 Sup. Ct. 447, 32 L. Ed. 878; Coyle v. Davis, 116 U. S. 108, 6 Sup. Ct. 314, 29 L. Ed. 583; Howland v. Blake, 97 U. S. 624, 24 L. Ed. 1027; Norman v. Gunton (C. C.) 127 Fed. 871.

Lipscomb testified that Boyd agreed to buy at the sheriff's sale for him, but no time was fixed for reimbursement; that he was simply to work the place and pay Boyd out as fast as he could; that he did not have much conversation with him and did not know whether any one heard the agreement or not. Boyd testified that there was no such agreement or understanding, and that he never had any conversation with Lipscomb about the matter. This was the direct testimony upon the subject. There was also some testimony as to whether Lipscomb and Boyd had any conversation on the day of the sale, and some to the effect that in conversations which were heard by the witnesses nothing was said by Boyd about buying for Lipscomb. There was also some hearsay testimony including some declarations of Lipscomb made to other parties which should not be regarded. The testimony of Boyd was taken before Lipscomb's death.

In our opinion this testimony is insufficient to establish complainant's case, and the reasonable inferences from the established facts and the relations of the parties tend to the same conclusion. While the trust deed held by Boyd & Co. was given to secure an existing indebtedness as well as future advances, there was no obligation upon their part to make such advances. The judgment upon which the sheriff's sale was had was not even known to Boyd & Co. when the trust deed was taken, and therefore could not have been in contemplation. The judgment was in favor of a third party, and Boyd & Co. were misled by Lipscomb as to the existence of the claim upon which it was rendered. Lipscomb informed them, in substance, that he was not indebted, or, if he was, the amount was very small, and yet the creditor obtained judgment against Lipscomb for nearly $8,000; and, in ignorance of the existence of this judgment and the lien thereof upon the land, Boyd & Co. advanced to Lipscomb several thousand dollars and took what proved to be a subordinate

trust deed. Moreover, after execution was issued on the judgment and levied on the land, Boyd & Co. were ignorant thereof and did not ascertain that the land, which constituted their chief security, was about to be sold, until within a few days before the sale. Lipscomb did not inform them of it. Again, most if not all of the money paid by Lipscomb when he originally purchased the land was advanced by Boyd & Co., and about two thirds of the purchase price yet remained unpaid and was secured by a vendor's lien upon the property which was also superior to their trust deed. In the various dealings between Lipscomb and Boyd & Co. the former seemed to be getting deeper into debt, and nothing whatever appears tending to show any reasonable inducement for a voluntary increase by Boyd & Co. of the amount of their loans. Again, while we need not recite the evidence showing the conduct of the parties after the sheriff's sale, it is sufficient to say that it is quite inconsistent with the contention that Boyd bought as trustee or otherwise than for the sole and exclusive benefit of his firm. This he had a right to do. He was under no obligation to Lipscomb and owed him no duty in that particular. Therefore no trust arose out of the relations of the parties, and there is not sufficient evidence to establish one by an affirmative agreement.

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

THE FAIR v. MANNY LEMON JUICE EXTRACTOR CO.

(Circuit Court of Appeals, Seventh Circuit. April 10, 1906.)

No. 1,134.

PATENTS—VALIDITY AND INFRINGEMENT—LEMON JUICE EXTRACTOR.

The Manny patent, No. 415,048, for a lemon juice extractor (Claim 3), which claims broadly the combination of a base of dish form, a cone extractor having juice-releasing projections on its surface, and a strainer located above the bottom of the dish-formed portion of the base, is void for anticipation by the Mitchell British patent, No. 16,910, of 1889. Claim 4, which covers a specific modification of the Mitchell structure as limited thereby, *held* not infringed by the device of the Easley patent, No. 644,736, which embodies a different modification of the same combination.

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

Robt. B. Killgore, for appellant.

L. L. Morrison, for appellee.

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

BAKER, Circuit Judge, delivered the opinion of the court.

From a decree enjoining appellant from infringing patent No. 415,048, November 12, 1889, to Manny, for a lemon juice extractor, this appeal is prosecuted.

The claims are of the combination order; and, as the controversy concerns the validity of the broader claims and the infringement of the narrower, one of each is given.

"(3) A lemon juice extractor, consisting of a base of dish form, a cone extractor having juice-releasing projections on its surface, and a strainer located above the bottom of the dish-formed portion of the base, whereby the juice is separated from the seeds and pulp as it is extracted, substantially as set forth.

"(4) A lemon juice extractor, consisting of a reservoir-base, a cone extractor, and a strainer composed of uprising fingers between the cone and outer wall of the base, substantially as set forth."

Mitchell's British patent, No. 16,910, May 18, 1889, shows a cone extractor having juice-releasing projections on its surface. For receiving the juice, a separate receptacle, such as a tumbler, is one method provided. If a separate receptacle is used, the cone may be either of two kinds—one with holes in the cone itself, the other with holes in the bottom of a rimmed flange about the base of the cone. If of the first type, the cone is necessarily hollow; if of the second, "it may be solid." As the second is the only type that can be used in a lemon juice extractor of the kind in suit, which has as an integral part thereof a reservoir-base, it is only necessary to examine particularly Mitchell's construction in that regard. "The cone may be made with vertical ribs (Fig. 1), or may have rounded projections (Fig. 3), or be serrated or jagged (Fig. 4)." "The cone is by preference made with a rim or flange, with a number of slots, holes, or openings, to allow the juice to pass through to the collecting receptacle." Fig. 6 of the drawings discloses radial slots in the horizontal portion of the flange, and Fig. 7 shows that the outer edge of the flange is upraised, forming an annular dam, in which the pulp and seeds may be held while the juice passes through the slots. "The extractor, as shown at Figs. 8 and 9, is made in one piece, with a saucer or dish, which receives the juice from the lemon, and from which the juice can be easily emptied." Figs. 8 and 9 alone do not show any means of separating the juice from the pulp and seeds; but, as that had already been described and illustrated, these figures evidently were intended only to picture the location of the strainer "above the bottom of the dish-formed portion of the base." So that, when the description and drawings are all read together, it becomes manifest that the elements and the combination of claim 3 in suit were fully anticipated by Mitchell.

Claim 4 is distinguished from claim 3 by the limitation that the strainer shall be "composed of uprising fingers between the cone and outer wall of the base." That is, the invention involved in claim 4 consists merely in the specific modification of the Mitchell device. Appellant's device, made under Easley's patent, No. 644,736, March 6, 1900, differs from Mitchell's in this—that the slots are in the rim of the annular dam, instead of in the bottom. The slots in the rim and appellee's "uprising fingers" perform the same office in the same combination, and infringement would be undoubted if appellee were entitled to the range of equivalency that belongs to the generic inventor. But both parties being mere improvers in an open field, the grant of the Easley patent for a specific form of adaptation of the prior art raises the presumption that the differences in the devices before us are substantial, not colorable, and the heavy restrictions put upon claim 4 by the Mitchell patent sustain the presumption.

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

THE THREE BROTHERS.

(Circuit Court of Appeals, Second Circuit. April 2, 1906.)

No. 124.

SHIPPING—INJURY TO SCOW BEING TOWED IN ICE—NEGLIGENCE AS BAILEE.

The city of New York *held* liable for injury to a hired scow from floating ice while being moved by its direction to a safer place in North river by a tug also in its employ, which performed its work in a proper manner, on the ground that the city failed to exercise ordinary care as bailee in permitting the scow to remain until such time in a place which was dangerous in winter time when ice was running.

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

For opinion below, see 134 Fed. 1001.

This cause comes here on appeal from a decree of the United States District Court for the Southern District of New York, holding the city of New York solely responsible for damages resulting from injury to libelants' scow Walter J. by reason of floating ice striking her and cutting into her side while she was in tow of claimant's tug Three Brothers. The opinion of the court below (reported in 134 Fed. 1001) accurately states the facts showing the relations of the parties in interest and the circumstances connected with the injuries received as follows: "The scow was in the employ of the city, and lying, with three others, in an exposed position at the foot of 134th street, North river. The Three Brothers was also in the employ of the city, and was paid by the hour for what she did, and at an increased rate of compensation on account of work in ice. * * * On the day in question considerable ice was running in the river, causing apprehension of danger to the scows on the part of the city officials in charge of them, and they requested the tug to remove the scows to 50th street, North river. * * * The tug * * * made fast to the scows with two hawsers, of about 100 feet in length. The tow was made up tandem, the scows being fastened within a few feet of each other. The Walter J. was next to the last in the tow. The tide at the time was ebb, and large quantities of heavy ice were brought down the river. The destination was down the river, but on account of the tide and ice the tug took a course across but headed somewhat up the river. When the tail of the tow was about 200 feet out from the pier at 134th street, and a little below, the tow was caught in some heavy ice, and carried by the tide, which at that place set on the eastern shore of the river, to 132d street, where the Walter J. was injured, and, with another scow, was left while the tug took the others to their destination." The tug then returned to the Walter J. and the other scow, and hauled them out into the river, when the captain of the Walter J. informed the master of the tug that she was leaking, and before he could reach her and pump her out she capsized. The court below held the city liable, upon the ground that it had failed to use the ordinary care of the property in its custody which was required of it upon its undertaking as bailee.

E. C. Kindleberger, for appellants.

Peter Alexander, for claimant.

La Roy S. Gove, for libelants.

Before LACOMBE, TOWNSEND and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The assignments of error challenge the correctness of this decision, on the ground that the damage did not occur through any negligence on the part of the city, but

through the negligence of the tug, in the performance of its towage service under conditions known to be dangerous, in attempting to tow the four scows at once when her power was insufficient, in not keeping a proper lookout, and in not taking proper care of the scow after it had been injured. Inasmuch as the removal was at the request of the city officials, no blame could be imputed to the tug for complying with said request in a proper manner. The uncontradicted evidence of the officers of the tug that she was abundantly able to perform the towage service upon which she was engaged, the indications, in view of the evidence, that under the conditions encountered it would have made no difference whether there had been four boats or only one in tow, and the fact that the absence of a lookout was not charged as a fault, and was immaterial under the circumstances, amply support the conclusion of the court below that the tug was not negligent in these particulars. Furthermore, if, as contended, the city negligently caused the scows to be left in a dangerous position—a question to be discussed later—the master of the tug was amply justified, under the directions given, in endeavoring to remove all of them at once, as he did.

The question as to the negligence of the tug in not taking proper care of the scow after she had been injured was not discussed by the court below. But, in any event, we think the evidence fails to show negligence on the part of the master of the tug in this regard. During all the time that the Walter J. was lying against the upper end of the 132d Street Pier, her captain had an opportunity to examine her condition and the extent of her injuries, and to determine whether it would be dangerous to move her; and, inasmuch as he failed to notify the master of any objection to her removal, the tug cannot be held liable for the result of such failure. We concur, therefore, in the conclusion of the court below that the tug was free from fault.

The serious question in the case is as to the negligence of the city in leaving the scows in an exposed position at the 134th Street Pier. It appears that this pier has been used as a dump for the department of street cleaning for six years, that the scows had remained there in safety during the first half of the ebb tide, and that the captain of the Walter J. thought the scow was safe there, and told the master of the tug to leave him there; urging that there was too much ice to take the scow away. But, on the other hand, it appears that there is no pier above this one at 134th street to protect it; that the ebb tide sets directly in on this pier; that the scows were made fast on its upper side; that several scows have been hurt there and overturned by the ice; and that spiles under the dock have been carried away by the ice. No witness on the part of the city has testified that the berth was a safe and proper one at the time in question. On the contrary, it appears from the testimony of the witnesses for the libelants, confirmed, in large measure, by that of the witnesses for the respondent, that the dump at this pier has been closed on account of ice, and that the berth is a dangerous place in the winter time when ice is running. The District Court, in Bleakley v. City of New York, 139 Fed. 807, has found that this is so, and that accidents have oc-

curred there, causing injury to boats, "because the place having no protection from the north, and the ebb tide setting the ice on the pier, it is obviously not a place where boats can be left with any reasonable assurance that they will not be injured."

Under the well-settled law as laid down in the cases cited by the court below in its opinion, we think the city was liable as bailee for negligence.

The decree is affirmed, with interest and costs.

MAYR et al. v HOLMQUIST et al.

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

No. 1,199.

PATENTS—INFRINGEMENT—CURTAIN-STRETCHING FRAME.

The Mayr patent, No. 617,813, for a curtain-stretching frame, is for a combination of old elements, and, in view of the prior art and of the rejection of claims by the patent office, contains but a single novel feature, which consists of so proportioning the metal base of the movable pins and the slot in which they move that when a curtain engages the projecting point the base will tilt, and its respective edges will bear against the opposite sides of the slot, thereby preventing the sliding of the pin. As so construed, it is not infringed by the device of the Hoffheins patents, Nos. 603,690 and 676,895, which accomplishes the same result by different means.

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

The bill of appellants, Mayr as owner and the stretcher company as his licensee, against appellees for infringement of letters patent No. 617,813, issued January 17, 1899, to Mayr for improvements in curtain-stretchers, was dismissed on the ground of noninfringement.

The description and claims are as follows: "My invention relates particularly to that class of bars used in frames for stretching lace curtains while drying in which the pins are made movable, so as to engage the meshes of the lace curtain at such a point that it will exert constraining force upon the curtain in but one direction, and thereby prevent a lateral force often found in frames where the bar-pins are made stationary; and the object of my invention is, first, to make a pin that shall be simpler of construction than the pins now in use, and, secondly, to prevent the pin sliding when in use. I attain these objects by means of the mechanism illustrated in the accompanying drawings, in which—

"Figure 1 is a plan view of a section of the bar, showing pins in position for use. Fig. 2 is an end view of the bar. Fig. 3 shows views of the pin with base of same piece of wire, and illustrates it with a round and square base. Fig. 4 shows a pin with a base consisting of a piece of metal, with a pin soldered or riveted thereto.

"Similar letters refer to similar parts throughout the several views.

"*a* represents a section of the bar, having a rabbeted edge on its upper surface. Opening on this rabbeted edge is the T-slot *c*, in which slide the pins *d d*. In Fig. 3 I have shown the base of the pins *d* in two shapes, round and square: but it is evident that they might have any one of an indefinite number of shapes if made to fit in the base of the T-slot. It is also evident that the base might have a different shape, making an L-slot or any similar shape.

"The pins are made to move freely in the slot; but when the curtain is stretched upon the frame the pins will be drawn over to the position indicated by the dotted line *e* in Fig. 2, and the base of the pin will be held rigidly

against the sides of the slot, so as to prevent sliding, thereby giving all the advantage of a stationary pin while in use and of a sliding pin when adjusting the curtain.

"A pin with a metal base having the upright piece soldered or riveted thereto, as shown in Fig. 4, I have found quite satisfactory, but prefer the pin shown in Fig. 3, as it can be stamped out of a single piece of wire, thereby lessening the cost to manufacture, and the pin formed in this way is very durable.

"Having thus described my invention, what I desire to secure by letters patent is—

"(1) A curtain-stretcher bar, having a rabbeted upper edge, a T or similarly shaped slot, opening upon the rabbeted upper edge, a pin with a metal base and so constructed that the said pin shall extend upwardly from said base, made movable in said slot, the metal base of said pin and the slot being so proportioned that when tilted such base will bear against both sides of the slot, thereby preventing the sliding of the pin, substantially as and for the purpose set forth.

"(2) A curtain-stretcher bar, having a rabbeted upper edge, a T or similarly shaped slot, opening upon the rabbeted upper edge, a pin having a base formed out of a single piece of wire, and so constructed that the said pin shall extend upwardly from said base, made movable in said slot, the base of said pin and the slot being so proportioned that when tilted such base will bear against both sides of the slot, thereby preventing the sliding of the pin, substantially as and for the purpose set forth."

"The dotted line *e* in Fig. 2" indicates a tilting of the pin's base within the slot of 10 degrees or more.

Appellees claim to make their curtain-stretcher in accordance with two patents granted to Hoffheins, No. 603,690, May 10, 1898, and No. 676,895, June 25, 1901, both having been applied for subsequently to Mayr's application. The three applications were pending in the patent office concurrently for some time before the issuance of a patent upon any of them.

From the description in appellees' second patent, which was for improvements upon the first, the following quotation will show the character of the pin and its relations to the slot in the rabbeted edge of the bar:

"F is the support or base for the movable or adjustable pins, each base formed integral with its pins *f* by bending a piece of wire on itself to have two side arms or pieces *f''* and f^4, connected at one end by a cross-bar f^3, as shown in Fig. 9, and having the pin *f* at the free end of the arm or side piece *f''* with a bend or curve *f'* at or near the point of juncture, by which the pin is given a bearing or support at the edge of the mouth *e* on the face of the rail, as shown in Figs. 8 and 10. The arm or side piece *f''* lies within the slot or cut *e'*, and the arm or side piece f^4 also lies in this slot or cut *e* on the opposite side, as shown in Figs. 8 and 10, and these arms or side pieces *f''* and f^4 at their free ends throw outward, and, as shown, the free end of f^4 is turned inwardly, to permit the ready entrance of the support F into the slot or groove E'. The side pieces or arms *f''* and f^4 have a spring action by which the support is self-held in position by the bearing of the arms against the walls of the slot or cut *e'*, which spring action does not interfere with the ready and easy changing or moving of the pins in use. These movable or adjustable pins in the end rails or pieces permit their being brought together or spread apart at any desired point for setting the side rails or pieces at the required distance apart for the width of curtain or fabric, and by providing the bend or curve *f'* the pin is brought over the edge of the mouth or opening *e*, and away from the inner edge of the rail, which with an inclined slot, as in Fig. 10, not only gives a firm bearing and support on the rail or piece for the pin, but also carries it farther away from the edge of the mouth or opening *e*, so that there will be less danger of breaking out or splitting the edge from strain in use."

In the first Hoffheins patent the following claims were allowed:

"(6) The combination of a frame-piece having at the inner edge a supporting-face terminating in a slot or groove on each side, and an attaching or retaining pin formed integral with its support or base from a single piece of wire

bent to produce a support or base having independent side arms or pieces free at one end, and having an outward spring for the side arms or pieces to enter the slots or grooves of the supporting-face, and lock and retain the pin in an adjusted position by the spring action, forcing the side arms or pieces in contact with the wall of the slot or groove, substantially as and for the purposes specified.

"(7) An attaching or retaining pin for a stretcher, consisting of a single piece of wire bent to form the pin and a support or base therefor having free arms or side pieces, wider at the open than at the closed end, to give a spring action for holding the pin in an adjusted position, substantially as and for the purposes specified."

And in the second, these:

"(9) A sliding adjustable pin for a curtain-stretcher frame, having a base to enter a longitudinal slot or groove in the frame-rail, and having above the base an outward bend or curve beyond the base of the pin to overlie the body of the rail, with an upwardly and inwardly inclined pin end, substantially as described.

"(10) A curtain-stretcher bar, having a rabbeted upper edge, an open longitudinal slot in the rabbeted upper edge, wider at its base than on the face of the rail, in combination with an adjustable pin movable in said lot, and having an outward curve above the base extending over the body of the rail, thereby supporting the pin against outward strain, and having above the curve an upwardly-projected pin-point, substantially as described."

The record exhibits the following prior patents:

No. 42,077, March 29, 1864, to Chess; No. 62,422, February 26, 1867, to Idle; No. 285,886, October 2, 1883, to Flickinger; No. 410,790, September 10, 1889, to Eastman; No. 487,240, December 6, 1892, to Backof; No. 490,230, January 17, 1893, to Osgood; No. 515,701, February 27, 1894, to Wisner; No. 521,200, June 12, 1894, to Bartley; No. 532,416, January 8, 1895, to Cochran; No. 535,154, March 5, 1895, to Austin; No. 540,783, June 11, 1895, to Eno; No. 543,644, July 30, 1895, to Chenoweth.

Further facts are stated in the opinion.

Garry P. Van Wye, for appellants.

Wm. O. Belt, for appellees.

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

BAKER, Circuit Judge (after stating the facts). The prior art, as disclosed in this case, taught Mayr how to construct a curtain-stretcher with bars that formed an adjustable frame; how to rabbet the bars and cut the T-shaped slots; how to fashion a pin-base that was held by the slot, was movable along the slot, and carried the pin-point outside of the slot; and how to bend a single piece of wire into a pin, including both the shaft and the base.

This wire pin, as a pin, was covered by the patent to Chess; but none of the prior patentees (Backof, Osgood, Wisner) who used pins held by and movable in the slots had tried the Chess pin in the rabbeted and slotted stretcher box. So Mayr made this claim:

"A curtain-stretcher bar, having a rabbeted upper edge; a T or similarly shaped slot, opening on the said upper edge; a pin having a base stamped out of the same piece of wire, made movable therein, substantially as shown and for the purpose set forth."

But all of these elements were old, and old, too, was the combination of the rabbeted and slotted bar with certain movable pins. Consequently, the examiner took the view that no invention was required to

substitute the Chess pin for one of the others in the slotted bar. Mayr then amended the claim to read:

"In combination with a curtain-stretcher bar, a movable pin with a base stamped or formed out of a single piece of wire, and so constructed that the said pin will stand perpendicular to said base, substantially as shown and for the purpose set forth."

But this claim as amended was just as plainly for the Chess pin in the Backof bar. So it was rejected, and that decision was affirmed on appeal to the examiners in chief.

The other two claims in Mayr's original application were also rejected by the examiner. They came before the examiners in chief in substantially the form in which they appear in the patent, except this, that the wording of the claims in the patent, "the base of said pin and the slot being so proportioned that when tilted such base will bear against both sides of the slot, thereby preventing the sliding of the pin," has been substituted for, "the pin made movable in said T-slot in such a way that the pin will be drawn against the side of the T-slot when the curtain is stretched upon it, thereby preventing the sliding of the pin when in use." The rejection of these claims was also affirmed by the examiners in chief, but they suggested that they would recommend an allowance of the claims if amended so as to specify distinctly that "the base of the pin and the slot are so proportioned that when tilted such base will bear against both sides of the slot, thereby preventing the sliding of the pin." Mayr thereupon made the suggested amendments and took out the patent.

The file-wrapper and contents, together with the reference patents, thus make clear exactly what Mayr did. He took the combination of a stretcher bar, a rabbeted edge, a T-shaped slot, a wire pin with its base within the slot and its point projecting out through the lips of the slot (a combination which he agreed, by acquiescing in the rejections, was open for any one to use), and improved upon it by so proportioning the base of the pin and the slot that when a curtain should engage the projecting point the base would tilt, and its respective edges would bear against the opposite sides of the slot, "thereby preventing the sliding of the pin." The proportioning of the slot and base to obtain the slide-preventing tilt is the only feature that can give vitality to the patent, and in order to appreciate the force and bearing of the proceedings in the patent office, that feature of the claims must be read in connection with the description and drawings. The description says that "the pins are made to move freely in the slot." The drawings show a very distinct tilting—as much as 10 degrees—and while they are, of course, not to be taken as working plans, nevertheless the description and drawings, together with the history of the claims, require such a looseness in the slot that there shall be a distinct and intended tilting of the base to secure the specified result.

Appellees insist that the proportioning of the base and slot to obtain the slide-preventing tilt cannot sustain the patent, because it was present in the earlier devices. The Backof patent is probably the strongest reference, outside of Mayr's disallowed claims. Backof's pin points project from wooden blocks, which are held by and are movable along

the slot or groove. The specification requires the blocks to "work freely in the groove," but apparently only to the extent necessary to enable the blocks to be slidden into place readily. There is no hint in the description or drawings or claims that there shall be a distinct and intended play between the base and the slot in order to obtain thereby a further or new result. On the contrary, the patent indicates that such a thought was entirely absent from Backof's mind. The wooden block was to be fitted as snugly into the slot as possible, without preventing the user from moving it readily; and so with the device of Mayr's claim, which was totally rejected. It was offered as an improvement upon Backof's bar. But because the known wire base was to be substituted for the known wooden base, and be fitted into the slot in the known way, the claim was rejected.

We cannot give to the Backof patent and to Mayr's rejected claim a construction to sustain infringement different from that put upon them to avoid anticipation. Now, if upon Backof's snugly fitting block a prying strain be put by means of the projecting pin shaft as a lever, there will necessarily be a binding effect, in the nature of a tilting of the base within the slot, and as Backof required the blocks to "work freely in the groove," there might be a barely perceptible tilting; and this is found in the Backof exhibit. But the binding was rather to be avoided than sought, like the binding of rings upon a curtain pole, where freedom of movement is the object; and the record satisfies us that not only was there no distinct and intended tilting, but also that the binding caused by the strain of the curtain was not sufficient to lock the pins in place.

Mayr improved upon Backof by substituting a wire base for the wooden block; but this improvement was open to every one's use, as Mayr confessed in the patent office. There is no exhibit of Mayr's rejected claim, but it is quite evident that if upon the snugly fitting wire base a prying strain be put by means of the projecting pin shaft as a lever, there will necessarily be a binding effect, in the nature of a tilting of the base within the slot. And as it is a requirement of every stretcher bar with movable pins that the pins be free for adjustment by the user, there might be a barely perceptible tilting. Nothing has been shown in evidence to prove whether the bite of the wire base of Mayr's rejected claim on the wooden bar, caused by the strain of the curtain, would or would not be sufficient to lock the pins in place.

To sustain the validity of the allowed claims as amended, we must hold that the distinct and intended titling was not anticipated by the unsought and unavoidable binding or tilting of the Backof patent and Mayr's rejected claim. So infringement can be predicated on nothing less than such a proportioning of base and slot as will charge appellees with using a distinct and intended tilt to prevent sliding. Mayr could not monopolize the result. If that was not already attained in Mayr's disclaimed improvement, appellees were free to use that improvement, with its unsought and unavoidable binding, and proceed therefrom to the result of a curtain-locked pin by any means other than using the distinct and intended tilting of the claims in suit. In the Hoffheins patents and in the exhibits of appellees' stretcher bar the result is obtained by adding to the unavoidable binding in Mayr's rejected claim the friction that

comes from making the base normally wider than the slot, and bending the shaft so that it bears upon the outside of the lip of the slot. We disagree with appellees' contention that the spring-base alone locks the pins when the curtain is put on the stretcher. On the spring-side of the base there is the combined friction of the spring and of the unavoidable binding that obtained in Mayr's rejected claim; and on the other side the total friction is divided between the unavoidable binding within the slot and the intentional bearing of the bent shaft upon the outer surface.

At the bar appellants called attention to the fact that appellees' exhibited pins were made of wire that would not retain its spring. Even so, the pins would at least fill the slot as completely as in Mayr's rejected claim.

The presumption which, in view of the state of the art, arose from the grant of the Hoffheins patents, accords with the facts of the record in supporting the conclusion that Mayr and Hoffheins started from common ground, and each made an independent advance. Compare Milwaukee Carving Co. v. Brunswick Co., 126 Fed. 185, 61 C. C. A. 175, and Loew Supply Co. v. Fred Miller Co. (C. C. A.) 138 Fed. 889.

The decree is affirmed.

KLAW et al. v. LIFE PUB. CO.

(Circuit Court of Appeals, Second Circuit. April 20, 1906.)

No. 227.

1. TRIAL—REQUEST FOR RULINGS—FORM.

In an action for libel, plaintiff's counsel requested the court to hold, on the cut alleged to be libelous, that it constituted libel per se on its face as a matter of law, and that the only question for the jury was the question of damages. *Held*, that such request contained more than a single proposition and was therefore properly refused.

2. SAME—EXCEPTIONS—TIME OF TAKING.

Where, at the close of the charge, plaintiff's counsel stated that he had no exceptions, exceptions to the charge attempted to be taken after the jury had retired were too late.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 680–682.]

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

The action was for libel, the alleged libel being a cut or picture published in defendant's illustrated weekly paper, known as "Life." The jury brought in verdict for defendant.

Harrison Leck, for plaintiff in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The first proposition urged upon this appeal is that the trial judge should have instructed the jury that the picture

was libelous per se, instead of leaving it to them to determine whether or not it was libelous. The only exception upon which this contention is based was reserved under the following circumstances. At the close of the trial the plaintiffs moved that certain evidence be stricken out, which was denied. Thereupon their counsel said:

"Now I ask your honor to hold on the cut that as a matter of law it constitutes libel per se upon its face, and the only question for the jury to pass on is the question of damages."

The request was denied and exception taken.

Manifestly this request contains more than a single proposition. It called upon the court to withdraw from consideration of the jury not only the question as to the character of the publication, but also as to whether it was directed against plaintiffs, and whether it was justified. Counsel for plaintiffs concedes that the request covers all three propositions, and the exception to its refusal therefore is unsound. Had the judge charged the request as it was submitted to him it is conceded his doing so would have been reversible error.

It is further contended that the court erred in some instructions as to the degree of care which should be exercised by booking agents and proprietors of plays as to the safety of the place of exhibition. We cannot, however, upon this appeal, inquire into any such questions, because the exceptions relied upon were not taken until after the jury had retired. Indeed, at the close of the charge, plaintiffs' counsel said: "I think your honor has covered our requests, and I have no exceptions." The practice of undertaking to reserve exceptions after the jury has retired has been condemned by the Supreme Court in Hickory v. U. S., 151 U. S. 316, 14 Sup. Ct. 334, 38 L. Ed. 170, and by this court in Commercial Travelers' Ins. Co. v. Fulton, 79 Fed. 423, 24 C. C. A. 654. The authority relied upon by plaintiffs in error (Dunlap v. N. R. Co., 130 U. S. 649, 9 Sup. Ct. 647, 32 L. Ed. 1058) is not in point. In that case verdict was directed for the defendant—practically a nonsuit on all the evidence—so that the jury did not retire at all, and an exception reserved before the cause terminated by discharge of the jury might fairly be considered as being reserved "before the jury retired."

Some minor questions are raised as to the admission of testimony, and as to some specific questions to witnesses, but they are of no importance and need not be discussed. The exceptions thereto do not present any error calling for a reversal.

Judgment affirmed.

COLUMBUS CHAIN CO. v. STANDARD CHAIN CO.

(Circuit Court of Appeals, Sixth Circuit. May 17, 1906.)

No. 1,532.

1. APPEAL—ALLOWANCE—PRESUMPTION OF REGULARITY.
Where an appeal is allowed in open court, the presumption is that it was allowed by a judge duly authorized to hold such court, and the record cannot be changed or corrected on motion to dismiss appeal to show otherwise by affidavits filed in the appellate court.

2. SAME—JURISDICTION—CITATION.
When an appeal is allowed in open court, neither the issuance of a citation nor the giving of an appeal bond is jurisdictional.

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

On motion to dismiss appeal.

George M. Finckel, for the motion.

C. C. Shepherd, opposed.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

PER CURIAM. A motion has been made by the appellee to dismiss the appeal, on the ground that the proceedings looking to the taking and perfection of the appeal were all signed by Judge Wanty of the Western District of Michigan after August 1, 1905, when he was not sitting as judge of the Southern District of Ohio, or with the Circuit Court of Appeals for the Sixth Circuit, and when his authority under a designation to sit in the Southern District of Ohio from June 1, 1905, to August 1, 1905, had expired.

The motion is overruled, because it does not appear from the record of the case either that the appeal was allowed by Judge Wanty, or, if allowed by him, that he was not acting under authority of a proper designation. The record shows the filing of a memorandum opinion by Judge Wanty in the case on July 6, 1905, and the entry of the decree dismissing the complaint on July 14, 1905. Then it appears in the record that afterwards, on November 28, 1905, a petition for an appeal with assignment of errors was filed in the clerk's office, and on the same day the following entry was made

"This day came the plaintiff, by its solicitor, and presented to the court its petition for the allowance of an appeal to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, which petition upon consideration by the court is hereby allowed, and the court allows an appeal to the United States Circuit Court of Appeals for the Sixth Circuit, upon the filing of a bond in the sum of five hundred dollars, with good and sufficient surety to be approved by the court."

This allowance, being made in open court, must be presumed to have been made either by the United States Circuit or District Judge having authority to hold court in the district at the time, or, if by the judge of any other district, then under authority of a proper designation. No motion was made to modify this entry so as to show that

the allowance was made, or attempted to be made, by Judge Wanty acting without any proper designation. We have already held in Re McCall (just decided) 145 Fed. 898, that the record imports verity, and cannot be contradicted or corrected by an affidavit filed in this court upon an application for a mandamus or upon a motion like this. The record does show that on December 8, 1905, an appeal bond was filed, approved by Judge Wanty, and on December 16, 1905, a citation issued, signed by Judge Wanty, as follows:

"Geo. P. Wanty, Judge of the United States District Court, Western District of Michigan, sitting and holding Circuit Court by designation in the Eastern Division of the Southern District of Ohio."

The presumption to be drawn from Judge Wanty's signature is that he was acting under a designation valid at the time, but, in view of the allowance of the appeal in open court, neither the issuing of a citation nor the giving of bond was jurisdictional. If either is defective, it may be perfected. Noonan v. Chester Park Athletic Club, 93 Fed. 576, 35 C. C. A. 457; Jacobs v. George, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127. There is nothing in the record to overcome that presumption of legality which is applied in The Alaska (C. C.) 35 Fed. 555.

The motion is overruled.

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

(Circuit Court, S. D. New York. December 20, 1905.)

PATENTS—DECREE SUSTAINING VALIDITY—RESTRAINING PARTY FROM USING DECISION TO OBTAIN TRADE ADVANTAGE.

It is doubtful whether a court has power to compel a party to a decree sustaining a patent to recall circulars sent out to customers stating the holding of the court, or to further advise the recipients of the circulars that the decree has been appealed from and superseded by the adverse party, where the decision of the court does not appear to have been willfully perverted.

Horace Pettit, of counsel, for complainants.

Elisha K. Camp (Philip Mauro and C. A. L. Massie, of counsel), for defendant.

HAZEL, District Judge. This is an application to require the complainant by compulsory order to correct certain alleged misrepresentations respecting the decision of the court in the above-entitled action, holding the patent infringed. The asserted misrepresentations are claimed to have been contained in a previously mailed circular letter addressed by complainant to various persons, and it is also urged that the court require the complainant to notify the persons receiving such original circular letter that the relief under the decree since filing same has been stayed. Complainant has read opposing affidavits averring its absolute good faith, and disclaiming any intention to injure the defendant in its business. Since the supersedeas has been allowed, the complainant has mailed to persons to whom the original circular had been sent a notice that the defendant is licensee under the patent in suit. The asserted good faith of the complainant is not entirely beyond question. That the complainant attempted to obtain a trade advantage over its competitors is probable, and its motives apparently were based on the theory that it was good business policy to quickly advise the trade that it had succeeded in establishing the validity of the patent in controversy. This is shown by its omission to state in the circular that the defendant had the legal right to sell the records, and by its precipitancy in publishing or advertising the decision of the court. The objectionable circular was mailed on October 26, 1905, after a motion for supersedeas had been noticed by the defendant for hearing on the succeeding day. That the complainant's officers were aware of such pending motion may therefore be presumed. The circular may not have been false or fraudulent, and counsel's interpretation of the opinion may not be inaccurate; but knowing that the case would be reviewed on appeal, and that a stay in all probability would be allowed, a proper consideration for the court should have suggested waiting until the appeal, or, at least, the motion for stay, had been decided before publishing any claimed advantages over competitors in business. It is doubtful, however, whether the court, under the circumstances and in the absence of a perversion of the decision, has jurisdiction to compel the complainant to recall its original circulars or give the relief sought, and accordingly the application is denied.

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

(Circuit Court, S. D. New York. February 19, 1906.)

1. PATENTS—CONSTRUCTION OF CLAIMS.

The claims of a patent finally allowed and accepted by the patentee must be read in connection with the claims set forth in the original application and with the prior art, and cannot be construed to cover what was rejected or disclosed by prior devices.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 234, 236½.]

2. SAME—NOVELTY—PRODUCT OF OLD PROCESS.

If a process is old and well known, the product of such process must likewise be considered as old in a patentable sense, and is not patentable as a separate and distinct invention.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 42, 49.]

3. SAME—INFRINGEMENT—SOUND RECORDS.

The Berliner patent No. 548,623, for duplicate sound records and method of making the same, in view of the prior art and the proceedings in the patent office, must be limited as to the material of which the duplicate records are made to hard rubber, which is that specified in each claim as allowed. As so construed, *held* not infringed.

In Equity.

Horace Pettit, for complainants.

Elisha K. Camp, Philip Mauro, and C. A. L. Massie, for defendant.

HAZEL, District Judge. This action was brought to prevent the infringement of letters patent No. 548,623, issued October 29, 1895, to Emil Berliner for sound record and method of making same. Complainants are exclusive licensees and owners of the patent, which relates to a process of copying or duplicating what is commonly known as a zigzag or laterally undulating sound record. Sound records of this type have a groove of even depth, as distinguished from sound records which have an uneven depth, and are peculiarly adapted for use with the talking machine known to the trade as the "Gramophone," of which Mr. Berliner was the inventor. According to the specification and proofs, the sound records in controversy were manufactured of hard rubber. Their shapes or forms were similar to a disk or tablet suitable for rotating. The preferred form of the records of the prior art, as instanced by the Bell & Tainter patents, which expired in 1893, was cylindrical, and in operation they were fitted to a mandrel. The sound records which are claimed to infringe complainant's records were manufactures of shellac and heavy earthy material, covered with lampblack. In appearance they were similar to the sound records in suit. The substances used by the defendant in the manufacture of the sound records are claimed by complainants to be the equivalent of hard rubber. This proposition primarily requires a construction of the scope of the claims. For convenience of comparison, all the claims of the patent are herein set forth:

"(1) The process of duplicating flat sound records, which consists in depositing copper or other like metal on an original record, then detaching the copper reverse thus produced, and facing the same with a layer of hard

metal, which is not attacked by sulphur, and then pressing the reverse into temporarily softened hard rubber, substantially as described.

"(2) The process of duplicating flat sound records, which consists in facing an electro-deposited reverse of a record with nickel or iron, then pressing this reverse into hard rubber, substantially as described.

"(3) As an article of manufacture, a sheet of hard rubber, having upon its face an undulatory groove of even depth, representing sound waves, substantially as described.

"(4) As an article of manufacture, a sheet of hard rubber, having pressed into its face an undulatory line of even depth, representing sound waves, substantially as described.

"(5) A copy of a flat sound record, which consists of a disk of hard rubber, having impressed upon its face the lines representing the record, substantially as described."

The first and second claims of the patent relate to the process of manufacture, while the third, fourth, and fifth relating to the product are the only ones which it is alleged the records of the defendant infringe. The defenses interposed are want of novelty, and, principally, a denial of infringement. The defendant contends that claims 3, 4, and 5 are free from indefiniteness or uncertainty, and that their scope is defined and limited by the action of the patent office and the prior art to the precise material of manufacture therein specified. On the other hand, the complaint insists that, considered in connection with the specification and prior state of the art, a broad construction of said claims is warranted. The specification describing the process says:

"My method is to cast the previously cleaned zinc-record disk in a cyanide of copper or cyanide of brass solution, electrolytically, by which a very thin film of copper or brass adheres to the zinc. After being thus prepared, the coated zinc disk is placed into a sulphate of copper bath, and copper deposited on it electrolytically. The deposit, when thick enough, is then detached, and forms an accurate matrix, showing the sound record of the zinc disk in reverse."

In speaking of the substances to be used for making a duplicate record, the specification says:

"This matrix can then be impressed into suitable material, and thereby produce exact duplicates of the original record-sheet. I have found hard rubber and celluloid to be excellent materials from which to make such duplicates. These substances when heated become very soft, and when in this soft state they are impressed with a matrix, such as above described. * * * In impressing a copper matrix on softened rubber, however, the sulphur fumes which are generated when heating the rubber attack the copper, and destroy the smoothness of its surface."

To protect the matrix from the sulphur fumes generated in heating the rubber, the patentee immersed the matrix in an iron or nickel bath, and by following the means detailed in the specification was enabled to manufacture a strong and durable sound record. The patentee was the inventor of the gramophone, an apparatus for recording and reproducing vibratory sound. The laterally undulating sound record used prior to the invention in suit was made from an original etched zinc plate, and when the rotating record came in contact with the so-called "stylus point," vocal sound was produced. A detailed description of the Berliner talking machine, which was invented in the year 1887, is unnecessary, for in this action we are concerned simply with the product of a process for making the sound records. The applica-

tion for the patent in suit as originally filed on March 18, 1893, was several times rejected by two different examiners, because the process claims were broad in scope, in that they provided for the use of "a material which is hard in a cold state, but soft and yielding in a warm state;" but the claims, which in terms were restricted to hard rubber, were unobjectionable. The examiners in disallowing the original claims cited the patents of Edison, No. 382,419, dated May 8, 1888, and Herrington, No. 399,265, of March 12, 1889, to show that it was old "to make an impression of any design upon a blank of hard rubber, the surface of which had previously been rendered soft and compressible by heat." Afterward the specification describing a process of impressing the matrix into blank sheets of impressible substance was amended by the applicant, and the patent was allowed. It is not claimed that the patentee was the original inventor of a process for duplicating sound records. In the patent to Edison, No. 200,521, dated February 19, 1878, for improvement in phonograph, a method is described of multiplying copies of a sound record by a stereotyping process, and in the later patent to Edison, cited by the examiner, a method of duplicating records of phonogram blanks by impressing a wax composition is described. In the patent of Herrington, which was for a process of duplicating phonograms, the specification refers to a cylinder coated with wax, resin, pitch, celluloid, glue, rubber, or some equivalent material, which may be so softened, by means of heat or otherwise, in order to retain the impression of the record. Although the Herrington patent related to a cylindrical record, it nevertheless showed that it was old at the date of the invention in suit to use an impressible substance for making sound records. In accordance with the views of the patent office, as indicated by the file wrapper and contents, the patentee accepted narrower claims than those originally contained in his application.

The principal question is whether the accepted claims entitled the complainant to cover a sound record having undulatory grooves of uniform depth, manufactured of shellac and baryta, or whether the patentee strictly limited himself to the use of hard rubber in the manufacture of the patented article. The law is well settled that the claims finally allowed and accepted by the patentee must be read in connection with the claims set forth in the original application. In Hubbell v. United States, 179 U. S. 80, 21 Sup. Ct. 28, 45 L. Ed. 100, the Supreme Court says:

"The claims as allowed must be read and interpreted with reference to the rejected claim and to the prior state of the art, and cannot be so construed as to cover either what was rejected by the patent office or disclosed by proper devices."

To a similar effect, see Royer v. Coupe, 146 U. S. 532, 13 Sup. Ct. 166, 36 L. Ed. 1073; White v. Dunbar, 119 U. S. 51, 7 Sup. Ct. 72, 30 L. Ed. 303; Shepard v. Carrigan, 116 U. S. 593, 6 Sup. Ct. 493, 29 L. Ed. 723; Phœnix Caster Co. v. Spiegel, 133 U. S. 368, 10 Sup. Ct. 409, 33 L. Ed. 663; Wheaton v. Norton, 70 Fed. 833, 17 C. C. A. 447; Leggett v. Avery, 101 U. S. 256, 25 L. Ed. 865. In Brill v. Car Co., 90 Fed. 667, 33 C. C. A. 213, the court says:

"It is immaterial, we think, whether the patent office was right or wrong in rejecting the complainant's original claims on the ground that the invention therein described was anticipated by the prior art. By amending his specification and claims the complainant admitted, in effect, that some limitation was necessary, and it is now too late to assert that he was entitled to his original claims, or that the claims as finally allowed are as broad as his original claims."

These authorities are thought to control the construction of the claims in question. An examination of the file wrapper and state of the art indicates that the claims, in the absence of any ambiguity, must be limited to that which was explicitly claimed. Each of the claims plainly refers to "a sheet or disk of hard rubber," which has pressed into its face an undulatory groove of even depth, representing sound waves. As said, it was not new to impress records representing sound waves into a plastic material, nor was it new to thus impress the zigzag record of Berliner. Complainants' contention that the disclaimers in the patent office related simply to the process, and not to the product, is thought, in view of the prior art, to be unsound. It has been held that, while a new process for producing the old article (alizarine) was patentable, the product could not be patented. Cochrane v. Badische, 111 U. S. 293, 4 Sup. Ct. 455, 28 L. Ed. 433. Apparently, then, if the process is old and well known, the article produced by that process likewise must be considered as old in a patentable sense, and accordingly it cannot be regarded as a separate and distinct invention. See Ex parte Hines, 60 O. G. 576; Ex parte Demeny, 64 O. G. 1649. It is true that words were used in the specification of the patent in suit which lend color, perhaps, to the argument of complainants. Portions of the specification describing the process read thus:

"This matrix can then be impressed into suitable material. * * *" "I have found hard rubber and celluloid to be excellent materials from which to make such duplicates." "These substances when heated become very soft, and when in this soft state they are impressed with a matrix, such as above described, and are cooled while still under pressure." "Referring to the drawings, there is shown a disk, I, of hard rubber or like material."

These quoted expressions, however, in my mind, are an acknowledgment of the state of the art, namely, that the sound records can be manufactured of different materials or substances. It is manifest, however, that what the patentee desired to protect was a sound record of hard rubber, as distinguished from a sound record made of other material. Such, I think, was the essence of claims 3, 4, and 5. Concededly, hard rubber and celluloid were excellent materials from which copies of the zigzag sound records could be made, but in making them the copper matrix was impressed on the softened rubber, and the sulphur fumes which were generated attacked the copper, and destroyed the smoothness of its surface. In this situation the problem, evidently, was to overcome or dissipate the harmful effects of the sulphur fumes upon the copper matrix. This was accomplished, as already stated, by coating the copper matrix with substances which would withstand the sulphur fumes. Although other suitable materials for making the sound records were familiarly known, yet the

efficiency and advantage of hard rubber for duplicating sound records according to the patentee's process was unknown, and hence the explicit claims covering the product of his invention.

Counsel for complainants invoke the doctrine of equivalents, and insist that the principle of Frost v. Cohn, 119 Fed. 505, 56 C. C. A. 185, is decisive of the question of equivalency presented here. To this proposition I must withhold my assent. There is a wide dissimilarity, in my opinion, between the specification and claims in suit and the specification and claims in the Frost Case. There the specification, in express terms, showed an intention by the patentee to include as an equivalent any other substances adapted to prevent the button from slipping, "and having characteristics similar to rubber, and adapted to the same use." Nor were the claims restricted to the material mentioned by the action of the patent office; the patentee agreeing to such restriction. Similar reservations as were made in that case cannot be read into the claims under consideration. No useful purpose would be subserved by considering the other adjudications cited by counsel for complainants. The rule in the Frost Case, above referred to, would certainly control the disposition of the case at bar were it not for the fact that, in my judgment, the proof requires a strict construction of the claims in controversy. Any other construction would be an enlargement of them beyond their scope. The suggestion of want of novelty in view of the foregoing need not be considered. My conclusion is that in the manufacture of sound records the defendant does not embrace the material specified in claims 3, 4, and 5 of the patent in suit, and therefore is not an infringer of such claims. It follows that the complaint must be dismissed, with costs.

GENERAL ELECTRIC CO. v. NATIONAL ELECTRIC CO.

(Circuit Court, E. D. Wisconsin. May 12, 1906.)

PATENTS—INFRINGEMENT—ARMATURE CORES.

The Reist patent, No. 508,637, for an armature core built up in sections of laminæ, with separators of thin radial metal ribs to secure ventilation, was not anticipated, and discloses patentable invention and a device of great utility and merit. Claims 2, 4, and 6 also *held* infringed.

In Equity. On final hearing.

On final hearing of bill, alleging ownership of letters patent No. 508,637, issued November 14, 1893, to H. G. Reist for an armature core, and infringement by the defendant company. The patent specifications state that the "invention relates to dynamo electric machines, and imbodies an improvement in the construction of armature cores, whereby ample ventilation is obtained for dissipating the heat generated therein without detriment to the inductive qualities of the core, and without materially increasing the expense of construction." The claims on which the alleged infringement is predicated are numbers 2, 4, and 6 of the patent, which read as follows: "(2) In an armature core the combination, with sections built up of laminæ, of separators consisting of ribs of metal between said sections, and in contact with adjacent laminæ, whereby ventilating space is afforded between the inner and outer surfaces of said core, as described." "(4) In a toothed armature core built up of laminated sections, separators consisting of ribs extending outwardly from the teeth on one of said sections to the corresponding teeth on the adjacent section, whereby said sections are mutually supported, and air passages rad-

ial to the center of said core afforded, as and for the purpose specified." "(6) An armature core, consisting of layers of laminæ built up in sections or bundles, and pronged or skeleton separators attached to an outside lamina of each of said sections, whereby ventilating space is provided between adjacent sections, as described." The main defense, if not the only one, is anticipation and want of patentable invention, although noninfringement is also urged in the argument and briefs.

Richardson, Herrick & Neave, for complainant.
Charles A. Brown, for defendant.

SEAMAN, Circuit Judge (after stating the facts). The oral argument at the hearing impressed me strongly in favor of the validity and great utility of the patent in suit, irrespective of the important consideration that Judge Thompson had reached like conclusion in an adjudication in the Southern District of Ohio against the Bullock Electric Manufacturing Company. 146 Fed. ——. Since the argument I have read the briefs and the opinion of Judge Thompson, have examined as well the material testimony, and am convinced that the Reist device was a marked advance in the art, disclosing the structure for an armature core which was justly entitled to letters patent. The discussions by counsel and experts on one side and the other are interesting, both historically and in the subject-matter, but neither the issues involved nor the time at my disposal warrant extension of this opinion to review the various contentions. I deem it sufficient, therefore, to state the deductions of fact upon which the decree for the complainant is authorized, under my understanding of the evidence.

When Reist entered the field with his device for an armature core in 1893, not only was the great desirability of ventilation for such cores well recognized, but inventors had made numerous attempts to that end without success. In each prior device the ventilation was obtained with such deduction from the capacity of the machine that the device was worthless for practical use, and the proof is undisputed that for several years the trade had rejected and abandoned all such devices, so that unventilated armature cores, with their known tendency to overheating, were universally used. Nevertheless, the solution by Reist in the patent means cannot rest patentability on the fact alone of its success where others had failed in the quest for ventilation, although that fact may be helpful as one of the tests of invention.

It is true that Reist did not discover the value of wrought iron as the main element of the armature core, nor the value of lamination to increase its efficiency, nor division of the laminæ into sections to provide air spaces, nor am I impressed with the view that he made a "fundamental discovery of the principle of ventilation." He was the first, however, to build up the armature core in sections of laminæ, with separators of thin radial metal ribs in direct contact with the laminæ, and so arranged that complete ventilation was provided between the sections, not only "without detriment to the inductive qualities of the core," or "increasing the expense of construction," in the language of the specifications, but with the capacity increased; in other words, his device avoided the electrical and magnetic difficulties which made the prior attempts worthless. The several specific means thus employed in the structure of his core are plainly not present in like combination

in any prior structure in evidence. The approach to it, in several of these devices and in the Richniewski publication of 1892, appears very close in the present light of the Reist disclosure, but each fell short of the true solution for an operative core, and neither, as I view them, introduces an element of novelty which points the way to the Reist consummation. That none of the references constitute anticipations in the sense of the patent law seems to me unquestionable, and I am clearly of opinion that meritorious invention appears in the device as set out in claims 2, 4, and 6, and that each is infringed by the defendant.

The matter brought into the present record which was not in the above-mentioned case against the Bullock Electric Manufacturing Company does not impress me as differentiating the question of the validity and scope of the patent from the view expressed in the opinion of Judge Thompson, and I concur in that view.

Decree will pass accordingly.

LAAS et al. v. SCOTT et al.

(Circuit Court, E. D. Wisconsin. May 3, 1906.)

PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

On an application for a preliminary injunction to restrain infringement of a patent, by a defendant over whom complainant prevailed in interference proceedings in the Patent Office and in the Supreme Court of the District of Columbia on appeal therefrom, the judgment of such court creates a presumption in complainant's favor as to the question of priority of invention, and, where that is the only question in issue, entitles him to the injunction, unless overcome by proof establishing defendant's contention beyond a reasonable doubt.

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

Raymond & Barnett, for complainants.

E. H. Bottum, for defendants.

QUARLES, District Judge. This is a motion for a preliminary injunction based upon a bill in equity charging infringement of United States letters patent No. 757,754, praying an accounting and injunction, and is also predicated upon the affidavit of Robert H. Wiles, a mechanical expert, who swears that there is substantial identity between the devices of complainants and defendants. The defendants in reply rely upon their answer and certain affidavits, and affidavits were submitted by complainants in rebuttal. These affidavits disclose a sharp conflict as to facts, and involve charges of perjury and mutilation of entries in books of account, etc.

The answer admits that Scott, one of the defendants, filed an application in the Patent Office for a patent upon a device claimed in terms in the specification of letters patent No. 757,754. It admits an interference in the Patent Office as to claims one and two of complainants' patent; that proceedings were had and testimony taken on both sides; and that such case was carried by appeal through the several tribunals of the Patent Office, and thereupon an appeal was taken

from the ruling of the Commissioner of Patents to the Court of Appeals of the District of Columbia, where the issue of priority was decided in favor of the complainants. It is admitted in the answer that defendants are manufacturing and selling rail stays after the Scott device, but not in such quantities as charged in the bill. The answer contains no reference to the prior art, and the patent of the complainants is not impeached on any other ground. It has been held that having applied for a patent upon the identical device, the defendants could not with good grace raise an issue as to patentability. Thomas v. Electric Co. (C. C.) 111 Fed. 923.

The defendants again raise the same issue which was settled adversely to them by the Court of Appeals of the District of Columbia, and still insist that the defendant Scott was the original inventor, and was guilty of no laches in presenting his application to the Patent Office, and is therefore entitled to be held and considered the original inventor of such device. All the affidavits on both sides relate to the question of priority. Thus it appears that the defendants seek in this action a retrial of the identical issue that was decided adversely to them by the Court of Appeals of the District of Columbia. There may be good ground for contending that the determination of the Court of Appeals is a finality as to the very parties who litigated this question in that tribunal. It will be remembered that the Supreme Court of the District of Columbia had no jurisdiction over interferences, but that jurisdiction is expressly conferred upon the Court of Appeals by section 9 of chapter 74, 27 Stat. 436, Act Feb. 5, 1893 [U. S. Comp. St. 1901, p. 3391] without any qualification whatever. It is a court of general jurisdiction.

If it were not for section 4915, Rev. St. [U. S. Comp. St. 1901, p. 3392] there could be no question as to the conclusiveness of this judgment between the parties thereto. But it is not necessary to decide or further consider that question for the purposes of this motion. The authorities seem to be agreed that when one has sustained his right to priority of invention in a contested interference, he is entitled to a strong presumption in his favor. Coffin v. Ogden, 18 Wall. 120, 124, 21 L. Ed. 821; Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017; Morgan v. Daniels, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657. There seems to be sufficient authority for the further proposition that the complainants who have thus maintained their contention of priority are prima facie entitled to a preliminary injunction pendente lite. 2 Robinson, § 5613; Smith v. Halkyard, (C. C.) 16 Fed. 414; Palmer Tire Co. v. Newton Rubber Works (C. C.) 73 Fed. 218; Barr v. New York Co. (C. C.) 32 Fed. 79; Celluloid Co. v. Chrolithian Co. (C. C.) 24 Fed. 275. This conclusion is consonant with reason. These parties figured in the interference. There is in this suit no issue raised except the question of priority. There would seem to be no necessity for requiring proof of any other adjudication as a condition precedent to injunctional relief. It is practically conceded that defendants are marketing a device covered by the monopoly that complainants are entitled to enjoy by virtue of their patent, and it is averred in the bill, and not specifically denied, that

defendants are not financially responsible to answer for the damages, savings, and profits that may be awarded against them herein. Seidenberg v. Davidson (C. C.) 112 Fed. 431.

The law seems to be well settled that in asserting the priority of their invention in the teeth of the decision of the Court of Appeals, the defendants are assuming a burden analogous to that which devolves upon the prosecutor in a criminal case. They must satisfy the court beyond a reasonable doubt. Therefore it would seem that the only question left open on this application is whether the defendants by their ex parte showing here have successfully maintained their contention beyond a reasonable doubt.

In view of the fact that the defendants have since the argument of this motion filed a cross-bill under section 4915, Rev. St. [U. S. Comp. St. 1901, p. 3392] for a retrial in equity, and as the persons making these several affidavits will undoubtedly be witnesses upon such hearing, it is not expedient that the court should discuss the affidavits in detail. It is perhaps sufficient to say that the showing made by the defendants does not exclude every reasonable doubt that the defendant Scott was the first meritorious inventor of the device in question; that the strong presumption that the law raises in favor of the complainants by reason of the decision of the Court of Appeals of the District of Columbia, has not been met and overcome by the affidavits here presented, and therefore the court is constrained to hold that complainants are entitled to a preliminary injunction as prayed, and it is so ordered.

VANT WOUD RUBBER CO. v. STERNAU et al.

(Circuit Court, S. D. New York. April 27, 1906.)

PATENTS—SUIT FOR INFRINGEMENT—SUFFICIENCY OF BILL.

A bill to recover damages and profits for infringement of a patent, which merely alleges that it was issued in due form of law on application "to the proper department of the government," and while alleging title in complainant by assignment does not show the date of such assignment, nor that it carried the right to past damages, is insufficient.

In Equity. On demurrer to bill.

Whittaker & Prevost, for plaintiff.

Richard N. Dyer and John Robert Taylor, for defendants.

WHEELER, District Judge. This suit is brought upon three alleged patents against the defendants as a firm, and has been heard on demurrer. The bill alleges that:

"The patentee made application for letters patent to the proper department of the government of the United States, in accordance with the then existing laws of Congress, and, having duly complied in all respects with the requirements of said laws, on the 23d day of August, 1892, letters patent to the United States No. 481,359, signed, sealed and executed in due form of law for the said invention, improvement, and discovery, were issued and delivered to the said Arthur Kahn, whereby there was secured to him, to his heirs, executors, administrators, and assigns, for the term of seventeen years

from the said date of issue, the full and exclusive right of making, using, and vending to others to be used, the said improvements. That by certain assignments and mesne assignments, instruments in writing, duly recorded in the records of transfer of title in the United States Patent Office, the entire right, title, and interest in and to the said patent No. 481,359, and in and to all claims for damages and profits arising from the use, manufacture, and sale of said invention, became and are vested in your orator."

—and has the same allegations as to the other two patents, with proper changes of name of inventor, number, and date, and that:

"The said defendants have well known all the facts hereinbefore set forth, and have been duly notified of the date and grant of your orator's said letters patent and of the said defendant's infringement thereof, but nevertheless they, prior to the filing of this bill, made, sold, and used, and after said notice, without license of your orator, against your orator's will and in violation of your orator's rights, now continue to make, sell, and use, within the Southern District of New York and elsewhere, bath sprays and massage devices, in some parts thereof substantially the same in construction and operation as in the said letters patent respectively claimed, the exclusive right and privilege to make, sell, and use which are thus by law vested in your orator, and refuse to pay to your orator any of the profits which have been made by such unlawful manufacture, sale, and use, or to desist from further infringement of said letters patent."

The sufficiency of these allegations to show proper patents and right of recovery thereon is challenged, with others relating to the originality of the inventions as foundations for the applications. In one respect lack of the latter is conceded, and leave to amend asked.

The most important question relates to the issue of the patent. The government does not own inventions, nor any monopoly of them, but under the Constitution provides for creating a right to exclusive use by the Patent Office, through acts of agencies prescribed for that purpose. The Patent Office is within the Department of the Interior, but that department as such does not issue patents as it transacts its ordinary business, but only by the acts of the Commissioner of Patents and his assistants, subject to appeal in certain cases. This fully seems to appear from Butterworth v. Hoe, 112 U. S. 50, 5 Sup. Ct. 25, 28 L. Ed. 656. Showing merely that on application to the "proper department of the government," patents were issued does not show that they were issued by the proper officers, which should be and usually is done by their names of office. The right of recovery of profits and damages accrues to the owners of the patents at the time, and assignments should be set out with sufficient particularity to show that it accrued to the plaintiff. These choses in action are not so assignable as to give a right of recovery in the name of the assignee. Hayward v. Andrews, 106 U. S. 672, 1 Sup. Ct. 544, 27 L. Ed. 271. The allegations here seem to be framed upon the idea that by the assignments the plaintiff has the right to recover the profits and damages from the beginning, and therefore those accruing to the plaintiff are not separated. The bill seems to be very defective in these respects, and the demurrer must be sustained. Amendments should be allowed, but they are so important, on payment of costs.

Demurrer sustained, and bill adjudged insufficient, with leave to amend on payment of costs within 30 days, or bill to be dismissed, with costs.

HOGAN v. WESTMORELAND SPECIALTY CO.

(Circuit Court, E. D. Pennsylvania. May 3, 1906.)

No. 31.

1. PATENTS—SUIT FOR INFRINGEMENT—DEMURRER.
   By profert of a patent in a suit for its infringement it is carried into the bill, and, if it is plainly devoid of invention on its face, a demurrer to the bill on that ground is well taken, and must be sustained.
   [Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 515.
   Demurrer for want of invention in patent infringement suit, see note to Caldwell v. Powell, 19 C. C. A. 595.]

2. SAME—INVENTION—SALT AND PEPPER DREDGE.
   The Hogan patent, No. 752,903, for a dredge for salt or pepper, having the cap made of celluloid, is void on its face for lack of patentable invention; there being no invention in the substitution of celluloid, the qualities of which were well known, for other materials previously used for making such caps.
   [Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 23.]

In Equity. Suit for infringement of letters patent No. 752,903 for a dredge granted to Oliver K. Hogan February 23, 1904. On demurrer to bill.

Howard P. Denison, for demurrer.
Ernest Howard Hunter, for complainant.

ARCHBALD, District Judge.[1] The sole question here is whether it is patentable to provide that the perforated cap or top of a salt cellar, pepper box, or other like article, shall be made out of celluloid, in place of the materials hitherto used. By the profert of the patent, it is carried into the bill, and, if on its face it is plainly devoid of invention, the demurrer is well taken and must be sustained. Richards v. Chase Elevator Co., 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991; Fowler v. City of New York, 121 Fed. 747, 58 C. C. A. 113. So far as the case of Warner Bros. v. Warren Featherbone Co. (C. C.) 97 Fed. 604, is not in accord with this, it cannot be followed.

As declared in the specifications, the invention in suit—

"Primarily comprehends a dredge consisting of a body of nonmetallic material, the neck of which is provided with molded threads and a cap, the latter in one piece and wholly of celluloid; said cap haveing a depending screw-threaded flange, the thickness of the material forming the said flange and the character of its connection with the rest of the cap being such as to result in a certain amount of flexibility, enabling a proper engagement of the flange with the threaded portion of the nonmetallic body, irrespective of lack of uniformity in the threads of either part, a characteristic generally present in articles where the threads are produced by a molding operation."

Proceeding to point out the existing disadvantages in articles of this character to be obviated by the invention, it is further said:

"Practice has demonstrated that, where two glass or vitreous articles are molded with threads for mutual engagement, the non-uniform character of the

[1] Specially assigned.

threads resulting from the molding operation renders the connection of such parts by their threads extremely difficult. This may be obviated to some extent by making the threads relatively coarse and the engaging portion of one of the parts sufficiently ample to facilitate its taking over its companion, but such expedient would manifestly preclude a tight fit. Another remedy would be to grind the threads after they have been molded, so as to render them accurate; but such recourse would be both tedious and expensive and not warranted in the production of a cheap class of articles. Hard rubber might be employed in the formation of a dredge-cap and when the dredge-cap was so constituted it would avoid some of the serious features of metal. Moreover, a hard rubber cap might be made to possess the flexibility required on account of irregularity in the threads of the engaging parts; but, were such cap employed in connection with a salt-dredge, even the comparatively small percentage of hydrochloric acid evolved would be sufficient to unite with the sulphur in the rubber composition and ultimately result in the disintegration of the latter and consequent injury of the cap."

After explaining in detail the form and construction of the cap, "it will be appreciated from the foregoing description," says the inventor, "that a dredge embodying my invention is extremely hygienic, of finished and attractive appearance, and highly efficient, as well as comparatively inexpensive. The lightness of weight of the improved article, when considered with respect to dredges wholly of glass or other similar vitreous material, is appreciable. Such reduced weight also constitutes a favorable factor in the shipment of large quantities of these dredges. Due allowance being made on account of its limited thickness, and bearing in mind its several novel advantages, the cap used in my improved dredge is quite durable."

Conceding that all which is so claimed for a celluloid cap is true of it as compared with others, it by no means follows that it involved invention to perceive that this would be the result of the substitution of that material, and with all its verbiage that is what the patent in the end comes down to. There is no difference in form or construction from anything which had preceded it, except as the one is able to be made thinner and lighter, and admits in consequence of a closer correspondence and fit between the screw and flange of the cap and the neck and shoulder of the dredge. But the natural qualities of celluloid have long been well known, and cannot be monopolized in this way for the production of so simple and common an article as the top of a dredge or salt cellar. The substitution of a new and different material may possibly in some rare instances amount to invention. But in order to do so—it is submitted—the substitution must lend itself in some special and not readily discernible manner to the production of a new and not otherwise attainable function or result, nothing of which appears here. It was well understood, for example, that the composition called celluloid, by reason of its comparative hardness, durability, and lightness, as well as its capacity for being nicely shaped and molded, was able to be fashioned into any number of useful forms; and it certainly would be carrying the idea of inventive genius to the extreme to hold that anything of that kind was required to perceive that the perforated top or cap of a dredge or salt cellar could be made with advantage out of it. It amounted, at

best, to no more than the extension and adaptation of the recognized qualities of the material specified to the production of a simple and common domestic article, without any change in function, and with only a very inconsiderable variation in the result.

The patent has four claims,[2] in each of which, except the first, the invention in terms is made to depend upon the use of celluloid. In the first, instead of this, "a material insensible to the emanations from the salt" is specified. This, while apparently seeking to broaden the claim as to the material, necessarily eliminates all dredges except where salt is the commodity, and thus to that extent narrows it. Not only, however, does it by reason of this go outside of the specifications, but, in designating the material by the suggested quality only, it is made too indefinite and general to be sustained. As to the other claims, nothing further need be said than that dependent as they are on the mere substitution of celluloid for metal, rubber, or glass, previously in use, they involve no invention and are therefore void on their face.

The demurrer is sustained, and the bill is dismissed, with costs.

[2](1) A two-part dredge comprising a body of noncorrosive material having integrally an upper threaded portion, and a cap made wholly of a material insensible to the emanations from the salt, said cap embodying a top containing perforations and a flexible threaded flange, the latter in direct engagement with said threaded body portion.

(2) A two-part dredge comprising a body of noncorrosive material having integrally an upper threaded portion, and a thin shell-like cap made wholly of celluloid, said cap embodying a top containing perforations and a flexible threaded flange, the latter in direct engagement with said body portion.

(3) A two-part dredge comprising a body of noncorrosive material having integrally an upper threaded portion, and a cap made wholly of celluloid, said cap embodying a top containing perforations, and a thin flange having threads impressed through the thickness thereof and in direct engagement with said threaded body portion.

(4) A two-part dredge comprising a body of glass having an upper portion with molded threads, and a thin shell-like cap made wholly of celluloid, said cap embodying a top containing perforations and a flexible flange having threads impressed through the thickness thereof and in direct engagement with said molded threads of the body portion.

KEASBEY & MATTISON CO. v. H. W. JOHNS-MANVILLE CO.

(Circuit Court, S. D. New York. March 6, 1905.)

PATENTS—INFRINGEMENT—MACHINE FOR MOLDING TUBES.

The Keasbey patent, No. 397,860, for a machine for molding tubes, discloses invention, and the patentee was the inventor. Also *held* infringed.

In Equity.

Suit for injunction and an accounting for alleged infringement of U. S. letters patent No. 397,860, dated February 12, 1889, granted to Henry G. Keasbey for improvement in a machine for molding tubes, etc.

Edward K. Jones (Edmund Wetmore, of counsel), for complainant.

A. Parker Smith, for defendant.

RAY, District Judge. The same questions involved here, substantially, have recently been passed upon by the Circuit Court of Appeals, Third Circuit, in Keasbey & Mattison Co. v. American Magnesia & Covering Co., 143 Fed. 490. It is only necessary for this court to refer to the opinion of that court in that case. The views there expressed are adopted.

There will be a decree accordingly and for an accounting. The patent is valid. Keasbey was the inventor, and defendant infringes.

In re ARMSTRONG.

(District Court, S. D. Iowa, W. D. April 7, 1906.)

No. 254.

1. BANKRUPTCY—VALIDITY OF LIENS—MORTGAGES GIVEN WITHIN FOUR MONTHS.

The question whether or not a mortgage given by a bankrupt within four months prior to his bankruptcy, which was not fraudulent in fact, so as to bring it within the provisions of Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], is void as a preference must be determined under the provisions of sections 60a and 60b, 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], construed together.

2. SAME—EVIDENCE CONSIDERED.

A bankrupt owned over 3,000 acres of land in Iowa, besides a valuable homestead and a large amount of personal property, in all worth over $200,000. He was extensively engaged in farming and dealing in stock, and had been for many years regarded as a man of wealth and high personal standing. Within four months prior to his bankruptcy a local private bank to which he owed nearly $100,000 and the owner of which was old and in poor health asked him to secure its claim by a mortgage which he did. He continued to do business with the bank and afterward became indebted to it on overdrafts for more than $5,000, which was later secured by another mortgage. After the first mortgage was given and recorded, another bank, to which he was indebted, asked security, and was given a mortgage in part on other property; the bankrupt at the time also furnishing a statement showing him to be worth, including his homestead, over $50,000, above all indebtedness. *Held*,

under the evidence that, while he was in fact insolvent when the mortgages were given, he did not believe himself to be so, but gave the mortgages in good faith, and without intention to give preferences; that neither of the mortgagees, when the first two mortgages were given knew, or had reasonable cause to believe that he was insolvent, and that such mortgages were valid liens, but that the overdraft mortgage given at a later date when his condition was better known was void, as a preference.

In Bankruptcy. On claims of William Arts and Thomas B. McPherson, mortgagees.

T. J. Mahoney, John N. Baldwin, George S. Wright, J. P. Conner, P. E. C. Lally, and George H. Mayne, for claimants.

J. L. Kennedy, M. L. Learned, and George W. Paine, for the trustee.

McPHERSON, District Judge. Alexander Armstrong, several years ago came from Illinois, to Carroll county, Iowa, and engaged in farming and raising, feeding, buying, and selling of live stock, doing a large business. He became possessed of about 2,500 acres of land near Glidden, in Carroll county, and later on of more than 600 acres of land in Monona county. He had several store buildings in Glidden, and about six years since acquired a residence worth several thousands of dollars, in the town, five or six miles from the farm. He was believed by all to be worth more than $200,000, and to be a man of high character, and his credit was measured by his requests. He was able to read in print, but in writing with difficulty, if at all. For several years he did part, at least, of his banking business at the German Bank in Carroll, Iowa, known in this case as the "Hess Bank" from the name of the cashier. As time passed, he left the Hess Bank and became a borrower from former friends in Illinois, and from live stock commission men in Omaha and Chicago, and from an Omaha bank, presently to be mentioned, and from a bank in Carroll, referred to as the "Arts Bank." In buying property, he at times would assume the payment of mortgages, but usually credit was extended him on the strength of his own signature. He had a son Henry, the owner of much property, for whom he indorsed large sums, who in 1904, became involved. But his suretyship debts he did not disclose until disaster overtook the son, subsequent to the mortgages in question. Alexander Armstrong, July 27, 1904, filed in this court his petition in voluntary bankruptcy, and August 26, 1904, he was adjudicated a bankrupt.

Wm. Arts, of Carroll, the county seat of Carroll county, is a banker and capitalist. His bank, the German American Bank, known as the "Arts Bank," is a private bank of $50,000 capital. Arts is a man of wealth, but in what sum is not disclosed. He is 64 years of age, and for the past two or three years, has been in bad health. He has three sons, W. A., Joseph, and Frank. W. A. Arts is his father's bank cashier. But Mr. Arts himself, when his health permitted, directed and controlled his affairs. Neither of the sons had any ownership in the bank, nor in the father's affairs. Joseph does not seem to have had much, if anything, to do with the matters in-

volved herein. The son Frank is a merchant in Nebraska. In 1904, he was called to Carroll on account of the father's illness, and while there, he and the cashier, W. A. Arts, thought it best to go over the affairs of the bank, and they concluded to and did take, May 2, 1904, from Armstrong and wife, a mortgage on his Carroll county farm of 2,280 acres to secure four notes then aggregating $98,503.32. Mr. Arts was advised of this in the evening of that day by his son, and by a daughter who worked in the bank. He ratified the act, and in person took the mortgage the following day to the office of the county recorder and had it recorded; he then being convalescent. This mortgage being to secure an antecedent indebtedness, and given within four months of the proceedings in bankruptcy, is assailed by the trustee and other creditors, as being an unlawful preference.

The Union National Bank is of Omaha, with G. W. Wattles as its president, and Mr. Thomas as its cashier. Wattles had resided in Carroll county, Iowa, was acquainted with Mr. Armstrong, both before and since he (Wattles) removed to Omaha 12 years ago. June 13, 1904, Armstrong gave his note evidencing his indebtedness to the Wattles bank for $22,000, and a mortgage securing the same on the lands in both counties. He also gave for the same purpose a chattel mortgage on all his farm machinery and the crops for 1904, on the Carroll county farm. This note and these mortgages were taken in the name of G. W. Wattles, trustee, for convenience, the Union National Bank in fact being the owner. After taking the mortgage of $98,503.32, Arts continued business with Armstrong; the latter drawing checks on Arts' bank, thereby creating overdrafts aggregating near $3,000, which, with other indebtedness amounted June 17, 1904, to $5,512.40. On that day Armstrong gave Arts a mortgage to secure that sum, conveying 615 acres of Monona county land. Arts seeks to enforce that mortgage, and the trustee assails it as being an unlawful preference, as having been given within four months of the bankruptcy proceedings, and given to secure a prior indebtedness. These three claims have been submitted to the court. They were referred to the referee who took and has reported the evidence with his findings of fact, practically all of which are assailed by exceptions, some by one party, and some by others. While the court indorses some of the findings, but not all, the case is simplified for this court, and perhaps for the Appellate Court, if an appeal or proceedings for review be taken, by making independent findings of fact.

First, as to the McPherson claim:

The note for $22,000 is negotiable in form. McPherson bought it before due, knowing nothing of its consideration, nor that it was a renewal of prior notes, and knew nothing concerning any facts connected with the mortgage. In the usual course of business he paid Wattles in money, its full face value. A few days before buying the note, he knew of a proposed attachment suit against Armstrong, and was asked to become a surety on the bond. He declined to become such surety, and advised against bringing the ac-

tion. But he acquired no knowledge of Armstrong's insolvency, and all information that came to him with reference to the proposed action is of no importance in this case. During the pendency of this action, McPherson has sold the note and mortgages back to Wattles, or the bank. Whether selling the note back places the bank in a different position from what it once occupied I will not discuss. What I hold is that the note represents an actual and bona fide indebtedness for the full amount expressed. Armstrong has no defense to the note, nor any part thereof, in the hands of Wattles or his bank or in the hands of any holder. The mortgages securing the note would pass to McPherson both by assignment and as incidents to the note, and would pass back to Wattles, or the bank, when the note went back. But the question of these transfers, in my opinion, is immaterial, and it is not of the slightest concern whether Wattles or his bank, or McPherson, is pressing the claim. McPherson was an innocent holder of both the notes and mortgages for full value before due. Now Wattles' bank owns them. But the bankrupt statute controls the situation. I know of no authority that holds that an innocent purchaser before due of such paper, can escape from the bankrupt statute. And counsel for claimant cites no authority, and the contention is without force. If I am not correct in this, the dullest mind, with a stifling of the conscience, can easily circumvent the statute against unlawful preferences.

The McPherson claim was secured by mortgages. At the time they were given, Wattles and his bank had learned of the Arts mortgage. Mr. Thomas, the cashier, went to Armstrong to ascertain his financial standing which resulted in Armstrong giving him a signed written statement. That statement was to the effect that he owned Iowa real estate of the value of $223,400, after omitting his homestead. He placed the value of his homestead at $12,000. He placed his real estate mortgages, including the one to Arts, at $147,500, leaving the net value of his real estate, aside from his homestead, at $65,940. He represented his cattle, horses, hogs, and machinery to be worth $19,300, and his other debts, including that of Wattles, $47,900. Counting his homestead, his net worth, then according to his own schedule, was $54,340, and omitting his homestead his net worth, as per his statement, was $42,340. In my opinion the homestead should not be considered on the question of solvency or insolvency, although as eminent a judge as Judge Hammond held otherwise in Re Bauman (D. C.) 96 Fed. 946, and the letter of the statute sustains that holding.

In the year previous Armstrong made a written statement to Wattles' bank for the purpose of obtaining credit, now covered by the note and mortgages in question, in which his property, including his homestead, was listed at $246,750, and his liabilities at $36,000. Armstrong was believed by Wattles and his associates in the bank, as well as by the people generally, to be a man of integrity and high character, and in all respects worthy of belief. That Wattles and his cashier, in taking the security, believed Armstrong to be solvent, I have no doubt, and it is equally clear that Armstrong

himself then believed the same. There are but two facts tending to show that Armstrong then believed he was creating an unlawful preference. The one fact is that Armstrong so testifies. But as against his testimony is evidence from witnesses equally credible. And against his testimony are his two written statements; on one of which he obtained credit, and on the other was granted time. The fact that the bank asked for security, or even was insistent, is no proof of knowledge of insolvency. If such facts are to be deemed material as showing insolvency, or knowledge of insolvency, then any and every man asking for security is to be challenged in his effort to protect himself against future contingencies. Wattles knew that Arts had his claim covered by a mortgage, and it naturally and legitimately was a reason why he should have his claim secured. But wanting either a past or present indebtedness secured is not proof of knowledge of insolvency. Armstrong was a large dealer in cattle, and it is common knowledge of all informed people in the West, that such a business is of a fluctuating character. The solvent cattle dealer of this year may next year be in embarrassed circumstances.

The evidence fails to persuade me that Armstrong then knew that he was insolvent, and much less does it tend to persuade me that Wattles or his cashier knew of it. The fact that he was then insolvent is but one link in the chain of evidence. The facts are that Arts' mortgage started the talk. Then he gave the Wattles mortgage, insisting he would and could pay all claims in full. Then, after conferences, he concluded that bankruptcy proceedings would be profitable to him. He then recalled, and, for the first time in many years, if ever, he made known a very large claim of 20 years standing, due, as he says, to his wife. This claim was known by no one but himself and wife, and for years had been barred by the statute of limitations, but for the fact, that he only could plead the statute, and his own interest suggesting it, he waives the statute. And to make such waiver effective, he recalls, so he says, that he knew he was insolvent when he made the mortgages.

As to the Arts mortgage, the case is much stronger. Arts was not asking for a mortgage, and never had asked it. He was an old man, and had been stricken with disease. His cashier was content with the situation. His daughter working in the bank made no suggestion, nor did his other resident son. All of them, as a matter of filial duty, and probably by prospect of inheritance, were interested. Thereupon, his son from Nebraska comes to remain with the father during what was supposed to be his last illness. And this son, a business man, loitering about the bank, most sensibly said that Armstrong's indebtedness held by a feeble old man, was too large, and had run too long without security. The mortgage was requested for that reason, and it was given. And if this amounts to the dignity of proof of insolvency or knowledge thereof, then no man can safely close his affairs. The contention is that there was an oral agreement to keep it from record. This is not only denied by evidence of the most substantial and detailed character, but

the fact that it was at once recorded with no intervening circumstance, shows that the contention should not be believed. And the fact that Arts asked that a notation thereof be kept from a blotter on the counter is of slight importance. It was not a public record. The recorder kept it on his own volition, and the promiscuous crowd only examined it. Abstractors and searchers of titles and liens went to the official records, where the mortgage was of record and indexed. It was not unnatural that Arts preferred to not display his business to the gossips. It is a circumstance against Arts; but it is only a circumstance. But the substantial fact, in addition to all others, is that Armstrong with nothing to his credit, kept on drawing checks on the bank of Arts until he created an overdraft of several thousands of dollars. But for the belief of Arts, in the solvency of Armstrong, why were those checks honored? And but for the belief of Armstrong in his own solvency, why did he draw them? When he drew those checks, he expected them to be paid, thereby evidencing his belief that Arts believed him to be solvent. Any other answer makes him a confessed and common swindler of an old man, his long-time friend, and who had carried him for years. And this I do not believe. It is more charitable and reasonable to believe that he is now too anxious to participate in his wife's name of a larger share in the estate. Subsequent events show that he then was insolvent. But we are now looking backwards. Arts and Wattles were then looking forward. The result of it all is that both Arts and Wattles took their mortgages in good faith for actual indebtedness as stated in their mortgages. Neither of them knew of the insolvency of Armstrong, nor had either of them reasonable grounds for believing him to be insolvent. Nor did Armstrong then know it nor believe it, but he believed as he insisted over and over again that he was solvent, and would and could pay his debts in full with a few months' time.

A different state of facts exists as to the mortgage taken by Arts to secure the overdrafts referred to and some omitted indebtedness. That was the creation of an unlawful preference. Time had elapsed since taking his large mortgage, and a different situation existed, and the facts were becoming known. But as to the large mortgage of Arts, and the one to Wattles, on the foregoing facts, what is the law and how shall it be applied? Of course, all parts of the statute of 1898 and the amendments of 1903 must be construed together, and every provision must be given a meaning. And the apparent conflicting recitals can only be given a meaning as intended by Congress, by applying the provisions applicable to the facts. A statute arbitrary in its provisions can be interpreted in no other way.

The question is: What is the law of the case in hand? And in arriving at that the question is: What has been decided in cases similar to this? and not, what has been said by argument on other questions? That the scope of the statutes is that the bankrupt is to be protected and discharged, and his estate as owned by him four months prior to the adjudication, as said in one case by Judge Sanborn (Swarts v. Fourth Nat. Bank, 117 Fed. 1, 54 C. C. A. 387), is

true. And it is equally true as stated by Justice Miller (Wilson v. City Bank, 17 Wall. 480, 21 L. Ed. 723), reversing the order of statement, that the primary object is to secure a just distribution of the bankrupt's property, and the secondary purpose is to release the bankrupt from his debts. Undoubtedly correct as these statements are, there are exceptions thereto. It is only the honest debtor who is released, and from only part of his debts, and then only by surrendering part of his property, and such part as he has not lawfully disposed. So that the issues in the cases at bar must be kept in mind. And in ascertaining what is now before the court, material aid is given by stating what is not before the court.

By giving the mortgages, the question is not whether Armstrong committed acts of bankruptcy, and whether he could have been adjudicated a bankrupt in an involuntary proceeding, because this is a proceeding in voluntary bankruptcy. It was upon his own petition that he was adjudicated. Therefore the provisions of section 3, Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], have no relevancy. But if mistaken as to this and if section 3 is relevant, then the language of the section shows that the preference condemned is the one made by the debtor with the intent by him to prefer such creditor over his other creditors. This is not a case where Arts or Wattles has received a preference, and is urging a claim with or without surrendering the preference, and, therefore, section 57g (30 Stat. 560 [U. S. Comp. St. 1901, p. 3444]) is not controlling. And if 57g has the slightest relevancy it will be seen that the amendment of 1903, Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1905, p. 689], specifically refers to such preferences as can be avoided under 60b or 67e. Act July 1, 1898, c. 541, 30 Stat. 562, 564 [U. S. Comp. St. 1901, pp. 3445, 3449]. This is not a case wherein either Arts or Wattles is seeking to enforce a mortgage void under the Iowa laws, nor under the general unwritten law, as having been made or received with the intent to hinder, delay, or defraud creditors. The mortgages were authorized under the Iowa laws, and there is no fraud on the part of the mortgagor or the mortgagee, and no purpose to hinder, cheat, defraud, or delay any creditor. Therefore, neither the statute denouncing conveyances actually fraudulent, nor the state laws, control this case. And this is not a case wherein the trustee is seeking to recover property, including money turned over or paid, as an unlawful preference. Therefore section 70 (30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]), which provides that certain property shall vest in the trustee, and what property he can recover, is not decisive.

But this case, restated, is one where a debtor in fact insolvent, makes a mortgage to secure prior indebtedness within four months, free from fraud, believing he is solvent, and the mortgagee believing the same, and not having facts which would lead him to believe in insolvency. Section 60a, defines that to be a preference, but neither as an actual nor a constructive fraud. 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. Section 60b provides that the trustee can avoid such preference by an action, or defensive proceedings

in court, in a case wherein the mortgagee shall have had reasonable grounds to believe that it was intended thereby to give a preference. And it follows that the two paragraphs of section 60a, and section 60b, pertaining to the one subject of preference, must be construed together. Otherwise, all preferences will be unlawful, and all preferences will be avoided. And then 60b becomes nothing but empty words. I shall briefly review the cases I believe to be in point, omitting the large number deciding questions arising under other sections of the statute.

In re Eggert, 102 Fed. 735, 43 C. C. A. 1, by the Circuit Court of Appeals, Seventh Circuit. The cases under the statute of 1867 are reviewed and elaborately discussed. The mortgage was within four months, was for a prior debt, and made when the debtor was insolvent. But the mortgagee did not know of the insolvency, and the trustee was ordered to pay the claim in full, and the order was affirmed. After reviewing the cases, Judge Jenkins says:

"The resultant of all these decisions we take to be this: That the creditor is not to be charged with the knowledge of his debtor's financial condition from mere nonpayment of his debt, or from circumstances which give rise to mere suspicion in his mind of possible insolvency; that it is not essential that the creditor should have actual knowledge of, or belief in, his debtor's solvency, but that he should have reasonable cause to believe his debtor to be solvent; that if facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose."

Hackney v. Raymond Bros. Clarke Co., 94 N. W. 822, by the Supreme Court of Nebraska. The case was one brought by the trustee to recover property turned over within four months by an insolvent on a prior debt. The trustee was defeated and the case was affirmed largely on the strength of the Eggert Case.

In re Virginia Hardwood Company (D. C.) 139 Fed. 209, by Judge Rogers, of the Western Arkansas District. The mortgage was defeated, but only because of the facts, that an unlawful preference was intended, he having such knowledge of the insolvency and knowing that a preference was intended.

In re Graham (D. C.) 110 Fed. 133, decided by Judge Humphrey, of the District of Illinois. On the facts, the court held that the transfer within four months was made and received with the intent to create a preference, and therefore was set aside.

Egan Bank v. Rice, 119 Fed. 107, 56 C. C. A. 157, by the Circuit Court of Appeals, Eighth Circuit. The court held that the chattel mortgage in part to secure a prior debt, executed within four months, was fraudulent, because allowing the mortgagor to remain in possession and sell.

Pollock v. Jones, 124 Fed. 163, 61 C. C. A. 555, by the Circuit Court of Appeals, Fourth Circuit. The mortgage was for a prior debt executed within four months. The mortgage was avoided on two grounds: (1) Executed by one of the firm only; (2) because both mortgagor and mortgagee knew that a preference was created.

McNair v. McIntyre, 113 Fed. 113, 51 C. C. A. 89, by the Circuit

Court of Appeals, Fourth Circuit. The mortgage was for a prior debt, within four months, and was enforced against the trustee on findings that neither knew of the insolvency, and there was no intent to create a preference. Brandenburg on Bankruptcy (3d Ed.) § 962, presents the proposition in line with the foregoing cases. He analyzes the statutes by saying that not one section must be taken, but that force must be given to all the provisions, and reaches the conclusion that to avoid such a mortgage, five phases must concur, and if any one is lacking the transfer will be enforced, viz.: (1) The debtor must have been insolvent. (2) He must have made the mortgage. (3) The result must be to give the secured creditor a greater percentage than other creditors. (4) It must have been made within four months. (5) The mortgage creditor must have had reasonable cause to believe that a preference was intended. The law of Bankruptcy by Loveland (2d Ed.) §§ 159, 160, is stated the same as by Brandenburg. Cullinane v. Bank, 123 Iowa, 340, 343, 98 N. W. 887; Des Moines Bank v. Morgan Jewelry Co., 123 Iowa, 432, 437, 99 N. W. 121.

Counsel on both sides in the case at bar, most earnestly contended at the argument that the recent case by the Supreme Court of Keppel v. Tiffin Bank, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790, is in point. But it is not. That was a case on the one question of the meaning of the word "surrender" under section 57g. And that court held, four judges dissenting, that when a mortgage was adjudged to be an unlawful preference, that the mortgagee could then participate as a general creditor, because he then had "surrendered." On that question the case is an authority, and on no other question. And Swartz v. Bank, 117 Fed. 1, 54 C. C. A. 387, was with reference to the surrender feature covered by 57g.

I conclude this opinion, by stating my general conclusions. Section 67e has reference to conveyances and transfers involving moral turpitude and which are fraudulent in fact. Section 60a defines the word "preference," while 60b provides what preferences can be avoided, and the two must be construed together and as a whole. If this be not so, then I am unable to see the purpose that 60b can serve. And the preference to be avoided must not only be a mortgage or transfer executed by an insolvent within four months, and to secure a prior debt, but the mortgagee when taking it must have had reasonable cause to believe it was intended to give him a greater per cent. than the other creditors would receive. I appreciate the importance of the argument that the property of the bankrupt is to be equitably and ratably apportioned among the creditors. Much can be said as to that, and in many cases such is the law. But the term "creditors" does not mean all creditors, and when the law is so made to mean, then credit, as well as business generally is at an end. General principles of jurisprudence must govern in business circles, except as changed by statute. And when Congress enacted section 3 against preferences it was provided to be unlawful only when the debtor intended the preference, and by section 60b.

when the mortgagee had the intent. And a mortgage of itself is not a preference.

The holding is that Arts, as to his large claim, and Wattles, as to his claim, had no such intent. Those two claims will be paid by the trustee. The other claim of Arts will stand as an unsecured claim.

In re HOBBS & CO.

(District Court, N. D. West Virginia. April 17, 1906.)

1. BANKRUPTCY—JURISDICTION OF COURT—CONTROVERSIES BETWEEN THIRD PERSONS.

   Under the general powers conferred on courts of bankruptcy, by Bankr. Act July 1, 1898, c. 541, § 2, (67), 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421], to cause the estates of bankrupts to be collected and distributed, to determine controversies in relation thereto and bring in additional parties when necessary for the complete determination of a controversy, the test of jurisdiction to determine matters in controversy between third persons is the necessity of doing so in order to administer the estate.

2. SAME.

   Where a firm of building contractors was adjudged bankrupt, having on hand at the time uncompleted contracts for buildings against which mechanics' liens had been filed by persons who had furnished labor and materials to the bankrupts, which contracts it is necessary to complete to obtain payment from the owners and avoid loss to the estate, the court of bankruptcy has jurisdiction to bring in the lien claimants and adjudicate the validity of their liens, so far as they affect the balance due under the contracts as a necessary condition precedent to a settlement between the bankrupts and the owners.

3. MECHANICS' LIENS—WEST VIRGINIA STATUTE—RECORDING OF CONTRACT.

   Under the provision of the mechanic's lien law of West Virginia (Code 1899, c. 75, § 5), requiring the owner, in order to limit his liability to lienholders to the contract price to record his contract with the county clerk, "or so much thereof as shows the contract price and the times of its payment," such contract need not be acknowledged to be entitled to record.

4. BANKRUPTCY—ENFORCEMENT OF MECHANICS' LIENS ON BUILDINGS ERECTED BY BANKRUPTS.

   Various mechanic's lien claims, under the statute of West Virginia, against buildings in course of erection by a bankrupt firm, considered, and adjudicated in so far as they affected the amount due from the owners to the bankrupts under their contracts..

In Bankruptcy. On report of special master.

On April 21, 1904, the Randolph National Bank, James P. Tenley, and Robert Spurling filed in this court their petition against the firm of Hobbs & Co., composed of Frank N. Hobbs, Robert M. Boyle, and Lewis E. Parkinson, asking that said firm be adjudged bankrupt. On the next day the same parties filed an ancillary petition setting forth that said Hobbs & Co. were building contractors having contracts for building the Davis & Elkins College at Elkins, W. Va., at a contract price of between $40,000 and $50,000, and a business building for W. H. Cobb of the same place for about the same contract price; that there were considerable sums due on said contracts from the owners, but large amounts of mechanic and labor liens had been taken and were being prepared to be taken against said buildings; that said firm was believed to have under contract buildings in Fairmont, W. Va., Morgantown, W. Va., and elsewhere; that the debts and liabilities of said firm would ag-

gregate about $50,000; and that the face value of its assets was about the same, subject, however, to set-offs which would reduce the true value of such assets to between $10,000 and $15,000; that about the 18th day of April, 1904, Frank N. Hobbs, a member of the firm, had absconded with a large amount of the assets, leaving the firm utterly insolvent; that on April 18, 1904, the two other members of the firm, Boyle and Parkinson, had filed their bill in equity in the circuit court of Marion county against Frank N. Hobbs, as sole defendant, charging the criminal conduct of Hobbs and the impairment of the credit of said firm thereby, and praying the appointment of receiver to take charge of and protect the remaining assets of the firm from his control; that on that day receivers had by said state court been appointed in the persons of E. M. Showalter and J. P. Kirby, who duly qualified as such. The prayer is that Hobbs, Boyle, and Parkinson, as individuals and as composing the firm of Hobbs & Co., and Showalter and Kirby, receivers, be made defendants, and that a receiver be appointed for said firm by this court. Upon this petition, on said April 22, 1904, an order was entered by this court appointing W. H. Cobb and E. M. Showalter temporary receivers for said firm, and directing them to take possession of the property, collect outstanding debts, institute suits for that purpose, ascertain and report the assets and what contracts remained unexecuted, the cost of completion, and the amounts unpaid by the owners thereon, and, in order to do this, authorizing them to employ a skilled builder to assist in making estimates.

On May 25, 1904, the original petitioners filed an amended petition, in which they allege that it has appeared since the filing of their original petition that said firm had five large contracts, one for the erection of a building for the state at the University for about $13,000, two for C. W. Watson at Fairmont, aggregating about $25,000, one for W. H. Cobb for about $38,000 and one for the Davis & Elkins College for about $48,000; that it would cost $1,263 to finish the Cobb house upon which event there would be due from Cobb $3,923; that $2,900 would complete the Davis & Elkins College Building, when $7,442 would be due from that corporation; that to complete the two Watson houses would cost for the one $6,700 and $7,000 would then be due therefor, for the other $3,300, when $7,448 would be due thereon; that the contract with the state for the University had been canceled; that the debts of said firm aggregated about $50,000 and its assets would not exceed $20,000; that material purchased by said firm was on the grounds, ready to be placed in said houses, and all that would be necessary would be to employ and pay the labor involved to complete said contracts; that not to utilize said material in said buildings for which it had been specially prepared would be to make it almost entirely valueless, while for the owners to have to buy new material and complete their respective buildings would absorb all of the contract prices; that a large number of mechanics' and materialmen's liens had been taken upon said several buildings, some valid, others not, and that the Kane & Keyser Hardware Company had instituted a suit to assert such a lien for nearly $2,500 against the Cobb building, and other suits were threatened to the imminent danger of great loss to the assets of said bankrupt firm; that the wife of Hobbs was seeking to withdraw assets of said company; that judgments were being taken against the firm and material removed by materialmen from the custody of the firm, and the prayer is that receivers be appointed and an injunction be awarded restraining all persons from interfering with their administration of affairs, and especially restraining Kane & Keyser Hardware Company from further proceedings in its suit. The injunction was granted, and process issued thereon.

On May 27, 1904, the usual orders adjudging said firm of Hobbs & Co. and Frank N. Hobbs, Robert M. Boyle, and Lewis E. Parkinson members thereof, as individuals, bankrupt, and referring the case to Geo. P. Shirley, referee, were entered. On May 28, 1904, receivers Showalter and Cobb filed their first report, in which they say they have been unable to collect any of the assets of said firm; that it had five unfinished contracts on hand, one for the University building which the state had canceled, but for work upon which they think $1,500 should reasonably be recovered from the

state of West Virginia; that they had two architects examine the other four buildings and return their estimates with their report, from which they state the amounts necessary to complete the buildings and the amounts then to become due therefor to be substantially as stated above from the amended petition; that Cobb, the Davis & Elkins College, and Watson each has bonds of indemnity from the Ætna Indemnity Company to secure performance of their contracts; that mechanics' liens have been taken, the validity of many in large amounts they doubt; that other assets of said firm are due from the Cook Hospital & Training School, Lon C. Smith, the city of Fairmont, Joseph C. Rider, Ella B., Joseph B., and George C. Murray; that E. M. Showalter executed a note for $736 to the wife of Hobbs which belonged to the firm, and asks that she be required to prove her right thereto, and that material on hand should be at once used to complete the buildings. On the same day an order was entered filing this report, directing the receivers to employ mechanics and proceed to complete the buildings of Cobb and the Davis & Elkins College, to collect as the work progressed the pro rata parts of the contract prices, and apply the same towards paying the construction costs, and, in case either one of the said owners failed to pay, then to borrow money sufficient to complete said buildings, issue certificates, and provide for the payment of the same out of the residue due upon the buildings when completed. This order granted also the injunction against the Kane & Keyser Hardware Company and others above referred to.

At various times in the clerk's office and before Referee Shirley, answers of the Kane & Keyser Hardware Company, the Davis & Elkins College Corporation, W. H. Cobb, C. W. Watson, the S. H. Calkins Company, and Charles C. Hough had been filed, and on July 28, 1904, upon the petitions, these answers, replications thereto, the motion of Kane & Keyser to dissolve the injunction as to it, it was ordered that the motion to dissolve be overruled and said injunction continued, the cause be referred to Referee Shirley as special master to report: First, the material and labor liens against the Cobb lots and buildings; second, such liens upon the Davis & Elkins College property; third, such liens on the Cook Hospital & Training School Company's property; fourth, such liens on the property of Ida M. and Lucy L. Watson. This order further directed all additional necessary parties to be made, and gave leave to petitioners to file another amended petition for that purpose. It then directs said special master to report: First, which of said mechanics' and materialmen's liens against the several buildings arose for labor performed by Hobbs & Co., and whether said liens were perfected before or after the institution of these proceedings; second, what part of the contract prices for said buildings was due at the institution of this suit, all the facts relating to said contracts, and what amounts have been paid by owners to complete their buildings since the appointment of the receivers; third, whether any other liens existed against the real estate of the owners prior to such mechanics' labor and materialmen's liens; fourth, to ascertain the specific real estate bound for said mechanics', etc., liens; fifth, the amount due or to become due to Hobbs & Co. on the Cobb Building at the time of the institution of the suit by Kane and Keyser; sixth, any other pertinent matter. The master is directed to give notice to parties, and leave was then given to all parties claiming labor, mechanics' and materialmen's liens against the Davis & Elkins College and other properties against which suit had not been brought in the state court to institute and mature, but not further prosecute, one suit against each property in the state courts to assert such liens.

On August 19, 1904, the original petitioners filed a second amended petition making new parties, as suggested by the court in the order last referred to, stating that the lots upon which the C. W. Watson houses were being constructed belonged to Ida M. and Lucy L. Watson; that Sallie N. Showalter had recently had a house erected for her by Hobbs & Co.; that mechanics' liens have been taken upon this building, and they do not know the contract price or the status of the work upon the same; that the John R. Cook Hospital & Training School Company had a large building constructed by said bankrupt firm, but it does not know the contract price or the

amount due thereon; that Cobb had executed a deed of trust on his lot to J. F. Harding, trustee, to secure A. B. Serpell $10,000. The prayer is that Ida M. Watson, Lucy L. Watson, John R. Cook, Cook Hospital & Training School Company, Sallie Showalter, J. F. Harding, trustee, and A. B. Serpell be made defendants and answer, and all parties having liens come into this suit and assert the same.

The answers referred to in the decree of the 28th day of July, 1904, need not in this statement to be considered further at this time than to state that the property owners thus answering all seem to admit the jurisdiction and right of this bankrupt court to pass upon and determine the validity of the mechanics', materialmen's and laborers' liens sought to be asserted against their respective properties, but earnestly deny the validity of each and every one of them for reasons that will be more fully considered in the opinion following. Before Special Master Shirley 40 separate and distinct answers of mechanics, materialmen, and laborers were filed setting up liens upon the various properties and filing the record evidence upon which such liens were based. The special master, after months of almost continuous labor, and the taking of an enormous amount of testimony, on the 15th day of September, 1905, filed his report to which the Davis & Elkins College Corporation, W. H. Cobb, Ida M., Lucy L., and Clarence W. Watson, the Cook Hospital & Training School Company, owners, and the Collins Company, the Kane & Keyser Hardware Company, Kelley & Jones, James E. Hanley, L. Creed Wolf, the Elkins Planing Mill Company, the Fairmont Wall Paper Company, and the D. M. Anderson, Mariner Son & Co., lien claimants, have filed voluminous exceptions.

Dailey & Bowers, W. H. Cobb, Charles Powell, G. M. Alexander, and E. M. Showalter, for owners.

Harvey F. Smith, Talbott & Hoover, W. B. Maxwell, D. H. Hill Arnold, W. E. Baker, C. W. Maxwell, J. F. Harding, James A. Bent, S. T. Spears, W. S. Meredith, W. B. Cornwell, P. J. Hoge, Scott Lowe, Tusca Morris, and A. L. Lehman, for claimants.

DAYTON, District Judge (after stating the facts as above). At the threshold of a consideration of this very voluminous record and the many intricate and perplexing questions involved, it becomes absolutely necessary to keep in view constantly the extent of this court's jurisdiction in the premises. As a court of bankruptcy, inasmuch as the firm of Hobbs & Co. and its members as individuals have been properly adjudged bankrupts, it is its plain duty (a) to secure control of all the assets of said firm or its individual members, and (b) disburse such assets to the respective creditors of each—firm assets to firm debts, individual assets to individual debts. Inasmuch as no assets have been found of the individual members, and no debts proven against them as such, they as individuals need not be further considered. In the distribution of the firm assets all its creditors, after the payment of the costs of suit and administration, are entitled to share pari passu, unless liens exist as provided by sections 64, 65, 66, and 67 of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 563–565 [U. S. Comp. St. 1901, pp. 3447–3450]), in which case such liens are to be expressly preserved in priority. It is no concern, ordinarily, of this court what collateral controversies may arise between outside parties because of an individual's, firm's or corporation's bankruptcy. Its sole purpose must be, as I have said, to collect the assets and apply the same to the bankrupt's debts. Con-

sent of parties to determine outside and collateral issues between other parties cannot give jurisdiction to this court. Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867; Olds Wagon Works v. Benedict, 67 Fed. 1, 14 C. C. A. 285.

It would therefore at first blush appear that this court could have nothing to do with the determination of the controversies existing between the materialmen, the mechanics, and the laborers on the one side, and the owners on the other side; the first claiming and the latter denying the existence of liens upon the properties of the latter, and that all this court should do would be to collect from the owners the sums due under contract from them to Hobbs & Co. and disburse the amounts thereof among the creditors of this bankrupt firm. In any event, I think it can be assumed at once that no obligation rests upon this court by its process to enforce any such liens against the properties of such owners. But, on the other hand, it is to be remembered that these courts do have jurisdiction to "bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy." The touchstone of jurisdiction in such cases is whether it is necessary, in order to fully secure and disburse the bankrupt's assets, to pass upon the rights of other parties. Does such necessity necessarily exist in this case? After earnest thought and consideration of the situation I am driven to the conclusion that it does. Here was a contracting firm, doing a very large business, hopelessly involved, thrown into bankruptcy, with every dollar of its assets locked up and dependent upon the fulfillment of its uncompleted contracts. In each case it had, for a fixed price, contracted with the owner to build, and in each case the owner had right to withhold the contract price or a part of it to secure the building's completion. In each case the debts due these mechanics, materialmen, and laborers were primarily debts contracted by the bankrupt firm and not by the owners. These owners cannot in any event be held personally liable for these debts to these men, while the firm and its individual members were so liable. Only by an express statute of the state can the owners be affected at all by these debts, and that under express conditions and limitations fixed by the statute, by having liens therefor attach to the building upon which work was done or material provided for which was the consideration of the debt. If such lien has attached to the owners' property, he has the right to demand that this contracting firm secure its release by payment, and, if he does not, to withhold from the amount due from him to the contractor sufficient to pay it. Thus it is that this court could not require the owner to pay over to its receivers or trustee the sum due, unless it did so with the obligation upon it to devote the fund as far as it would go to the release of such liens, without violating the sanctity of the contract between the owner and the contracting firm. Under such circumstances, the valid liens attaching to the owners' property become in equity liens upon the funds collected on behalf of the bankrupt contractor from the owner, and such funds must first be applied to the payment of such liens before any general creditors can have any lot or share therein. The conclusion therefore is

inevitable that, in order to make proper distribution of the funds arising under each contract, this court must determine the validity of these claims of liens thereunder. It is to be always remembered that these liens are created solely by the state statute and are against common-law right, therefore full and substantial compliance with the statutory limitations is required to maintain them. It is further to be borne in mind that this court, in construing this statute, will follow the constructions given it by the court of last resort in the state.

The West Virginia statute authorizing these liens is contained in sections 2 to 13 inclusive of chapter 75 of the Code of 1899 of that state, except that section 3 has been very materially amended by chapter 42, p. 132, of the Acts of the Legislature of 1903. The provisions of this statute are, at least, obscure—perplexing, if not to an extent contradictory of each other. Section 2 provides that every mechanic, builder, artisan, workman, laborer, or materialman shall have a lien upon the structure and the lot of ground upon which it stands, constructed, etc., under contract with the owner or his agent; the aggregate of such liens not to exceed the contract price, and no priority to exist between them. Section 3 originally, as found in the Code, provides that materialmen, laborers, etc., performing labor or furnishing material under a contract with a principal contractor or his subcontractor for the construction, etc., of a structure provided for in a contract between its owner and such principal contractor, shall have a lien for such labor performed or material furnished (not exceeding the price for the same stipulated in the contract between such principal contractor or his subcontractor and such materialman, laborer, of mechanic) on the structure and the lot of ground upon which it stands.

That such liens shall have priority over other liens created subsequent to the performance of such labor or the furnishing of such material; that the laborer and mechanic shall have the first lien, and the liens of laborers, mechanics, or persons furnishing material or machinery to a contractor, shall take precedence over the lien taken, or to be taken, by the contractor indebted to them, and all assignments and transfers of such head contractor of his contract with the owner, or by a subcontractor of his contract with the head contractor, and all proceedings in attachment or otherwise against the head contractor or subcontractor to subject or incumber his interest in such contract are made subject to the liens of the laborers, mechanics, and materialmen who have labored upon or furnished material for the constructing, altering, repairing, or removing of such structure under contract with the contractor or subcontractor. The language making these provisions in the original act, found in the Code and in the amended act as found in chapter 42, p. 132, of the Acts of 1903, are identical. The original act then proceeds as follows:

"It shall be the duty of such laborer, mechanic or person furnishing material to file with the owner or his authorized agent an itemized account of the labor done or material or machinery furnished verified by affidavit, within thirty-five days after the same is performed or furnished, and his neglect or failure so to do shall release the owner from all responsibility and his property from all lien for any item therein done or furnished prior to the

said thirty-five days, and the *owner may at any time by notice in writing require such laborer, mechanic* or person furnishing the material or machinery to file with him such itemized account, and the neglect or failure to do so, within ten days after receiving such notice, shall release the owner from all responsibility and his property from all lien for all labor done or material or machinery furnished by the person so neglecting or failing prior to the giving of such notice."

The language in italics is supplied from the note as having been by accident omitted in the engrossed act. It is absolutely necessary to complete the sense. In the amended act of 1903 this clause reads as follows:

"It shall be the duty of such laborer, mechanic or person furnishing material, to file with the owner or his authorized agent an itemized account for the labor done or the material or machinery furnished, verified by affidavit, within thirty-five days after the same is performed or furnished, which said thiry-five days shall be construed to mean that the laborer, mechanic or person furnishing material shall have thirty-five days after he shall have ceased to have performed labor, or furnished machinery or material to file such notice, and that if the notice is given within thirty-five days, as aforesaid, it shall include all items for labor performed or machinery furnished, within a period not exceeding nine months from the date of said notice, to the owner of the property on which the lien is to be charged; and his neglect or failure so to notify the party to be charged within thirty-five days, after he shall have ceased to furnish labor, machinery or material, shall release the owner from all responsibility, and his property from all lien for any item therein done or furnished prior to the said notice; and the owner may at any time by notice in writing require such laborer, mechanic or person furnishing the labor, material or machinery, to file with him such itemized account, and the neglect or failure so to do within ten days, after receiving such notice, shall release the owner from all responsibility, and his property from all lien, for all labor done or material or machinery furnished by the person so neglecting or failing prior to the said giving of such notice."

The section, both in the original and amended act, then sets forth a proviso that any laborer or other person employed to do work or furnish material or machinery for, or to, a contractor may, before doing work or furnishing material or machinery, give notice in writing to the owner, that he will hold him responsible if not paid by the contractor, and, if such notice is given, then the itemized account referred to need not be given unless expressly required by the owner, and the lien will not in any way be impaired by failure to furnish certain itemized accounts. In the amended act forms are given for the itemized account and the notice. Section 4 of the act provides that any lien under sections 2 and 3 shall be discharged unless the party claiming it, within 60 days after ceasing labor or furnishing material or machinery, file with the clerk of the county court a verified account of the amount due after allowing all credits with a description of the property sufficiently accurate to identify it with the name of the owner. Section 5 provides the duty of a clerk to record this account and description, and then says:

"No payment by the owner or his agent to a contractor, shall affect or impair the lien of a laborer, or materialman, provided for in section 3 of this chapter. But such owner may limit his liabilities so that the amounts to be paid by him shall not exceed in the aggregate the price stipulated in the said contract between himself and the contractor, by having the said contract, or so much thereof as shows the contract price, and the times of its

payment, recorded in the office of the clerk of the county court of the county, where such house or other structure is situated, prior to the performance of the labor and the furnishing of the material, or the machinery for the same. But if such owner fails to have said contract so recorded, the contractor shall be held to be his agent and the house or other structure, and the lot on which it is situated, then be held liable for the true value of all labor done and the material and machinery furnished therefor, prior to said recording, although the same may exceed in the aggregate the price stipulated in the contract between the owner and the contractor."

It is next to impossible to attempt to construe and apply this legislation without calling attention to its vicious character, and especially to that portion of it contained in the amended act of 1903. In almost every case, class legislation is to be condemned, and results, practically, in injuring rather than benefiting those for whom it is enacted. I am fully persuaded this legislation, so manifestly intended for the benefit of laborers and mechanics, instead of aiding in the long run will only injure them. In effect, instead of leading them to think and act for themselves, protect themselves when working for a contractor, collect their wages promptly from him as they should do, and cease to labor for him when he falls behind in payment, it lulls them into a carelessness in so caring for their interests, into a fancied security based upon the idea that, no matter how improvident or even dishonest their contractor may be, their labor must and will be paid for by the owner with whom they have no contractual relations and who they may not know, under and by virtue of this law. They pay little attention in consequence, how far the payments of their wage becomes in arrear until the almost inevitable litigation comes, and the expense and loss of time in conducting it usually sacrifices the amount due them. On the other hand, under such law as this, for any one to undertake to build by contract becomes a most serious matter. The state subjects the private citizen to all of its iniquities, but, of course, excepts itself from its effects, for it has been held that no public building can be subject to the provisions of this act. Hall v. Scites, 38 W. Va. 691, 18 S. E. 895.

"Public policy and public necessity" create the ground for such exceptions. The Legislatures enacting such laws as these would seem to regard that little or no conception of the equal rights of citizens as to each other, or the sanctity of their contracts one with the other, is required to be exercised by them in the administration of true public policy and necessity. When a man enters into a contract with another to build him a house, mutual obligations arise under the contract, the one to build, the other to pay, and if the contractor expends his money and labors in erecting the building, as by the contract he has bound himself to do, and which if he fails to do he can by the contract be compelled by law to do, or else to answer in damages for such failure, it is well that he should be secured in the payment by the owner with a lien on the building and the ground upon which it stands, to the extent of the contract price, but, when such contractor, after having so bound himself with the owner is then permitted to hire whom he pleases, good workmen, bad workmen, lazy workmen, or worthless workmen, without interference from the owner and whom

the owner may not know, make reasonable or unreasonable contracts with them for their wages, buy in like manner and with like non-interference from the owner, his material from all parts of the country, his sash and doors from Chicago, his nails from Wheeling, his plaster from Pittsburg, his lumber from North Carolina and Michigan, and all from men the owner never did and cannot know and at prices over which he cannot have control; for this to be done with no other or further agreement on the owner's part than to pay a specified sum or sums for the building completed or partially so, as the case may be, and at a specified time or times to the contractor and to him only and then have this law step in and announce that his solemn contract did and could do no more than constitute this contractor his agent, and that, if such contractor has failed to pay the money paid over to him by such owner, as required by the terms of the contract, to these laborers, mechanics, and materialmen, with whom such owner has no privity by contract or otherwise, and whose whereabouts he may not know of, that in that event his building and ground is to be subject to pay all these debts of the defaulting contractor, no matter how much their sum total may exceed his contract agreement, is nothing short of the grossest outrage, to say the least of it. This outrage has been accentuated by the act of 1903, which was apparently enacted for the express purpose of permitting this species of "plucking" and despoiling the owner to continue for a period of nine months, and it would almost seem in order that he may be punished good and hard for his temerity in undertaking to build at all. Section 5 of this statute, however, after providing that payment by the owner to a contractor shall not effect or impair these labor and material liens, does say that the owner may limit his liability in amount to the contract price, provided he record the contract, or so much of it as shows the contract price and the terms of payment, in the office of the clerk of the county court of the county, prior to the performance of such labor or the furnishing of such material, but it further provides, if this recordation is not made, the contractor is to be held as agent for the owner, and the lot and house of such owner is to be liable for the labor and material demands, no matter how much exceeding the contract price.

If it were an original proposition presented for the first time to me, or even if it was absolutely necessary for me, in order to settle the questions here, to pass upon this section directly, I do not think I would hesitate a moment in holding the latter clause of this section to be in direct violation of constitutional inhibitions against invalidating contracts. A wayfaring man, though a fool, well knows that no man, in contracting with another to build his house, intends to constitute that other his agent with power to create against his property debts to an unlimited degree, and without his knowledge, and it seems to me no Legislature, no matter how consuming its desire to truckle to classes, ought to be permitted to declare such contract to be so. In this case the Davis & Elkins College Corporation did record its contract before labor performed or material furnished, but it is earnestly contended that this contract had not been acknowledged by

the parties before recordation, and is subject to all the requirements of the recordation acts relating to deeds and other conveyances of title in this respect, and therefore is in fact an "unrecorded" paper. There is nothing in this contention. Fortunately all papers do not have to be acknowledged before recordation in the county clerk's office, and the very language of this section requiring only the clauses giving the contract price and the times of payment to be recorded clearly shows that these building contracts are of this class. Wagon Co. v. Hutton, 53 W. Va. 154, 44 S. E. 135. Certain it is that in the interest of common justice the effect of the provision limiting the owners liability by his recordation should be given the widest and fullest scope, and I have no hesitancy in saying that these labor and materialmen's liens should not by any court be enforced against the building of this corporation beyond the balance of the contract price still in its hands or in the hands of the special receivers of this court who may have collected such balance from such corporation. This balance, however, whatever it may amount to, after making it contribute its proportionate share of the costs incurred in this proceeding, should be applied to these liens—first to the labor ones, and the balance pro rata to those for material. That it may be so applied, I must ascertain what ones of these liens conform to the requirements of this statute, and I now do ascertain, from the master's report and the evidence filed with it, them to be as follows: First, the labor liens: Floyd Triplett, $47.50; Alfred Phares, $22.50; J. C. McDonald, $33.25; L. Sturm, $47.50; Wm. Herron, $37.50; W. H. Head, $32.50; C. A. Poling, $46.25; Ward Lewis, $36.75; J. M. Knapp, $45; J. O. Johnson, $45; J. A. Moore, $36.25; W. A. Allensworth, $55; Theodore Mayer, $37.50; Fred Hoffman, $29.75; J. A. Kelley, $47.50; Thomas Haines, $76. Second, the liens for material: Kane & Keyser Hardware Company, $2,084.36; Collins Company, $2,690.07; Kelley & Jones Company, $2,779.40; Fairmont Wall Plaster Company, $32.10; Elkins Planing Mill Company, $283.80; James E. Hanley, $1,378.70; L. C. Wolf, $1,374.46; and the D. M. Anderson, Mariner, Son & Co., $1,593.75. The objection made to the first seven above-named material liens are technical in character, going to the question of these people being subcontractors, their accounts not being properly itemized, and their notices improperly served. I think all these objections should be overruled. I have sustained the exception taken by the D. M. Anderson, Mariner, Son Company, and allowed this lien, following the very recent cases of Grant v. Cumberland Valley Cement Co., 52 S. E. 36, decided October 31, 1905, by the Supreme Court of Appeals of West Virginia, and Rainey v. Freeport Smokeless Coal & Coking Co., 52 S. E. 473, decided by said court on November 28, 1905. These cases were not out when Special Master Shirley made his report. They seem to be directly antagonistic to the former holdings of this court as set forth by such cases as Mertens v. Tile Company, 53 W. Va. 192, 44 S. E. 241, and Niswander v. Black, 50 W. Va. 188, 40 S. E. 431, which manifestly the special master followed, but they are the latest rulings of this court, although in my judgment not the soundest, upon this subject, and for that reason

will be followed by me. I agree with the master that the lien asserted by K. G. Lyon cannot under any of these cases be sustained, and I have disallowed it.

The Cobb contract was not recorded, and it is not necessary, as I have said, to finally pass upon the question whether the laborers and materialmen, by complying with the terms of this statute, can hold Cobb's property liable for any sum beyond the contract price. To settle that question would be to exceed this court's jurisdiction in the premises. It is beyond peradventure that Hobbs & Co. could not collect from Cobb a sum greater than the contract price. Therefore the trustee in this bankruptcy case can collect no sum in excess of the unpaid balance of such contract price. This balance represents the sum total of the bankruptcy firm's assets due from and in the hands of Cobb, and, as Cobb could not be required to pay over this balance without being indemnified to the extent thereof to the release of proper liens against his property growing out of the building contract, it is my duty to pass upon and decide what are proper liens and apply this balance to them. As a credit upon these liens, the gross sum of this balance is applicable, but it is to be reduced as to such lienors to the extent of its proportionate part of the costs of this and the bankruptcy proceeding. This applies to the balance due from the Elkins College Corporation and the other balances due under the Cook Hospital and Watson contracts hereinafter to be considered. In other words, these balances, as assets of Hobbs & Co., are due these lienors as creditors of Hobbs & Co. The costs of these proceedings must be taken and paid from such assets to the loss pro tanto of the creditors, but not to the loss to any extent of the owners who are to be considered only as holders of the funds for their own protection and indemnity. In this instance there are no labor liens to be paid in full as first in priority. The materialmen and mechanics who have filed liens, in my judgment conforming to this statute, against the Cobb building, are as follows: Kane & Keyser Hardware Company, $2,711.11; Kane & Keyser Hardware Company, $46.84; the Elkins Planing Mill Company, $412.98; the Randolph Company, $299.24; and L. Creed Wolf, $458.53. I think the objections made upon technical grounds to these liens should be overruled, and I agree with the special master that the D. M. Anderson, Mariner, Son Company claim for $184.87 cannot be upheld as such a lien. Touching the trust lien for $10,000 due to A. B. Serpell I do not regard it necessary to pass upon it in any way. It is a lien upon this property, but wholly independent of this building contract and amply secured. It ought not to participate in this distribution of this balance due from Cobb to Hobbs & Co., under the building contract, because it is not Hobbs & Co.'s debt but Cobb's, and Cobb is not in bankruptcy nor subject, in the settlement of his affairs, to that court's jurisdiction. The validity of this trust lien is to be therefore regarded as in no way affected or impaired by this proceeding.

The contract of Jno. R. Cook and the Cook Hospital & Training School Company with Hobbs & Co. was not recorded. The contract price was paid in full, but a claim was advanced by Hobbs & Co. for

extra labor. The extra labor was conceded, but the price demanded first was resisted as excessive. The special master has investigated this matter fully, and I agree with his conclusion that $3,200 is a fair value for this extra labor; $1,200 of this had been paid, leaving a balance of $2,000 due from this hospital company. There are no labor liens demanding payment in full as first in priority under the terms of the statute. I ascertain and decide that the following materialmen and mechanics have complied substantially with the requirements of this statute and are entitled to share pro rata in the distribution of this $2,000 balance after the payment from it of its proportionate share of the costs, as hereinbefore set forth: The Electric Supply & Construction Company, $1,088.47; A. M. Knight, $50.28; Reed Plumbing Company, $3,197.29; Charles D. Hough, $118.89; S. H. Calkins Company, $1,117.58; and Dickerson Building Supply Company, $66.40. I have carefully considered the objections made to these claims on technical grounds and agree with Special Master Shirley that they must be overruled, under the state decisions I have heretofore cited.

Hobbs & Co. entered into two separate and distinct contracts with C. W. Watson; one to remodel a residence property at the price of $22,398, increased by extras to $24,908.33, the other for the erection of a stable or barn at the price of $19,636, increased by extras to $19,886. The ground upon which these buildings stand belongs to said Watson's sisters, Ida M. and Lucy L. Watson. C. W. Watson made these contracts in his own name, neither was recorded. Being a man of large means, it may have been his purpose to erect these buildings on the old homestead for his sisters at his own expense. In fact his statement in his answer that he acted independently of his sisters in this matter seems to me conclusive from the high character and probity of the man. However, the evidence discloses that he has always conducted the business affairs of these sisters of his, that no objections were at any time made by them to the erection of these buildings upon their ground, and that they had full knowledge of the character and plans of the buildings and of the building operations. These sisters and C. W. Watson live together. Under these circumstances I think the special master was right in concluding that, so far as these mechanic liens were concerned, the law from the circumstances would assume C. W. Watson to have acted in legal effect, as agent for these owners in the making of these contracts. Under the contract for the residence property a small balance of $751.24 remains. This sum, after deducting its share of costs in the manner heretofore directed in respect to the other funds, should be disbursed pro rata upon the mechanic and material liens complying with the requirements of this statute. These I ascertain to be the Collins Company, $1,805.05; D. M. Anderson, Mariner, Son Company, $1,736.73; John F. Phillips, $593.57; Charles D. Hough, $743.29; Kelley Brothers, $152.20; Reed Plumbing Company, $459.98; and Hamilton & Hoffman, $452.41. I think the special master right in rejecting the claims of the Dickerson Building Supply Company for $192.30 and of Allen & Son for $92.07, on the ground that these claimants undertook

to take their lien on property not involved in the contract, under the ruling in Mertens v. Tile Company, 53 W. Va. 192, 44 S. E. 241. I have disagreed with the special master who rejected the claims of the Collins Company, the D. M. Anderson, Mariner, Son Company, and parts of the claims of John F. Phillips and Kelley Bros. His action was based upon the ruling in Niswander v. Black, 50 W. Va. 188, 40 S. E. 431. I base my action upon the later cases of Grant v. Cement Co., and Rainey v. Coal Company hereinbefore cited, in which the Supreme Court of Appeals of the state seems to have almost abandoned their former rule of strict construction. I am not in sympathy with them, but follow them. Touching the contract for the Watson stable it is sufficient to say that not a dollar balance remains of the contract price. All has been expended, and besides near $3,000. additional was required to be paid by Watson to complete the structure according to the requirements of the contract.

It is wholly unnecessary for this court therefore to further consider this contract or attempt to pass upon the validity of the liens claimed. If these are to be enforced at all, it must be in another court, and under the iniquitous last clause of section 5 of this statute, which I could not and will not sustain until directed by a higher court having power to control my action. The matter touching the dealings between Hobbs & Co. and Showalter injected into this proceeding does not belong here. The demand is a disputed one not involving special liens which the referee in the bankruptcy proceeding proper should ascertain and settle.

A decree should be entered in this cause referring it to the referee in bankruptcy to be heard by him in connection with the original proceeding, and directing him to have the trustees in bankruptcy collect the balances of the funds from the parties as set forth in the special master's report herein, and cause such funds to be disbursed in the manner and to the parties as set forth herein, and to proceed in all respects as in this opinion directed. As said referee and the special master are the same person, and it will be embarrassing for him as referee to ascertain and fix his own compensation as special master, I think such decree should fix such compensation. The labor in this case done by the special master has been enormous. It was before him for sixteen months, during which time he worked almost constantly upon the matters involved. He has taken a very large amount of testimony. He has been heretofore allowed by order of this court a part payment of $500, and I have determined to allow him $500 additional compensation, and the sum of $245 actually expended by him in expenses. The other costs and the compensation of the receivers, the referee, being in no way interested in, can very properly ascertain and fix, subject of course to revision, if it should, when fixed by him, be asked by parties in interest.

In re CASTLE BRAID CO.

(District Court, S. D. New York. June 25, 1906.)

1. BANKRUPTCY—PROOF OF CLAIM—PROBATIVE EFFECT OF ALLEGATIONS.
The allegations of a proof of claim against an estate in bankruptcy are to be taken as true, and if they set forth the necessary facts, and are not self-contradictory, they establish the claim prima facie, even when objections are filed, and the burden of overcoming such prima facie case rests upon the objector.

2. SAME—CORPORATIONS—NOTES GIVEN TO OFFICER.
Where the proof of a claim against the estate of a bankrupt corporation sets out notes given by the corporation, and alleges that they were given for money lent by the payee to the corporation at its special instance and request, that they are wholly unpaid, and not secured in any way, the probative force of such allegations is not affected by the fact that the payee was an officer of the corporation when the notes were given, and in the absence of evidence in support of objections the claim should be allowed.

3. SAME—CONTRACT WITH DIRECTORS FOR PURCHASE OF STOCK.
A proof of claim against a bankrupt corporation set out a contract between the corporation and the claimants for the purchase by the corporation of the stock thereof held by claimants, who were at the time officers and directors. The contract was assented to by all of the stockholders, and recited that dissensions existed between the stockholders, and that the purchase was made to settle the same and terminate pending litigation, and, in consideration of the transfer of their stock by claimants, and their agreement not to enter into competing business for three years, they were to be paid a stated sum in installments. The proof alleged that the stock had been assigned and the conditions performed by claimants, and that the greater part of the payments had been made. Also, that claimants held certain securities for a portion of the remainder. *Held*, that such proof was sufficient to establish the claim prima facie; the contract being valid in the absence of proof that it was ultra vires or not made in good faith, or that the corporation was insolvent at the time.

4. CORPORATIONS—PURCHASE OF STOCK—NEW YORK STATUTE.
The provision of the stock corporation law of New York (Heydecker's Gen. Laws, p. 2906, c. 36, § 23), that no corporation shall pay dividends except from the surplus profits of its business, "nor divide, withdraw, or in any way to pay the stockholders, or any of them, any part of its capital stock," except in case of its dissolution and after its debts are paid, does not broadly prohibit a corporation from purchasing its own stock, and a contract for such purchase is not necessarily void as ultra vires.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 1530.]

5. SAME—CONTRACT WITH DIRECTORS.
While the directors of a corporation are regarded in equity as trustees, and a contract between them and the corporation will be closely scrutinized, and set aside on slight evidence that it is fraudulent or detrimental to the interests of the corporation, such a contract is not void on its face merely because of the fiduciary relation between the parties which appears therein.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, 1401–1415.]

In Bankrutcy. Review of holding of referee that under the proofs of claims submitted herein, and the peculiar facts appearing therefrom and the objections thereto, both duly verified, the burden of proceeding with evidence in support of the claims is on the claimants, and consequently that the trustee, objecting, need not produce any evidence in support of the allegations of the objections filed.

James, Schell & Elkus, Abram I. Elkus, and Joseph M. Proskauer, for the trustee.

Sol Kohn (Louis Marshall, of counsel), for claimants.

RAY, District Judge. In due form the proof of claim of Meyer W. Schloss and Joseph W. Schloss, jointly, alleges:

"That the Castle Braid Company, the corporation against which a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to said deponent and Joseph W. Schloss, jointly, in the sum of sixty-six thousand five hundred and sixty-two and 47/100 ($66,562.47) dollars and interest. That the consideration of said debt is as follows: That said corporation agreed with deponent and said Joseph W. Schloss, by agreement in writing bearing date the 30th day of March, 1904, which agreement is hereto annexed, to pay to deponent and Joseph W. Schloss the sum of one hundred and fifty-eight thousand one hundred and twenty-five ($158,125.00) dollars for their interest in the capital stock and in the assets of the said corporation, which interest was by said agreement duly transferred to the said corporation, and in further consideration of the performance by deponent and said Joseph W. Schloss of certain obligations therein set forth, which they have duly performed. That said sum was to be paid as follows: twenty-five thousand ($25,000.00) dollars on or about April 1, 1904, and five thousand one hundred and twenty 19/100 ($5,126.19) dollars monthly thereafter until the balance of said sum should be fully paid. That no part of the said sum of one hundred and fifty-eight thousand one hundred and twenty-five ($158,125.00) dollars has been paid, except the sum of ninety-one thousand five hundred and sixty-two 47/100 ($91,562.47) dollars, leaving a balance due of sixty-six thousand five hundred and sixty-two 47/100 ($66,562.47) dollars."

Then follows a detailed statement of the dates when certain specified sums became due, and of the times when the other sums not due and payable would become due and payable. Then the claim continues:

"That no part of the said debt has been paid. That no note has been received for said debt, nor has any judgment been rendered thereon. That there are no offsets or counterclaims to the same. That the only security held by deponent and said Joseph W. Schloss, or either of them, for said debt is the following: The sum of ten thousand two hundred and forty 38/100 ($10,240.38) dollars, which, as deponent and said Joseph W. Schloss claim, is held for their benefit by C. A. Auffmordt & Company, a copartnership in the borough of Manhattan, city of New York, and a certain mortgage, dated March 18, 1897, made by William J. Schloss, Henry W. Schloss, and Meyer W. Schloss for fifty thousand ($50,000.00) dollars, upon which there is now due and unpaid the sum of twenty-five thousand ($25,000.00) dollars and accrued interest, which deponent and said Joseph W. Schloss claim is also held for their benefit by the said C. A. Auffmordt & Company."

The agreement referred to in such proof of claim and thereto annexed, dated March 30, 1904, made between said claimants, parties of the first part, the Castle Braid Company, party of the second part, and Henry W. Schloss, party of the third part, recites that the parties of the first and third parts are "the owners of a large majority of the stock of the Castle Braid Company," and "are directors and officers thereof"; Henry W. Schloss being president, Joseph W. Schloss vice president, and Meyer W. Schloss treasurer. It also recites that:

"Serious differences have arisen between them regarding their respective interests in the said stock, and with reference to the management of the said corporation, which differences have resulted in litigation now pending between the parties hereto, and other litigation is apprehended, which differ-

ences and litigation have greatly impaired the efficient conduct of the business of the said corporation, and threaten to cause great damage and loss to it."

And also:

"It is desired for the best interests of the party of the second part that the parties of the first part should dispose of their stock and all interest in the said corporation, and resign as directors and officers thereof, and agree not to engage in competition with the party of the second part of the period of three years in respect to the matters and things hereinafter set forth."

The said agreement then continues:

"Now therefore, in consideration of the premises and of one dollar ($1.00) by each of the parties hereto to the other in hand paid, the receipt whereof is hereby acknowledged, this agreement witnesseth: (1) The parties of the first part sell, assign, and transfer and set over to the party of the second part all their shares of stock, and all their right, title, and interest in and to the assets of the said Castle Braid Company and of Schloss & Sons. (2) The first parties agree to resign as officers and directors in said company. (3) The parties agree to discontinue all actions pending between them. (4) The first parties agree not to compete with the company in the manufacture, etc., of certain specified things. (5) [Then follows the agreement of the second party to pay for the capital stock and other interests and things mentioned said sum of $158,125, in certain payments, as before mentioned.] (6) The second party agrees to pay certain moneys due the estate of one William J. Schloss. (7) The party of the third part agrees not to sell his stock until full payment is made to the first parties by second parties, and that until then he will continue to act as president of the company. (8) The second party agrees that it will not sell or dispose of the stock of the parties of the first part until it shall have fully paid the amount hereinbefore provided to be paid to the parties of the first part, save and except that it shall have the privilege of disposing of its treasury stock at not less than par, applying the proceeds towards the indebtedness of the party of the second part to the parties of the first part."

This agreement, duly witnessed and duly acknowledged, the acknowledgment of the company being in due form to comply with the laws of the state of New York, was signed by all the parties, and there was annexed thereto a written ratification and approval of same, signed by all the stockholders of said corporation. There is also annexed to the certificate of review made by the referee a duly verified claim made by Meyer W. Schloss against said company, bankrupt, based on three promissory notes of said company, signed "The Castle Braid Company by Henry W. Schloss, President," given for cash loaned to the company, it is alleged in said claim, and which notes, each for $5,000, were made March 31, 1905, April 3, 1905, and May 1, 1905, respectively, payable at 552 Broadway, New York, to the order of Meyer W. Schloss. Each of these notes is indorsed by said Henry W. Schloss individually. This poof of claim is in due form, and states that such notes are due and have not been paid, or any part thereof, and that there are no offsets or counterclaims thereto, and that "deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever." The notes, and also copies thereof, are attached to and filed with the claim. Meyer W. Schloss, the payee of the note, was in fact treasurer of the Castle Braid Company, the maker of the note, but this fact does not appear in the proof of claim. The proof says:

"That the said notes were given for cash loaned at the time of the respective dates of said notes by deponent (Meyer W. Schloss) to the corporation at its special instance and request; that no part of said debt has been paid, nor has any judgment been rendered thereon."

The objections filed to the claim of Meyer W. Schloss and Joseph W. Schloss are: (1) Deny that there is any money due or owing on said claim. (2) Object that it appears on the face of the claim that securities are held for the payment of the debt alleged, and that the securities must be liquidated and their value determined before the allowance of the same. (3) Object that within four months prior to the filing of the petition in bankruptcy certain moneys ($10,000, or more) were paid to the claimant under such circumstances as to constitute a preference, and the claimants must surrender their preferences before their claims can be allowed. (4) That the contract being one between the corporation and its officers and directors, as stated, they (claimants) "were prohibited from making a contract with the corporation of which they were directors which would operate to their individual advantage. That the said contract was void on this account, and no moneys are due thereon." (5) Objects that the contract is void and of no effect. That "at the time of the making of said contract there was no surplus from which the said Castle Braid Company could purchase its own stock," and, also, that when the various sums agreed to be paid became due there was no surplus from which same could be lawfully paid, or purchase its own stock, and that from the date of the contract to the date of the filing of the petition in bankruptcy there was no surplus in the treasury of the corporation from which any of its own stock could be purchased, and therefore said contract was wholly void. (6) Objects, in substance, that the payments made and turning out of security as alleged was part of, and done in pursuance of, a fraudulent scheme to hinder, delay, and defraud the creditors of the corporation, the Castle Braid Company, now bankrupt. (7) Objects, in substance, that there is now pending and undetermined in the Supreme Court of the state of New York an action brought by one Emanuel W. Bloomingdale, as receiver of the said bankrupt corporation, against Henry W. Schloss, Meyer W. Schloss, Joseph W. Schloss, et al., to recover of them about $200,000 "as an indemnity for the damages suffered by the bankrupt corporation by virtue of dealings between the said corporation and the defendants in said action, and that the moneys recovered in said action would and should be a counterclaim to any moneys payable as a dividend on the claim of claimant if allowed. (8) Objects, in substance, that the claim is without merit, and no obligation to pay exists, and claimants are in fact debtors of the bankrupt corporation. All these material allegations and objections are made on information and belief except so far as they appear from the contract or agreement itself, which is attached to the proofs of claim.

The claim of Meyer W. Schloss on said notes is objected to on the grounds: (1) That there is no money due thereon. (2) That within four months the corporation paid claimant more than $10,000 cash when it was insolvent, under such circumstances and with such knowledge in the claimant that such payment constituted a preference, and same must be surrendered before the claim can be allowed or any divi-

dend paid. (3) The pendency of the action brought by Bloomingdale, as before set forth in the objections to the claim on the contract, etc. It is not necessary to repeat same here. (4) That the moneys claimed to have been loaned to the corporation by Meyer W. Schloss were moneys received by him from certain securities transferred by the Castle Braid Company to Meyer W. Schloss and Joseph W. Schloss jointly. That the transfer of said security to them was in fraud of creditors and void and of no effect, and that such money, so loaned, is the property in fact of the trustee in bankruptcy, and also certain other moneys derived from said securities in the hands of said Schloss or both of them. (5) That such claim is without merit, and the bankrupt corporation owes nothing to claimant, but, on the other hand, claimant is largely indebted to said corporation, its trustee in bankruptcy.

The material allegations of the objections to this claim are on information and belief.

It is settled in Whitney v. Dresser, 200 U. S. 532–535, 26 Sup. Ct. 316, 50 L. Ed. ——, citing and approving In re Sumner (D. C.) 101 Fed. 224; In re Shaw (D. C.) 109 Fed. 780; In re Cannon (D. C.) 133 Fed. 837; In re Carter (D. C.) 138 Fed. 846; In re Doty, 5 Am. Bankr. Rep. 58; In re Saunders, 2 Lowell, 444, 446, Fed. Cas. No. 12,371; In re Felter (D. C.) 7 Fed. 904–906—in substance, that the allegations of the proofs of claim are to be taken as true. If they set forth all the necessary facts to establish a claim, and are not self-contradictory, prima facie, they establish the claim, even in the presence of objections, and the objector is then called upon to produce evidence and show facts tending to defeat the claim of probative force equal to that of the allegations of the proofs of claim. The burden of proof is always on the claimant, but, as probative force is given to the allegations of the proofs of claim, and no probative force is given to the objections, this must be met, overcome, or at least equalized, by the objecting party. In short, if the proofs of claim state facts sufficient to make a prima facie case, and it is stated that there is no security, the referee is bound to allow the claim, unless evidence controverting such facts is given by the objecting party, or an offset or counterclaim thereto is proved or established, or it appears that security is held for the claim. If the claim is secured, and the contract itself does not fix the mode of ascertaining the value of such security, the court must first ascertain its value in one of the modes prescribed by law before it can be allowed. In such case the claim can be allowed for the balance only. See section 57 of the act of July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443].

The question is therefore reduced to this, do these proofs of claim on their face state facts which, admitted to be true, make out the claim in favor of the claimants?

As to the claim on the notes, the proofs thereof show that the note was given by the corporation to one who was one of its officers, and, in the absence of an allegation to the contrary, it might be assumed possibly, that they were used to satisfy some demand of, or for the personal benefit or use of, an officer of the corporation. See cases cited. In re Troy & Cohoes Shirt Company (D. C.) 136 Fed. 420, affirmed

by Circuit Court of Appeals, 142 Fed. 1038. But the claim unequivocally says the notes were given for money loaned by the payee of the notes to the corporation at its special instance and request, and that it is not secured in any way. Therefore, there is no fact stated in the proofs of claim on the notes that in any degree impairs the probative force of the allegations therein contained. I know of no rule of law that prohibits such a corporation as this was from borrowing money of one of its officers, and giving its note therefor, or that makes such a note invalid. As the verified objections have no probative force, I do not see that there is any burden to proceed with the proof of this claim on the notes resting on the claimant. There is no admission anywhere that it is a secured claim, or that any preferential payment has been made thereon or received by the claimant. Such facts cannot be assumed to exist because alleged by the objecting party. If shown to exist, then the amount and value of the security in the one case is to be ascertained and deducted, and the claim allowed for the balance only, and in the other the amount of the preference when ascertained must be surrendered to the trustee as a condition of allowing the claim and before it can be allowed. See sections 56 and 57 of the act of July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, pp. 3442, 3443].

It is unquestionably true that the trustee is at liberty to call the claimant if necessary, and subject him to a most rigid examination—one in the nature of a cross-examination—but in the face of the decision in Whitney v. Dresser, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. ——, and of the absence of any provision in the law requiring a claimant to show affirmatively, otherwise than in his proof of claim, that his debt is not secured, or that he has not received a preference (and this he is not required to state in his proofs), I do not see that as to the claim on the notes any burden of proceeding rests on the claimant, and it is so held.

In regard to the claim of Meyer W. Schloss and Joseph W. Schloss jointly on the contract or agreement in question, I am of the opinion that, under subdivision "h" of section 57 of the bankruptcy act, the mode of ascertaining the value of the securities held by the claimants (the mode not being fixed by any agreement between the parties in interest) is discretionary with the court. But this does not affect the general and broader question as to whether or not the burden of proceeding to prove their claim rests now upon the claimants. There is nothing suspicious about the claim in itself, except its general nature and the relations of the parties. The facts are stated plainly, and without attempt at concealment or evasion, so far as can be discovered. The contract was approved by all the stockholders, and recites several considerations for the covenants and agreements therein contained. Claimants' proofs allege that they have fully performed the agreement on their part, that the corporation accepted the benefits to be derived from performance, and partly performed on its part; and from the recitations in the agreement it appears, prima facie, at least, that the agreement at the time made was a wise and beneficial one. It has not been made to appear that any fraud or deceit was practiced, or that the contract was in fraud of or prejudicial to the then existing creditors of the corporation. On the other hand, to settle disputes and litiga-

tions would appear beneficial. While at law the directors of a corporation are regarded as its agents in equity, they are deemed to be trustees, and are treated as such. "The directors of a corporation are subject to the obligations which the law imposes upon trustees and agents. They cannot, therefore, with respect to the same matters, act for themselves and for it, nor occupy a position in conflict with its interests." Wardell v. Railroad Co., 103 U. S. 651–658, 26 L. Ed. 509; Bosworth v. Allen, 168 N. Y. 157, 61 N. E. 163, 55 L. R. A. 751, 85 Am. St. Rep. 667; McGourkey v. Toledo & Ohio Railway, 146 U. S. 536–552, 13 Sup. Ct. 170, 36 L. Ed. 1079. In this case, at page 552 of 146 U. S., page 175 of 13 Sup. Ct. (36 L. Ed. 1079), the court said:

"Indeed, the business of manufacturing rolling stock, and loaning it to railways which have not a sufficient capital to purchase a proper equipment of their own has become a recognized industry. If, however, such contracts are made by directors of the road with themselves, or with others with whom they stand in confidential relations, they are open to the suspicion which ordinarily attaches to transactions between a corporation and its directors; and if they appear to have been made directly or indirectly for their own benefit, courts will refuse to give them effect. Drury v. Cross, 7 Wall. (U. S.) 299, 19 L. Ed. 40; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; Wardell v. Railroad Company, 103 U. S. 651, 658, 26 L. Ed. 509."

It is seen that it must be made to appear that such a contract is made for the benefit of the officers or directors. See generally Wald's Pollock on Contracts (3d Ed.) 387, and note. See, also, Sage v. Culver, 147 N. Y. 241, 41 N. E. 513. Numerous other cases might be cited, but it is not necessary.

In Wardell v. Railroad Co., supra, at page 658 of 103 U. S. (26 L. Ed. 509), it was said by Mr. Justice Field in giving the opinion of the court:

"It is among the rudiments of the law that the same person cannot act for himself and at the same time, with respect to the same matter, as the agent of another whose interests are conflicting. Thus a person cannot be a purchaser of property, and at the same time the agent of the vendor. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and, 'constituted as humanity is, in the majority of cases duty would be overborne in the struggle.' Marsh v. Whitmore, 21 Wall. (U. S.) 178, 183, 22 L. Ed. 482. The law, therefore, will always condemn the transactions of a party on his own behalf when in respect to the matter concerned he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted. Directors of corporations, and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule. They are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect. They cannot, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits. Hence, all arrangements by directors of a railroad company to secure an undue advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they, or some of them shall take stock in it, and then that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration. Great Luxembourg Railway Co. v. Magnay, 25 Beav. 586; Benson v. Heathorn, 1 Y. & Col. C. C. 326; Flint & Pere Marquette Railway Co. v. Dewey, 14

Mich. 477; European & North American Railway Co. v. Poor, 59 Me. 277; Drury v. Cross, 7 Wall. (U. S.) 299, 19 L. Ed. 40."

In Bosworth, etc., v. Allen, supra, it was held:

"The directors of a corporation, while not technically trustees thereof, as the title of the corporate property is vested in the corporation itself, are charged with the duties of trustees, and bound to care for its property and manage its affairs in good faith; and for a violation of that duty, resulting in waste of assets, injury to its property, or unlawful gain to themselves, they are liable to account in equity to the corporation or its representatives, the same as ordinary trustees."

In Wald's Pollock on Contracts (3d Ed.) p. 386, in introducing the subject, it is said:

"If an agent deals on his own account in the business of the agency without first obtaining the consent of his principal, and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction."

Here all directors and stockholders consented, and in the absence of proof to the contrary it may be assumed and presumed that the facts are correctly recited in the agreement. The trustee in bankruptcy represents the creditors of the bankrupt corporation, but it is not made to appear that any of the creditors who were such at the date of the bankruptcy were creditors when the contract was made, or that the corporation was then insolvent, or that the stock was not worth all that was agreed to be paid therefor. The contract was made March 30, 1904. The petition in bankruptcy was filed in September, 1905, about 18 months thereafter. The court cannot indulge in any presumption of insolvency at a prior date, or that the agreement was in fraud of or even prejudicial to creditors existing at the time of its execution, or that the officers, directors, and stockholders were acting for any purpose other than the best interests of the corporation and its creditors, if any, or in violation of law.

In Lorillard v. Clyde, 86 N. Y. 384, Andrews, J., said:

"The presumption is in favor of the legality of contracts. The law does not assume an intention to violate the law, nor will an agreement be adjudged to be illegal where it is capable of a construction which will uphold it and make it valid."

See, also, cases hereafter cited.

It is urged that the contract was void and unauthorized for the reason that the corporation (a New York corporation) was prohibited by statute from purchasing its own stock except out of its surplus. I assume that section 23 of the stock corporation law of the state of New York (article 2, c. 36, p. 2906, Heydecker's General Laws of New York) is referred to and relied on. That section, as amended, reads as follows:

"Sec. 23. Liability of Directors for Making Unauthorized Dividends.—The directors of a stock corporation shall not make dividends, except from the surplus profits arising from the business of such corporation, nor divide, withdraw or in any way pay to the stockholders or any of them, any part of the capital of such corporation, or reduce its capital stock, except as authorized by law. In case of any violation of the provisions of this section, the directors under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at

large upon the minutes of such directors at the time, or were not present when the same happened, shall jointly and severally be liable to such corporation and to the creditors thereof to the full amount of any loss sustained by such corporation or its creditors respectively by reason of such withdrawal, division or reduction. But this section shall not prevent a division and distribution of the assets of any such corporation remaining after the payment of all its debts and liabilities upon the dissolution of such corporation or the expiration of its charter; nor shall it prevent a corporation from accepting shares of its capital stock in complete or partial settlement of a debt owing to the corporation, which by the board of directors shall be deemed to be bad or doubtful."

This section primarily relates to the making of dividends, and expressly limits the payment thereof to the "surplus profits arising from the business of such corporation." It then provides that the directors shall not "divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital of such corporation, or reduce its capital stock, except as authorized by law." In conclusion it says:

"But this section shall not prevent a division and distribution of the assets of any such corporation * * * nor shall it prevent a corporation from accepting shares of its capital stock in complete or partial settlement of a debt owing to the corporation, which by the board of directors shall be deemed to be bad or doubtful."

Does this section broadly forbid the purchase by the corporation of its shares of stock held by its directors? Clearly not, if the transaction is fair and honest, and in the interest of such corporation, and not of the selling directors, and therefore not offensive to the law under the cases cited. But the directors shall not "in any way pay to the stockholders, or any of them, any part of the capital of such corporation," and by the concluding words of the section this is not to "prevent a corporation from accepting shares of its capital stock in complete or partial settlement of a debt owing to the corporation," and deemed bad or doubtful. By implication it may forbid the purchase of any property of any description from the stockholders, and the payment therefor from the capital of the corporation; that is, from any fund except the surplus. The prohibition, if it applies to purchases of property, applies no more to a purchase of stock than to any other thing of value. The purchase of the stock of the corporation by the corporation from the stockholders is not prohibited or forbidden, but payment therefor from the capital may be and possibly is. That question is not necessarily here for decision.

In 2 Purdy's Beach on Private Corporations, at pages 1284 and 1285, it is said:

"The doctrine that corporations, when not prohibited by their charters, may buy and sell their own stocks is supported by a respectable line of authorities; and the rule appears to be well settled in the United States that a corporation may, unless prohibited by statute, purchase its own stock, or take it in pledge or mortgage; that it may purchase its own stock in exchange for money or other property, and hold, reissue, or retire the same, provided such act is done in entire good faith, is an exchange of equal value, and is free from all fraud, actual or constructive, provided that the corporation is neither insolvent nor in process of dissolution, and that the rights of creditors are not injuriously affected."

This is the rule in New York, Massachusetts, Illinois, Georgia, Iowa, Vermont. See cases cited, note 67, p. 1284, 2 Purdy's Beach on Private Corporations, supra.

In the City Bank of Columbus v. Bruce & Fox, 17 N. Y. 507, it is held:

"In the absence of prohibition by statute, a corporation may purchase its own stock, hold it unextinguished, and reissue same."

In Joseph as Trustee in Bankruptcy, etc., v. Raff, 82 App. Div. 47, 81 N. Y. Supp. 546, affirmed 176 N. Y. 611, 68 N. E. 1118, it was held:

"A corporation which expected to receive its principal revenue from a book in course of publication found itself unable to pay its current obligations in cash as they became due. It was then decided to elect as president of the corporation a person who had agreed that he and his friends would subscribe for capital stock to the extent of $300,000. In order to permit this plan to be perfected, the board of directors of the corporation entered into an agreement with the then president thereof, which provided that, in consideration of the tender by the latter of his resignation as president and director, the corporation would purchase his stock for a certain sum in cash; that it would also give him notes for the amount of the salary due to him, and other notes for a certain amount as liquidated damages for the termination of his contract of employment. The agreement was made in entire good faith, and in the honest belief that the corporation was solvent, and would be able to continue business. Five months after the consummation of the agreement, a petition in bankruptcy was filed by the corporation, and a trustee of its property was appointed, who brought an action to set aside the agreement. Held, that the agreement was valid; that, under the circumstances, the corporation might purchase its own stock with the purpose of immediately reissuing it; that, even were the purchase illegal, the corporation would be estopped to repudiate it, when it was not able to restore the vendor to the position he was in before the sale."

It is true, however, that this was a New Jersey corporation.

In 7 Am. & Eng. Encyc. of Law, p. 818, it is said, citing a large number of cases in many states:

"There is nothing in the nature of a corporation that renders it absolutely incapable of holding or dealing in its own stock," etc.

In the case now before this court it does not appear that there was not a surplus at the time the contract was entered into. It appears that there were good and valuable considerations for the agreement to pay, as specified, other than the transfer of the stock, viz., the discontinuance of certain actions, the transfer of interests in the firm of Schloss & Sons, the agreement not to manufacture articles in competition with the company. Nevertheless, it comes back to the propositions, does the section of the stock corporation law quoted prohibit the payment to a stockholder for any good and valuable consideration (such as property sold to it by the stockholder) any money from the capital, and, if so, must the claimant show affirmatively there was a surplus from which to pay when the agreement was made? It seems clear to me that there is no presumption or legitimate inference to be drawn from any fact appearing that the parties contemplated payment in violation of law, or that there was no surplus with which to discharge the obligations of the contract. As the corporation had the benefit of full performance by the claimants, and there has been no rescission or restoration or offer to restore, and no fraud or unfairness is apparent on the face of the contract, it seems clear a valid claim,

prima facie, is made out by the proofs, and that the burden of proceeding in the contest, not of proof, now rests on the trustee contesting. The authorities are that way.

In Railway Co. v. McCarthy, 96 U. S. 258, at page 267 (24 L. Ed. 693), the court said:

"Where a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid. Corporations are presumed to contract within their powers."

To same precise effect, Express Co. v. Railroad Co., 99 U. S. 199 (25 L. Ed. 319):

"The contract of a corporation is presumed to be infra vires until the contrary is made to appear."

In Union Water Co. v. Murphy's Flat Fluming Co. et al., 22 Cal. 621, it is held:

"A contract by a corporation, which is not upon its face necessarily beyond the scope of its authority, will, in the absence of proof, be presumed to be valid."

In Chautauqua County Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347, the court held:

"The dealings of a corporation which apparently are consistent with its charter are not to be regarded as illegal and unauthorized without evidence tending to show that they are of such a character."

And at page 381, of 19 N. Y. (75 Am. Dec. 347), the court said:

"The dealings of a corporation, which on their face or according to their apparent import are within its charter, are not to be regarded as illegal or unauthorized without some evidence tending to show that they are of such a character. In the absence of proof, there is no legal presumption that the law has been violated. On the contrary, these artificial bodies, like natural persons, are entitled to the benefit of the rule which imputes innocence rather than wrong to the conduct of men."

See, also, De Groff v. American Linen Thread Co., 21 N. Y. 124, and opinion at page 127; also, Safford v. Wyckoff, 4 Hill (N. Y.) 442, and the observation of Chancellor Walworth, which is quoted with approval in 19 N. Y. at page 382 (75 Am. Dec. 347):

"Where a corporation is authorized to give a negotiable security for any purpose, and there is nothing to show for what the particular security was given, if there is nothing on the face of the instrument itself to create a suspicion that it was issued for an illegal object, the court will presume that it was given for a legitimate purpose, rather than for one which was unauthorized and illegal."

It is true that it will require but little evidence of unfairness or of fraud to shake such a claim, resting, as it does, upon a contract between the corporation and some of its own directors and managing officers; but it seems clear to the court that, in the absence of all evidence to impeach the fairness of the contract, the claimants may safely rely upon the proofs presented. However, it must be borne in mind that the law looks with a watchful eye upon such a transaction—one between those having the management of a corporation, being directors therein, and occupying a position of trust and confidence, and the

corporation itself—especially where such directors are to be benefited in any way, and where, as here, the rights of general creditors are involved. Twin-Lick Oil Co. v. Marbury, 91 U. S. 588, 589 (23 L. Ed. 328), where it is said:

"That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others. Koehler v. Black River Falls Iron Co., 2 Black. (U. S.) 715 [17 L. Ed. 339]; Drury v. Cross, 7 Wall. (U. S.) 299 [19 L. Ed. 40]; Luxemburg R. R. Co. v. Maquay, 25 Beav. 586; The Cumberland Co. v. Sherman, 30 Barb. (N. Y.) 553; Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co., 16 Md. 456 [77 Am. Dec. 311]. The general doctrine, however, in regard to contracts of this class is not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it. We say this is the general rule, for there may be cases where such contracts would be void ab initio; as when an agent to sell buys of himself, and by his power of attorney conveys to himself that which he was authorized to sell. But, even here, acts which amount to a ratification by the principal may validate the sale."

See, also, Risley v. Indianapolis, B. & W. R. Co., 62 N. Y. 248; Barnes v. Brown, 80 N. Y. 536; Munson v. Syracuse, G. & C. Ry. Co., 103 N. Y. 73, 8 N. E. 355; Barr v. N. Y., Lake Erie, etc., R. Co., 125 N. Y. 263, 26 N. E. 145. Aldine Manufacturing Co. v. Phillips, 129 Mich. 240, 88 N. W. 632, is also in point.

The question submitted is therefore answered, that the burden of proceeding now rests upon the trustee contesting, and not upon the claimants.

INTERSTATE COMMERCE COMMISSION v. REICHMANN.

(Circuit Court, N. D. Illinois. February 27, 1906.)

No. 27,507.

1. COMMERCE—INTERSTATE REGULATION—POWER OF CONGRESS—TRANSPORTATION CHARGES.

The constitutional power of Congress to regulate commerce among the several states includes the power to regulate freight rates by requiring that they shall be uniform to all shippers, and in construing statutes enacted to that end freight rates should be construed to mean the net cost to the shipper of the transportation of his property, and such regulations may lawfully apply, not only to common carriers, but to all persons and corporations occupying such relation to transportation that the conduct of their business may operate to impair uniformity of rates.

2. SAME—POWERS OF INTERSTATE COMMERCE COMMISSION—PRIVATE CAR COMPANIES.

A private car company which delivers its cars to railroad companies to be furnished indiscriminately for the use of shippers, receiving pay for such use from the railroad companies on a mileage basis, is within the provision of Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599], making it unlawful for any person "or corporation to offer, grant, give, or solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any prop-

erty in interstate or foreign commerce by any common carrier * * * whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier, or whereby any other advantage is given or discrimination is practiced," and the giving by such a car company of any rebate or allowance to a shipper using its cars, whereby he secures the transportation of his property at a less rate than that named in the published tariff of the carrier for transportation of such property in its own cars, although from its own funds and without the connivance or knowledge of the carrier, is a violation of the statute. Such a car company is therefore subject to the jurisdiction of the Interstate Commerce Commission, charged with the duty of enforcing the statute and having power to inquire into the operations of any agency of transportation which may so conduct its business as to destroy uniformity of rates.

On application by the Interstate Commerce Commission for an order requiring a witness before it to answer a question.

C. B. Morrison, for complainant.
Levy Mayer, for defendant.

LANDIS, District Judge. This controversy involves the power of the Interstate Commerce Commission. That body was in session at Chicago, endeavoring to ascertain how the managers or owners of cars not owned by carriers, but employed by them in the interstate transportation of freight, conducted their business. The respondent was on the stand as a witness, and having testified that he was vice president of Street's Western Stable Car Line, an Illinois corporation owning some 9,000 cars, in general use for the transportation of live stock over the lines of the various railroads on this continent, was asked the following question: "What part of the mileage, or from whatever source, have you given up to shippers during the last six months?" On the advice of counsel, the witness refused to answer, on the ground, as alleged, that the Commission was without authority to exact from him the information called for, and the Commission petitioned the court for an order requiring the witness to answer. It appears that the Street Company's cars are not let to railway companies under regular lease, but that they pass indiscriminately over all lines, participating in the live stock transportation business to such extent as may be dictated by the carrier's necessity or policy, in the discharge of its obligation to supply shippers with cars; that the car company's only revenue for the use of its cars is six-tenths of a cent for each mile run, paid by the railway company on whose rails the mileage has been earned. The car company has no direct or open relations with the intending shipper. It does not undertake to supply him with cars. This is done by the carrier, and when the shipper is furnished cars belonging to the Street Company, he gets no other or better transportation service than when his cattle go forward in cars of the carrier railway company. Nominally, at least, the car company's only relation respecting freight to be shipped is with the carrier, and its only interest in the transaction is that the freight may go forward in its cars; and this, because when the car stands idle it produces no revenue for its owner, and when it is in motion it is

earning mileage. It will therefore be observed that the best business policy of the car company is that which produces a maximum of activity on the part of its cars.

In considering the question, I shall assume, as counsel did at the argument, that an answer by the witness would have disclosed that payments of money were made by the Street Company to shippers of freight, and with a view to thereby inducing such shippers to demand that carriers furnish them with Street's cars for the transportation of their future shipments. And I shall further assume, as the proof indicates, that these payments were made by the car company solely on its own initiative and responsibility—disassociated, completely, from any connivance on the part of the carrier railway company to which the shipper delivered the traffic, in the first instance, for transportation. For if such payment should come from the carrier to the shipper, the Street Company being used by the parties merely as an agency of payment, it would be a rebate, and therefore a plain violation of law. It was maintained for respondent that the witness should be excused from answering the question on the theory that existing statutes of the United States are operative on common carriers and not on private car companies, and (having particular reference to the so-called "Elkins Act" of February 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), that Congress is without power to prohibit the payment of money by private car companies to shippers of freight; in other words, that the Commission is without authority to inquire into such a corporation's affairs. When the words "commerce" and "transportation" are used herein, they are to be understood as relating to interstate "commerce" and "transportation."

The purpose of the enactment of the statutes relating to interstate commerce was to give to all shippers of property uniform treatment in the matter of transportation, and the Interstate Commerce Commission was created to secure the enforcement of those statutes. In the discharge of this duty, the Commission is authorized to procure information from any person whatsoever tending to show whether those laws are being obeyed. The question then presented is, would the payment, by the private car company, of a sum of money to a shipper who had previously paid the railway company the regular rate, place such shipper in a more favorable position respecting the question of transportation than that prescribed by the published tariff and occupied by shippers generally, and if so, has Congress prohibited a private car company from making such payment; and is such prohibition authorized by the federal Constitution. That the person to whom the payment is made has been, thereby, removed from the level of equality, to establish which the laws were passed, is too plain to justify extended consideration. With respect to the transportation of his property, he is just as much better off than the general run of shippers as the payment amounts to. The net cost of the transaction to him—his freight expense—has been reduced just that much. It, therefore, being apparent that in such a case the purpose of the legislation has been defeated, the inquiry is, "has this defeat resulted from the violation of a valid statute of the United States?"

And first, of the power of Congress. The language of the commerce clause of the Constitution is: "The Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." It will be observed that this grant is without qualification or restriction; that it is all the power over the subject that the people had; that, therefore, there now abides in Congress sovereign authority over interstate commerce; that is to say, all the authority over the subject that inheres in government. The real question, therefore, presented, is not merely whether Congress has authority to regulate private car companies, but, rather, "is the power to require a uniform freight rate an attribute of sovereignty?" I am not aware that the general principle that this authority does exist is now seriously antagonized. One result of the enactment of the original Interstate Commerce law, and of the controversy that has arisen under it, is the practically universal acquiescence in this proposition. But the application of the principle to the case at bar is disputed. Let us, therefore, have an understanding of what is meant by "freight rate." It cannot be denied that there is very respectable authority in support of the contention that a rate is the sum of money which the carrier receives from the shipper when he delivers his property for transportation. But is this the real—the only meaning of the term? If the carrier should subsequently pay to the shipper a portion of the sum so received, would not the net amount the shipper paid be the rate? Or, if some other interest commercially concerned in that particular transaction of transportation, as for example, a car company, should pay a sum of money to the shipper on account, or in consideration, of the transaction, would not the net result shown by subtracting the amount thus received by the shipper from the sum originally paid by him to the carrier be the rate? And in such a case, would not the car company, instead of the carrier railway company, make the real rate? Is not the answer to this inquiry necessarily in the affirmative?

Bearing in mind the quasi public character of the service for the performance of which the shipper pays the money, involving, as it does, the exercise of franchise powers granted by the nation or the state, or by both, I shall consider, in dealing with this question, that the rate with which constitutions and statutes are concerned is the net cost to the shipper of the transportation of his property. The frailty of the contention that Congress may legislate only respecting carriers is chargeable to the unsound premise that the authority reposed in Congress is merely to regulate one class of corporations engaged in commerce, whereas the grant is of the power to regulate the thing itself, by whomsoever carried on or participated in. Having, therefore, plenary power to regulate interstate commerce, and uniformity being of the very essence of regulation, the true rule must be that as a logical and necessary incident of the power to regulate, Congress may prohibt the doing, by any person whatsoever, of any act or thing, the purpose or effect of which is to prevent or disturb uniformity. And this power of prohibtion is as broad as the subject of the regulation. It embraces not only carriers, but it extends to

and includes all persons and corporations occupying such a relation to transportation as that the conduct of their business may operate to effect an impairing influence on uniformity. All agencies and instrumentalities of transportation, by virtue of their employment as such, from the beginning of the first act of "taking up property at one place" to the end of the last act of "setting it down at another place," are as completely subject to this sovereign dominion as is the carrier.

The question then arises, "has Congress exercised this power by enacting a law applicable to the pending controversy?" Down to the year 1887, the rules of the common law controlled this subject. Under those rules, a carrier was required to transport property for what was called "reasonable compensation," but judges did not agree that the carrier was obliged to treat all shippers alike. The attitude of both shipper and carrier was therefore dictated by business expediency; the former seeking the service at the least possible cost to himself, and the latter making such rates, and conceding such advantages, as seemed calculated, or appeared necessary, to invite traffic, the full liberty of neither being regarded, as in any substantial way, embarrassed by the law of the land. The result of this unrestrained freedom of action was that large volumes of traffic originating in a common source received preferential treatment by carriers, and it was for the purpose of putting a stop to this practice that the original interstate commerce act was passed. That law sought to establish a condition of absolute uniformity throughout the domain of interstate transportation, to the end that no man having freight to ship would be charged more than anybody else had to pay. That this law failed to accomplish the object of its enactment was due, primarily, to the fact that its prohibitions were aimed at and operated only on carriers. Its provisions did not extend to and embrace persons and corporations interested in or concerned with the transportation business other than carriers, and their agents and shippers remained at full liberty to exact from railway companies transportation service at lower rates than were accorded patrons generally. If lower rates were given, the carrier, only, was guilty of an offense. The principal effect of the law seems to have been to require the resort to roundabout methods for the purpose of evading uniformity. The records of the proceedings of the courts and of the Interstate Commerce Commission, during the years succeeding 1887, disclose the employment of a large variety of means to evade the law. One of these was the use of the so-called private car; that is, a car which did not belong to the railway company, but did belong either to the shipper himself or to a corporation which was neither carrier nor shipper, it being generally understood that in the case of the shipper whose traffic went forward in his own car, excessive payments were made to him on the alleged score of mileage, which, in effect, brought his transportation cost below the regular rates, and in the case of the shipper whose goods were vehicled in cars belonging to a car company, payments of money, as commissions or otherwise, were made to him by or through the medium of such private car company; the effect of which was to give him the service at a cost below the regular tariff.

These various evasions had developed to such an extent that at the session of 1902–03, Congress set about to devise a plan to put a stop, once for all, to transportation favors. The previous endeavor to accomplish this by penalizing acts of favoritism committed by carriers and their agents having proved abortive, and the experience of 15 years under the original act having demonstrated that if shippers of property were to be placed on an absolute level of equality, additional prohibitory legislation extending to shippers and to persons and corporations beyond, or behind, the railway company, was necessary, the law of 1903 was enacted.

Section 1 of that act provides, first, that anything done or omitted by any agent of a carrier corporation in violation of the law relating to interstate commerce, shall also be held to be a like violation on the part of the carrier. This section then enacts that the willful failure of the carrier to publish its tariffs or rates for the transportation of property shall constitute a misdemeanor. The enactment then proceeds as follows:

"And it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive, any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier * * * whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier, or whereby any other advantage is given or discrimination is practiced."

The offering, granting, or giving, or soliciting, accepting, or receiving, any such rebate, concession, or discrimination, is declared to be a misdemeanor punishable with a fine. While this enactment, in terms, prohibits any person, persons, or corporation, from giving any concession or discrimination in respect of the transportation of property by a common carrier, the respondent contends that the only effect of the clause quoted is to prohibit the shipper from soliciting or accepting preferential treatment from the carrier, and the carrier and its agents from offering or giving it. This contention means that, whereas, the universally conceded purpose of the law relating to interstate commerce is to put all shippers on an equality, the shipper is still perfectly free to accept money from any other source than the carrier itself, and that any person or corporation other than the carrier is at liberty to make such payment. It is not and cannot be denied that the effect of such a transaction would be to absolutely disrupt uniformity. Indeed, the very purpose of the payment by the car company is to place the shipper in a position of preference, and thereby to induce him to require the carrier to furnish Street's cars for his future shipments, on which, presumably, he would receive like payments from the car company, thus securing to him a continuing financial advantage not contemplated by the regular tariff. Does the language bear this construction? Is it the deliberately expressed intention of Congress, in this legislation enacted to preserve the integrity of the published rate, that the rate may be varied by some intervening or coöperating or subserving agency, or is it the expressed intention that nobody may do what a carrier is forbidden to do? Let it be remembered that the carrier and its agents had already been required

to adhere to the regular published rate, it having been specifically enacted, at the beginning of section 1, that any offense committed by the carrier's agent, as provided by the original act, should be held to be a like offense committed by the carrier corporation. Do the words, "it shall be unlawful for any person, persons, or corporation to offer, grant, or give * * * any rebate, concession, or discrimination * * *" prohibit a private car company from paying money to a shipper "in respect of the transportation of his property" by a common carrier in cars belonging to the car company? Such payment is not merely "in respect of such transportation," but it is in consideration of such transportation. And that it would be a concession or discrimination which would operate to give the fortunate payee an advantage, by reducing his freight account below the regular rate, is obvious. John Jones, cattle shipper at Omaha, calls on the Denver & Chicago Railroad Company for 10 cars for Chicago shipment. The railway company gives Jones cars belonging to the Street Company. Jones pays the railway line the regular rate. The cattle go forward in Street's cars, and at the end of the month the railway company sends to the Street Company a check covering mileage earned by the cars. Thereupon, the Street Company pays out of its own revenue, to Jones, $10. Jones takes the $10 and credits his freight account accordingly. The net result is that Jones is $10 better off than he would have been had the shipment been handled in cars belonging to the railway company; that the cost to him of the transportation of his cattle has been reduced $10 below the regular rate, to which extent he has enjoyed a concession or discrimination which has given him an advantage over his competitor, Smith, whose request for cars, made at the same time that Jones made his, was complied with by the railway company furnishing its own cars, it being assumed, of course, that the carrier received from Smith, as it did from Jones, the published rate, and did not subsequently give him any rebate.

It is conceded that if the Street Company had paid the money at the instance of the railway company, the Street Company and the railway company would each be guilty of a misdemeanor, but guilty not merely because money was paid to a shipper, but solely, because when it paid the money the Street Company was acting as the representative of the railway company. The contention of respondent is, however, that although the car company is prohibited from thus acting in behalf of the railway company, it is not unlawful for the car company to give the shipper the money from its own treasury, and this means that the shipper (whose preferential treatment in the matter of transportation, the law was enacted to prevent) may, with equal propriety, accept the money from the car company, being only careful to ascertain in advance that in making the payment the car company is using its own funds, and is not acting in a representative capacity for the carrier corporation. The logic of this position is that in any prosecution of a carrier railway company, or private car company, or shipper, for violating the law by departing, or causing a departure, from the published rate, it would be a complete exoneration of either one or all of these parties for the car company to simply admit that

although it gave the money to the shipper, the funds came out of its own treasury. That this is not what Congress endeavored to enact is evidenced by section 2 (32 Stat. 848 [U. S. Comp. St. Supp. 1905, p. 600]), which is as follows:

"That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

I am of the opinion that the law prohibits the car company from giving to any shipper of property a favor or advantage not publicly offered to all shippers by the published tariffs issued by the carrier, and therefore that a reply to the question, which the witness refused to answer, would give the Commission information respecting a matter as to which it is charged with the performance of a duty.

Let an order be entered in accordance with the prayer of the petition.

UNITED STATES v. CARDISH et al.

(District Court, E. D. Wisconsin. April 3, 1906.)

1. INDICTMENT—FEDERAL STATUTE—JOINDER OF COUNTS—ARSON.

Under Rev. St. § 1024 [U. S. Comp. St. 1901, p. 720], which provides that two or more charges for crimes or offenses of the same class may be joined in the same indictment in separate counts, two counts, each charging the same defendants with the burning of a different building, may be joined in an indictment for arson.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 419, 420, 422.]

2. INDIANS—ARSON COMMITTED ON RESERVATION WITHIN A STATE.

Act March 3, 1885, c. 341, § 9, 23 Stat. 385, which provides that all Indians committing any one of certain enumerated crimes against the person or property of another Indian or other person within the boundaries of any state and within the limits of any Indian reservation shall be subject to the same laws and penalties "as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States," by implication repeals Rev. St. § 2143, in so far as that section makes a distinction between white persons and Indians in respect to the crime of arson committed in the Indian country, and under the later statute the crime and the punishment are the same whether committed by a white person or an Indian, or against a white person or an Indian.

3. ARSON—DWELLING HOUSE—SCHOOL BUILDING.

A school building, one part of which is occupied as a habitation, with interior communication between the parts, is a dwelling house," within the meaning of the term as used in the law of arson.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Arson, §§ 8, 13.]

4. SAME—INDICTMENT—DESCRIPTION OF BUILDING.

An indictment for arson by the burning of "a certain dwelling house of the United States of America there situate, such dwelling house being then and there known as the 'Girls' Building of the Menominee Indian Training School,' and then and there occupied and used as such dwelling

house of the United States of America by the teachers of the said United States in the Indian service, and by other persons, such teachers and other persons being to the grand jury unknown," is sufficient in its description of the building and of the persons occupying the same, and shows, within the fair intendment of the law, that the building was not the habitation of defendants.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Arson, §·41.]

On Motion to Quash Indictment.

See 143 Fed. 640.

H. K. Butterfield, U. S. Dist. Atty.

Eberlein & Eberlein, for defendants.

QUARLES, District Judge. This is a motion to quash the second indictment found against the defendants for burning the Indian Training School on the Menominee Reservation. A former indictment, based upon the same transaction, was held bad on demurrer. All the counts of this indictment are nolled except the second and fourth. The second count is in the words and figures following, to wit:

"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 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 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 Indians, as aforesaid, namely, a member of the said Menominee tribe, did, within the boundaries of a state of the United States, to wit, the state of Wisconsin, a certain dwelling house of the United States of America there situate, such dwelling house being then and there known as the 'Girls' Building of the Menominee Indian Training School,' and then and there occupied and used as such dwelling house of the United States of America by teachers of the said United States in the Indian service, and by other persons, such teachers and other persons being to the grand jury unknown, feloniously, willfully, and maliciously did set fire to, and the said dwelling house 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 Indians, as aforesaid, did, on the 17th day of January, A. D. 1905, commit the crime of arson against the property of another, to wit, 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 aforedescribed, 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."

The fourth count is identical with the second, except that it charges the burning of the "Boys' Building" instead of the "Girls' Building."

The first objection made to the indictment is that it charges two separate, distinct felonies, one involving the burning of the Girls' Building of the Menominee Indian Training School, etc., while the other charges the burning of another building, known as the "Boys' Building." The relative situation or location of these two buildings is not set out. For aught that appears in the indictment, they may have been a mile apart. Therefore, for the purposes of the motion, it must be conceded that two distinct crimes are charged. The two offenses, however, are of the

same nature, and punishable by the same penalties. The objection does not furnish ground for a demurrer. The remedy of the accused is by motion to compel the government to elect. Section 1024 Rev. St. [U. S. Comp. St. 1901, p. 720]; Pointer v. United States, 151 U. S. 396, 400, 14 Sup. Ct. 410, 38 L. Ed. 208; Ingraham v. U. S., 155 U. S. 434, 15 Sup. Ct. 148, 39 L. Ed. 213; Crain v. U. S., 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097.

The second objection is more serious. It involves the construction of section 9 of the act of March 3, 1885 (chapter 341, 23 Stat. 385), 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 the 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 in 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."

It is contended that the above section, containing no repealing clause, did not work a repeal of section 2143, Rev. St., passed in 1854, which reads as follows:

"Every white person who shall set fire, or attempt to set fire to any house, out-house, cabin, stable or other building in the Indian country, to whomsoever belonging; and every Indian who shall set fire to any house, out-house, cabin, stable or other building in the Indian country, in whole or in part belonging to or in lawful possession of a white person, and whether the same be consumed or not, shall be punishable by imprisonment at hard labor for not more than twenty-one years, nor less than two years."

It may be conceded that, if section 2143 remains in force and is the law of this case, the indictment is fatally defective, because it does not indicate whether the occupants of the building at the time of the alleged burning were white people or Indians.

It is argued with great vigor that repeals by implication are not favored in the law, and many authorities to that effect have been cited. While the general principle is undoubtedly correct, the law is well settled that a repealing clause is not necessary to do away with the pre-existing statute, if the purpose of Congress to that effect is clearly indicated; and this may be done in a variety of ways.

In Henderson's Tobacco, 11 Wall. (U. S.) 652, 657, 20 L. Ed. 235, the court say:

"Statutes are indeed sometimes held to be repealed by subsequent enactments, though the latter contain no repealing clause. This is always the rule when the provisions of the latter acts are repugnant to those of the former, so far as they are repugnant. The enactment of provisions inconsistent with those previously existing manifests a clear intent to abolish the old law."

In United States v. Tynen, 11 Wall (U. S.) 92, 20 L. Ed. 153, the court say:

"When there are two acts on the same subject, the rule is to give effect to both, if possible. But, if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not, in express terms, repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."

See, also, Ward v. Race Horse, 163 U. S. 504, 514, 16 Sup. Ct. 1076, 41 L. Ed. 244.

It is matter of common knowledge that for many years, and, indeed, until within a very recent period, it was the policy of the government to deal with an Indian tribe as though it were another nation or people. Hundreds of treaties were made by the government with these tribes, whereby the tribal relation and authority were expressly recognized. At the same time, they were treated as the wards of the government, and a practical bonus was paid upon idleness by the largesses that were from time to time conferred upon them. It took 100 years of experience to demonstrate a proposition, which, stated in the abstract, appears self-evident, namely: that it is impossible to civilize a tribe as such; that civilization, like education or religion, must necessarily deal with the individual. It was finally found that the treatment by the government of its Indian wards had been unsuccessful and unscientific. Then appeared the dawn of a new and more enlightened policy, which contemplated breaking up the reservations, disintegrating the tribes, allotting lands in severalty, conferring the rights of citizenship, and individualizing the Indian, giving him the same rights, privileges, and immunities of citizenship, offering him the same inducements for industry, and, in short, dealing with the red man as we deal with other nationalities, by putting them on a common level of citizenship and opportunity, and leave each man to work out his own salvation. This change of policy may be noted in the legislation of Congress. In 1871 an act was passed, which now stands as section 2079, Rev. St., whereby, in substance, it is provided that thereafter no Indian nation or tribe within the United States shall be acknowledged or recognized as a nation, tribe, or power, with whom the United States may contract by treaty, etc. By another act (February 8, 1887, c. 119, 24 Stat. 390) any Indian who adapts the habits of civilized life may become a full citizen.

It was provided by the act of February 8, 1887 (chapter 119, 24 Stat. 388), that:

"Each and every member of the respective bands or tribes to whom allotments have been made shall have the benefit of and be subject to the laws both civil and criminal of the state or territory in which they may reside."

This legislation marks a new era in our Indian policy, and the section we are considering (section 9 of the act of March 3, 1885, c. 341, 23 Stat. 385) is an essential part of this new scheme; for, as we read it, it is intended to make the Indian upon the reservation amenable to the same laws and punishments as to the crimes enumerated therein

as any white man or other person in any place which is within the exclusive jurisdiction of the United States.

Let us now turn to section 2143. We find that it embodies the tendencies of the discarded system, and it recognizes the distinction between the white man and the Indian. The same characteristics are noted in section 2142, while 2142 extends the laws of the United States for forgery and depredation upon the mails over the Indian country. By section 2145, as to all crimes not specially mentioned in that title, the general laws of the United States in force in all places within the sole and exclusive jurisdiction of the United States are extended over the Indian country, except as to a crime committed by one Indian against another; so that, if arson had not been specifically provided for in the above title, it would, by virtue of section 2145, have been made punishable under section 5385 [U. S. Comp. St. 1901, p. 3648], which expressly punishes arson in forts and other places within the exclusive jurisdiction of the United States. Even these earlier enactments manifest the purpose of Congress to gradually extend over reservations the Penal Code as administered where the government has exclusive jurisdiction; but the section under consideration was a long step in that direction. Among other things, it eradicates, so far as the enumerated crimes are concerned, the jurisdiction, so long exercised by the tribes, over all crimes committed by an Indian against the person or property of another Indian.

Read in the light of these facts, it seems clear that the act of 1885 was intended to bring the crimes therein mentioned, when committed by an Indian upon a reservation within a state, within the punishment laid down for the same crime when committed by a white person within a fort, arsenal, or other place exclusively within the jurisdiction of the United States; in other words, the whole subject-matter of section 2143, so far as it relates to a crime by an Indian, is covered by the later enactment, which is clearly repugnant to it, because the circumstance of color and race have been thereby eliminated as ingredients, and the United States has for the first time assumed to punish Indians resident upon reservations within a state. This view has been adopted by the Supreme Court in United States v. Kagama, 118 U. S. 375, 383, 6 Sup. Ct. 1109, 30 L. Ed. 228. The court treats this act of 1885 as a new departure in legislation, which tends to sweep away the old system and the old distinctions. See, also, Draper v. United States, 164 U. S. 240, 241, 17 Sup. Ct. 107, 41 L. Ed. 419.

For this reason, I must hold that section 2143, Rev. St., was by necessary implication repealed by the act of 1885, so far as it is repugnant to the later act.

Third. It is contended that the indictment is fatally defective in its description of the building burned and of the persons whose habitation it was. The indictment says:

"A certain dwelling house of the United States of America there situate. such dwelling house being then and there known as the 'Girls' Building of the Menominee Indian Training School,' and then and there occupied and used as such dwelling house of the United States of America by the teachers of the said United States in the Indian service, and by other persons, such teachers and other persons being to the grand jury unknown."

It is claimed that a schoolhouse is not a house or dwelling at the common law. Stated broadly, this is true. But it was well settled at the common law that a building, to constitute a dwelling house, need no be used exclusively for that purpose. If one part of the building is used as a habitation, it gives the character of a dwelling house to the entire building, if there be an internal communication between the two. Rex v. Stock, Rus. & Ry. 138, also reported in 2 Taunt. 339, is a leading case in England as to what constitutes a dwelling house. The offense there charged was burglary, but as to the definition of the above term, it is equally applicable. The indictment charged the offense to have been committed in the dwelling house of three copartners, naming them. The evidence showed that the lower rooms were occupied by the partners as a banking house, and no one slept on the first floor. The upper rooms were occupied by John Stevenson, who was a servant of the prosecutors, and engaged in their business at weekly wages, with lodging for himself and family. The rooms that he thus occupied had a separate entrance from the outside. The only communication betweeen these upper rooms and the lower floor was a trapdoor and ladder. The defendant having been convicted, the question reserved for the judges was, first, whether this inhabitancy could be considered as the inhabitancy of the prosecutors by their servant, and, second, if yea, whether there was such a severance of the lower part as to prevent it being included as a part of their dwelling. The conviction was unanimously affirmed. See, also, Rex v. Smith, 2 East. P. C. 497. A jail has been held to be a house, within the meaning of the law of arson, when the jailor lives therein with his family. People v. Van Blarcum, 2 Johns. (N. Y.) 105. In King v. Dunnevan, 1 Leach, Cr. Law, 81, the prisoner was indicted for setting fire to the common jail. It was laid in the first count as "the house of the corporation of Liverpool, called the 'common jail'"; second, of the "mayor and bailiffs of Liverpool, called the 'common jail'"; third, of Anna Hornby; fourth of Richard Rigby. It appeared in evidence that the jail belonged to the corporation of Liverpool; that Rigby was the keeper; that the keeper's dwelling house adjoined thereto, wherein Rigby lived; and that Hannah Hornby lived with him. Gould, J., who tried the case, reserved it for all the judges, who were of the opinion that this case was fully within the act (9 Geo. I, c. 22); the dwelling house being considered as part of the prison, and the whole prison being the house of the corporation. This statute of Geo. I was held not to change the old common law, or to create any new offense. King v. Spaulding, 1 Leach, 258. In McLane v. State, 4 Ga. 338, in the indictment the building was described as "a house used as a dwelling house, the property of Moses Harshaw, in the county of Habusham." Indictment held good by the Supreme Court.

There is a quaint old case decided by the Court of Appeals of Virginia in 1787 (Commonwealth v. Posey, 4 Call. [Va.] 109, 2 Am. Dec. 560). It concerned a common-law indictment for arson, which charged in separate counts the felonious burning of two separate buildings; one laid as "the house of William Clayton" in a certain parish, the other described as "the common jail and county prison of the

county of Kent." Objections were made that neither building was described with sufficient certainty. Each one of the nine judges rendered a separate opinion. It was held that the indictment was sufficient; that "the house of William Clayton" meant the house belonging to William Clayton, and that "house" as there employed meant "dwelling house"; that the allegation regarding the jail was sufficient, because it clearly designated the building, and that the prison was a dwelling house in contemplation of law, because it was the abode of persons confined under legal process. Only one of the nine judges dissented.

The strictness of the common-law rules of pleading in criminal cases, like every other rule of the common law, is bottomed on reason. They are not arbitrary or subtle when clearly understood. Lord Coke used to say that "he is ignorant of the law who knoweth not the reason thereof." The obvious reasons underlying these strict requirements in defining the dwelling house in an indictment for arson are twofold, and both intended for the better protection of the accused—first, to enable him to prepare his defense intelligently; second, to protect him in case of a verdict either way from a second prosecution for the same offense. For these reasons, ambiguous or imperfect description of the building burned will not be tolerated.

The practical test, therefore, in this case is whether this particular building has been so described as to clearly identify it, so that the defendants may know with certainty what particular building they are charged with burning, and so that no mistake or confusion can afterwards arise out of which might spring a second accusation for the same offense. In an ordinary case the building would simply be designated in an indictment as the dwelling house or A. B., in possession of C. D., in such a county or district. No exact location or further description of the building would be required. But in the indictment in question the description is definite as to ownership, particular as to nature and situation, so that the identity of the building for all purposes is put beyond doubt.

But it is alleged that the essence of the common-law crime of arson is the burning of the building of another, and that this indictment is faultly in not specifying by name the persons who were then occupying and dwelling in the building. It is claimed that in no other way can the strict rule of the common law be met, and only thus can it be made to appear that the building was not in the occupancy of the accused. It is argued that, if the persons who occupied the building were "to the grand jury unknown," it might well be that they were the accused. At the bottom of this rule lies the simple proposition that at the common law a man was not guilty of arson who burned his own house while he occupied the same. The indictment, therefore, must in some way negative that proposition, not by any prescribed formula of words, but sufficiently to show that the building burned was not that of the defendants. I find an early authority which sanctions the very form employed in this indictment in Rex v. Rickman, 2 East. P. C. 1034, where a parish pauper set fire to a house in which he was put to reside by the overseers, and it was not known who the trustees were in whom

the legal ownership was vested. It was held that it might be described as "the house of the overseer, or of persons unknown."

I think that the averments of the indictment are sufficient to indicate that the building was the habitation of another, within the fair intendment of the law.

For these reasons, the motion to quash must be denied.

JOHNSON v. UNION PAC. R. CO.

(Circuit Court, D. Rhode Island. April 26, 1906.)

No. 2,702.

1. GARNISHMENT—PROPERTY SUBJECT TO GARNISHMENT—RIGHTS OF GARNISHEE.
   A railroad company, having in its possession within a state freight cars owned by another company whose lines of road are in other states, under an arrangement giving it the right to use such cars in its business in that and other states, until it should be convenient to return them loaded at some point on the owner's road, has such an interest in them and right to their use that it cannot be compelled to surrender them as garnishee in an action by foreign attachment against the owner in the state where they are found, or to return them to such state after their use elsewhere, and an attempted attachment by service of such garnishment does not give the court jurisdiction.
2. SAME—SITUS OF INDEBTEDNESS—CONSOLIDATED CORPORATION.
   A railroad company was incorporated under the same name in three different states and operated a line of road extending through all of them. The business was conducted as that of a single corporation having one set of directors and officers. *Held* that, whether regarded as a single corporation incorporated in three states or as three corporations practically consolidated by their stockholders, there was such practical unity that the situs of an indebtedness due to another company arising out of the operation of the road for the purposes of garnishment was in either one of the three states.
3. SAME—INDEBTEDNESS ARISING OUT OF INTERSTATE COMMERCE.
   The fact that an indebtedness due to a nonresident railroad company arose out of the conducting of interstate commerce does not exempt it from garnishment under a foreign attachment.

On Motion of Defendant to Dismiss for Want of Jurisdiction.

Alfred S. Johnson and Lewis A. Waterman, for plaintiff.

Gardner, Pirce & Thornley, for defendant.

BROWN, District Judge. This is an action on the case for negligence, brought by the plaintiff Johnson to recover damages for personal injuries suffered upon a line of railway operated by the defendant in the state of Kansas. The writ was sued out of the superior court of the state of Rhode Island for Providence county. It commanded the attachment of the goods, chattels, and real estate of the defendant; also the attachment of the personal estate of the defendant "in the hands or possession of the New York, New Haven & Hartford Railroad Company, a corporation duly created, doing business in part in Providence, county of Providence, as trustee of the said defendant."

The plaintiff proceeded under section 524, p. 153, of the Court and

Practice Act, passed by the General Assembly of Rhode Island at its January session, 1905. This act provides that actions at law sounding in tort may be instituted against nonresidents, having property within the state, by original writ of attachment. Service was made upon the garnishee or trustee named in the writ. The defendant appeared specially in the state court, representing that the matter and amount in dispute exceeded the value of $2,000; that the controversy was between citizens of different states; that the defendant was a corporation organized and existing under the laws of the state of Utah, a citizen and resident of the state of Utah, and a nonresident of the state of Rhode Island. An order of removal was entered in the state court. The defendant, appearing specially, now moves this court for a dismissal of the action for lack of jurisdiction. This raises the question: Has the plaintiff succeeded in making an attachment?

By the garnishee's affidavit, it appears that, at the dates of several services upon it, it had in its possession certain freight cars belonging to the defendant, but that it held the same under an arrangement with the defendant whereby the New York, New Haven & Hartford Railroad Company has a right to use the cars in its own business until such time as it may find it convenient and proper to return the same reloaded with freight to some point on or near or reached by the line of railway of the defendant.

The defendant contends that the garnishee has such an immediate interest in the property, and such a right of use of the cars, that when it has exercised this right the cars will have reached the possession of the defendant in a foreign jurisdiction, and that it will be beyond the power of the garnishee to return the cars, or of the court to obtain a return. It is urged that the garnishee cannot be deprived of its right to use the property by reason of a controversy between other parties in which it has no interest, citing Drake on Attachment (3d Ed.) p. 462, as follows:

"It is an invariable rule that under no circumstances shall a garnishee, by the operation of proceedings against him, be placed in any worse condition than he would be in if the defendant's claim against him were enforced by the defendant himself"—citing, also, C. F. Wall v. Norfolk & Western Ry. Co., 52 W. Va. 485, 44 S. E. 294, 64 L. R. A. 501, 94 Am. St. Rep. 948; Michigan Central R. R. Co. v. Chicago, Michigan & Lake Shore R. R. Co., 1 Ill. App. 399; Connery v. Quincy, Omaha & Kansas City R. R. Co. (Minn.) 99 N. W. 365, 64 L. R. A. 624, 104 Am. St. Rep. 659.

The plaintiff argues that, in the case at bar, there was no express agreement giving to the New York, New Haven & Hartford Railroad Company the right to use the cars; and it is objected that the defendant relies merely upon a custom, and that that custom is of the most vague and indefinite kind. It is contended that this is, in effect, merely a license or privilege to use cars for hire practically as it sees fit, and must yield to the greater right of a creditor and a resident of this state to attach the property. It is urged that the rule that the garnishee cannot be placed in a worse position by the attachment has its exceptions, and does not permit a garnishee to return the goods or articles attached, freed from the attachment, to the owner.

The proposition that the plaintiff, in trustee process, cannot be

placed in a better position than the principal defendant, is recognized in Waldron v. Wilcox, 13 R. I. 518, 520; Brown v. Collins, 18 R. I. 242, 27 Atl. 329; Smith v. Millett, 11 R. I. 528.

It is difficult to see upon what principle the plaintiff can be allowed, by his attachment, to destroy the right of the New York, New Haven & Hartford Railroad Company to use these cars in the state of Rhode Island, to load them with freight, and to transport them through or into other states. It is also quite clear that the burden of returning these cars from another state to the state of Rhode Island cannot be imposed upon the garnishee. The cases cited by the defendant are direct authorities for this position. It therefore becomes unnecessary to consider the general question of the right to make garnishment of rolling stock, or whether such garnishment would constitute an obstruction of or interference with interstate commerce. I am of the opinion that the jurisdiction of this court cannot be supported by virtue of the attempt to attach the defendant's cars in the possession of the garnishee.

The next question is whether the plaintiff has succeeded in garnishing a debt due from the garnishee to the defendant.

The garnishee makes oath that the New York, New Haven & Hartford Railroad Company, in addition to its incorporation in Rhode Island, is incorporated by act of the Legislature of the state of Connecticut, in which state the corporation was first organized under that name, and by the Legislature of the commonwealth of Massachusetts, and operates various lines of railway in Connecticut, Massachusetts, Rhode Island, and New York; that the corporations incorporated by all of said states are administered by one board of directors, and by a single corporate organization; that the principal office is in the state of Connecticut, the first incorporating state.

The garnishee sets forth that, at the times of various services upon it, there were due and payable in the state of Connecticut, from the various corporations known as the New York, New Haven & Hartford Railroad Company to the Union Pacific Railroad Company, certain sums, as the balances due on accounts between the Union Pacific Railroad Company and the New York, New Haven & Hartford Railroad Company; that the consideration for the charges by the Union Pacific Railroad Company against the New York, New Haven & Hartford Railroad Company, from which said balances accrued, was in part for use by the New York, New Haven & Hartford Railroad Company of cars of the Union Pacific Railroad Company, in part for tickets sold by the New York, New Haven & Hartford Railroad Company upon some part of its system as aforesaid, the proceeds of which were payable to the Union Pacific Railroad Company, and in part for repairs made by the Union Pacific Railroad Company upon cars belonging to the New York, New Haven & Hartford Railroad Company; that all accounts out of which said balance grew were kept at the principal office of the New York, New Haven & Hartford Railroad Company in New Haven, in the state of Connecticut; that the balances due were payable at said principal office; that the situs of said indebtedness was at the main office in New Haven.

The garnishee further swears that it is impossible to state how much, if any, of said balances was due from the Rhode Island corporation, or how much was due to said Union Pacific Railroad Company from said Rhode Island corporation or from any of said corporations for or by reason of the use of any of its cars in the state of Rhode Island, or for tickets sold as aforesaid within said state.

It sufficiently appears from the garnishee's affidavit that the New York, New Haven & Hartford Railroad Company does business in three states under a single administration.

It is the defendant's contention that the Rhode Island incorporating act of May 17, 1893 (Acts & Resolves, January Session, 1893, p. 377), created an independent Rhode Island corporation; that it did not merely reincorporate a foreign corporation in this state; that consequently the Rhode Island corporation can be liable only for an unascertainable proportion of the balance due to the Union Pacific Railroad Company; and that this is a liability which it owes to the Connecticut corporation rather than to the Union Pacific Railroad Company directly.

The status of the New York, New Haven & Hartford Railroad Company has been before the courts of this circuit. Smith v. N. Y., N. H. & H. R. R. Co. (C. C.) 96 Fed. 504; Goodwin v. N. Y., N. H. & H. R. R. Co. (C. C.) 124 Fed. 358. In these cases the questions related to citizenship.

It does not seem necessary, however, to determine whether the Legislature of Rhode Island reincorporated in this state a pre-existing corporation of the state of Connecticut, or of Massachusetts, or created a new corporation of Rhode Island with the same name and powers within this state. Whether the garnishee is a single corporation incorporated in three states, or three corporations which practically have become so consolidated that their affairs cannot be separated, I am of the opinion that the situs of the indebtedness on the joint or consolidated business, for the purposes of garnishment, is in either state.

The practical inconvenience of adopting any other view is so great that we should hesitate to confuse by judicial decision what the stockholders of the various corporations of the New York, New Haven & Hartford Railroad Company have seemed to regard as a very simple arrangement. In Goodwin v. N. Y., N. H. & H. R. R. Co. (C. C.) 124 Fed. 358, 370, Judge Lowell said:

"Whether the organization is deemed (1) a single corporation, (2) one corporation with several aspects, (3) several separate corporations of which only one is recognized in each of the creating states, or (4) several separate corporations each recognized everywhere, is of no importance, except for the practical results which follow the adoption of one fiction or another. * * * It is not a question of justice, but of ultimate convenience, in what court a corporation may sue or be sued. It is injustice, and not mere inconvenience, that an organization of any kind shall be compelled to pay its debts twice over. In selecting a fiction, moreover, it may sometimes be wise to take one which has some slight inconvenience in practical results, if its logical development is generally convenient, rather than another which has a slight advantage in some respect, but whose logical development would lead to such injustice that exceptions and subfictions must be numerous and strained."

What the stockholders of the New York, New Haven & Hartford Railroad Company have joined together so completely for their business convenience cannot be practically separated when it comes to the question of the situs of an obligation for purposes of garnishment. There is a practical unity of organization extending over three distinct jurisdictions. If we are to separate the corporations sharply, the same reasons which exist for denying that the situs of the debt is in Rhode Island would exist for denying that it is either in Massachusetts or Connecticut. The result would be that what, from a practical point of view, is a single obligation, would, by an artificial division, require either a difficult accounting to determine the proportional parts of the obligation assumed by each corporation, or would require us in each instance to dismiss a suit begun by garnishment of the New York, New Haven & Hartford Railroad Company. The location of a business office for the transaction of affairs of the three corporations in the state of Connecticut cannot compel the plaintiff to resort to that jurisdiction.

It is further contended that no garnishment process can run against accounts payable to a foreign railroad corporation arising out of the conduct of interstate commerce. The defendant relies upon Philadelphia S. S. Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200. I am unable to see the applicability of that case. That a state tax upon the gross receipts of a steamship company, derived from the transportation of persons and property by sea, is held to be a regulation of interstate and foreign commerce in conflict with the exclusive powers of Congress under the Constitution, does not lead to the conclusion that the earnings of a railroad company in interstate commerce are free from attachment for its debts. There is no analogy between the cases, and no authority is cited having any tendency to support the defendant's proposition.

I am of the opinion that the state court acquired a limited jurisdiction by virtue of the attachment of a res, and that such jurisdiction cannot be destroyed through removal proceedings, and a dismissal by this court. Purdy v. Wallace Muller Co. (C. C.) 81 Fed. 513.

In deciding that the motion to dismiss must be denied, I do not decide, however, that this court has yet acquired final jurisdiction of a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000. Upon the garnishee's affidavit, a doubt arises whether the attachments exceed in the aggregate the amount of $2,000. Unless the defendant shall enter a general appearance, or unless the allegations in the removal proceedings give to this court a jurisdiction broader than that which may have been acquired by the state court through the attachments, it may become necessary to remand the case to the state court. See Purdy v. Wallace Muller Co. (C. C.) 81 Fed. 513.

The motion to dismiss is denied.

The defendant is allowed 10 days to plead, or to take such other proceedings as it may deem proper.

BRIGGS v. TRADERS' CO. et al.

(Circuit Court, N. D. West Virginia. April 17, 1906.)

1. COURTS—JURISDICTION OF FEDERAL COURTS—MANNER OF RAISING QUESTION OF JURISDICTION.

Under section 5 of the federal judiciary act of March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511], which requires a Circuit Court to dismiss or remand a suit if it shall appear at any time that the court is without jurisdiction or that the parties have been improperly or collusively made or joined, it is immaterial in what manner or by what pleading the question is raised.

[Ed. Note.—For cases in point, see vol. 13. Cent. Dig. Courts, § 818.]

2. SAME—DISCRETION OF COURT.

If the want of jurisdiction of a Circuit Court appears from the face of the bill, it is the duty of the court as soon as its attention is called to the fact or it is discovered, no matter how far the cause has progressed to place the parties as nearly as possible in statu quo and to dismiss the suit; but if the want of jurisdiction does not appear on the face of the bill or from the record but the objection is based on alleged extrinsic facts, it is the duty of the court to exercise its discretion in determining whether or not in the then condition of the cause and in view of the relations existing between the parties by reason of the proceedings already taken therein, it will permit such issues of fact to be raised.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 818.]

3. CORPORATIONS—SUIT BY STOCKHOLDER.

A suit in a federal court by a stockholder against the corporation alleging that it has ceased to actively conduct its business or to elect officers or directors and that it is largely indebted and asking the appointment of a receiver and a winding up of its affairs is not one founded on rights which may properly be asserted by the corporation within the meaning of equity rule 94, and complainant need not show that he has complied with its requirements.

4. SAME—SUIT FOR DISSOLUTION—WEST VIRGINIA STATUTE.

Under Code W. Va. 1899, c. 53, § 58, which authorizes a court on application of a creditor or stockholder to appoint a receiver to administer the assets of a corporation "upon sufficient cause being shown therefor," a stockholder may maintain a suit in a federal court on behalf of himself and other stockholders for the dissolution of the corporation and distribution of its assets, where the requisite diversity of citizenship appears, and it is alleged in the bill that the corporation has ceased to do business and is taking no action towards payment of its debts or the protection of its property, and other stockholders and creditors need not be joined as parties where it is alleged that they are unknown to complainant.

5. COURTS—OBJECTION TO JURISDICTION—LACHES.

Where a stockholder's suit for dissolution of a corporation, brought in a federal court, and of which such court had jurisdiction on the face of the record, had proceeded for 16 months, during which time a receiver had been appointed who had collected the assets of the corporation and made an advantageous sale of its property, and the claims of creditors had been proved, a nonparticipating creditor which in the meantime with knowledge of the suit proceeded in a state court and obtained a judgment against the corporation will not be permitted to intervene after such lapse of time to raise an issue of fact upon the question of jurisdiction in respect to which it does not claim to have any more knowledge or information than it had when the suit was commenced

In Equity.

On August 3, 1904, the plaintiff Briggs filed his bill in equity against the Traders' Company, a corporation, and John Koblegard and Burton M. Despard, trustees, in which he alleges himself to be a citizen of New York and the defendants of West Virginia; that he is a stockholder of defendant company to the extent of 50 shares of the par value of $5,000; that the company is the owner of a 50-year lease of a lot of ground in Clarksburg, W. Va., upon which it has erected a large building for use as a hotel, opera house, storerooms, and a banking room, which latter has been leased by it to the Traders' National Bank for a term of 16 years, with privilege of renewal: that the operations of said company have not been profitable, but its business for several years has been conducted at a loss and large indebtedness accumulated; that on January 29, 1895, it executed to the defendants Koblegard and Despard and to one Clifford now deceased, a first mortgage on the property to secure bonds which were sold and that besides this indebtedness, other large debts to persons unknown to plaintiff are due aggregating a total of $45,000, that for a year or more preceding the filing of this bill, the officers and directors had ceased to take any part or lot in the conduct or management of said company's affairs, had held no meetings of directors or stockholders, and no new officers had been elected; that rentals have been permitted to go unpaid, no effort is made to collect them, that no active head, board of directors or governing body exists for said corporation to whom plaintiff as a stockholder could apply for relief, that default has been made under the terms of the mortgage sale under it advertised by the trustees, the general indebtedness is unascertained; that a large amount of personal property is in the hotel which ought to be sold with it or otherwise it would be sacrificed; that judgments are being obtained and executions issued against it. The prayer is to stay the sale by the trustees, appoint a receiver, ascertain the debts and their priorities and generally adjust the affairs of this company. This bill was presented, it appears, in open court, and the same day it was filed, an order was entered granting the injunction and appointing a receiver to take charge of the property.

On September 13, 1904, by order entered before any appearance by parties, the plaintiff was allowed to amend his bill by inserting in the first paragraph the words "On behalf of himself and all other stockholders who may come in and join in said suit," and by the same order one J. M. Hustead filed his petition, and was admitted a party plaintiff, alleging therein himself to be and to have been when the transactions occurred a nonresident of West Virginia, and the holder of 10 shares of the capital stock of said corporation, and the allegations of the bill to be true. Various orders were from time to time entered, providing for the operation and lease of the opera house, the hotel, accepting the resignation of the receiver and the appointment of another, the reference of the cause to a special master to ascertain debts, etc., and permitting and directing sales of the property to be made by the trustees in the mortgage of part of said corporation's property, and of the residue by Special Commissioner John W. Davis. The latter made and reported a sale of the banking room, which, upon upset bid, was set aside, and a new sale ordered made and reported, which is now asked to be confirmed.

In this condition of affairs, on November 25, 1905, the Bank of the Monongahela Valley, a West Virginia corporation, was permitted to file its petition in the cause in which it alleges itself to be a creditor of said Traders' Company, evidenced by a judgment recorded against it, T. Moore Jackson and Fleming Howell for $9,793.50 and $19.20 costs on October 5, 1904, in the Circuit Court of Harrison county, W. Va., that the action upon which said judgment was founded was commenced on April 19, 1904, prior to the institution of this Brigg's suit in this court, but judgment was delayed by reason of pleas entered by the defendants; that the term of court at which said judgment was rendered commenced on September 13, 1904, and the judgment relates back as of that day when said petitioner acquired under the law a judgment and execution lien upon the property of said Traders'

Company; that Howell is bankrupt, and Jackson insolvent, and neither have property out of which said judgment can be made; that but for the institution of this suit and the appointment of a receiver therein, on September 3, 1904, it would have all the property of said Traders' Company bound for its said judgment and execution lien. It thereupon assails the jurisdiction of this court and its right to suffer the maintenance of this suit upon legal grounds appearing upon the face of the bill and proceedings, and further charges as a matter of fact that the plaintiff Marsenus H. Briggs never in fact owned any stock or interest in the Traders' Company, but colluded with one John T. McGraw whereby the stock owned by the latter was assigned to said Briggs for the sole and only purpose of giving the said Briggs a nonresident citizen (McGraw being a resident one) a colorable right to institute this suit; that he in fact never had any legal right to institute it, and this court no jurisdiction to maintain it; that all orders and decrees entered in it are void and of no effect; that although its suit was pending in the state court at the time of the institution of this one and the plaintiff had knowledge of it and of the petitioner's debt, he did not make petitioner party to this suit because he did not desire to allow plaintiff to make defense thereto and destroy his right to maintain this cause. The prayer of this petition is that petitioner may be made a defendant, may be permitted to demur and plead to said bill, and if deemed necessary, be permitted to file its answer thereto; that Briggs be required to state under oath just when and how, and for what purpose, he obtained possession of the 50 shares of stock; that all orders entered in this cause be vacated and the cause be dismissed for want of jurisdiction, and that its debt be satisfied out of the proceeds of the sale of the property of the said Traders' Company.

The order allowing this petition to be filed, entered on November 25, 1905, recites that "it appearing * * * that the petitioner * * * is materially interested in the matters in controversy in this cause, and in any proceeds arising from the sale of the property of the Traders' Company, it is therefore ordered that the said petition be, and the same is hereby, filed, and the Bank of the Monongahela Valley, on its motion, is made a party defendant to this cause, and given leave to plead, demur, answer, and make any proper defense to the bill in this cause."

Davis & Davis, M. D. Post, and Johnson & Hoffheimer, for plaintiff and intervening creditors.

Sperry & Sperry, for petitioner, the Monongahela Bank.

DAYTON, District Judge (after stating the facts as above). The plaintiff's counsel earnestly insist this petition of the Bank of the Monongahela Valley should not be considered but dismissed from consideration, because it was filed by order in November, 1905, which made the petitioner a party defendant and granted it leave to demur, plead, answer, or make other defense to the bill. It has neither pled to nor answered the bill, but on March 7, 1906, an order was entered formally filing a demurrer to the bill, which was therein recited to have been tendered at a special term of the court held in the month of December, and at the same time a motion was submitted by said petitioner to dismiss the plaintiff's bill for the reasons set forth in its said petition. Plaintiff insists that several rule days having passed without the formal entry of any demurrer, plea, or answer, that the bill should stand pro confesso. I cannot concur in these views for these reasons: Prior to the act of 1875 the common-law rules touching the necessity of a plea in abatement to the jurisdiction prevailed in the federal courts, and it was held that the filing of a plea to the merits was a waiver of such plea to

the jurisdiction. Farmington v. Pillsbury, 114 U. S. 138, 143, 5 Sup. Ct. 807, 29 L. Ed. 114. This act of March 3, 1875 (18 Stat. 472, c. 137, § 5 [U. S. Comp. St. 1901, p. 511, tit. 13, c. 7, § 629]), provides that if at any time after suit brought or removed it appears "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require."

Since the passage of this act it has been held that "in its general scope this rule (enunciated in Farmington v. Pittsburg) has not been altered by the act of 1875," but this act "changed the rule so far as to allow the court at any time, without plea and without motion, to stop all further proceedings and dismiss the suit the moment a fraud on its jurisdiction was discovered." Hartog v. Memory, 116 U. S. 588, 590, 6 Sup. Ct. 521, 29 L. Ed. 725; Williams v. Nottawa, 104 U. S. 209, 211, 26 L. Ed. 719. The jurisdiction of this court cannot longer be a matter of either consent or confession. It is therefore immaterial how the question arises, whether by plea, demurrer, answer, petition, or by the court's own inspection of the record, it is the court's right, and therefore its duty to stop all further proceedings and dismiss the suit, so soon as want of jurisdiction is made to appear. The petition here is designed for one purpose and one only that of raising the question of this court's jurisdiction, and of setting forth its substantial interest in securing a denial of it. I think it entirely sufficient for this purpose and that no further plea, demurrer, or answer to the bill was or is required.

In considering this question of jurisdiction, however, in my view, we must do so from two standpoints and with different rules governing in each case such consideration: First, if the want of jurisdiction appears from the face of the bill, then I have no hesitation in saying that no matter how far the cause has progressed or how difficult it may be to retrace the steps taken it is the duty of the court, nevertheless, to retrace those steps, place the parties as far as possible in statu quo and then dismiss the proceedings, so soon as its attention is called to or it discovers such lack of jurisdiction; second, if the want of jurisdiction does not appear on the face of the bill, and is not disclosed in the pleadings or proof, but is solely based upon the alleged facts existent, if at all, outside the record, then it is the duty of the court, I conceive, to exercise a wise discretion in determining whether or not, in the then condition of the cause and the relations existing between the parties by reason of proceedings already taken therein, it will permit such issues of facts to be raised. In this petition jurisdiction is assailed on both grounds, and we will first consider whether the bill and proceedings on their face show such want of it. It is very earnestly insisted that this bill shows that the cause is not one maintainable under equity rule

No. 94. I think this contention is absolutely sound, because the proceeding is not one by a stockholder "founded on rights which may properly be asserted by the corporation." On the contrary, it is manifestly a proceeding against the corporation even to the extent of assailing its longer right to exist. For this very reason I think it clear that the plaintiff before bringing it was not required to conform to the requirements of this rule; in short, that this rule is in no way applicable. Leo v. Union Pacific Ry. Co (C. C.) 17 Fed. 273; Ranger v. Cotton Press Co. (C. C.) 52 Fed. 611; Taylor v. Decatur M. & L. Co. (C. C.) 112 Fed. 449.

The diverse citizenship, giving jurisdiction to this court, in matters arising under state laws, is clearly set out in the bill, but petitioner earnestly insists that the suit cannot be maintained under these laws because section 57 of chapter 53 of the Code of 1899 of West Virginia requires not less than one-third in interest of the stockholders to join in a bill brought to wind up the affairs of a corporation. On the other hand counsel for plaintiff and others interested on that side strongly urge that this section of the Code does not apply; that it relates to a suit brought to dissolve a "going" concern by a minority interest in stock as for instance, where the corporation, although solvent, was no longer doing a paying or otherwise satisfactory business; and they insist this case is one authorized by section 58 of chapter 53 of said Code, which provides:

"When a corporation expires, or is dissolved or before its expiration or dissolution, upon sufficient cause being shown therefor, such court as is mentioned in the preceding section, may on application of a creditor or stockholder, appoint one or more persons to be receivers to take charge of and administer its assets; and whether such receiver be appointed or not, may make such orders and decrees and award such injunctions in the cause as justice and equity may require."

Counsel for petitioner denies the application of this statute, and insists that under it a bill would be demurrable, at least, which did not make all other stockholders and creditors parties. The question has been ably argued on both sides and a number of authorities cited. Without taking time to discuss the matter in detail, it is sufficient for me to say that while I doubt the right of a single contract creditor of a company under this last-named statute to maintain such a suit as this under the rulings in Smith v. Railroad Co., 99 U. S. 398, 401, 25 L. Ed. 437, Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 977, 37 L. Ed. 804, and Hollins v. Brierfield Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, as contravening the seventh amendment to the Constitution, providing that the right to trial by jury shall be preserved in ascertaining these debts, which rule is strictly enforced by the federal courts regardless of all state statutes as set forth in these cases; yet I can well see how the condition of the stockholder is different. He has an interest in the property such as fulfills the prerequisite to bringing suit laid down by Justice Field in Scott v. Neely, and this interest is fixed and limited by his actual stock held. His interest is not a debt of the corporation such as could be reduced to judgment by jury trial; on the contrary, it is subordinate

to all debts, and the mere holding of it implies an obligation to creditors to preserve as far as possible the corporation's property for the benefit of such creditors. I therefore hold that where diversity of citizenship exists a suit by a stockholder under and by virtue of this statute may be maintained if the facts warrant it, and further under the rulings in Crumlish's Adm'r v. Railroad Co., 28 W. Va. 623, I am constrained to hold that the facts in this case as charged in the bill, and which seem not to have been denied, are sufficient to so warrant. Nor do I think the objection for lack of parties is sound. The bill by amendment made before appearance and by express leave of the court is filed by plaintiff on his behalf and on behalf of all the other stockholders of the company, and there is a substantial charge in it that the names of such stockholders and the creditors are to the plaintiff unknown.

Holding, therefore, that this bill on its face shows no lack of jurisdiction, and can be maintained, the next question to be considered is whether I shall permit this petitioner, The Monongahela Valley Bank, to come in at this stage of the proceeding and raise the issue of fact whether the plaintiff, Briggs, is the bona fide holder of the 50 shares of stock claimed by him, or whether he is by collusion a mere nominal holder or assignee thereof for the purpose solely of giving jurisdiction to this court. As I have indicated heretofore, this involves an exercise of wise discretion on the part of the court to be governed by the circumstances of each case that may arise. The court should promptly condemn by the penalty of dismissal any fraud committed upon its jurisdiction when such fraud appears. Yet, I conceive, it is not to presume that such fraud has been committed nor should it delay the prompt and effective determination of the parties' rights in order to make investigation of unsupported suggestions that such fraud has been committed notwithstanding the contrary has been in effect alleged by the plaintiff in the bill. Prior to the act of 1875, it is to be remembered that a person desiring to raise this question of jurisdiction in the federal court had to do so within the time and with all the technical accuracy required by a plea in abatement under common-law pleading. If he did not he was presumed to have waived objection to jurisdiction. This act was not designed to modify "the general scope of this rule" so far as the litigants were concerned, but to confer upon the court the independent power to dismiss when fraud upon its jurisdiction was apparent, notwithstanding no such plea in abatement had been by any of the parties filed, as held in Hartog v. Memory and Williams v. Nottawa, supra.

The statute, certainly, did not purpose that any suggestion of such fraud on the court's jurisdiction should delay the parties in interest to such an extent as to jeopardize or destroy the rights of numerous innocent parties which may have become ascertained and fixed by the proceedings in the cause, while the party seeking to be benefited by the disclosure stands and permits the proceeding to go on admitting that he had knowledge all the while of the fraud, yet keeping absolutely silent all the time about it. The confusion, uncertainty, and delay, not to speak of the wrongs and hardships that would spring from en-

couraging such laches, are at once apparent. In this case this petitioner practically admits itself to have had knowledge of the existence of this suit, which, as it charges, stands in the way of the collection of its judgment, for nearly 16 months since such judgment was obtained, before it filed or attempted to file this petition. Nor does it allege that during all that time it did not have the same knowledge of this alleged fraud upon this court's jurisdiction that it had when it filed such petition. During that time the case here has gone on, the affairs of the corporation have been to a degree ascertained, revenues have been derived from the rental of its property, such property has been sold most advantageously, creditors have proved their claims, and innocent purchaser's rights have attached. Under such circumstances, I think, the laches of the petitioner are too clear and apparent to allow me to entertain at this late day in the proceedings its prayer to go back and permit an issue of fact to be raised upon the question of jurisdiction. This bank, however, will have the clear right to prove its debt and share ratably with other creditors in the distribution of the corporation's assets.

Let the prayer of this petition, therefore, by decree entered, be denied, the sale reported by Special Commissioner John W. Davis be confirmed, and the cause proceed to a final decree disbursing the assets and settling the affairs of this Traders' Company.

NATIONAL FIREPROOFING CO. v. MASON BUILDERS' ASS'N OF CITY OF NEW YORK et al.

(Circuit Court, S. D. New York. April 4, 1906.)

CONTRACTS—LEGALITY—AGREEMENT BETWEEN EMPLOYERS AND TRADE UNIONS.

A trade agreement between a mason builders' association and bricklayers' union, by which the members of the association agree to include in their contracts for building all interior brick and mason work, such as the installation of fireproofing, etc., that they will not sublet such interior work, but will have it done by their own workmen, giving preference to those employed in the construction of the walls, so as to give them the easier and safer part of the work as well as the more exposed and dangerous, and enable them to more nearly make full time in bad weather, and which binds the members of the unions to work only for contractors who comply with such requirements, is not in itself unlawful, and when made in good faith, solely for the mutual benefit of the parties concerned, and not for the purpose of creating a monopoly or of preventing others from obtaining contracts and employing workmen on the same terms, is not in violation of any rights of one who desires to take separate contracts for fireproofing to be installed by his own men employed for that work alone.

In Equity. On motion for preliminary injunction.

James W. Osborne, for the motion.

F. A. Acer, Eidlitz & Horltz, Sidney J. Cowen, and Hillquit & Hillquit, opposed.

TOWNSEND, Circuit Judge. The facts herein, appearing from the complaint, answer, and affidavits, are as follows:

The complainant is a Pennsylvania corporation, extensively engaged in the manufacture and installation of tile fireproofing, and, since November, 1898, authorized to transact business in the city of New York, where it has installed its system of fireproofing in a number of large buildings. The defendants are members of the Mason Builders' Association of New York and of various bricklayers' unions. The defendant, the Mason Builders' Association, was organized in 1884. The objects of the association, inter alia, are to "adopt such measures for the better protection of employers and employés as shall lead to the promotion of harmony between all parties engaged with us in business; to arbitrate all differences, and so avoid the great evil of strikes," etc. This association, together with the representatives from the bricklayers' unions, has a joint arbitration board, before whom difficulties between the association and the bricklayers may be arbitrated, under a trade agreement between the representatives of the association and the various unions, and the effect of this agreement has been to practically dispose of all questions between the parties and to avert strikes. The said trade agreement contains the following clauses, of which complainant complains:

"(5) Members of the Mason Builders' Association must include in their contracts for a building all cutting of masonry, interior brickwork, the paving of brick floors, the installing of concrete blocks, the brick work of the dampproofing system and all fireproofing—floor arches, slabs, partitions, furring and roof blocks—and they shall not lump or sublet the installation, if the labor in connection therewith is bricklayers' work as recognized by the trade (the men employed upon the construction of the walls to be given the preference). [This clause is not objected to.] That all cutting of masonry be done by those best fitted for the work, and that the members of the Mason Builders' Association make the selection; but cutting of all brickwork, fireproofing, terra cotta, concrete arches and partitions, as well as the washing down and pointing up of front brickwork and terra cotta, shall be done by bricklayers. * * *

"(9) That any member of these unions, upon showing his card for membership, be permitted to go upon any job when seeking employment, unless notified by a sign, 'No Bricklayers Wanted'; and that employment be given exclusively to members of the unions that are parties to this agreement. The shop steward or business agent shall determine who are members of these unions. It shall not be the duty of the foreman to ask any man to what union he belongs. If the shop steward be discharged for inspecting the cards of the bricklayers on a job, or for calling the attention of the foreman to any violation of the agreement, he shall be at once reinstated until the matter is brought before the joint arbitration committee for settlement. The foreman must be a practical bricklayer.

"(10) No member of these bricklayers' unions shall work for any one not complying with all the rules and regulations herein agreed to. No laborer shall be allowed upon any wall or pier to temper or spread mortar, which shall be delivered in bulk; said mortar to be spread with a trowel by the bricklayers, who shall work by the hour only."

The fifth clause, against which complaint is particularly directed, was inserted in said agreement in 1893, at the request of the representatives of the bricklayers' unions, upon their contention that the fireproofing company were using special gangs of men for doing the work, and, thereby, making an unjust discrimination against them, in that the installation of the fireproofing blocks was strictly bricklayers' work, and that the men who had been at work upon the wall,

and who were exposed to the inclemencies of the weather, and the danger attached to said work, ought also to have an opportunity to do what was the easier and protected work of installing fireproof blocks, and upon the further contention that they should be allowed to do the inside work also, because it could be done almost continuously, and the men could make substantially full time, which they could not do when working upon the walls.

The complainant claims that the effect of this agreement is to ruin its business in the city of New York, so far as concerns the installation by it of its tile fireproofing, because, when it makes contracts to install its system, the bricklayers' unions have obliged the bricklayers employed by complainant to strike, and that therefore not only is the general contractor prohibited from contracting with complainant, but also an owner desiring to construct a building is precluded from contracting with it, as manufacturer, for the installation of its system of fireproofing in such building, and that this is contrary to law, because it deprives the complainant of its constitutional right and liberty to pursue its calling, and to do business in the city of New York, which is a right of property, and because, further, it is a conspiracy to prevent it, by threats and intimidations, from exercising its lawful trade in the use of its property, in violation of subdivision 5 of section 168 of the Penal Code of the city of New York, and because said agreement is in violation of public policy and the common law and statutes of New York, in creating a monopoly in the business of installing tile fireproofing, and in that it impairs the obligation of contracts, etc.

Defendants, in their affidavits, allege that the complainant has admitted that, if it were permitted to install its own material, it would be compelled to use a special gang of men, who were working for it continually; that the only way in which mason builders in the usual course of business can control the letting of contracts for the installation of fireproofing is to take the contract to do all the work of which the fireproofing is a part. They deny that the agreement was entered into with any desire to obtain the sole monopoly of said business, or to exclude the complainant from using its manufactured product, or to prevent it from being used in the city of New York, or to prevent complainant from making contracts for the installation of its system of fireproofing in buildings and structures. And, furthermore, they deny that they have prevented the complainant from getting such contracts by threats, intimidation, or otherwise, and deny that the agreement is directed against the complainant, asserting that the fifth clause therein was inserted years before the complainant was doing business in the city of New York.

In some of the affidavits of the defendant the situation is stated as follows:

"The defendant bricklayers have entered into an agreement with their employers, the mason builders, whereby the former will work for such employers, provided such employers contract with the persons employing them —that is, the owners of the buildings—to do all the brickwork; not to do simply the fireproofing, but all the brick masonry work necessary to be done in the erection of the building. The only brickwork that the complain-

ants are prepared to install, and have the facilities for installing, is the fireproofing. The installing of fireproofing in a building is but about 50 per cent. of the brick masonry necessary to be done. If the contracts in and about New York which the complainant enters into extended to all the brickwork of a building, undoubtedly the defendant bricklayers would be as willing to work for the fireproofing company as for the mason builders. This not being the case, the complainant should not ask the court to interfere with the contracts which the defendant bricklayers have entered into, or may hereafter deem wise to enter into, whereby said bricklayers secure the installation of all the brick masonry upon a building to be erected. It is to prevent the specialization of our trade that we have entered into article 5, which has been in operation since 1891. There are thousands of bricklayers at the present day working in New York City for independent contractors, namely, those not members of the Mason Builders' Association, but they observe the terms of article 5, though they have not signed it, and are not partners to it."

This case is one of great importance, the claims of the respective parties have been presented in a large number of affidavits, and the questions involved have been discussed in voluminous briefs. The agreement does not present the ordinary case of a combination of labor against employers and capital. It is a case of a combination of capital represented by the Mason Builders' Association and of labor represented by the Bricklayers' Union, which it is claimed injuriously affects the interests of capital represented by the complainant and other capitalists, and of labor represented by employés not members of the union or who have not signed the agreement.

If the contract is a conspiracy for the purpose and with the effect alleged by the complainant, and has been carried out by threats and intimidation, as stated in the affidavits, then a case is presented of an unlawful conspiracy to deprive the complainant of its liberty and property. If the purpose of the said agreement was to coerce those who were not parties to it, the case would be brought within the principles discussed in Curran v. Galen, 152 N. Y. 33, 37, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496. There the court held that, if the purpose of an organization was to coerce their workmen to become members of an organization under penalty of loss of position and deprivation of employment, it would be within the principle of public policy which prohibits monopolies and exclusive privileges.

The answer of defendants denies all the material allegations of the bill and affidavits, except the allegation as to the existence of this agreement. It is therefore different in this regard from Curran v. Galen, supra, where the facts were admitted by demurrer. If the allegations in the answer and the statements in the affidavits be true, the agreement resolves itself into one by which the builders merely agree that they will take contracts for mason work only where such contracts include the installation of the fireproofing, and that they will not sublet the same, but will use their own men for such installation, and whereby the bricklayers agree that they will work only for those who comply with this agreement.

It is claimed, for the reasons set forth in the affidavits and referred to above, that this agreement was entered into for the mutual advantage of the parties, in the line of the avoidance of strikes and

the opportunity for control by contractors of an entire contract, in permitting the bricklayers to do all the brickwork on a certain building, so that having done the outside work, exposed to the inclemencies of the weather, they might also do the inside and protected work and obtain full and better wages. If the facts be as contended by the defendants, there is nothing unlawful in this agreement. The rights of capital and labor are equally protected by the law in the making of such contracts as are for the best interests of the parties concerned, in the absence of proof of any act or motive other than that which is justified by the law. Indeed, it is difficult to see upon what theory the court could enjoin the defendants herein from carrying out said agreement. As is stated by Judge Gray in National Protective Association v. Cumming, 170 N. Y. 315, 335, 63 N. E. 369, 375, 58 L. R. A. 135, 88 Am. St. Rep. 648:

"Our laws recognize the absolute freedom of the individual to work for whom he chooses, with whom he chooses, and to make any contract upon the subject that he chooses. There is the same freedom to organize, in an association with others of his craft, to further their common interests as workingmen, with respect to their wages, to their hours of labor, or to matters affecting their health and safety. They are free to secure the furtherance of their common interests in every way, which is not within the prohibition of some statute, or which does not involve the commission of illegal acts. The struggle on the part of individuals to prefer themselves, and to prevent the work which they are fitted to do from being given to others, may be keen and may have unhappy results in individual cases; but the law is not concerned with such results, when not caused by illegal means or acts."

Furthermore, it is not clear, if these rules and regulations are reasonable, why complainant cannot comply with said rules and with said agreement and do the outside as well as the inside work. Its argument upon this point seems to be that it desires to be permitted to do a certain branch of a certain business in the way which is most profitable to it, by means of its own men and to the exclusion of others. It may readily be seen that, if this contention is sustained, any one supplying work and materials in the construction of a building might enjoin the carrying out of any agreement which excluded him from doing his particular part of the work in the same way, no matter how small or insignificant that work might be in the construction of the building. Such a situation would lead to needless confusion, and might further seriously interfere with the ability of the workmen to secure their wages from the various independent employers.

The very recent decision of the Court of Appeals, in Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5, shows that the question of law depends upon whether there is coercion by threats and by the unlawful use of power and influence in keeping other persons from working at their trade, and procuring their dismissal from employment, as in Curran v. Galen, supra, or a lawful agreement made by an employer with his workmen, regulating the performance of the work and restricting the class of workmen to such persons as are in affiliation with the association of the employers' workmen, provided the restrictions were not oppressive.

In these circumstances, and because the questions presented depend

upon the existence or nonexistence of disputed facts, I do not feel justified in granting the extraordinary remedy of a preliminary injunction. The decision of the questions at issue should be postponed until after the determination of the facts, under the opportunity afforded by examination and cross-examination of witnesses.

The motion for a preliminary injunction is denied.

FLYNN v. FIDELITY & CASUALTY CO.

(Circuit Court, W. D. Missouri W. D. April 30, 1906.)

No. 3,092.

REMOVAL OF CAUSES—AMENDMENT OF PETITION—POWER OF COURT TO PERMIT. Leave to amend a petition for removal, by alleging directly the citizenship of plaintiff's assignor, may be granted by the federal court after the record on removal has been filed therein, but before any action has been taken thereon, where the record already shows such citizenship in legal effect, and that the case is one properly removable.

On Motion for Leave to Amend Petition for Removal.

J. C. Rosenberger and Piatt, Lea & Wood, for plaintiff.

Harkless, Crysler & Histed, for defendant.

PHILIPS, District Judge. The defendant has filed motion for leave to amend the petition filed in the state court for the removal of this cause, by making a formal statement therein to the effect that Adelia J. Flynn was at the time of the assignment of her interest in the policy in suit to her son, the plaintiff Frank Flynn, a citizen of Jackson county, Missouri. The policy of insurance was issued to John T. Flynn, the father of the plaintiff and the husband of Adelia J. Flynn. The policy was payable to said Adelia J. Flynn on the death of said John T. Flynn, who died on October 25, 1905. About the 7th day of January, 1906, she assigned and transferred to the plaintiff all her right and interest in said policy. The suit was brought on the 21st day of February, 1906, in the circuit court of Jackson county, Mo., to collect said policy. On the 12th day of March, 1906, the return day of the writ of summons in said case, the defendant appeared and filed its motion, with sufficient bond, for the removal of the controversy into this court. The state court held the application under advisement, and while it was so pending the defendant obtained from the clerk of said state court a transcript of the record and proceedings therein, and filed the same in this court on the 23d day of April, 1906. The petition for removal did not aver, in direct terms, that at the time of the assignment of said policy to the plaintiff the said Adelia Flynn was a resident citizen of Jackson county, Mo., and the amendment offered is to cure this defect in the petition for removal.

I am of the opinion that, as applied to the facts appearing on the whole record in this case, the right to make such amendment comes within the principles laid down in the opinion of Mr. Justice Brewer, in Kinney v. Columbia Savings & Loan Association, 191 U. S. 78, 24

Sup. Ct. 30, 48 L. Ed. 103. It is true that the defect in the petition for removal in that case was its failure to aver the citizenship of one of the parties to the suit. But it did appear that the purpose was to remove the case on account of diverse citizenship. The controlling principle laid down in the opinion is that the petition and bond for removal are in the nature of process, as they constitute the process by which the case is transferred from the state to the federal court; and the federal statute authorizes the circuit court at any time, in its discretion, etc., to allow an amendment of any process returnable to or before it where the defect does not prejudice and the amendments will not injure the party against whom such process issues; and the further provision that no declaration, process, or other proceeding in a civil cause in any court of the United States shall be abated, etc., for any defect or want of form, and the court may at any time permit either of the parties to amend any defect in the process or pleadings, at proper discretion. (Here the court read further from said opinion.)

It appears from the petition of the plaintiff in the case that the said Adelia J. Flynn "was at all the said times [that is from the issuance of the policy until the death of said John T. Flynn] his wife." The petition for removal properly alleges the citizenship of the defendant company to be in the state of New York, and that the plaintiff is a resident of the city of Kansas City, Jackson county, Mo., and is a citizen of said state. It also alleges that there is a controversy between citizens of different states, and which can be fully determined between them; that at the time of the death of said John T. Flynn "he was likewise a citizen and resident of the state of Missouri." This was tantamount in law to an allegation that the said Adelia J. Flynn, his wife, was at the time of his death a citizen and resident of the state of Missouri. The settled rule of law of the courts of the United States is "that domicile having once been acquired continues until a new one is actually acquired, animo et facto." 10 American & English Enc. of Law (2d Ed.) p. 15. "Domicile by operation of law is the domicile which a woman acquired by marriage." After the death of the husband the wife, while at liberty to change her residence, until she has changed it, retains the residence of her deceased husband at the time of his death; and as a matter of evidence the domicile once acquired is presumed to continue until another is acquired. Marks v. Marks (C. C.) 75 Fed. 325. And the burden of proof rests upon the party who claims a change in this condition. Desmare v. United States, 93 U. S. 605, 23 L. Ed. 959.

Conceding the law to be that where an assignee sues in the state court it is essential to entitle the defendant to remove the controversy into the United States court that diversity of citizenship should appear between the defendant and the assignor of the contract at the time of the assignment what have we on the face of the record in this case? We have that on the 25th day of October, 1905, the husband of said Adelia was a citizen and resident of Jackson county, Mo.; and, as a conclusive presumption of law, his wife was then a resident citizen of the county. The record further shows that the assignment was made by her to the plaintiff on the 7th day of January, 1906. The presump-

tion of law, therefore, is that the residence which existed on the 25th of October, 1905, continued to January 7, 1906. So that, as a matter of law and fact, the case stands the same as if the record, and the petition for removal alleged that Mrs. Flynn was a resident citizen of Jackson county, Mo., in October, 1905, and continued so to be until the date of the assignment of the policy. The only criticism of the petition for removal is that it omits to state in so many words that at the time of the assignment she was a resident citizen of Jackson county, Mo. It does, therefore, seem to me too clear for dispute that the facts disclosed on the face of the petition show that the direct averment of her citizenship presents a case clearly within the right of an amendment. Mr. Justice Brewer, in the course of his discussion, says:

"The citizenship of the defendant, both at the time the suit was commenced and when the petition for removal was filed, was clearly and positively stated. There was a general averment that it was a case of diverse citizenship, and, therefore, one in which by the statute the party was entitled to a removal."

It will then be observed that he lays stress upon the fact that "the trust deed, which was the subject-matter of the controversy, showed upon its face that the plaintiffs were of Salt Lake county, and was executed before a notary public in that county. The continuance of that situation is to be presumed." So, here, the record in this case shows, in legal effect, that the wife of John T. Flynn was a resident citizen of Jackson county, Mo., at the time of his death in October, 1905; and the presumption of law is that continued to the date of the assignment of the policy on January 7, 1906. The case presented, therefore, is one which the defendant had a right to remove; and as said by Mr. Justice Brewer, "nothing had been done to prejudice the rights of the plaintiff before the petition for removal was perfected."

It is true that in McNulty v. Connecticut Mut. Life Ins. Co. (C. C.) 46 Fed. 305, Judge Shiras remanded the case because the petition for removal did not show that diversity of citizenship existed between the defendant and the assignor. But such state of record did not exist in that case as in this, and no effort was made by the removing party to amend the petition.

The motion to amend is sustained.

In re WYOMING VALLEY ICE CO.

(District Court, M. D. Pennsylvania. April 11, 1906.)

No. 558.

BANKRUPTCY—PRIORITIES OF CLAIMS—TAX ON CORPORATE BONDS—LIABILITY OF CORPORATION TO COLLECT.

Revenue Act Pa. June 30, 1885 (P. L. 193) inter alia imposes a tax at a fixed rate on the bonds of corporations owned by residents of the state, and makes it the duty of the treasurer of every corporation doing business in the state to collect such tax due from its bondholders, by retaining it from the interest paid on its bonds, and to pay the same to the state treasurer. As such act is construed by the Supreme Court of the state, the tax thereby imposed is not upon the corporation, although it is held

liable to the state therefor. *Held*, that an account settled by the state officers against a bankrupt corporation, on account of taxes so imposed on its bonds, was not a tax due from the bankrupt entitled to priority of payment, under Bankr. Act July 1, 1898, c. 541, § 64a, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], but merely a liability arising from its duty to collect the taxes due from its bondholders and provable and payable like any ordinary indebtedness, in the absence of any statute making it a preferred claim in case of insolvency.[1]

In Bankruptcy. On certificate from H. A. Fuller, referee.

George R. Bedford, for exceptions.
George J. Llewelleyn and W. S. McLean, opposed.

ARCHBALD, District Judge. An account was duly settled against the bankrupt corporation by the fiscal officers of the state of Pennsylvania, for $904.50, the taxes due from resident holders of its bonds for the years 1901 to 1903 inclusive. Priority of payment is claimed for this as a tax, under the provisions of Bankr. Act July 1, 1898, c. 541, § 64a, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], and the referee has allowed it. There can be no question as to its right to be so preferred, if such is its character (In re Prince & Walter, 12 Am. Bankr. Rep. 675, 131 Fed. 546; City of Chattanooga v. Hill, 15 Am. Bankr. Rep. 195, 139 Fed. 600), but that is denied. And the mere fact that it is called a tax is not conclusive, if not really so (In re Cosmopolitan Power Co., 14 Am. Bankr. Rep. 604, 137 Fed. 858), nor even though in its origin, that may be said of it, with truth.

By the Pennsylvania revenue act of June 30, 1885 (P. L. 193) "all mortgages, money owing by solvent debtors, whether by promissory note or penal or single bill, bond or judgment," are made "taxable for state purposes, at the rate of three mills on the dollar of the value thereof annually," which by subsequent acts is increased to four mills, without in other respects changing it. Act June 1, 1889 (P. L. 420); Act June 8, 1891 (P. L. 229). To facilitate the collection of this tax on the bonded and other indebtedness of corporations, it is provided in the act first named:

"Sec. 4. That hereafter it shall be the duty of the treasurer of each private corporation, incorporated by or under the laws of this commonwealth, or the laws of any other state, or of the United States, and doing business in this commonwealth, upon the payment of any interest on any scrip, bond, or certificate or indebtedness, issued by said corporation to residents of this commonwealth, and held by them, to assess the tax imposed and provided for state purposes upon the nominal value of each and every said evidence of debt, and to report on oath annually on the first day of November, to the Auditor General the amount of indebtedness of the corporation owned by residents of this commonwealth, as nearly as the same can be ascertained; and it shall be his further duty to deduct three mills [changed to four mills as stated above] on every dollar of the interest paid as aforesaid, and return the same into the state treasury within fifteen days after the thirty-first day of December in each year; and his compensation for his services shall be the same that city and borough treasurers receive for similar services; and for every failure to assess and pay said tax and make report as aforesaid, the Auditor General shall add ten percentum as a penalty to the amount of the tax; on payment of said tax by a corporation the bonds, certificates or other evidences of indebted-

[1] Cf. In re Waller, 15 Am. Bankr. Rep. 753, 142 Fed. 883.

ness, issued by it shall be exempt from all other taxation in the hands of the holders of the same."

The treasurer of every corporation doing business in the state is thus bound to collect, in the manner prescribed, from resident bondholders, the tax which is so imposed, and, upon his failure to do so, the corporation is, no doubt, liable. But the cases, one and all, make it clear that the obligation of the corporation is one of collection only, and does not make the tax its own. Says Clark, J., in Commonwealth v. Del. Div. Canal Co., 123 Pa. 594, 618, 16 Atl. 584, 587, 2 L. R. A. 798:

"The act constitutes the company or its treasurer, as such, the collector of the tax, and, upon failure to discharge the duty imposed by law, the settlement is properly made against the company, whose servant he is, as in case of the default of any other officer of the government, upon whom a like duty is imposed. The obligation rests upon the company; but, as the company can only act through its officers, the default of the officer is esteemed the default of the company, and the penalty is visited upon them. The treasurer is designated in order that there may be no evasion; he has exceptional opportunities to know and has the power in his own hands to perform the several matters required."

It is in the same case, however, later said:

"The tax is not upon the corporation; it is upon the holder of the corporate bonds."

And in Commonwealth v. Lehigh Valley R. R., 129 Pa. 429, 449, 18 Atl. 406, 408, it is said:

"The settlement is made against the company, not for taxes of the company, but for taxes which the company through its treasurer ought to have collected. If the treasurer has failed or refused to perform what the law plainly required him to do, and has thereby relinquished his right to charge the creditors, upon whom the primary obligation would otherwise have rested, the company whose interests he represented, and whose instructions he is presumed to have pursued, is rightly held for the consequences of such willful default."

Commenting upon the same subject, in Commonwealth v. Wilkes Barre & Scranton Railway, 162 Pa. 614, 621, 29 Atl. 696, 699, it is further said by Simonton, P. J., whose opinion is adopted by the Supreme Court:

"The liability of the corporation is, indeed, in the nature of a penalty, but it is a penalty for a neglect of duty on the part of its treasurer."

And, finally, in Commonwealth v. Railroad, 186 Pa. 235, 246, 40 Atl. 491, 492, it is declared by Mitchell, J.:

"The tax is not in any sense or in any degree a tax on the corporation or its property, but on the individual citizen of the state who holds the bonds. The corporation is chargeable with it only as a collector, and by reason of default in the duty to collect."

By this authoritative determination of the law it appears that while, as between the state and the resident bondholders, the obligation is a tax, for which the latter is primarily and directly liable; as to the corporation, it is not such, but only a liability, due to the duty imposed by the statute to aid in its collection. The corporation becomes

a debtor for the amount of the tax, which it is required to deduct from the interest going to the bondholders; and whatever preference or priority this may give to the state over creditors, in case of insolvency, under the state law, of which, if any, I have not been advised, there is none under the provisions of the bankruptcy act with regard to the payment of taxes, which are relied upon. According to what is there said (section 64a):

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt, to the United States, state, county, district, or municipality, in advance of the payment of dividends to creditors."

But, to justify this, the tax in plain terms must be one which is due from the bankrupt, and not, as here, a mere liability for the collection of it from another.

It is also said, however, that in the present instance the corporation has agreed in its bonds that the interest stipulated for shall be without deduction for taxes, and that these are thus made its own. But whatever may be the effect of this provision, as between the corporation and the bondholder, it does not change the character of the obligation of either of them, to the state; which is material. As to the bondholder, it is still a tax, which he is bound to pay, and which the state may enforce against him, even though the corporation has undertaken to see to its payment.

This also meets the suggestion that the state may lose the tax by the refusal to give it a preference. The tax is by no means lost because it is not paid in full out of the property of the bankrupt corporation in preference to others. It is entitled, of course, to its proportionate share; but more than this, being due from the bondholder, the state can still collect it, not so conveniently, it may be, as by the method provided by the statute, with the aid of the corporation, but it is merely left in this respect in the same situation as it was before this provision was brought into the law, of which it cannot well complain.

The exceptions are sustained and the referee reversed, and distribution is directed to be made in accordance with the views expressed in this opinion.

In re E. M. FOWLER & CO.

(District Court, E. D. North Carolina. April 21, 1906.)

BANKRUPTCY—PARTNERSHIP—EXEMPTIONS.

Where, prior to the bankruptcy of a firm, one of its members had agreed to sell his interest to his partners, and thereafter acted on the contract and accepted employment as a clerk in the store operated by his partners and frequently declared that he was no longer a member of the firm, he was not entitled to be treated as a partner and allowed exemptions out of the firm's assets in bankruptcy, though the sale of his interest had not been completed by the execution of a formal agreement and payment of the consideration.

In Bankruptcy.

W. A. Stewart, for bankrupts.
Godwin & Davis, for creditors.

PURNELL, District Judge. The following facts are found by the referee upon which he holds that A. F. Fowler was entitled to the personal property exemption allowed under the Constitution of North Carolina:

"On the 16th day of December, 1905, the firm of E. M. Fowler & Co., was adjudged bankrupt upon involuntary petition, and upon the 5th day of January, 1906, R. F. Thornton, E. M. Fowler, and A. F. Fowler, named in the said involuntary petition as partners trading as E. M. Fowler & Co., were adjudged bankrupt upon individual voluntary petitions filed by each of them; said involuntary and voluntary petitions hereto attached marked A, B, C, and D, respectively. That R. L. Godwin was duly appointed and qualified trustee in bankruptcy in the partnership proceedings. That on February 24, 1906, R. F. Thornton, E. M. Fowler, and A. F. Fowler, by their attorney, W. A. Stewart, filed a petition asking that R. L. Godwin, trustee, be required to show cause before the undersigned referee why he should not allow the personal property exemptions of the petitioners; said petition hereto attached marked E. That the undersigned made the order to show cause requested (copy attached to the petition), and the matter came up for hearing before the undersigned referee on March 6, 1906. R. L. Godwin, trustee, filed answer to the petition setting out that he had set apart the personal property exemptions of E. M. Fowler and R. F. Thornton, and denying the right of A. F. Fowler to have exemptions set apart to him; said answer hereto attached marked F. The Rheinstein Dry Goods Company and Fleischmann Morris Company, through their attorneys, Messrs. Godwin & Davis, filed objections to the allotment of exemptions to R. F. Thornton; said objections hereto attached marked G. The testimony heretofore taken in this cause on January 2d and February 20th, respectively, was introduced and is herewith sent marked H and J.

"The undersigned is of the opinion that the objections to personal property exemptions of R. F. Thornton filed by the Rheinstein Dry Goods Company and Fleischmann Morris & Co., do not state any sufficient reason for withholding the same. The record and the testimony show that R. F. Thornton was a partner of the firm of E. M. Fowler & Co., at the time of the bankruptcy, and if he was a partner he is entitled to the personal property exemptions authorized by the Constitution of North Carolina, and the amount of money which he contributed to the firm in order to establish his partnership relation is immaterial. In re Wilson, 4 Am. Bankr. Rep. 260, 101 Fed. 571.

"The other question to be considered is raised by the answer of R. L. Godwin, trustee, Exhibit F, and is whether or not A. F. Fowler is entitled to have his personal property exemptions allotted to him out of the firm assets. The undersigned finds the following facts: That prior to April, 1905, R. F. Thornton, E. M. Fowler, and A. F. Fowler were partners doing business in the county of Harnett, under the style of E. M. Fowler & Co. That in April, 1905, A. F. Fowler proposed to the other two members of the firm to sell his interest to them in consideration of $104 or $105, and the cancellation of such indebtedness as the books of the firm showed due by him to the said E. M. Fowler & Co. The other members of the firm said that they would accept the proposition, but no formal agreement was entered into, no money was paid to A. F. Fowler, and the evidence is not clear as to whether or not his account on the books of the company was marked settled. A. F. Fowler clerked in the store from April until October 31st, when the firm executed a deed of assignment. He was not at the store regularly, but was there from time to time. The deed of assignment was not signed by A. F. Fowler. No notice of dissolution was ever published or sent to creditors. That, prior to and since the institution of bankruptcy proceedings, A. F. Fowler has claimed not to be a partner. That through his attorney he now con-

tends that he is entitled to personal property exemptions. As a conclusion of law, the undersigned holds that neither A. F. Fowler nor the firm of E. M. Fowler & Co. had taken necessary action to relieve the said A. F. Fowler of his partnership liability to creditors as a member of the firm of E. M. Fowler & Co. And that the said A. F. Fowler is entitled to have the trustee allot to him his personal property exemptions allowed him by the Constitution of North Carolina.

"He therefore signed an order directing the trustee to proceed to allot the personal property exemption of A. F. Fowler out of the firm assets in his hands. To which ruling the trustee excepts, and requests that the matter be certified to the judge for his opinion."

In re Wilson, 4 Am. Bankr. Rep. 260, 101 Fed. 571, seems to have been misconstrued by the referee in taking a part of the argument as a conclusion of the court; the part of the argument being that the proper steps for the dissolution of the firm had not been taken, hence the retiring partner was, under the decisions of the Supreme Court of North Carolina, entitled to a personal property exemption out of the assets of the firm. A more applicable authority to this case would have been In re Woollcott (D. C.) 140 Fed. 460, in which it was held that the bankrupt must own the personal property out of which he claims an exemption. In the case at bar it appears that A. F. Fowler had not only sold his interest and received therefor the cancellation of a debt due the firm of about $300, but he had acted on the contract taking employment as a clerk, and frequently declared in conversation that he was no longer a member of the firm. In other words, it was more than a mere bargain to sell, and had been acted on for a year or more by entirely changing the relations of the parties, and the court doubts very much if, as suggested by the referee, he could have been held responsible for any part of the debts of the firm had he been solvent. It is not necessary, however, to decide this question. He had agreed to sell, had acted on the agreement, and entirely changed his relationship with the firm. In other words, he had acted on the bargain and parted with his interest in the property. It would be using the bankrupt law and the personal property exemption provision of the Constitution of North Carolina to perpetrate a fraud on the creditors of the firm to allow such partner personal property exemption out of the assets. This the court of bankruptcy, being controlled by rules in equity, cannot and will not do.

The referee is therefore reversed, and the petition for personal property exemption out of the assets of the firm of E. M. Fowler & Co. is denied and dismissed. The ruling of the referee as to the claim of R. F. Thornton for personal property exemption is affirmed. He was in every respect a member of the firm. The court being of this opinion, it is unnecessary to pass on the exceptions as to the findings of facts by the referee, the effect of which seem to be simply that the findings of fact by the referee were not full enough.

UNITED STATES FIDELITY & GUARANTY CO. v. DES MOINES NAT. BANK OF DES MOINES, IOWA.

(Circuit Court of Appeals, Eighth Circuit. March 16, 1906.)

No. 2,200.

1. EMPLOYER'S INDEMNITY BOND—DEGREE OF CARE TO BE EXERCISED BY EMPLOYÉ—INSTRUCTION TO JURY.

In an action upon a bond whereby a guaranty company agrees to make good and reimburse to an employer any pecuniary loss sustained by him through the personal dishonesty or culpable negligence of an employé in connection with the duties of his employment, and wherein "culpable negligence" is defined to mean "failure to exercise that degree of care and caution which men of ordinary prudence and intelligence usually exercise in regard to their own affairs," it is error to instruct the jury that the degree of care and caution, failure to exercise which on the part of the employé will render the guaranty company liable for a resultant loss, is "the very highest, you might almost say the highest possible," "the very highest," and "an extraordinary and a very high degree."

2. EVIDENCE—AN INFERENCE OF FACT CANNOT BE DRAWN FROM PREMISES WHICH ARE UNCERTAIN.

An inference of fact cannot be legitimately drawn from a rebuttable presumption, but only from premises which are certain.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2444, 2445.]

3. SAME—CIRCUMSTANTIAL EVIDENCE CONSISTENT WITH EITHER OF TWO OPPOSING THEORIES PROVES NEITHER.

A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. If the facts are consistent with either of two opposing theories, they prove neither.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2436.]

4. NEGLIGENCE WHEN ACTIONABLE—PROXIMATE CAUSE OF LOSS OR INJURY.

Negligence is actionable only when loss or injury proximately results therefrom, and to be thus proximate the loss or injury must be a natural and probable consequence which ought to have been foreseen or reasonably anticipated in the light of the attendant circumstances.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 72.]

(Syllabus by the Court.)

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

J. L. Parrish (R. L. Parrish and C. C. Dowell, on the brief), for plaintiff in error.

Charles L. Powell (W. L. Read, on the brief), for defendant in error.

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

VAN DEVANTER, Circuit Judge. The Des Moines National Bank of Des Moines, Iowa, recovered in the Circuit Court against the United States Fidelity & Guaranty Company, a Maryland corporation, a verdict and judgment in the sum of $5,000, with interest, upon a

bond whereby, subject to the conditions therein contained, the guaranty company agreed to make good and reimburse to the bank any pecuniary loss sustained by it through "the personal dishonesty or culpable negligence" of Elton C. Kelley, its receiving teller, in connection with the duties pertaining to that position, "and for which the employé shall be legally liable to the employer." To secure a reversal of that judgment the guaranty company sued out this writ of error.

One of the conditions of the bond was this:

"The company shall not be liable hereunder for any loss occasioned by mistake, accident, error of judgment on the part of any employé, or any robbery, unless by or with the connivance or culpable negligence of the employé; and 'culpable negligence,' as used in this bond, shall be taken and held to mean failure to exercise that degree of care and caution which men of ordinary prudence and intelligence usually exercise in regard to their own affairs."

In different portions of the court's charge to the jury the degree of care and caution, failure to exercise which constitutes culpable negligence within the meaning of the bond, was declared to be "the very highest, you might almost say the highest possible," "the very highest," and "an extraordinary and a very high degree." This was excepted to at the time and is assigned as error. The exception was well taken. The terms of the contract, which were perfectly plain, did not call for the exercise by the employé of the very highest or an extraordinary degree of care and caution, but only such as men of ordinary prudence and intelligence usually exercise in regard to their own affairs. That the two things are not substantially the same, but essentially different, and that the charge conveyed to the jury an enlarged idea of the right of the bank and of the obligation of the guaranty company, are self-evident propositions.

Error is also assigned upon the court's refusal, at the conclusion of the evidence, to direct a verdict for the guaranty company; the contention being that there was no evidence that Kelley was personally dishonest, or that the loss sustained by the bank was occasioned by his negligence and was one for which he was legally liable to his employer. The evidence was without conflict and may be summarized as follows:

Kelley was the receiving teller of the bank, Collins was its paying teller, and Zwart was its cashier. It was part of Kelley's duties as receiving teller to take the place and to perform the duties of the paying teller during the temporary absences of the latter. Collins was absent on his annual vacation from Saturday evening, August 9th, until Monday morning, August 25, 1902, and his place was filled by Kelley from Monday morning, August 11th, until Saturday evening, August 23d. As temporary paying teller, Kelley was chiefly engaged during business hours in paying out money on checks. His place of work was separated from other portions of the bank by wire partitions and iron frames forming a sort of cage, which was distant about 30 feet from the general vault in which were kept the books, files, and papers of the bank, and a safe for the safekeeping

of the cash. Three or four other employés worked at stations between the paying teller's cage and the vault. The safe had two compartments; one called the "reserve chest," in which was kept the reserve cash not ordinarily required for immediate use, and another in which was kept what was termed the "counter cash." By the custom of the bank the counter cash was taken by the paying teller from the safe to his cage in the morning of each business day and was returned in the evening, but the reserve cash remained in the safe during business hours as well as at other times. As occasion required, the counter cash was replenished from the reserve cash, and, when the amount of the former became too large, it was reduced by transferring part of it to the latter. The outer door of the safe was equipped with a time lock and the reserve chest was equipped with a separate lock. The combination to the latter was in the possession of the president, Zwart, and Collins, but was not given to Kelley. The president and Collins were absent during Kelley's service as paying teller, and when it was necessary for him to have access to the reserve cash, which was almost of daily occurrence, Zwart, who was then the managing officer of the bank, would unlock the reserve chest and leave it in that condition for the remainder of the day. In this way the reserve cash was made also accessible to the other employés—and there were several of them—who had frequent occasion to go into the vault for books, files, and papers. When Kelley was at lunch during the noon hour his place was filled by another employé. At the close of business hours, whatever money had been taken in by other employés during the day was turned over to Kelley as part of the counter cash, and it was then part of his duties to count the counter cash, to place it in the proper compartment of the safe, to count the money in the reserve chest, and to make appropriate entries upon his books of the amount and character of the cash on hand. He would then lock the reserve chest—which he could do, although he did not have the combination—and would also set the time lock on the outer door of the safe. When he assumed the duties of paying teller, the money in the reserve chest, as also the counter cash, was counted by him or in his presence, and was found to correspond in amount and character with what was called for by the books. During his service in that station he regularly performed its duties, save that, although instructed so to do, he did not make a daily count of the money in the reserve chest. Instead of that he kept an account of the original amount in that chest and of all amounts taken therefrom or placed therein by him, and at the close of each business day used the amount shown by that account to be in the reserve cash in balancing his books. On Saturday evening, August 23d, after counting the counter cash and placing it in the safe as usual, he locked the safe, entered in his books the amount and character of the cash on hand, and left on a vacation, as had been before arranged. On Monday morning, August 25th, Collins resumed his station as paying teller, and, on counting the money in the safe, found that the counter cash corresponded with the books and with Kelley's entries, but found that there was $5,000 less paper currency in the reserve cash than was called for by

the books and by the account kept by Kelley. Kelley returned and assisted in the investigation which followed. There were no errors in bookkeeping which accounted for the loss. It was actual. Zwart, Kelley, and the employé who filled the latter's place during the noon hour each testified that he did not take the money. When or how the loss occurred, or what became of the money, was not more definitely shown than has been stated. In that connection it is well to refer to the following testimony, even though it involves some repetition:

Reynolds, the president of the bank, says:

"This shortage was discovered on the 25th of August, 1902. I did not return until two or three days afterwards. When I did return Kelley was there. Considerable examination was made of the books of the bank with reference to this shortage. We all had more or less to do with the same. It run through a period of perhaps a month. Mr. Kelley participated in the examination. He was given every opportunity to make an examination. I assisted some in it. No discovery was ever made of what became of the money, nor has it ever been paid back to the bank by any one. * * * In this investigation there was nothing to indicate what did become of the money. We did not discover anything. Q. There was nothing to indicate that Mr. Kelley got the money more than any one else? A. We do not know what became of it. In this vault in which this safe was located was contained all the other paraphernalia, business files, letter files, books, and other things, books of collection and everything that was used there from day to day and hour to hour, except what might be stored away for safe-keeping * * * Q. Now, these various clerks and bookkeepers and tellers you refer to had occasion to, and did continuously, go in and out of this vault here in which this safe was contained? A. Oh, yes; they were going in and out for anything they wanted. Q. They went in after their books, collections, and any papers that they wanted to use in the bank? A. Yes, sir; they would go into the vault and get it. Q. They went back and forth past the door of the safe, did they not? A. Yes, sir; * * * I did not find anything in making this examination as to the shortage, except we found that the shortage was located in his (Kelley's) department by his own books. The other employés who had access to the vault did not keep anything in the safe, and had no right under their employment to go into this safe."

Zwart, the cashier, says:

"No one except the paying teller, or the one acting as paying teller, had any business in that safe in the ordinary conduct of the business of the bank. The duties of the other employés did not permit or require them ever to go to that safe for anything. * * * I took off the combination so that he (Kelley) or any one else could open the reserve chest, and then I went back and told him it was open, and after that, when he had occasion to go back at any time and get money, he went back and got it during that day, unless he locked it again. I do not know whether he would lock it again until night. He would have to take the cash out of the reserve chest to count it—that was my instructions to him—at the close of business each day, and he certainly could not count it if he did not have access to it. Q. So that it was your expectation after you opened it in the morning it would remain open during the day? A. That must have been actually the case. Q. Do you know that was being done? A. It had to be that way. * * * These various employés who were working there had free access to that safe. They passed right by this door by [of] the reserve chest as they passed in and out. Any one of them might have opened that door to the reserve chest after I left it in the morning, if they knew how. There was nothing to do but to throw the bolts, swing the handle, and pull the door open. I think any ordinary bank clerk would know enough to do that. * * * I always found the combination on when I was called upon to

open it in the morning. * * * He (Kelley) had to call on me because I had the combination. He did not. It was then his duty, after I had unlocked the reserve chest, to take out from time to time such money out of the reserve chest as he might need in the conduct of his business as paying teller. His position was in the paying teller's cage paying money out to different parties, and he simply, when he got short of money, went back to the vault and got it out of the reserve chest."

Owen, the general bookkeeper, whose desk was nearest to the vault door, says:

"I worked with my back to the vault, two or three feet further east than the door. I did not intend to keep watch of the employés who went in and out of the vault. I did not pay any attention to the employés."

Kelley says:

"My present occupation is that of teller in the Iowa National Bank. I am 28 years of age. I have been working for banks here in Des Moines for about eight years. * * * When I went back to get money out of this reserve chest during these days, I always found it closed. The combination is what they turn on the last number. All you have to do is to turn just a trifle and it would open itself. It was so that any one could open it. That is the condition in which I found it each day when I went back to get money out of the reserve chest. If I took any out I would make the proper entry on the book. The same way, if I had too much on hand and put it in the reserve chest, I would add to it. * * * At the close of business each day I used the total I had on that book to balance by. * * * Everybody had access to that safe; that is, it was always left in such condition that anybody that wanted to could open it. The outside safe was open, as I said before, but the reserve chest was left in such a condition that anybody could open it readily. The other employés in the bank had access to the vault and passed in and out. They had always done that during all the time I had been there. They passed right by the door of this safe in which the money was kept."

The only evidence that it was known at any time before the discovery of the loss that Kelley was not making a daily count of the reserve cash was this: Zwart, the cashier, testified:

"I do not know how the question came up, but he told me he did not count the money in the reserve chest at the close of business each day, but he showed me the book in which he kept track of the amount he put into that department, and the amount he took out. I told him that was not a safe way to balance the cash at night; that he must inventory that cash at night when he balanced. I told him this as soon as I discovered that he was keeping this memorandum instead of making this count, which was the second or third day that he was acting in Collins' absence. I do not know whether he continued to count the cash after that. * * * I supposed all the time he was counting the cash at night."

And Wellslager, a bookkeeper, testified:

"I overheard Mr. Zwart make some remark to Kelley, while Kelley was acting as paying teller in Mr. Collins' absence on vacation, about counting his cash every evening. He told him to count his cash each night. I do not know how the conversation came up. All I know about it is there was something said, and I overheard Zwart tell Kelley to count it every evening instead of keeping a notebook memorandum. That was the first or second day that Kelley began to perform these duties."

The view in which the learned judge who presided at the trial denied the guaranty company's request for an instructed verdict, and submitted the case to the jury, is shown by his charge, in which it was said:

"Now, whether the money was there upon Saturday evening (August 23d) the evidence, of course, does not show. The evidence does not show when that $5,000 disappeared, and the evidence does not show who took the $5,000. The evidence does not show whether it was stolen or whether it disappeared through some act of carelessness in the shipment of money, or something of that kind; that is very largely a matter of conjecture, how it got out of there. But it disappeared, and the bank was and is short $5,000 from this reserve fund. * * * Now, while there is no proof that Mr. Kelley stole this money, and it is not claimed that he did, by counsel for plaintiff, you have a right to consider the facts that either somebody stole this money, or else it was gotten away with by the negligence of some one in sending it or shipping the money out to some other bank, or somehow or other, and the recipient of the money not making the mistake known. * * * Now, it has been argued that, because he did not count the money on each evening, it cannot be said that the loss resulted from that. In one sense that is true, but in another sense that is very material. If he had counted the money every evening, as instructed and directed by his superior officer, namely, the cashier, Mr. Zwart, the loss of the money would have been earlier ascertained. * * * But the money was counted in there when Mr. Kelley relieved Mr. Collins from the duties of that place. $5,000 of the money was gone when Mr. Collins came back to take his place. Therefore, you are warranted, not necessarily so, but you would be warranted in reaching the conclusion, that, while the method or cause of this loss is not shown, you would be warranted in finding that this money was lost by his negligence, by his blamable negligence, by his failure to exercise the degree of care that you would expect of me or anybody else intrusted with that amount of money. * * * The plaintiff bank has the burden of proof to show this negligence, or culpable negligence, as expressed in the policy, as charged in the petition; but, while that is true, and when the facts are all made known, you have a right to infer from all of these circumstances, that in some way or other, without disclosing the particular way, that this money was lost through his negligence; and the fact that other employés could go in and out of there, and that they could have taken it, of itself throws but very little light upon it. * * * This money was put there in Mr. Kelley's possession, debited to him on the books, showing he was in the care and control of it."

Thus the charge proceeded, upon the view that, while the matter of when and how the loss occurred and what became of the money was not shown but left to conjecture, Kelley's relation to the money, his control over it, and his custody of it, were such that the jury would be justified in inferring that the loss, because not shown to be otherwise, was in some way or other the result of culpable negligence on his part. Essentially the same idea is expressed by counsel for the bank, when they say:

"We contend that by the manner of procedure in this bank, and the system of accounting in vogue in this bank, we have shown conclusively that Kelley got the money and can't tell what became of it, and so his bond is liable unless they show what became of it."

We cannot concur in that view. It presupposes that the reserve cash was within the control and custody of Kelley, and applies to him the rule applicable to a bailee or other custodian whose situation is such that a loss, if not otherwise explained, warrants the inference that it was due to his negligence or dishonesty. Kelley occupied no such relation to this money. He could take from it to replenish the counter cash and add to it from the latter, and it was his duty to count it at the close of business each day, and then to lock the safe; but, in other respects, it was not within his control or custody. It

was the cashier, and not Kelley, who carried the combination to the lock, who could say whether the reserve chest should be kept locked or unlocked during business hours, and who could otherwise take measures for the safety of the money. When Kelley was attending to his important duties in the paying teller's cage, as was required most of the time, the reserve chest and its contents were beyond the range of his observation, the chest was unlocked, and its contents were easily accessible to other employés, over whom he had no control, and who were passing in and out of the vault, and sometimes out of the bank, without any immediate supervision of their movements. True they had no right to disturb the money, but that was not an assurance that none of them would yield to the temptation which the situation presented; nor does the presumption of innocence, which would protect them from the charge of theft in the absence of satisfactory evidence thereof, warrant the inference that Kelley was either negligent or dishonest. Smith v. First National Bank, 99 Mass. 605, 97 Am. Dec. 59. Such an inference cannot be legitimately drawn from a rebuttable presumption, but only from premises which are certain. United States v. Ross, 92 U. S. 281, 23 L. Ed. 707; Manning v. Insurance Co., 100 U. S. 693, 25 L. Ed. 761; Looney v. Metropolitan R. R. Co. (U. S.) 26 Sup. Ct. 303, 50 L. Ed. ——; Globe Accident Ins. Co. v. Gerisch, 163 Ill. 625, 45 N. E. 563, 54 Am. St. Rep. 486; Chicago, etc., Ry. Co. v. Rhoades, 64 Kan. 553, 68 Pac. 58.

Passing, for the moment, the fact that Kelley neglected to make a daily count of the money in the reserve chest, it is plain that the evidence bearing upon the cause or occasion of the loss was altogether circumstantial, and was as consistent with the theory that the loss was occasioned solely by the personal dishonesty of one of the other employés, to whom the money in its exposed condition was easily accessible, as with the theory that it was occasioned by the personal dishonesty or culpable negligence of Kelley. Which theory was correct was left to mere conjecture. The bank had the burden of proof, and, as it failed to produce any evidence reasonably tending to establish the latter theory to the exclusion of the other, the guaranty company was entitled to a directed verdict in its favor. Asbach v. Chicago, etc., Ry. Co., 74 Iowa, 248, 37 N. W. 182; Smith v. First National Bank, 99 Mass. 605, 97 Am. Dec. 59; Crafts v. Boston, 109 Mass. 519; Morley v. Eastern Express Co., 116 Mass. 97; Searles v. Manhattan Ry. Co., 101 N. Y. 661, 5 N. E. 66; Ruppert v. Brooklyn Heights R. R. Co., 154 N. Y. 90, 47 N. E. 971; Chicago, etc., Ry. Co. v. Rhoades, 64 Kan. 553, 68 Pac. 58. As was well said by the Supreme Court of Iowa in Asbach v. Chicago, etc., Ry. Co.:

"A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent, merely, with that theory, for that may be true, and yet they may have no tendency to prove the theory."

The case of Smith v. First National Bank is well in point. It was an action to recover the value of bonds deposited with the bank for

safe-keeping and alleged to have been lost through its negligence. There was no evidence of negligence, except that which resulted by inference from the fact of loss, and the surrounding circumstances were such as to leave it equally open to inference that the bonds had been stolen by one of several persons who had access to the vault in which the bonds were kept. For a loss in the latter mode the bank was not responsible. The court, after observing that the plaintiff had the burden of proof, and that its evidence failed to exclude the possibility of loss by other means than negligence of the defendant, and left the case to be decided by mere inference, without any facts to determine which inference was correct, said:

"There being several inferences deducible from the facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover. There is strictly no evidence to warrant a jury in finding that the loss was occasioned by negligence and not by theft. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is essentially wrong."

It remains to be considered whether, under the evidence, Kelley's failure to make a daily count of the money in the reserve chest could have been properly found to have been a proximate cause or occasion of the loss. Two propositions are submitted on behalf of the bank in that connection: One, that knowledge on the part of another employé, having access to the reserve chest, that a daily count of its contents was not being made, and therefore that a loss would not be promptly discovered, may have encouraged him to abstract the money when otherwise he would not have done so; and, the other, that, if a daily count had been made, the loss would have been disclosed at the close of business on the day in which it occurred, and this might have led to a discovery of the cause or occasion of the loss and to the recovery of the money. Neither proposition has any support in the evidence. Both are conjectural. There was no evidence of any general knowledge among the other employés that the reserve cash was not being regularly counted or of the abstraction of the money by one who had knowledge of that fact. When the loss occurred, whether on the first, the last, or some intervening day of Kelley's service, was not known, and the evidence was devoid of any suggestion that an earlier discovery of the loss would have led to a recovery of the money. In truth, there was no attempt to show any causal connection between the failure to regularly count the reserve cash and the loss which the bank sustained, and certainly there was no such necessary or natural connection between them as would reasonably warrant any inference upon the subject.

Negligence is actionable only when loss or injury proximately results therefrom, and to be thus proximate the loss or injury must be a natural and probable consequence which ought to have been foreseen or reasonably anticipated in the light of the attendant circumstances. Milwaukee, etc., Railway Co. v. Kellogg, 94 U. S. 469, 475, 24 L. Ed. 256; Scheffer v. Railroad Co., 105 U. S. 249, 252, 26 L. Ed. 1070; St. Louis, etc., Ry. Co. v. Commercial Ins. Co., 139 U. S. 223,

237, 11 Sup. Ct. 554, 35 L. Ed. 154; Chicago, etc., Ry. Co. v. Elliott, 5 C. C. A. 347, 55 Fed. 949, 20 L. R. A. 582; Cole v. German Savings & Loan Society, 59 C. C. A. 593, 124 Fed. 113, 63 L. R. A. 416; Western Union Telegraph Co. v. Schriver (C. C. A.) 141 Fed. 538; Dubuque Wood & Coal Ass'n v. Dubuque, 30 Iowa, 176, 183; Handelun v. Burlington, etc., Ry. Co., 72 Iowa, 709, 32 N. W. 4.

Careful consideration of the evidence and of the arguments of counsel convinces us that there was no evidence legitimately tending to show that the loss was sustained through any personal dishonesty or culpable negligence on the part of Kelley, and that therefore the request of the guaranty company that a verdict be directed in its favor should have been sustained.

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

HOOK, Circuit Judge (specially concurring). In the charge of the Circuit Court, the guaranty company was held responsible for the failure of the acting paying teller to exercise a higher degree of care in the performance of his duties than that contemplated by the express language of the bond. For this reason I concur in the reversal.

STATE OF SOUTH CAROLINA ex rel. CUNNINGHAM et al. v. JACK et al.

JACK v. WILLIAMS et al.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1906.)

No. 463.

RAILROADS—DUTY OF PURCHASERS TO OPERATE—INSOLVENCY—REBUILDING.

A railroad company was chartered to construct a line from Greenville, S. C., to Knoxville, Tenn. Only 12 miles from Greenville had been built when the whole scheme collapsed because of lack of funds. The 12 miles ended in the woods, and after the appointment of a receiver he borrowed $12,500 on receiver's certificates to build 3 miles more to reach a town. The receiver operated the road for four years without being able to pay any interest or the principal on the receiver's certificates, or to pay himself anything for his services, or to keep the road in repair. Its operation was then discontinued, and after three attempts to sell the road at public auction, it was purchased by the holders of the receiver's certificates for $15,000. The franchise became forfeited because of the purchasers' failure to organize a corporation to operate the same within 60 days, as required by Rev. St. S. C. § 1610, and after an expert had reported that $10,000 would be required to render the road safe to operate for a year, the receiver was permitted to dismantle the road, and sell the rails and rolling stock. *Held* that, though the state was not a party to such proceedings, the purchasers were not bound, several years after the railroad had been dismantled, to replace the same in the same condition it was when dismantled, in order that the road could be operated by others as a public highway.

Appeal from the Circuit Court of the United States for the District of South Carolina, at Charleston.

For opinion below, see 113 Fed. 823.

J. W. Barnwell (B. M. Shuman, on the brief), for appellants.

B. A. Hagood, T. P. Cothran, M. F. Ansel, and S. J. Simpson, for appellees.

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

MORRIS, District Judge. This is an appeal from the decree of the Circuit Court (Simonton, Circuit Judge) entered February 1, 1902, dismissing the cross-bill of the appellants filed in the case of Jack, plaintiff, against Williams and Beattie, defendants. The original case of Jack, a citizen of Georgia, against Williams and Beattie, citizens of South Carolina, was filed in the Circuit Court of the United States for the District of South Carolina, at Charleston, in April, 1897, alleging that under a decree of that court entered August 17, 1892, directing a foreclosure sale of the property, rights, and franchises of the Carolina, Knoxville & Western Railroad Company, said Williams was the highest bidder at said sale, and had become the purchaser of the 15 miles of railroad sold under that decree for $15,000. The bill in the original case further alleges that, although Williams was the purchaser reported to the court, and to whom the legal title of all said property was conveyed, that the complainant Jack and said Beattie and Williams had jointly furnished the purchase money, and that under an express agreement Williams held the title for the joint benefit of himself and the said Jack and Beattie. The bill alleged that the railroad as projected had been intended to extend from Hambury, N. C., to Knoxville, Tenn., but that only 12 miles had been completed, which had been hastily and imperfectly constructed and insufficiently equipped. This 12 miles had been constructed by a construction company which itself became insolvent, and could proceed no further with its contract. The bill further alleged that it was first operated in 1889, and after 1892 had been operated by the receiver appointed by the court until the sale thereof in July, 1896, when it ceased to be operated; that during all that time it had not paid operating expenses, and not a dollar had been paid on account of interest or receivers' certificates; that the roadbed had sunk, the bridges were out of repair, and that to put the road in repair to make it safe to operate would cost at least $10,000; that it would be financially ruinous for the then owners to attempt to run the road; that the owners had exerted themselves to promote a scheme by which the small portion of the road which had been built could be operated, but had not succeeded; that the citizens along the line had been in vain appealed to for assistance, and that while the road was operated they to a large extent refused to patronize it, and hauled their produce and merchandise by wagons to Greenville. It was a fact appearing in the subsequent proceeding that in the effort made by the receiver in the original case to successfully operate the road the court had authorized him to borrow $12,500 on receiver's certificates, which had been spent in constructing 3 miles of additional track to reach the town of Marietta, which construction extended the track from 12 miles to 15 miles. The bill of complaint of Jack further alleged that the Legislature of

South Carolina had passed an act, approved March 5, 1897, requiring all owners of railroads to reorganize, under section 1610 of the Revised Statutes of South Carolina, within 60 days after the passage of the act, under a penalty of $50 per day for failure to do so. The bill alleged that it would be utterly useless for the owners of said railroad to attempt to comply with said act, and yet if they refused to do so they might be subjected to the penalty imposed by said act. The prayer of the bill was that the defendants Williams and Beattie be enjoined from taking any steps to become incorporated under the above-mentioned South Carolina law, that a receiver be appointed to take possession of said property, and to sell the same for purpose of partition among the parties owning the same, in such manner as the court might direct. The Circuit Court appointed Mr. W. C. Cothran receiver, as prayed. The receiver obtained the services of a skilled railroad expert to report to the court the then condition of the 15 miles of road, and he reported that the trestles and roadway were in very bad condition, the track in a great many places covered with earth, in some places for a distance of 100 yards to the depth of two feet, and that it would cost $10,907.50 to put it in a condition to be operated for one year. The court in a decretal order entered May 18, 1897, recited the disastrous history of the road, and that it had been demonstrated that if then repaired and put and maintained in proper condition for operation it could only be operated at a positive loss. That in the suit in which the former receiver was appointed and in which the foreclosure decree of sale was entered the property was three times offered at public sale as a railroad without receiving what was then considered an adequate bid, and was finally sold at the fourth public sale to the holders of the receiver's certificates at the sum of $15,000, which was not sufficient to pay the debts incurred by the receiver. That as a railroad it was absolutely worthless, and that its rights, privileges, and franchises to maintain and operate the railroad had been forfeited.

In view of the worthless character and condition of the property as a railroad, and the futility of any attempt to operate it as a railroad, the court directed the receiver to remove the iron rails and fastenings from the roadbed, and to sell them, together with the rolling stock. The property so removed was sold as directed by said order of the court, and the proceeds after deducting expenses were distributed to the owners. There were certain other provisions having reference to the possibility of the state of South Carolina chartering another corporation for the purpose of exercising the franchises of the Carolina, Knoxville & Western Railway Company, in which case, as the court held, the present owners would be entitled to be paid the value of the rails, etc., removed, and the new corporation would be damaged only to the extent of relaying the rails, and the court directed $2,000 to be retained by the receiver to answer any such damage. No such new corporation was ever created, and the said provision has never become operative. Thereafter, on December 29, 1900, the state of South Carolina, with the consent of the Attorney General of the state, at and by the relation of T. B. Cunningham and others, by

leave of the court filed its cross-bill against Jack, Williams, and Beattie and the Charleston & Western Carolina Railway Company. The cross-bill recited the various acts of assembly by which the Carolina, Knoxville & Western Railway Company was in 1887 made a corporation and succeeded to the rights, privileges, and franchises of several prior corporations, and was empowered to construct a railroad from Knoxville, in Tennessee, to Greenville, in South Carolina, with a connecting link to Augusta, in the state of Georgia, of which 12 miles had been constructed from Greenville to within 3 miles of Marietta, in Greenville county. The cross-bill further recited the prior proceedings in the case in the United States Circuit Court in which the cross-bill was filed. It is alleged that the receiver had sold and transferred to the defendant the Charleston & Western Carolina Railway Company all the rails and personal property mentioned in the proceedings for $28,000, and the said money was paid by the purchaser after notice that the complainant in the cross-bill had applied to the court for leave to file their cross-bill. The cross-bill then alleges that the said railroad could have been profitably operated at the time when said Williams ceased to operate it, and at the time when said Jack filed his bill of complaint alleging the contrary, and could be profitably operated at the time of filing said cross-bill, and that the failure to operate the same as a public highway under the laws of South Carolina, and the consequent depreciation of the property, was due to the unwillingness of the purchasers, Jack, Williams, and Beattie, to incur any expense or risk in the operation thereof, and to their preference to receive a profit by destroying the same as a public highway by dismantling the same. That by an act of the General Assembly of South Carolina approved February 17, 1900, the franchises purchased by Jack, Williams, and Beattie were specifically preserved and secured to the purchasers thereof, and that there was now no obstacle in the way of operating said road, even if such difficulty had ever existed, and that it was now the duty of the defendants, Jack, Williams, and Beattie and the Charleston & Western Carolina Railway Company, to forthwith organize a company under the laws of the said state, and to operate the said railroad as required by the laws thereof. The prayer was that the said defendants be required to restore to the roadbed the rails and other property taken therefrom, or to pay into the registry of the court the money received from the sale thereof, and such further sums as might be necessary to restore similar rails to said roadbed, to repair the damage done the cross-ties, trestles, and roadbed caused by the removal of the rails, and that the said defendants be required to operate the said road as required by the laws of said state for the carriage of freight and passengers in the same manner as before the sale to the original purchasers, or, in case the court should find that they were unable to do so, then that they be required to offer the same in its entirety as a public highway, and in default that the court should order that the sale and all previous orders appointing the receiver be set aside.

The answer of the defendants Jack, Williams, and Beattie denied that the railroad was anything more than an incomplete fragment of

the railroad designed and chartered to be built. They denied that the relators were dependent on the railroad for transportation of either goods or passengers. They averred in their answer that they had purchased the road after it had been offered at public sale four times without a bidder, except the $15,000 bid by the defendant Williams, and that after their purchase they ceased to operate it because it had been demonstrated that this fragment of roadbed only 15 miles long, could not pay expenses of operation, and that to operate it would have subjected them to ruinous loss of money, with no possibility of remuneration, and that neither the relators nor any other people had ever given them any encouragement or assistance, although they had tried to interest people in the completion of the said railroad, but without any success. Testimony was taken and the matter of the cross-bill came on to be heard before the late Circuit Judge Simonton. After painstaking consideration of the case, and for the reasons stated in a lengthy opinion filed in the case (113 Fed. 823), that learned judge held that at the time the road was dismantled it had been demonstrated that the 15 miles of road was worthless as a railroad, and could not be operated except at a loss, and that the franchise was forfeited; that under the circumstances the purchasers of the property were entitled to make the only use of what they had purchased which was possible, which was to remove and sell the iron. The court entered a decree dismissing the cross-bill, and from that decree this appeal was taken.

The contention of the appellants is that the dismantling of the road was a violation of the right of the state of South Carolina in a highway established by its authority; that the corporation having exercised the powers given to it by the state to enable it to construct the highway, no one could have the right thereafter, without notice to the state and permission obtained, to abandon the enterprise, and take away the removable property.

There are many circumstances peculiar to this case. They appear in the testimony and in the pleadings, and are carefully set out in the opinions filed in the case below. In the first place, the existing structure was not the railroad chartered by the state. That railroad was one extending from Greenville, S. C., to Knoxville, Tenn. In 1887 a contract was made with a construction company for the building of that line. Only 12 miles from Greenville had been built when the whole scheme collapsed in consequence of the decision of the Supreme Court of South Carolina that the townships along the line could not lawfully issue bonds to aid in building the road. Without that assistance it was hopeless to attempt to finance it. It was attempted to operate this small fragment of 12 miles, with the result that it was very soon in the hands of the receiver. Then, for the reason that the 12 miles ended in the woods, an effort was made to save it from abandonment by borrowing $12,500 on receiver's certificates with which to build 3 miles more to reach the town of Marietta. The receiver, by authority from the court, borrowed the money, and built the three additional miles, and managed to run the road for four years, giving it his personal attention, without charging anything for his services, paying

no interest, and not repaying the borrowed money. Having no money to spend in repair or betterments, at the end of the four years, for want of money spent to keep it up, the road was in a deplorable condition, and too dangerous to run. Its operation had to be discontinued, and it had to be sold for whatever it would bring. After offering it three times at public auction without any bid, at the fourth sale Williams, representing the holders of the receiver's certificates, in order to try and save something from the wreck, bought it at $15,000, and became the owner. This fragment of a proposed railroad was not built by the state, but by a corporation chartered for that purpose, authorized to incur debts and to mortgage its property, including its railroad. Nothing was contributed in any way by the interveners towards its construction. When it did not pay its mortgage debts, the railroad, like other mortgaged property, could be sold, and no doubt, under ordinary circumstances, the purchaser would be obliged to maintain the highway for the purpose to which it was devoted by the charter under which it was constructed. But when by actual experiments, continually made for four years by an officer of the court, it was demonstrated that as a railroad the highway had no value, and could not be operated except at a steady loss, and could not be sold except at a price less than the cost of the rails, and these facts were established by judicial finding, can it be said that the owner was to be compelled either to operate the road at a ruinous loss or to walk away and abandon even the iron rails? The contention of the appellants does not go to this extent, and it must be conceded that if, with respect to an incomplete fragment of a highway such as this, sufficient public notice had been given that the part built had proven unprofitable and was about to be sold as an abandoned undertaking, and nothing was done by those desiring the continuance of the railroad to render its continuance possible, then a decree affording the equitable relief granted in the original decree for dismantling the railroad might be justifiable. In this case there was great publicity as to the condition of the 15 miles of track. The failure of the original enterprise was notorious and the cause of it. The appointment of a receiver, and the running of a road under his management for four years, the building of the three miles of additional track under the court's order, were all matters of public notoriety. Thereafter there were the four advertisements of public sales, and the cessation of the operations of the road for nearly three years, and finally the removal of the rails and their sale. During this time nothing was done by any one interested in the continuance of the road to relieve the embarrassing situation of the unfortunate persons who had advanced money on the receiver's certificates.

As adverted to by the circuit judge, the power given by the charter was in terms permissive to build the railroad, and not mandatory to maintain it. When the condition is such as existed when the 15 miles of the rails were removed, it has been held that the owners of the road cannot be compelled to reconstruct and maintain it when it would not be remunerative. Northern Pacific R. R. v. Dustin, 142 U. S. 492–499, 12 Sup. Ct. 283, 35 L. Ed. 1092. The fact that the road does not pay the

expenses of running the trains is persuasive evidence that the service to the public does not require it to be kept in operation. Morawetz on Private Corporations, § 1119. When, as authorized by the decree of the Circuit Court, the dismantling was in progress, the relator, T. B. Cunningham, and others, with the consent of the Attorney General of South Carolina, filed their petition on March 27, 1899, asking that the receiver be restrained from further proceeding to dismantle the road. The court granted the prayer of their petition for an injunction; the order to become operative when the petitioners should file a bond with sureties in the penalty of $5,000 for the payments of the damages caused by the injunction. This bond was not given, and the injunction did not become operative.

The complainants in the cross-bill have procured offers of several persons who are willing to undertake to run the road and pay a rental of from $1,500 to $1,800 a year, provided the rails are put back, and the road restored to the same condition it was when the rails were removed. Doubtless, the general conditions of prosperity have improved since the date of the decree authorizing the removal of the rails, and if the question were now before the court possibly some one could be found who would undertake to repair and operate the road; but it was not so at the date of that decree. The proofs show that in 1899, when the rails were removed, the whole physical condition of the railroad was ruinous, and not safe to run; that to make it safe for one year would require $10,000. Naturally the deterioration of the ties, bridges, and roadbed had gone on, and to put the structures in the same condition they were in when the rails were removed would have required much greater outlay.

The prayer of the cross-bill is that the defendants be required to restore the rails to the roadbed, to repair the damages to the cross-ties, trestles, and roadbed caused by the removal, and that the defendants be required to operate the road, or to be required to offer the same for sale as an entirety as a public highway. As is so fully set forth in the opinion of the court below, this would be to require of the defendants to rebuild the road at a great expenditure, for which they would receive no return, even if it were now possible in the present more prosperous times to obtain sufficient revenue to operate this small fragment of road.

The opinion of the late Judge Simonton in the court below carefully recites all the facts connected with the attempts to operate the road, he having appointed the first receiver and being familiar with its history, and it seems to us unnecessary to further add to his convincing statement of the grounds upon which the cross-bill was dismissed.

Decree affirmed.

KIRVEN v. VIRGINIA-CAROLINA CHEMICAL CO.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1906.)

No. 632.

1. COURTS—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP.
The original beneficial owner may sue in a federal court on a note, although the nominal payee by reason of his citizenship would not have such right.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 868.

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.]

2. SAME—OBJECTION TO JURISDICTION—MODE OF TRYING ISSUE.
An objection to the jurisdiction of a federal court, where dependent on a question of fact, may be taken by answer, and the question of fact submitted to the jury, but such issue is an independent one, and should not be submitted with the other issues in the case to be determined by a general verdict.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 147, 152, 818.]

3. EVIDENCE—ADMISSIONS—STATEMENTS IN PLEADING.
Statements made in a complaint filed by a corporation and verified by its attorney, which was withdrawn before appearance by defendant and a new complaint filed, are not admissible as admissions by the corporation against its interest.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 719.]

4. CORPORATIONS—FOREIGN CORPORATIONS—VALIDITY OF CONTRACTS.
The failure of a foreign corporation to comply with the requirements of a state statute, imposing certain conditions precedent to the right of such corporations to do business in the state, does not render its contracts wholly void, but only suspends its right to sue thereon until it does so comply.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 2540.]

5. SAME—RIGHT TO ENFORCE CONTRACT—FAILURE TO COMPLY WITH LOCAL STATUTE.
Plaintiff, a corporation of another state, sold and shipped goods to defendant, a citizen and resident of South Carolina, on an order taken subject to its approval by one acting as its local agent, who took a note for the purchase price payable in South Carolina. It was not shown that plaintiff ever made any other sale in the state. At the time of such sale plaintiff had not complied with the statute of South Carolina authorizing it to do business within the state, but it did so before bringing suit on the note. *Held*, that the fact of its prior noncompliance with the statute was not a bar to its recovery, because: (1) The contract of sale was not made in South Carolina; (2) the single transaction did not constitute "doing business" in the state within the meaning of the statute; (3) the subsequent compliance with the statute rendered the contract enforceable, even if not so originally; and (4) the contract, being for goods to be shipped from another state, to allow the statute to avoid it after its execution by plaintiff would contravene the interstate commerce clause of the federal Constitution.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2526, 2545.]

In Error to the Circuit Court of the United States for the District of South Carolina, at Columbia.

A. T. Smythe (Smythe, Lee & Frost, on the brief), for plaintiff in error.

P. A. Wilcox (Mitchell & Smith, on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and McDOWELL and DAYTON, District Judges.

DAYTON, District Judge. On April 11, 1903, the Virginia-Carolina Chemical Company filed its complaint in the Circuit Court of the United States for the District of South Carolina, against J. P. Kirven, in which it alleges itself to be a corporation under the laws of New Jersey and Kirven to be a resident and citizen of South Carolina; that on March 14, 1898, Kirven made his promissory note to the order of one S. M. McCall for $2,298, payable at any bank in Darlington, S. C.; that McCall, payee in said note, acted solely as agent for the plaintiff company and never had any beneficial interest in the note, but the same had always been and was the property of plaintiff; that the note had not been paid and had been lost since its execution. To this complaint Kirven for answer and defense set up: First, that the note had been executed to McCall, a citizen of South Carolina, for fertilizer purchased of him alone, and that the company's interest in it accrued solely by assignment from him, and therefore the court below had no jurisdiction to try the cause; second, that on the date of the execution of said note the chemical company, as a nonresident corporation, had not complied with the statutes of South Carolina imposing certain conditions upon such corporations precedent to doing business in that state, and therefore both contract and note were void. By way of counterclaim he further charged the company to owe him for 70 bales of cotton of his attached and appropriated by the company. On the 16th and 17th days of March, 1905, the action was tried before a jury, resulting in a verdict for plaintiff company, a motion to set aside this verdict overruled, and judgment for $911.07, balance due after allowing credits admitted to have accrued since the institution of the suit. During the trial exceptions were taken to rulings of the court refusing to direct a nonsuit, refusing to direct a verdict for defendant, refusing to admit certain testimony tendered, giving a certain instruction and refusing to give a certain other instruction to the jury, and overruling a motion to set aside the verdict and award a new trial, but all these different exceptions relate solely to the two substantial questions involved; the one of jurisdiction, the other the right of the nonresident plaintiff corporation to enforce the contract without having complied with the state statute.

As to the question of jurisdiction: It is to be noted that it is solely a question of fact, turning upon the original ownership of the note. It is earnestly insisted by counsel for Kirven that the evidence shows that the note was executed to McCall, the lien in support of it was executed to McCall; that the plaintiff in prior judicial proceedings claimed it as assignee of McCall; that McCall on the witness stand admitted having "a beneficial interest" in it still, in the way of commision due him for making sale of the fertilizer for which it was exe-

cuted; and that the officers of plaintiff company failed to testify touching the matter, whereby a strong presumption arose against it. On the other hand, it is just as earnestly insisted that the evidence shows that the fertilizer for which the note was given was furnished alone by the company; that McCall could not and did not make the contract himself, but only after having "conferred with his house" and by letter so notified Kirven; that it was shipped by the company direct to Kirven; that McCall's interest as commission was wholly an independent one existing by contract between the company and himself to be paid to him by it alone and to whom alone he could look for such payment; that Kirven in propria personam had made affidavit in a former proceeding that he had purchased this fertilizer from McCall, as agent for the Chemical Company, and had executed the note and lien to him as such agent and was resisting payment to the company on wholly different grounds, to wit, the worthlessness of the fertilizer itself. It is well settled that the original beneficial owner can sue in the federal courts upon a note, although an original but nominal payee, by reason of citizenship, could have no such right. Holmes v. Goldsmith, 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118; Superior City v. Ripley, 138 U. S. 93, 11 Sup. Ct. 288, 34 L. Ed. 914; Hoadley v. Day (C. C.) 128 Fed. 302.

This proposition of law is virtually conceded. It is therefore very clear, from the very diverse deductions drawn by opposing counsel from this evidence, which, we may say in passing, they are justified in so drawing, that this cause is peculiarly one where the verdict of the jury, upheld by the judgment of the trial judge, ought not to be disturbed touching this determination of fact, unless in its determination the judge withheld from the jury pertinent and proper testimony, or, by instruction to the jury, misled it touching the application of the law to the facts. Both these things Kirven's counsel insist the court did. It seems the chemical company by its attorneys had in November, 1898, filed in the state court a complaint against Kirven, in which it was alleged the note in controversy had been executed by Kirven to McCall and by the latter indorsed to the company. This complaint was sworn to, on behalf of the plaintiff company, by Dargan, one of its attorneys, but, before any appearance of any kind was made by Kirven to it, it was by order withdrawn and dismissed and was immediately followed by a complaint based upon the lien given to secure the note in which an affidavit was filed making the exact admissions, if such they were, in almost the identical words, and which affidavit was made by Dargan, the attorney. In our judgment, the court was clearly right in ruling out the first, and it is very doubtful if he was justified in admitting the second affidavit. It could be admitted only for the reason that it was relied on and not repudiated by the plaintiff in a case prosecuted by it. It was certainly not proper to admit, as an admission against interest, a complaint drawn and sworn to by its attorney, which likely its own officers had never seen, and which was immediately withdrawn and dismissed.

But it is insisted that the court instructed the jury that they should find for the plaintiff in case they believed "the note was given and

taken for the benefit of the Virginia-Carolina Chemical Company, and that McCall's commissions were payable by that company, and that he had to look to that company for the same and therefore had no right to hold the note or to sue on it," for "then the fact that he was entitled to commissions on the amount of the note would not deprive this court of its jurisdiction," and that there was no evidence at all showing or tending to show that McCall's commissions were payable by the company, and he had to look to the company for the same. This contention is not sustained by the facts. On the contrary, it seems to us that the very opposite is true. McCall distinctly says that he had an agreement with the company in writing, by letter, which gave him a commission on the sale, but did not provide that he should give his own note for the goods. Under such a statement, drawn out upon cross-examination, can we avoid the conclusion that the company ratified the sale made by McCall as its agent to Kirven, was not to hold him responsible, either as principal debtor or as guarantor, but was to take Kirven's note and, when it was paid, was to pay McCall a certain commission for making the sale based upon the amount involved? When it is remembered that, at the instance of defendant's counsel, the court gave a very strong instruction upon their theory to the converse of this proposition and with much less testimony in support of it, we cannot justify complaint on their part against the trial judge in giving this instruction for the plaintiff. While we, therefore, find no error in fact in the determination of this question of jurisdiction, we feel constrained to say that it is always error to submit an issue of fact as to jurisdiction, with other issues, to a jury and permit it to be determined with such other issues, by a general verdict for or against the plaintiff. Lack of jurisdiction is a defense in abatement of the prosecution of the action and not in bar of the right of action itself. In common-law pleading it must, at the earliest moment, be raised by plea in abatement, made in person and not by counsel, and, if to the writ, must give defendant the better writ, and, if to the court, must indicate the court having jurisdiction. The issue upon such plea, if the matter be of law, must be determined by the court, but, if of fact, may be submitted to a jury. In either case the trial of this issue must be an independent one, for the plain and obvious reason that the judgment upon it, if effective, cannot be a bar to the plaintiff's right, but simply one of dismissal without prejudice.

Prior to the Act of 1875, the common-law rules touching the necessity of a plea in abatement to the jurisdiction prevailed in the federal courts, and it was held that the filing of a plea to the merits was a waiver of such plea to the jurisdiction. Farmington v. Pillsbury, 114 U. S. 138, 143, 5 Sup. Ct. 807, 29 L. Ed. 114. It has since been held that "in its general scope this rule has not been altered by the act of 1875," but that this act "changed the rule so far as to allow the court at any time, without plea and without motion, to stop all further proceedings and dismiss the suit the moment a fraud on its jurisdiction was discovered." Hartog v. Memory, 116 U. S. 588, 590, 6 Sup. Ct. 521, 29 L. Ed. 725: Williams v. Nottawa, 104 U. S. 209, 211, 26 L. Ed. 719. Thus while in practical effect this act of 1875 has extended

the right of the court to settle the question of its own jurisdiction and, to an extent, limited the right of a jury to pass upon that question when one of fact, it has by no means, when such question is submitted to a jury, destroyed the original methods by which it should be so submitted; and especially, under no form of pleadings, has it done away with the requirement that it shall be tried as an independent issue. This is true simply because the absolute necessity for it being so tried remains. As stated in Ashley v. Board, 8 C. C. A. 455, 468, 60 Fed. 55, 68:

"It is clear that such a question is an independent one, and cannot properly be confused with the issue on the merits; otherwise, it could not be determined from the verdict whether it was founded on a question of jurisdiction, or of the cause of action."

See, also, Terry v. Davy, 46 C. C. A. 141, 143, 107 Fed. 50, 52, where this principle is affirmed.

As to the question of the plaintiff corporation's rights, under the laws of South Carolina, requiring foreign corporations to comply with certain conditions before doing business in the state, to enforce this contract: It is no longer an open question that a corporation, being solely a creature of law, can have no power beyond that of the law which gives it birth. It has no right to exist under other laws or in other states except by comity. Chief Justice Taney, in Bank v. Earle, 13 Pet. 519, 588, 10 L. Ed. 274, has thus expressed it:

"It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law, and, where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation and cannot migrate to another sovereignty."

By the comity existing between the states and with other countries, these corporations are permitted to do business in other states than their own, but always subject to the laws of the domestic state which has the power at any time to restrict their operations and even expel them from its limits. They are not "citizens" within the meaning of article 4, § 2, of the federal Constitution, entitling them "to all privileges and immunities" as such "in the several states," nor do they come under the protection of section 1 of the fourteenth amendment, prohibiting the abridgement of such privileges and immunities. Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566, 19 L. Ed. 1029; Bank v. Earle, 13 Pet. 519, 10 L. Ed. 274; Phila. Fire Ass'n v. New York, 119 U. S. 110, 7 Sup. Ct. 108, 30 L. Ed. 342; Pembina C. S. & M. Co. v. Penna., 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432; Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552.

But, while all this is true, a corporation not created under the laws of a state, or not doing business in that state under conditions that subject it to process from the courts of that state, is within the meaning of the provision of the fourteenth constitutional amendment, declaring that no state shall "deny to any person within its jurisdiction

the equal protection of the laws," as held in Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432. Nor will such state statutes be permitted to interfere with the constitutional rights of Congress "to regulate commerce with foreign nations and among the several states." Interstate or foreign transportation is interstate or foreign commerce, within the meaning of this clause as held in a number of cases, such as: Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649; McCall v. California, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 392; Bowman v. C. & N. Ry. Co., 125 U. S. 465, 8 Sup. Ct. 689, 31 L. Ed. 700; Pickard v. Pullman S. Car Co., 117 U. S. 34, 6 Sup. Ct. 635, 29 L. Ed. 785.

It has further been held that sales of goods by a foreign corporation to a resident of a state, although made by a salesman or agent sent into the state, to be shipped to him in the state from another state, belong to the operations of interstate commerce and are not subject to these restrictive laws of the states. Caldwell v. North Carolina, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336; Brennan v. Titusville, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; Stoutenburg v. Hennick, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637; Robbins v. Shelby County, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137. Also, even though the business is done by the foreign corporation through an agent or firm resident in the state, and notes are given in settlement in the state and payable in the state. Kessler v. Perilloux (C. C.) 127 Fed. 1011; Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347; Davis, etc., Mfg. Co. v. Dix (C. C.) 64 Fed. 406. It has, however, been held that this interstate commerce clause does not apply to foreign corporations maintaining continuously an agency in a state from which orders are solicited and the goods are delivered to purchasers. Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611, 23 Sup. Ct. 206, 47 L. Ed. 328.

In construing the effect of these statutes in given cases, it has become frequently necessary for the courts to define what constitutes a "doing, transacting or carrying on a business," and, while there is some conflict, the great weight of authority is to the effect that isolated transactions, especially commercial, between foreign corporations and a citizen of the state, do not constitute a "doing, transacting or carrying on a business," within the meaning of such statutes using these terms. It has so been held by the courts of Alabama, Arkansas, Colorado, Illinois, Iowa, Kansas, Missouri, New Jersey, New York, Oregon, Pennsylvania, Tennessee, Texas, Washington, Wisconsin, and by the federal courts in such cases as Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; Frawley v. Penna. Casualty Co. (C. C.) 124 Fed. 259; Oakland Sugar Co. v. Wolf, 118 Fed. 239, 55 C. C. A. 93. Among such instances of single transactions not constituting a "doing of business," within the meaning of the statutes, are the making of a single sale or contract of goods to a citizen and the taking of a mortgage in the state to secure payment therefor. Ware v. Hamilton, 92 Ala. 145, 9 South. 136; Florsheim v. Lester, 60 Ark. 120, 29 S. W. 34, 27 L. R. A. 505, 46 Am. St. Rep. 165; Col. Iron

Works v. S. G. Mining Co., 15 Colo. 499, 25 Pac. 325, 22 Am. St. Rep. 433; Dela. Canal Co. v. Mahlenbrock, 63 N. J. Law, 281, 43 Atl. 978, 45 L. R. A. 538; Penn. Collieries Co. v. McKeever (Sup.) 87 N. Y. Supp. 869; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; Ammons v. Brunswick (Ind. T.) 82 S. W. 937. And the taking of notes in the state, for goods sold or a debt contracted in another state, and the suing thereon in the state, does not constitute such "doing of business." Creteau v. Foote (Sup.) 57 N. Y. Supp. 1103; Lumber Co. v. Holbert (Sup.) 39 N. Y. Supp. 432; Fuller Mfg. Co. v. Foster, 4 Dak. 329, 30 N. W. 166. And these statutes cannot effect contracts made by a citizen outside of his state with a foreign corporation, as, for instance, where an order is sent by the citizen for goods to the foreign corporation, or where such order is taken by a local agent, subject to the approval of the corporation, and is approved by the corporation outside the state, and the goods are shipped from outside the state by it to the purchaser in the state. In addition to the cases we have heretofore cited to this effect are Lumber Co. v. Chappell, 184 Ill. 539, 56 N. E. 794; Cordage Co. v. Mosher, 114 Mich. 64, 72 N. W. 117; Plow Co. v. Peterson, 93 Minn. 356, 101 N. W. 616; Peirce Co. v. Siegle Gas Fixture Co., 60 Mo. App. 148; and numerous cases in New York, New Jersey, Pennsylvania, Ohio, Tennessee, and Texas collected under note in 19 Cyc. 1277.

There is very great conflict in the decisions of the state courts construing the effect of the failure of foreign corporations to comply with these laws. Numerous cases in the states of Alabama, Colorado, Illinois, Indiana, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Texas, Utah, Vermont, and Wisconsin hold that such failure to comply renders the contracts of foreign corporations absolutely void and unenforceable, and especially so where no criminal penalty attaches by the terms of the statute. This harsh doctrine naturally shocks the conscience. It virtually encourages the individual citizen to be dishonest and repudiate his obligations, and that, too, where he has reaped the full fruits and benefits of the contract. Very naturally, and rightly, the courts have sought to avoid the consequences of such vicious legislation and the moral turpitude its strict enforcement involves. We therefore find many other cases in the states of Arkansas, Colorado, Idaho, Indiana, Kansas, Kentucky, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, North Dakota, Ohio, Rhode Island, South Dakota, Washington, and West Virginia holding that such contracts are not void or unenforceable, but that foreign corporations which have failed to comply are nevertheless permitted to sue upon them. Some of these decisions are based upon the superior claim of the law of comity, others upon the assumption that the criminal penalty provided by the statutes is exclusive of all civil forfeiture of the contract. Other cases in Kentucky, North Dakota, Pennsylvania, South Dakota, and Washington hold that, where a party has entered into a contract with a foreign corporation and has received the benefit thereof, he is estopped

from setting up the failure to comply with these statutes by the corporation, for the purpose of avoiding his liability on the contract. Still other cases hold that the failure to comply with these statutes does not render its contracts wholly void, but only operates to suspend the right of the defaulting corporation to sue until it does comply. See 19 Cyc. pp. 1289–1300, and notes; and 12 Cent. Dig. tit. "Corporations," §§ 2536–2543, where these different classes of decisions are collected.

It seems to us that the position last above referred to, holding the contract good, but suspending the remedy, is the reasonable and honest one to take. It may be admitted that some practical protection is afforded to the private citizen of a state by these statutes, in that they tend to keep out irresponsible foreign corporations seeking to impose upon such citizens; therefore it may well be demanded of foreign corporations that they shall carefully comply with these statutory conditions, and, in case they do not, the criminal penalty be enforced and the civil right to sue be suspended. But surely this is going far enough, for practically, under modern conditions, the largest proportion of the commercial and other business transactions occurring are carried on under corporate franchises, and busy corporations, like busy individuals, may forget, or overlook to comply, or make mistakes in compliance with these conditions—a failure not malum in se, but simply malum prohibitum. On the other hand, for individuals to repudiate the obligations of honest contracts of which they have derived the benefit involves moral turpitude of the gravest character, and neither Legislatures nor courts can afford to encourage them in so doing. The law should protect its citizens but, by such protection, should not teach them to be dishonest.

Without continuing the discussion further, it is only necessary for us, applying the principles we have set forth, to say that this defense in this case must fail for several reasons.

First. Because, looking at the evidence in the light most favorable to the appellee corporation, which we must do by reason of its having the sanction of the jury's verdict and the lower court's judgment, it seems clear to us the real contract in the case was not made in South Carolina, but in Richmond, Va. McCall, it is true, as quasi agent, did negotiate it with Kirven conditionally, but only conditionally. He says in his testimony:

"I made a conditional trade with him, that is, that I was to sell him so much goods, provided I could arrange with the Virginia-Carolina Chemical Company and S. W. Travers at Richmond, if I could arrange with the company, and I made him those prices, but I was to write him from Mayesville after I went back and conferred with these people to see if I could make arrangements to sell him the goods, and I did write them and did make the arrangement and sold him so much goods, as the agent for this company."

It is clear from this testimony, and from the copy of the letter of notification to Kirven which he produces in substantiation of it, that he had no power himself to contract; that the contracts, based upon his negotiation, had, in fact, to be ratified and made by the company or its agent at Richmond, Va., and was so made and approved there in legal effect. It is not disputed that the goods were shipped direct to

Kirven by the company. Kirven expressly so states in his affidavit. It was therefore a case of a contract made by a citizen outside of his state, that is, not in South Carolina, but in Virginia, by and through an order taken by an agent, subject to be approved and complied with by the corporation in Virginia, and therefore not subject to the statutory provisions of South Carolina relied on, as held by the cases we have herein cited.

Second. There was no attempt to show by evidence any other sales or acts tending to establish the fact that this corporation at the time was "doing business," in South Carolina, and we must presume, from the absence of such testimony, that no other such sales or acts could be shown. This, therefore, even if our first reason were not sound, must be held an isolated commercial transaction such as would not constitute a "doing of business" within the meaning of the statute, under the authorities we have cited.

Third. It is admitted that, after the contract was made, but long before this suit was brought, this corporation did comply with the South Carolina statute, thereby fully meeting the true and honest rule, that we approve, that such contracts are not void, but the right to enforce them is suspended until compliance with the statute is made.

Finally. This contract was made for fertilizer, by order through McCall, agent, at Richmond, Va., from which latter state the goods were shipped by the corporation direct to Kirven in South Carolina and received by him, and to allow a statute of this kind to void the contract would contravene the interstate commerce clause of the federal Constitution, as held by the cases hereinbefore cited.

We therefore see no error in the judgment of the court below, and the same is affirmed.

PRITCHARD, Circuit Judge, concurs fully in this opinion, and McDOWELL, District Judge, concurs in the conclusions reached.

RANNELS v. ROWE et al.

(Circuit Court of Appeals, Eighth Circuit. March 29, 1906.)

No. 2,163.

1. EXECUTORS—CONVEYANCE OF LANDS WITH WARRANTY IN EXCESS OF POWERS—PASSING OF INDIVIDUAL INTEREST AS DEVISEES.

A warranty deed to lands belonging to the estate of a decedent, made by his executors without authority, is ineffectual as against devisees, but where such executors were also devisees of an interest in the land, the deed, being in excess of their powers as executors, passes title to their individual interests by estoppel.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 587.]

2. DEEDS—CONSTRUCTION—CONDITIONS.

Whether a condition in a deed is precedent or subsequent is always a question of the intention of the parties, which is to be gathered from the context of the instrument read in those lights which are properly employed in the construction of writings.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 469.]

3. SAME.

A deed of lands to a railroad company recited the consideration as being a sum of money and a certain amount of the bonds and stock of the company, the receipt of which was acknowledged, and "in consideration of the building and completion of said railroad in three years from date hereof." At the end of the habendum clause were the words, "provided that said railroad shall be built and completed within the three years after date hereof," and the warranty concluded with the words, subject only to the conditions that if said railroad be not built and completed within three years from date hereof said lands shall revert * * * and this deed to be void. *Held*, that such condition was a condition subsequent, and the title passed and vested in the grantee subject to a right of forfeiture which might be asserted in case of a breach of the condition.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 495.]

4. SAME—BREACH OF CONDITION SUBSEQUENT.

A breach of a condition subsequent in a deed does not per se produce a reversion of the title, but the estate continues in the grantee until the proper step has been taken to consummate a forfeiture, and this requires a re-entry or some act that may be considered a lawful substitute therefor.

[Ed. Note.—For cases in point, see vol. 16, Cent Dig. Deeds, § 521.]

5. SAME—WAIVER OF RIGHT OF FORFEITURE.

The mere execution and recording of another deed to a third person, by the grantors in a prior deed, after the original deed has been recorded and without notice to the grantee therein, is not sufficient to effect a forfeiture of the first grant for breach of a condition subsequent, where no possession is taken, and the original grantee subsequently performs the condition, although after the time limited therefor in the deed has expired.

6. SAME—ARKANSAS STATUTE.

Sand. & H. Dig. Ark. § 701, authorizing the owner of an interest in lands in the adverse possession of another to sell and convey the same, was not intended to change the rule requiring re-entry or an equivalent act to forfeit an estate on breach of a condition subsequent.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 526, 529.]

7. CORPORATIONS—CONTRACTS—ATTACKING REGULARITY OF ORGANIZATION.

One who contracts with a corporation as such, or those in privity with him cannot avoid the effect of such contract on the ground of a defect in the organization of the corporation.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 84.]

8. EQUITY—LACHES—SUIT BY GRANTEE OF LANDS AGAINST SECOND GRANTEE.

A grantee of lands is not required to take any action to assert his title, as against a subsequent grantee from the same grantor, so long as the land remains wild and unoccupied, and is not chargeable with laches for failure to do so.

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

This was a suit brought by Rannels to quiet his title to several thousand acres of wild and unoccupied lands in the state of Arkansas. All of the parties interested in the controversy claim title through Edmund McGehee. Part of the property in controversy was patented directly to him as swamp lands in 1858 by the state of Arkansas. The remainder was patented by the state to the heirs and legal representatives of McGehee in 1883, 18 years after his death, but this difference is immaterial since, if for no other reason, it appears that the conveyances to his heirs and legal representatives were by way of confirmation of an equitable title previously existing in him.

McGehee died in Mississippi in 1865 and under his will one-half of his estate went to his wife and the remainder to three children subject to the adjustment between the latter of an advancement made to James G. McGehee, a son. It does not appear that the half of the estate devised and bequeathed to the children was sufficient in value to leave a surplus for division among all three after the two of them were put upon equal terms with their brother James. Consequently the case should be considered as though James took nothing under the will.

In 1869 the Legislature of Arkansas passed an act which recited that large quantities of lands had been sold to the state for unpaid taxes and remained unredeemed, thereby preventing the improvement of the same and affecting the revenues of the state, and provided that whenever the owner of any lands sold or forfeited to the state for nonpayment of taxes should donate or subscribe the same in aid of the construction of any railroad, and such fact was reported to the auditor of public accounts, a certificate as in case of redemption should be granted, and thereupon the tax claims of the state on the lands so subscribed or donated should be remitted and discharged, subject, however, to a condition allowing the state to reassert its claim in case the railroad should not be constructed within a time specified.

In 1873 three executors of the will of McGehee, among them the widow and the son James, conveyed the lands in controversy by two executors' deeds to the St. Louis & Memphis Railroad Company, a corporation organized under the laws of Arkansas. These deeds contained covenants of warranty by the grantors as executors and also conditions that the grantee should build and complete its railroad within three years thereafter. It is conceded that these deeds were invalid as against the devisees of McGehee who did not join in the execution thereof, for the reason that no authority to make them had been obtained from any court of competent jurisdiction. All of the debts of the testator were paid and his estate was afterwards settled up leaving the lands to pass according to the terms of the will. The complainant acquired title mediately from the railroad company. The defendants, Adela V. Boice and Alberta J. Sharpe, claim under purchases made from the devisees, including the widow, in the years 1881–1883. The other defendants are not interested.

The railroad company made various ineffectual efforts between 1873 and 1880 to build and complete its road and after having expended about $280,000 upon the roadbed did nothing further by reason of financial embarrassment until 1889 when it made a contract with another railroad company which resulted in the building of the road substantially upon the line of the original survey. This contract was authorized by an Arkansas statute (Mansf. Dig. §§ 5526, 5530). Notwithstanding the railroad company failed to construct its road within the three years contemplated by the conditions of the executors' deeds nothing was done in the way of re-entry or declaration of forfeiture for condition broken, by the McGehee devisees or their subsequent grantees, including the defendants, prior to the completion of the railroad, unless the execution by the devisees of the deeds of 1881–1883 to the defendants' ancestors in title would have that effect.

The Circuit Court entered a decree dismissing complainant's bill.

Julian Laughlin (M. L. Stephenson and E. C. Hornor, on the brief), for appellant.

Augustin Boice (John B. Jones, on the brief), for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

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

The deeds to the railroad company, under which complainant claims, were executed by three executors and they contained covenants of warranty by them in their representative capacities. One of the ex-

ecutors was the widow of the deceased owner of the lands and under the will she took a half interest therein. The deeds were void as executors' conveyances because no authority to make them had been procured from the court having jurisdiction; but they nevertheless operated as conveyances of the widow's individual interest. This results from the doctrine of estoppel. A trustee acting within his powers does not render himself liable on his contracts and conveyances; but whenever he exceeds his powers and undertakes to transfer and convey without authority he becomes personally answerable to the grantee on his covenants. Coe v. Talcott, 5 Day (Conn.) 88, 92; Morris v. Watson, 15 Minn. 212 (Gil. 165); Tarver v. Haines, 55 Ala. 503; Allen v. De Witt, 3 N. Y. 276, 280; Brown v. Edson, 23 Vt. 435; Poor v. Robinson, 10 Mass. 131; Heard v. Hall, 16 Pick. (Mass.) 457. Another executor who joined in executing the deeds was a son of the testator and also a devisee, but by reason of an advancement made to him which the will required to be adjusted it does not affirmatively appear that he took any interest in the lands upon the settlement of the estate. The other devisees not being parties to the deeds were not concluded by them, and their interests, aggregating one-half of the whole, afterwards became vested in the defendants Boice and Sharpe by sundry conveyances. The remaining part of the controversy is therefore confined to the half interest in the lands which formerly belonged to the widow.

A most important question in the case is that of the character of the executors' deeds—whether they were upon conditions precedent that were never performed or upon conditions subsequent that required affirmative action to create a forfeiture of the estate conveyed. In each deed the consideration is recited as being a specified sum of money, one-fourth in first mortgage bonds and three-fourths in the capital stock of the railroad company, paid by it, and "in consideration of the building and completion of said railroad in three years from date hereof." At the end of the habendum clause is this:

"Provided that said railroad shall be built and completed within the three years after date hereof."

The warranty clause concludes with these words:

"Subject only to the conditions that if said railroad be not built and completed within three years from date hereof said lands shall revert to Edmund McGehee's heirs and administrators and this deed to be void."

The defendants contend that the foregoing conditions are precedent, and that as the railroad was not built and completed within the time limited no estate ever passed from the widow to the railroad company. The complainant's claim is that the conditions are subsequent and that therefore the title passed and vested in the grantee when the deeds were delivered subject to a right of forfeiture which was not asserted in time. In a condition precedent no title passes or vests until it is performed, while a condition subsequent operates by way of defeasance of a title that has once vested. Davis v. Gray, 16 Wall. 229, 21 L. Ed. 447. Various technical rules have been suggested for determining whether a condition in a deed or devise is of the one kind

or the other, but the true test is that of intention which is to be gathered from the context of the instrument read in those lights which are properly employed in the construction of writings.

In Finlay v. King's Lessee, 3 Pet. 346, 7 L. Ed. 701, Chief Justice Marshall said:

"The same words have been determined differently and the question is always a question of intention. If the language of the particular clause or of the whole will shows that the act on which the estate depends must be performed before the estate can vest the condition is of course precedent; and unless it be performed the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate but may accompany or follow it, if this is to be collected from the whole will, the condition is subsequent."

To the same effect 2 Washburn on Real Property, *446.

The following have been held as exhibiting instances of conditions subsequent: A conveyance to a railway company upon condition that it should construct a certain length of road within a given time and upon default that the granted estate should revert (Schlesinger v. Railway, 152 U. S. 444, 14 Sup. Ct. 647, 38 L. Ed. 507); a conveyance upon condition that a county should build a jail upon the property within two years and so occupy it forever (Skipwith v. Martin, 50 Ark. 141, 150, 6 S. W. 514); a grant to a railway company of a right of way upon the express condition that it should construct its road within a time limited (Nicoll v. Railroad, 12 N. Y. 121); a conveyance upon the express understanding and condition that an institution be permanently located on the land within a year and in case of failure the title should revert to the grantors upon repayment of the purchase money. Mead v. Ballard, 7 Wall. 290, 19 L. Ed. 190. The lands in controversy were conveyed to the railroad company to aid it in constructing its railroad and part of the consideration was in the stock and bonds of the company which the deeds recited as having been paid. These securities must have been regarded as possessing value and in the very nature of such things it cannot be assumed that their value wholly depended upon the completion of the road within three years. It is reasonable to infer that the bonds of the company, part of which went to the grantors as consideration, were secured upon other property than the lands in question. That it afterwards turned out that the bonds were of little or no value is not important. The intention of the parties which controls is the intention existing when the deeds were executed, not that of a later period. The question is not affected by the disaster which finally overtook the grantee. The fact that other considerations than the conditions inserted in the deeds were given to and received by the grantors tends to show a purpose to pass the title subject to a right of subsequent defeasance upon the failure of the grantee to perform the conditions within the time limited.

Again, when the lands were conveyed they were subject to tax claims held by the state of Arkansas. In order to encourage the building of railroads and thereby promote the development of its resources the state, through an act of its Legislature, offered to remit and discharge its claims if the owners of the lands so incumbered

would donate or subscribe them in aid of such an enterprise. In this case the state officer designated by the statute was furnished with a list of the lands as having been so subscribed and there was at least a suspension for some years of the claims of the state. This was an additional consideration moving from a third party. Moreover, the language of the conditions at the end of the warranty clauses in the deeds is plainly inconsistent with the contention that such conditions are precedent. Express provision was made that the lands should revert if the road was not built or completed within three years. A title that has never passed cannot be said to revert. While the other recitals in the deeds are of more doubtful import they are not inconsistent with the conclusion which we have reached that all things considered the conditions were intended to operate if unfulfilled as a ground of subsequent forfeiture of an estate conveyed and that performance need not precede the vesting of the title.

It is also contended that assuming the conveyances to the railroad company to have been upon conditions subsequent, nevertheless the conditions were not complied with, the right of forfeiture was seasonably asserted and the estate of the company thereupon came to an end. It is true that the conditions were not performed within the stipulated period, but is it also true that the estate was terminated before the railroad was finally completed? A breach of condition subsequent does not per se produce a reversion of the title. The estate continues in the grantee until the proper step has been taken to consummate a forfeiture, and this requires a re-entry or some act that may be considered as a lawful substitute therefor. Ruch v. Rock Island, 97 U. S. 693, 696, 24 L. Ed. 1101; Schulenberg v. Harriman, 21 Wall. (U. S.) 44, 63, 22 L. Ed. 551. The grantor may waive a breach of the condition entirely or postpone compliance therewith and his consent to a continuance of the estate in the grantee is presumed from his silence and inactivity. To effect a forfeiture there must be some affirmative, positive act which manifests the intention of the grantor. It may be done by re-entry upon the lands conveyed, by the declaration of a forfeiture or by the commencement of a suit for that purpose. There was no re-entry in this case; the lands were wild and unoccupied and continued so. No suit was brought in court involving that question prior to the completion of the railroad. The only thing that challenges our attention in this connection is the execution by the devisees of McGehee of the deeds under which the defendants claim. But this alone is not sufficient. The company was not charged by the registry act with notice of the deeds recorded after it secured title and put its own deeds upon record. Birnie v. Main, 29 Ark. 591, 595. The deeds were not brought to the attention of the railroad company, no declaration of forfeiture in connection therewith was made, and the company was allowed to proceed until, by virtue of its contract, a railroad was finally constructed and completed as originally contemplated, though not within the time. An entry or an equivalent act designed to work a forfeiture is not a mere matter of form which may be dispensed with; it is regarded as being of substance because intended to destroy an estate (Tallman v. Snow, 35

Me. 342), and whenever acts or words are relied upon as a substitute for a re-entry upon the land they must be of such a character as to distinctly admonish the grantee that thenceforth there is no waiver of his breach of condition and that his title is at an end. Willard v. Henry, 2 N. H. 120, 122. An intention to forfeit formed in the mind but undeclared is ineffectual. And for the same reason is a forfeiture declared to a third person but not communicated to the grantee. These rules are especially applicable where the condition prescribed is the doing of something within a time limited and the grantee afterwards proceeds and does it or causes it to be done in ignorance of the grantor's purpose to assert a forfeiture. In such a case the grantor should be held upon plain principles of justice to have waived the temporary default, as was his privilege.

Three other matters require brief notice. The Arkansas statute authorizing an owner of an interest in lands in the adverse possession of another to sell and convey the same (Sand. & H. Dig. § 701) was not intended to change the rule requiring entry or an equivalent act to forfeit an estate upon condition subsequent. Such provisions are common in the legislation of the states and their purpose is to abrogate an ancient rule of the common law which has no relevancy to the subject under discussion. The contention that the railroad company was not a corporation, and therefore took no title because the laws of Arkansas were not in some respects complied with in its organization cannot be sustained. It is not for the defendants or those under whom they claim and who dealt with the corporation as such to make the objection. Town of Searcy v. Yarnell, 47 Ark. 269, 281, 1 S. W. 319. Equally untenable is the defense that the railroad company and its grantees were guilty of laches in failing to assert their claims for so many years. The lands were wild and unoccupied, and there was no occasion for any action on their part. Moreover, the delay in the adverse assertion of the conflicting claims was mutual. Penrose v. Doherty, 70 Ark. 256, 261, 67 S. W. 398.

It follows from the foregoing conclusions that the complainant is entitled to a decree quieting his title to an undivided half interest in the lands in controversy.

The decree of the Circuit Court is therefore reversed, with directions to enter one in accord with this opinion.

NAGLE et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 28, 1906.)

No. 77.

1. POST OFFICE—ACTION ON POSTMASTER'S BOND—EVIDENCE CONSIDERED.

In an action against a postmaster on his bond, a breach was alleged, in that defendant recommended and secured the appointment and payment by the United States of a laborer in his office who was wholly unnecessary. On the trial it was shown that a janitor was

necessary in the office, and also that on taking the office defendant was given a letter by his predecessor, in which the First Assistant Postmaster General authorized the appointment of a laborer at a stated salary, and asked that a certain form therefor be filled out and forwarded, which was done by defendant. *Held*, that defendant was entitled to go to the jury on the issue.

2. SAME—BREACH OF BOND—PAYMENT OF JANITOR.
A postmaster is not liable to the United States on his bond for government money paid by him as the salary of a janitor for his office, appointed by the post office department, where it is shown that the work was done, merely because the employé hired and paid scrubwomen or others to do portions of it.

3. EVIDENCE—JUDICIAL NOTICE—DEPARTMENT REGULATIONS.
A federal appellate court should not be asked to take judicial notice of department regulations, but where relied on they should be read and put into the record in the trial court.
[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 69.]

4. UNITED STATES—ACTION AGAINST OFFICER—CERTIFIED COPY OF ACCOUNT AS EVIDENCE.
Rev. St. U. S. § 886 [U. S. Comp. St. 1901, p. 670], which authorizes the admission in evidence, in a suit against an officer charged with the disbursement of public money, of a certified copy of his account from the books of the appropriate department, contemplates the certification only of a bookkeeper's plain statement of account; and a statement made in a certified copy of a postmaster's account, after showing that a charge was made against him, that it was on account of money paid by him to a laborer "for which no service was performed," is not admissible in evidence against him.

5. POST OFFICE—ACTION ON POSTMASTER'S BOND—EVIDENCE.
In an action on a postmaster's bond to recover money alleged to have been illegally paid out by him, evidence of what took place in the office after it was turned over to his successor was inadmissible against him.

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

This cause comes here upon a writ of error to review a judgment of the Circuit Court, Western District of New York, in favor of defendant in error, who was plaintiff below. The facts sufficiently appear in the opinion.

A. C. Wade, for plaintiffs in error.

Chas. H. Brown, for the United States.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The action is brought upon a postmaster's bond against the postmaster and his sureties. The condition of the bond is that:

"If the said Fred C. Nagle shall faithfully discharge all the duties and trusts imposed on him, either by law or the rules and regulations of the Post Office Department of the United States, and shall perform all other duties and obligations imposed upon or required of him by law or the rules and regulations of the said Department, in connection with the money order business, then the above obligation shall be void; otherwise, of force."

Nagle was appointed postmaster of Dunkirk, N. Y., in February, but did not enter upon the duties of his office until May 1, 1898. The

breach assigned is that on May 2, 1898, Nagle recommended to the first Assistant Postmaster General that one John A. Link be designated and appointed as a laborer in the post office at Dunkirk from May 1st at a salary of $600 a year; that, pursuant to such recommendation, the First Assistant Postmaster General duly appointed him, and his name was placed on the pay roll, and Nagle thereafter paid him such salary from time to time, quarterly, aggregating to and including June 30, 1902, $2,500.55; that on said May 2d it was, and ever since has been, wholly unnecessary and useless for the proper conduct of the business of that post office that Link or any other person should be designated and appointed as a laborer, as the said Nagle then and there well knew; that said Link never at any time since May 1, 1898, has performed any duties whatever, as laborer or otherwise, in the Dunkirk post office that would entitle him to any part or portion of the moneys so paid him, as Nagle then and there well knew; that Nagle paid the money to Link, then and there well knowing that the said Link had not performed any services whatever in said post office, as laborer or otherwise. It will be observed that two essentially different breaches are assigned; the one concerned with the original appointment, the other with the subsequent payments. The trial judge apparently relied upon the latter breach, for in directing a verdict for plaintiff for the full amount he said: "Nagle defaulted his bond to the government when he permitted this man, Link, to receive remuneration—receive emolument—without doing the work for which he was hired." And again: "Nagle violated his trust when he permitted Link to pay others to do the work for which he was hired." The plaintiffs in error, by requests to go to the jury separately on all the different issues, and by sufficient exceptions, timely reserved, have put themselves in position to argue the whole case here.

As to the first breach: The evidence showed (and, indeed, it would hardly need much proof to show) that besides the clerical work required in the Dunkirk post office, it was necessary that some one should keep the place clean. The furniture had to be dusted, the floor swept and sometimes scrubbed, litter removed, the windows washed, etc. Our attention is called to no statute nor to any post office regulation which makes it the duty of a postmaster or of his clerks in a post office of the first and second class to scrub the floors and wash the windows. From the citations in the brief of the District Attorney, it may be inferred that Dunkirk is a first or second class post office. Whether the building in which it is located is owned by the government or leased does not appear; but certainly any one coming to fill the position of postmaster there might fairly assume that by a janitor or some other person regularly appointed or temporarily hired for the purpose the government of the United States expected that its post office should be kept clean and decent for the dispatch of public business. The defendant, as we have seen, did not take office till May 1st. The first he heard of Link in connection with the office was the day before, April 30th, when his predecessor handed him the following letter:

"Post Office Department.
"First Assistant Postmaster General, Salary and Allowance Division.
"Washington, April 28, 1898.

"Subject: Laborer.

"Postmaster, Dunkirk, N. Y.—Sir: You are hereby authorized to appoint John A. Link as laborer in your office, at a salary of $600 per annum from May 1, 1898. Please report appointment on form A–45.

"Very respectfully, Perry S. Heath,
"First Assistant Postmaster General."

It will be observed that this was not addressed to Nagle, but to his predecessor, and was received by his predecessor. Moreover, it seemed fairly to import that the subject of the appointment and of the salary had already received consideration at Washington and been acted upon; nothing being left for the postmaster to do but to fill up the form referred to. The District Attorney argues that this letter was an absolute nullity. He asserts that the First Assistant Postmaster General "had no authority whatever to write such a letter without a recommendation from the postmaster." That may or may not be so—we do not find warrant for the statement in the quotations from any post office regulations printed in his brief—but if the regulations did forbid the Assistant Postmaster General to act until he had first received a recommendation, that circumstance does not help the case at bar. It is well-settled law that it must be presumed that a public officer performs his duty until there is some evidence tending to show the contrary. If a recommendation was required, it will be presumed that the Assistant Postmaster General had one before him when he wrote. Certainly, there is nothing in the record to indicate that he had not. After receipt of the letter, Nagle on May 2d signed and forwarded the form which recommended the appointment of Link as a laborer. In this state of the proof the defendants were clearly entitled to go to the jury on the question whether there was a breach of the bond in recommending the appointment of an unnecessary and useless person as laborer in the Dunkirk post office. Whether or not the plaintiff had shown enough to go to the jury on the same question, we do not express an opinion, since upon a new trial further facts may be shown.

The other alleged breach presents a different question. It may be conceded that when a postmaster continues for four years paying government money to a person whose name may be on the pay roll, but who to his knowledge does no work and renders no service, he fails to faithfully discharge all the duties and trusts imposed upon him. But that is not this case. There was evidence from which the jury might infer that Link did some work himself. There was undisputed evidence that he hired a scrubwoman, who washed the floors, and paid her himself for her services. The trial judge held that such an act was highly improper, that it was "debasing"; why so, the record does not disclose. We do not see why a janitor or laborer hired to keep a public building clean may not employ scrubwomen to assist him in his task, nor what principle of law or statute or regulation he would violate in so doing. The postmaster and his sureties could not be called upon to repay to the government money paid out to the laborer for work which he did himself, and for work which he procured to be done by a proper person, for whose services the laborer paid. As to the amount of the compen-

sation to be paid for all such laborer's work as might be required there, whether much or little, it was certainly an open question, so far as defendants were concerned, whether that had not been determined by the post office authorities without Nagle's participation.

Since these conclusions lead to a reversal, and there must be a new trial, it may be proper to call attention to some other matters suggested by the record. We express no opinion as to the effect of payments to Link of moneys which the postmaster knew were by Link paid to clerks in the office who themselves swept and dusted the office, or parts thereof, since additional proof on the new trial may be of some importance. Reference is made to the regulations of the post office, and some sections thereof are printed in the brief, but none of them are set forth in the record. The decisions of the Supreme Court on the subject of judicial notice of such rules and regulations are not entirely uniform. Caha v. U. S., 152 U. S. 221, 14 Sup. Ct. 513, 38 L. Ed. 415; The E. A. Packer, 140 U. S. 367, 11 Sup. Ct. 794, 35 L. Ed. 453. Where there is some question of statute law, where the court can itself by reference to books with which it is familiar, and which each judge possesses, determine just what statutory provisions were in force at a given date, there is no necessity for incumbering the record with them. But it is different with departmental regulations. No department ever sends its compilation of regulations to the judges. They are frequently amended, and, without special information from the department, no one can tell whether a particular regulation in some printed compilation was in force a year later. It is grossly unfair to a trial judge to cite some regulation upon a brief on appeal which was not laid before him on the trial. We have no doubt that it is far better practice to read any special regulations which may be relied upon into the record before the trial court. It is a hopeless task for an appellate court to determine what such regulations were at any particular time. It must either accept counsel's statement, or itself make inquiry of the particular department; neither of which practices is to be commended. It is to be hoped that upon the new trial the various regulations bearing upon the questions presented by the case may be specifically referred to.

The trial judge admitted in evidence a certified statement of account of Nagle as postmaster at Dunkirk. It stated, not only that Nagle was charged with the amount paid to Link as a laborer, but also added, "for which no service was performed." Defendants duly excepted. The part quoted is manifestly inadmissible. The statute (Rev. St. U. S. § 886 [U. S. Comp. St. 1901, p. 670]) contemplates that only the plain bookkeeper's statement of account may be thus certified in place of proof; it does not make judicial officers of the clerks in a department who make such entries. U. S. v. Case (D. C.) 49 Fed. 270.

It was also error to allow Nagle's successor in office to testify that, after Nagle had left, Link did no work in the Dunkirk office, and did not report there for work, and that there was no position in the office known as "laborer." With what took place after his office was turned over to his successor neither Nagle nor his bondsmen had any concern.

The judgment is reversed, and cause remanded for new trial.

CRAIG v. DORR et al.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1906.)

No. 624.

1. COURTS—JURISDICTION OF FEDERAL COURTS—ANCILLARY PROCEEDINGS BY CROSS-BILL.

A bill in equity was filed in a federal court to set aside deeds to certain lands, both the grantor and grantees in such deeds being made defendants. Such grantees filed a cross-bill against the grantor co-defendant to recover purchase money paid him for the land, and for the cancellation of notes given for deferred payments in case the conveyances should be held invalid. Subsequently a decree was entered by consent of such grantees, to which their codefendant did not object, granting to complainant the relief prayed for, but retaining the case for determination of the matters arising on the cross-bill. Issue was joined thereon, and after a hearing a decree was entered in favor of the complainants therein. *Held*, that the cross-bill was ancillary to the original suit, growing directly out of the matters involved therein, and was within the jurisdiction of the court, without regard to the citizenship of the parties thereto, and that the entry of the decree on the original bill did not deprive the court of jurisdiction to retain and try the issues on the cross-bill.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 801.

Supplementary and ancillary proceedings in federal courts, see note to Toledo, St. L. & K. C. R. Co. v. Trust Co., 36 C. C. A. 195.]

2. APPEAL—ASSIGNMENTS OF ERROR.

A decree entered by a circuit court after a hearing before the court, without any finding of facts, will not be reviewed by the Circuit Court of Appeals upon a general assignment of error which merely avers that the decree is "contrary to the law and the evidence adduced in the cause."

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2997, 2998.]

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

McCluer & McCluer, for appellant.

George W. Johnson (John H. Holt and Jake Fisher, on briefs), for appellees.

Before PRITCHARD, Circuit Judge, and PURNELL and KELLER, District Judges.

PURNELL, District Judge. In 1859 the state of Virginia granted to Thomas Mathews, Mason Mathews, and John Brown 2,100 acres of land in what is now West Virginia. John Brown conveyed to Thomas Mathews and Mason Mathews his undivided interest in two-thirds of this. Thomas Mathews and Mason Mathews conveyed to Betsy Brown. Thomas Mathews and Mason Mathews became the owners of 1,400 acres of this tract, and Betsy Brown 700 acres. Six hundred and fifty acres of this was assessed in 1873 as belonging to Betsy Brown, and 1,400 acres were assessed as the property of Thomas Mathews, Mason Mathews, and John Brown. All of these lands were returned delinquent for nonpayment of taxes to the sheriff of Nicholas county to be sold. The sheriff sold them, and they were

purchased by the state. The lands were then left off of the assessor's books, with a note that the same had been purchased by the state, and to certify the lands to the commissioner of school lands. The assessor continued them on the landbooks, and they were returned again for nonpayment of taxes in 1873 and 1874, and were sold by the sheriff in October, 1875, and again purchased by the state. The assessor or commissioner of revenue continued them on the books for the years 1875 and 1876, and they were again sold in 1877, and again purchased by the state. They were still continued on the books for 1877 and 1878, and were sold again in 1879, and purchased by the state, as also in 1881. James F. Hamilton claimed to have purchased 800 acres of the 2,100 acres, and received his deed from the clerk of the county court of Nicholas county on the 24th of August, 1884. But it is claimed by the original plaintiffs in this suit that this deed shows a sale of a 610-acre tract of this land in the name of Betsy Brown as delinquent for 1879 and 1880, and that this deed was null and void, that it should have been returned by the commissioner of school lands, and, if it had, it would have been sold as school lands.

It is alleged that all of the original parties were tenants in common in the 2,100 acres of land. It had never been partitioned, and the 650 acres, if delinquent, was returned improperly, or in the wrong name, and the deed shows 800 acres instead of 650 acres. The plaintiff charged irregularity on the part of the sheriff in returning the land delinquent. He charges that the sale in the name of Mathews and Brown is irregular and therefore void and conveyed no title; that the purchase by the state was void, because it was not properly certified by the clerk of the court of Nicholas county; that upon petition for the sale of these lands the petition was referred to James S. Craig, commissioner in chancery, and required him to report the matters and things contained in the order of reference; that he was the same James S. Craig who was commissioner of school lands; that he filed his report, which was to the prejudice of complainant and in violation of law; that on the 15th of August, 1887, the court decreed that the land should be sold; that James S. Craig, commissioner of school lands, on the 16th of September, 1887, sold the same to C. P. Dorr for $1,085; $395 was cash, and the sale was confirmed on the 23d of November, 1887, to C. P. Dorr. The plaintiff claimed further that this was an illegal sale, and H. M. Mathews gave a deed of trust for moneys due to Alexander Mathews, his brother, who afterwards died, and the sale was made under this trust, and Alexander Mathews became the purchaser. The original plaintiff further claimed that on the 3d of January, 1892, he purchased of Mason Mathews and Thomas Mathews their interest in this tract of land and the interest of the heirs of Mason Mathews, and received a deed for it. He claims that no legal sale was made for the land for delinquent taxes, and no legal sale was ever made by the commissioner of school lands, either as delinquent or forfeited, and he was entitled to his deed. They alleged that Dorr had not paid the commissioner of school lands the notes given by him for the deferred payments; nor had the commissioner given Dorr a deed for the land; and asked that Craig be en-

joined as commissioner from making a deed to Dorr, and Dorr be enjoined from taking possession of the land, and the cloud on the title be removed.

The defendant Craig filed his answer to this original bill, admitting the material allegations together with his exhibits, the notes given for the deferred payments, but claiming the sale made by him was in all respects regular and legal. The plaintiffs then filed an amended bill. This bill was filed on August 6, 1894. The fifth paragraph, as an amendment to his original bill, reads as follows:

"That by way of further amendment to his bill of complaint your orator is ready and willing and now here offers to pay such defendant as may be justly entitled to receive the same whatever purchase money he has legally paid to Commissioner Craig on account of the purchase of your orator's land, or to any sheriff on account of subsequent taxes properly assessed and charged thereon, if any such taxes have been paid, which upon information your orator denies, with interest on said moneys from the time they were so paid."

On the 8th of January, 1896, Dorr and Hutton filed their joint and amended answer to the complainant's bill. The exceptions to the original answer were then withdrawn, and the joint amended answer was replied to generally. On the 31st of January, 1896, Dorr and Hutton filed their cross-bill. On the 26th of January, 1898, C. P. Dorr, Elihu Hutton, and King, the complainant, prepared an agreed order or decree, by which King was given all of the relief asked for in his bill, and by agreement of the complainant and these two defendants, Dorr and Hutton, the decree of court provided this cause was retained to settle the differences between the defendants Dorr and Hutton on the one side and James S. Craig on the other. The decree was a decree adjudicating the rights of the plaintiff, and gave to the plaintiff all the relief asked, and settled all of the controversies between the complainant and defendants Dorr and Hutton. After all of the parties had been eliminated from these original suits, and all the relief asked in the original and amended bill of King had been by the court granted, under the agreement between the plaintiff King and the defendants Dorr and Hutton, then the only parties remaining from the original suit were the defendants C. P. Dorr and Elihu Hutton, on the one side, and the defendant James S. Craig on the other. In January, 1902, James S. Craig appeared specially for the purpose of objecting to taking the deposition, taking the ground that no process had ever issued upon said cross-bill, or was ever served upon him, which was set forth in an affidavit. Attention being thus called to the apparent failure to serve the subpœna, process was issued and served. In April, 1902, the defendant James S. Craig demurred to the cross-bill of Dorr and Hutton, which demurrer was set down for hearing, heard, and overruled. Craig afterwards filed a plea in abatement to the cross-bill, which was upon a hearing stricken out, and Craig answered. Evidence was taken both by Dorr and Hutton and the defendant James S. Craig, and on the 20th of January, 1905, a final decree in favor of Dorr and Hutton for $756.28 and costs was entered by the court.

The question presented is therefore one of jurisdiction, arising exclusively on the cross-bill of two defendants under the original bill against a codefendant, to recover money paid said codefendant for land improperly sold by him in an official and fiduciary capacity, which sale was attacked and set aside, arising out of and connected with the subject-matter of the original bill. The purpose of the cross-bill was to cancel the purchase money notes given Craig by Dorr for the land so purchased, and to recover the money paid him. No question is raised as to the jurisdiction of the original suit, but the right of the court to retain jurisdiction of the cross-bill after the decree settling all matters in controversy between complainant King and Dorr and Hutton, Dorr and Hutton and Craig being all residents of the state of West Virginia, is the question discussed and insisted on at the hearing.

The first position taken by appellant, that the final decree drawn, entered by consent of the complainant and the parties to the filing the cross-bill, ended the litigation, and carried with it the cross-bill, is untenable. The questions raised or the subject-matter of the cross-bill was expressly retained by the court, which had acquired jurisdiction of the parties and the subject-matter of the bill. Appellant was a proper party to the original bill, had filed an answer, not traversing the allegations of the bill, but admitting the sale, the payment of the cash, and the execution of the notes for the purchase money, but claims said sale was in all respects regular and legal. The relief asked in the cross-bill grew directly out of the matters complained of, the wrongful sale of the land of complainant, and the collection of the proceeds of such sale, the repayment of which appellant is still resisting. "When the cross-bill alleges additional facts not alleged in the original bill, but which are directly connected with the subject-matter of the original suit, prays affirmative relief directly connected with and arising out of the matters of the original suit and the additional facts alleged, the dismissal of the original bill does not carry with it the cross-bill, and the court may order the cause to be retained for a final hearing and decree upon the cross-bill." Bates Federal Procedure, § 386, and authorities cited. Cross-bills are necessary when certain defendants seek affirmative relief against their codefendant. Veach v. Rice, 131 U. S. 293, 9 Sup. Ct. 730, 33 L. Ed. 163; Overby v. Gordon, 177 U. S. 220, 20 Sup. Ct. 603, 44 L. Ed. 741; Comstock v. Herron, 55 Fed. 812, 5 C. C. A. 266.

The original case at bar was not dismissed, but the relief asked granted, and until this was done the relators in the cross-bill were not entitled to the relief demanded therein. Finding they could not sustain the title to the land acquired by their purchase and deeds from the appellant because of irregularities and other causes, they consented to a decree setting aside such sale and deeds, when, appellant not objecting to such consent decree, and not until then, were they entitled to have the purchase money refunded and the notes surrendered for cancellation. The land was bought in good faith, the cash paid, and the notes for deferred payment executed. If possible, Dorr and Hutton were desirous of retaining the land, defending the title there-

of; but, being advised they could not successfully do so, made a virtue of necessity, and consented to the decree granting the relief demanded in the bill, and asked that their money, for which they had received nothing, be refunded to them by Craig, who does not deny having received it as alleged.

The second position is that the diverse citizenship having been eliminated by the consent decree, Dorr and Craig both being citizens of West Virginia, the United States Circuit Court had no jurisdiction; the court has been devested of jurisdiction of the cross-bill. The same question was raised in Morgan Co. v. Texas Central R. R. Co., 137 U. S. 200, 11 Sup. Ct. 61, 34 L. Ed. 625, and decided adversely to appellant's contention, in 5th Syl. and opinion of the Chief Justice. Jurisdiction of a cross-bill is not dependent on diverse citizenship, and, having once acquired jurisdiction, a court of equity will administer the estate, do complete equity between the parties. A cross-bill is ancillary to the original bill. Morgan v. R. R., ut supra; In re Tyler, 149 U. S. 181, 13 Sup. Ct. 785, 37 L. Ed. 689; Rouse v. Letcher, 156 U. S. 49, 15 Sup. Ct. 266, 39 L. Ed. 341; Carey v. Houston & Texas Ry., 161 U. S. 133, 16 Sup. Ct. 537, 40 L. Ed. 638.

Appellant in his argument seeks to treat the cross-bill as an original bill, ignoring all the authorities on the subject. He contends there was no proper service of the subpœna. We are of a different opinion, but, admitting for the sake of the argument the service was defective, Craig appeared, filed a general demurrer, a plea in abatement, and an answer, and took depositions on a general appearance, without any notice or note that he was appearing under protest, and entering a special appearance for a special purpose. This would amount to a waiver of any irregularity in such service. This about answers all the questions raised in 12 exceptions found in the record, all of which are to the cross-bill, service of subpœna thereunder.

The only other exception is thus stated:

"Thirteenth. The court erred in rendering its decree of January 20, 1905, because the same is contrary to the law and the evidence adduced in the cause."

There was no reference to a master to find the facts, and the court does not state any facts as found, except that on the final hearing of all the matters arising on the cross-bill, demurrers, answers, and depositions there was due from Craig to Dorr, to whom had been assigned the claim of Hutton, the sum of $726.28, with interest thereon from the 28th day of January, 1905, and for costs. The record in this appeal is unsatisfactory, and the thirteenth assignment of error, as above cited, ignores the rules of this court as to exceptions. It does not "set out separately and particularly each error asserted and intended to be urged." It leaves the field open for what was done. Counsel under this exception go into an extended discussion of facts, which involves an examination of the entire record in the cause from the issuing of the original subpœna to the entering of the final decree, and finding the facts, including passing on the credibility of witnesses. This this court will not undertake to do. The following is the decree in which the exception points out no error:

Final Decree.

Thomas M. King v. C. P. Dorr et al. In Equity.

and

Thomas M. King v. Betsy Brown et al. In Equity.

These causes having heretofore been consolidated came on to be finally heard on the cross-bill, rule, and proceedings of C. P. Dorr, on papers heretofore read, former orders, and decrees, the answer of James S. Craig, the depositions of witnesses taken on behalf of the said Dorr on the 16th day of May, 1902, and on behalf of the said Craig on May 18, 1903, and thereafter, filed July 11, 1903. and argument of counsel. On consideration whereof, the court is of opinion that the said Dorr is entitled to recover from the said Craig, as defendant, the sum of $726.28, with interest thereon until paid. It is therefore considered by the court that the said C. P. Dorr do recover from said defendant James S. Craig the sum of $726.28, with interest thereon from January 28, 1902, until paid, together with his costs about his prosecution in this behalf expended, to be taxed by the clerk of this court. It is further adjudged, ordered, and decreed by the court that the said sum of money so decreed to be paid by the said James S. Craig be paid into the registry of this court, to be distributed by said registrar.

After a careful examination of the record, the facts being as herein stated, we find no error in the decree, and the same is therefore affirmed.

GUILD et al. v. PRINGLE.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1906.)

No. 629.

1. TRIAL—DIRECTION OF VERDICT.

A verdict should be directed only where the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different verdict.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 338–340, 376–380.]

2. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

The question of contributory negligence is a question of fact for the jury, except when all the material facts touching the negligence of the person injured are undisputed, and admit of no rational inference but that of his negligence.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence §§ 274, 286.]

3. MUNICIPAL CORPORATIONS—INJURIES FROM DEFECTS IN STREETS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where, in an action against a municipal contractor for the death of a pedestrian by falling into an excavation in a street, the testimony was conflicting as to whether there was a light burning at the point of the excavation at the time, and concerning the extent of deceased's knowledge of the excavation, the refusal of an instruction that deceased was guilty of such contributory negligence in failing to observe and avoid the hole as prevented plaintiff's recovery was proper.

4. SAME—EVIDENCE.

Where, in an action against a municipal contractor for the death of a pedestrian by falling into an excavation in a street, the city was not a party, and no attempt was made to charge it as a joint tort-feasor, evidence of the chairman of the city street committee as to the construction placed on a city ordinance respecting the use of covering, etc., at excavations in the streets was inadmissible.

In Error to the Circuit Court of the United States for the District of South Carolina, at Charleston.

See 118 Fed. 655.

R. W. Shand, for plaintiff in error.

D. W. Robinson, for defendant in error.

Before PRITCHARD, Circuit Judge, and PURNELL and WADDILL, District Judges.

PURNELL, District Judge. Maria H. Pringle, administratrix of Robert S. Pringle, deceased, brought suit for the recovery of $50,000 damages for injuries resulting in the death of her husband, Robert S. Pringle. The defendants, Guild & Co., were engaged, under contract with the city of Columbia, in constructing a sewerage system in the year 1902, and on the 4th day of August had a considerable line of excavation open along Indigo street. This excavation was about 4 feet in width, and from 12 to 16 feet in depth, and extended for a continuous line along said street 500 feet east and west, about 1,000 feet in all. Along the side of the excavation there was an embankment, formed by the earth taken therefrom, from 6 to 9 feet in height. The only breaks in this ditch and embankment were in front of a stable beyond Pringle's house west, and at the point where the same crosses the main line and side track of the A. C. L. Railway. At this point the ditch was tunneled under the railroad tracks, and there was an opening in the embankment for about 25 feet. This opening at the railroad tracks was the only place at which people walking could cross from the north to the south side of Indigo street, except by going east to Gates street or west to the point in front of the stables. The plaintiff's intestate in going to and from his home to the church, on the evening of August 4th, when the accident happened, passed by the excavation between the railroad tracks. The railroad tracks and the space between them leading into Indigo street, across the hole where the accident happened, were much traveled at the time this excavation and hole was left there, and the hole itself was directly in the way used for a walkway. In the middle of the break or excavation, and immediately in the space used between said railroad tracks for a walkway, a hole was dug into the tunnel which had been made under the tracks, which hole was left smooth at the top, and the dirt removed to the embankment on the outside of the railroad tracks. This hole was 4 by 5 feet at the surface and 14 feet in depth. The excavation and embankment rendered the street impassable for crossing purposes, except at the point indicated. The sidewalk east of the hole on the south side of Indigo street and of the embankment was not fit for use. This hole in the middle of the break between the railroad tracks had been dug and left open for several days before the accident. There was an electric street light situated at a distance of about 87 feet from the hole, but this cast a shadow across the hole, obscuring the hole, or making it look like a depression or mudhole. It was admitted that there was no covering or protection at the hole, except a red lantern, which the defend-

ants claimed to have there. The plaintiff offered a number of witnesses who testified that there was no lantern at this hole at which the accident happened at various times during the evening, and just a few moments before the accident. On this there was conflicting testimony. The defendant offered witnesses to prove that there was a light there on the evening of the accident, but a number of these are contradicted, and some of them did not pretend to say there was a light. There was conflicting testimony on this material fact. Plaintiff's intestate usually went to and from his duties in a buggy, did not walk by this hole or excavation, but knew it was there, and had passed by it, as to how many times there is conflicting testimony. At the close of plaintiff's testimony, and again at the close of all the testimony, defendant asked the court to direct the jury to return a verdict for defendant, which request was refused, and, as stated in the record, "with leave to counsel to note an exception." This is not in the prescribed form, but, as no point is made on the form of the record, it is passed by without comment. The jury returned a verdict against the defendants for $15,000, which was adjudged to be excessive, and an order entered setting aside the verdict "unless the plaintiff shall within thirty days from the date hereof file with the clerk of this court a writing remitting and releasing all of said verdict in excess of eight thousand ($8,000) dollars." Plaintiff made the required remitter, and judgment was entered for the reduced amount.

The first two exceptions are to the refusal of the trial judge to direct a verdict at the close of plaintiff's testimony, and again at the close of all the testimony. The rule of the courts of the United States on the subject of directing a verdict is again stated in McGuire v. Blount, 199 U. S. 148, 26 Sup. Ct. 1:

"No rule is better established in this court than that which permits a presiding judge to direct a verdict in favor of one of the parties where the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different verdict. It is clear that, when the court would be bound to set aside a verdict for want of testimony to support it, it may direct a finding in the first instance, and not wait the enforcement of its view by granting a new trial. Elliott v. Chicago, M. & St. P. Ry. Co., 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068; Union Pacific Ry. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434; Anderson County Com'rs v. Beal, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966; Delaware, L. & W. R. R. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213."

Other authorities might be cited, but it is unnecessary. An examination of those above will show that in stating the rule of the words of Justice Day, who delivered the opinion cited, were well chosen. "Where the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different verdict. This must be so in the sound judicial opinion of the trial judge, who, as said in Supreme Lodge v. Beck, 181 U. S. 52, 21 Sup. Ct. 532, 45 L. Ed. 741, is primarily responsible for the just outcome of the trial; but cases are not to be lightly taken from the jury. From the record it appears there was conflicting testimony regarding several material, governing issues of fact, and even counsel in their briefs do not now state the facts alike; they disagree. The trial judge was not

satisfied or even of the opinion the testimony and all the inferences which the jury could justifiably draw therefrom were insufficient to support a different verdict from that rendered by the jury, except as to the amount of damages, and the verdict was reduced in accordance with the views of the court as to this at the instance of defendants. Therefore, there was no error in the court's refusal to direct a verdict, and this exception is overruled.

"(3) The court erred in refusing defendants' request to charge: 'The uncontradicted testimony in this case having shown that R. S. Pringle knew of the existence of the hole at which he met his accident, knew that it was dangerously deep, knew its exact locality, and knew at the time of the accident that he was at the crossing where this hole was, he was guilty of such contributory negligence in failing to observe and avoid it as prevents the plaintiff from recovering in this action, I therefore direct the jury to find a verdict for the defendants,' to which the defendants at the time duly excepted."

On the subject of contributory negligence, the court, among other instructions, gave the following, to wit:

"Was Mr. Pringle himself negligent? Did he show a want of ordinary care? Do you believe from the testimony that he knew the shaft was there? Was he familiar with the location, or were the conditions surrounding such as to put one who was exercising reasonable care on notice that the dangerous place was there? If so, could he have avoided it if he had exercised ordinary care? In other words, was the accident the result of the want of ordinary care on his part? This is an important matter, to be founded upon the facts as you may find them to be, and such proper inferences as you may draw from conditions existing at the time about the shaft. If you come to the conclusion that he was wanting in ordinary care, and for want of such care fell into the shaft, the plaintiff cannot recover, even if you conclude that the defendants were negligent. The law is absolute on this point; no one can hold another responsible for negligence if he himself did not use his senses, did not exercise ordinary care, and this failure was the immediate cause of the injury which is complained of. As more particularly applying to this case, I charge you the law as follows: If the conditions existing around and about the shaft were of such a character as to put passers-by on notice that the shaft was there, and of its dangers—in other words, if a person passing, by the use of his senses in the ordinary way could see the shaft—be warned that it was there—then the duty devolved on such person to use reasonable caution in avoiding it. If a person knew the shaft was there, was familiar with the location and surroundings, the law would impose upon such person the duty of avoiding it, if by the exercise of reasonable care he could do so. Upon this principle you will therefore consider what the conditions around and about the shaft were at the time. What, from the testimony, do you conclude? Was the shaft so situated that it would be seen by a passer-by who was using his ordinary sense of sight? And in this connection you should bear in mind the fact that this sewerage was going on, and that deep excavations had been made and were open along Indigo street, in which the shaft was located. You may consider other circumstances surrounding—you may consider the fact that there was an arc light there, and whether or not that was sufficient to show to persons the location of this place of danger. If it could be seen easily and readily by the use of sight, although it was dangerous, and although defendants may have been negligent, yet if a man approached it refusing to exercise his senses and to use the surrounding circumstances as notice, and take the warning which a man ordinarily would in the exercise of his reason, then the law says, if he stepped into it that way, and was hurt, the defendants would not be liable, because of the fact that the accident was the result of his own want of care, and not because of the negligence of the defendants."

Having properly decided that the testimony was such as not to warrant the court in taking the case from the jury and directing a verdict, the special instruction was not proper, and the charge of the court was all defendants at the trial nisi could ask.

Except when all the material facts touching the negligence of the person injured are undisputed, and admit of no rational inference but that of his negligence, the question of contributory negligence becomes a question of fact for the jury. This has been decided so often it is elementary. Among the recent decisions are N. P. R. Co. v. Amato (1881) 144 U. S. 465, 12 Sup. Ct. 740, 36 L. Ed. 596, syl. 6, cited in Alaska Treadwell Gold Mine Co. v. Whelan, 64 F. 466, 12 C. C. A. 225; Inland Seaboard Coasting Co. v. Tolson, 139 U. S. 557, 11 Sup. Ct. 653, 35 L. Ed. 270; Gleeson v. Midland R. Co., 140 U. S. 443, 11 Sup. Ct. 859, 35 L. Ed. 458; T. & P. Ry. Co. v. Volk, 151 U. S. 78, 14 Sup. Ct. 239, 38 L. Ed. 78; Railroad Co. v. Gentry, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186.

The fourth and final exception is to the refusal of the trial judge to allow the chairman of the street committee and others to testify as to the construction placed upon a city ordinance as to placing covering, etc., at excavations in the streets. This presents a novel question, for which plaintiff in error cites no authority. That city officers can change the law as to negligence or contributory negligence by a construction given their own act is nova impressio. They might, under certain circumstances, make the municipal corporation jointly liable with the contractor, but could not exonerate the contractor. Under no rule of evidence was such testimony competent. The ordinances, or the construction thereof by the city officers, could neither enlarge nor diminish the liability and responsibility of the contractors to the public for negligence in the prosecution of the work in which they were engaged. However, it might have rendered the city jointly liable, but the city was not a party, and the testimony was not offered with the view of proving its joint liability, making it a joint tort feasor. With the view it was offered, the testimony was incompetent, and was properly ruled out.

As the record presents the case, there was no error, and the judgment of the Circuit Court is affirmed. Affirmed.

HENRIE v HENDERSON et al.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1906.)

No. 645.

1. APPEAL—JURISDICTION—CONSENT.

The fact that neither party objected to the jurisdiction of the federal court at the trial was insufficient to justify the circuit court of appeals in assuming jurisdiction to determine the controversy, unless the record affirmatively showed that the case presented was within the class of cases of which jurisdiction has been conferred on the federal courts.

2. BANKRUPTCY—ADMINISTRATION OF ESTATE—SALE OF REAL ESTATE—CONTRACTS—SPECIFIC PERFORMANCE—JURISDICTION.

Where a sale of a bankrupt's lands had been confirmed in the purchaser, and he had paid the purchase price for the same prior to any controversy

concerning his right to a deed, the court of bankruptcy had neither ancillary nor original jurisdiction of a proceeding by petitioner to restrain the trustee from making a deed to the purchaser, and to compel the execution of a deed by the trustee for a portion of the property to petitioner, to compel specific performance of an alleged contract relating to the sale of the land between the petitioner and the purchaser.

Petition for Revision of Proceedings of the District Court of the United States for the Northern District of West Virginia

For opinion below, see 142 Fed. 568.

J. C. McCluer (McCluer & McCluer, on the brief), for petitioner.

V. B. Archer, for respondents.

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

PRITCHARD, Circuit Judge. In the latter part of the year 1904, H. C. Henderson filed his petition in bankruptcy in the District Court of the United States for the Northern District of West Virginia, and was duly adjudged a bankrupt. He was the owner of considerable real estate lying in the county of Wood and state of West Virginia, near the Ohio river, in Williamston district. This land constituted the principal part of his assets, which amounted to about $75,000, and his liabilities were about the same amount. By direction of the court, this land, which was considered very valuable on account of its location and quality, was divided into lots of from 20 to 40 acres each. Lots Nos. 1, 2, and 3 lay adjacent to each other on the line of the Ohio River Railroad, and also the Interurban Electric Line, leading from Parkersburg, in West Virginia, to Marietta, in the state of Ohio. The Union Trust & Deposit Company was appointed trustee in the bankruptcy proceedings of H. C. Henderson, and caused all the lands to be advertised for sale on the 24th of May, 1905. Some lots lying in the town of Williamston belonging to the bankrupt estate were sold on that day, and at this sale James Henrie, petitioner, was a bidder, as was also J. B. Henderson, a brother of H. C. Henderson, the bankrupt. When the sale of these Williamston lots was concluded, J. B. Henderson approached the petitioner, James Henrie, and stated to him, as appears from the evidence as follows:

"I understand, Mr. Henrie, that you intend to buy some of the land down near our home, which will be sold this afternoon, and which has been laid off as lots Nos. 1, 2, and 3."

Mr. Henrie replied that he did intend to bid on it, and if it did not go too high that he would buy it. J. B. Henderson then stated:

"I would like to have that part that lies between the Interurban Railway and the Ohio River Railroad, and if you buy it, and will let me have it, I will not bid against you."

Mr. Henrie replied, "All right, I intend to buy it if it does not go too high." There is a contradiction of evidence about this transaction. J. B. Henderson states that he (Henderson) told Henrie that he was to bid until Henrie would direct him to stop bidding. However, there was some agreement between them, according to the evidence of

both Henrie and J. B. Henderson, that if Henrie bought this land he would let J. B. Henderson have the part that lay between the Interurban Electric Road and the Ohio River Railroad Company's property, and would make him a deed for the same. J. B. Henderson claims that Henrie was to let him have the land at the pro rata price per acre that he would pay for the entire tract. On the other hand, Henrie claims there was nothing said about the price. When the sale was made, these three lots, Nos. 1, 2, and 3, were offered as a whole as advertised, and the 60 acres were bought by Henrie at the price of $5,290. During the time the auctioneer was offering said lands as a whole for sale, Henrie was bidding on same lands, and J. B. Henderson was also bidding. J. B. Henderson states, as appears from the commissioner's report and from the evidence, that J. B. Henderson sent his brother to Mr. Henrie to know when he should stop bidding. Mr. Henrie, the petitioner, in his testimony, says he did come and ask the question, but that he (Henrie) made no reply to the question; that he was surprised at Henderson's bidding after making the proposition to him that he would not bid against him if he (Henrie) would let him have the part of the land indicated, and therefore he made no reply whatsoever to the brother of J. B. Henderson.

After it was announced that James Henrie was the purchaser of the land in question, it was then offered, in pursuance to the advertisement, separately by lots. The petitioner, Henrie, did not bid on these lots separately, but J. B. Henderson did. On two of the lots J. B. Henderson was the highest bidder, and the auctioneer declared him the purchaser of the same. When aggregating the amounts for which the lots separately had been sold, it was ascertained that it was not as much as Henrie had bid for the whole, and the auctioneer then announced that the three lots, Nos. 1, 2, and 3, were sold to James Henrie. Immediately after the sale, James Henrie, the petitioner, not desiring to give his notes for deferred installments of the purchase money, as advertised, and pay interest thereon, stated to the attorney for the trustee that he would pay the entire amount of the purchase money. J. B. Henderson stated that he would give his check for the land that Henrie had agreed he should have if he knew the quantity of the land, but he did not know the quantity, and proposed that his brother, H. C. Henderson, the bankrupt, and Morgan Henrie would some time lay it off. Henrie, the petitioner, stated that he was very busy at the time, and that they could attend to that at any time. After the land had been sold and the sale confirmed and the purchase money paid, J. B. Henderson instituted proceedings in the bankruptcy court to restrain the trustee in bankruptcy from making a deed to James Henrie for the property sold at the trustee's sale and purchased by Henrie, and also prayed for a decree to compel the trustee to make a deed to the said J. B. Henderson for certain portions of the land sold.

It does not appear from an inspection of the record that any motion was made to dismiss the proceeding in the lower court for want of jurisdiction. There is nothing to indicate that either party attempted to raise this question. Nevertheless, it has been held that, where neither party objects to the jurisdiction of the court below,

the consent of parties does not give the courts of the United States jurisdiction, unless the case presented is such as to bring it within that class of cases where jurisdiction has been conferred by the Constitution and laws.

In the case of Cutler v. Wm. A. Rae, 7 How. 730, 12 L. Ed. 890, Chief Justice Taney, in rendering the opinion of the court, says:

"Upon the face of the proceedings, therefore, the question arises whether the District Court had jurisdiction as a court of admiralty to try the matter in dispute. It is unnecessary to state more fully the pleadings and testimony until this question is disposed of. It is true the counsel for the appellant has waived all objections on that score. But the consent of parties cannot give jurisdiction to the courts of the United States in cases where it has not been conferred by the Constitution and laws, and if the proceedings show a case which the District Court was not authorized to try, it is the duty of this court to take notice of the want of jurisdiction, without waiting for an objection from either party."

Also, in the case of Mills v. Brown, 16 Pet. 525, 10 L. Ed. 1055, Chief Justice Taney, among other things, said:

"It is true the plaintiffs and defendants have both waived all objection to jurisdiction, and have pressed the court for a decision on the principal points. But consent will not give jurisdiction. And we have therefore on several occasions said that, when the act of Congress has so carefully and cautiously restricted the jurisdiction conferred upon this court over the judgments and decrees of the state tribunals, it would ill-become the court to exercise it in a different spirit, and it certainly could not be justified in expressing an opinion favorable or unfavorable as to the correctness of this decree when it has not the power to affirm or reverse it."

Even though it appears that the petitioner did not object to the federal court taking jurisdiction of this case, this court would of its own motion refuse to entertain jurisdiction of the parties if it does not affirmatively appear in the record that the court below had jurisdiction. In order to give the court jurisdiction, the record must show upon its face that this is a controversy between citizens of different states, and that the matter in dispute exceeds, exclusive of cost and interest, the sum of $2,000; and, inasmuch as there is nothing in the record which shows affirmatively that the controversy is between citizens of different states, and that the jurisdictional amount is involved, this court must of its own motion refuse to consider this proceeding for want of jurisdiction in the lower court.

This is not a case in bankruptcy in any sense of the word. It is not contended that either the plaintiff or defendant were parties to the proceeding before the referee in bankruptcy. It appears that proceedings were instituted in the bankruptcy court by J. B. Henderson to restrain the trustee in bankruptcy from making a deed to James Henrie for property sold at a trustee's sale in bankruptcy and purchased by Henrie, and also demanding a decree commanding the trustee to make a deed to the said J. B. Henderson for a certain portion of the lands that were sold. An inspection of the record discloses the fact that, before any controversy arose between the parties, the sale of the lands had been confirmed, and Henrie had paid the purchase price for the same. Henderson's contention is that a portion of the land purchased by Henrie should be conveyed to him, in ac-

cordance with a verbal agreement which he alleges was entered into prior to the sale of the lands by the trustee. Thus it will be seen that this is a controversy between two parties, neither of whom was a party to the proceeding in bankruptcy under which the property was sold. It is a controversy which does not in the slightest degree affect the creditors of J. B. Henderson, the bankrupt, nor is the trustee in any wise affected. Stripped of all extraneous matters, it appears to be an effort on the part of Henderson to compel specific performance of a contract relating to the sale of land. There is no provision which gives the bankruptcy court jurisdiction to hear and determine controversies of this kind. The object of the bankruptcy law is to afford the means by which the creditors of the bankrupt may secure an equitable and fair distribution of the bankrupt's property, etc., and the act contemplates that any collateral questions growing out of the settlement of the bankrupt's estate may be heard and determined in that court. But here we have parties who are contending about a matter which is in no way related to or connected with the affairs of the bankrupt. Under these circumstances, we fail to understand the theory on which this proceeding was instituted.

It is insisted that the court below had ancillary jurisdiction to the extent of restraining the trustee from making a deed for the property in question until the respondent could assert his rights in the proper forum. This position is untenable, because the court was without jurisdiction in the first instance; therefore there was nothing on which to base ancillary jurisdiction.

In the case of Raphael v. Trask, 194 U. S. 277, 24 Sup. Ct. 647, 48 L. Ed. 973, Justice Day, who delivered the opinion, among other things said:

"We had occasion to consider the nature of ancillary bills in the late case of Julian v. Central Trust Co., decided at this term, 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 629, and we are unable to find any precedent in the reported cases or text-books which will maintain this bill in that aspect. Ancillary bills are ordinarily maintained in the same court as the original bill is filed, with a view to protecting the rights adjudicated by the court in reference to the subject-matter of the litigation, and in aid of the jurisdiction of the court, with the purpose of carrying out its decree, and rendering effectual rights to be secured or already adjudicated. Story Eq. Pl. (8th Ed.) § 326, et seq.; Root v. Woolworth, 150 U. S. 401, 411, 14 Sup. Ct. 136, 37 L. Ed. 1123; Bates Fed. Eq. Procedure, vol. 1, § 97."

It is well settled that courts cannot exercise ancillary jurisdiction in cases wherein they do not possess jurisdiction in the first instance. Ancillary jurisdiction presupposes primary jurisdiction, and can only be invoked in aid of the same.

We are of the opinion that the court of bankruptcy has no jurisdiction of suits of this character, but, even if this were an effort on the part of the respondent to bring his suit in the Circuit Court of the United States, that court would be without jurisdiction, inasmuch as it appears from the record that both parties are citizens and residents of the state of West Virginia. We are therefore of opinion that the District Court was without jurisdiction to hear and determine the controversy between the petitioner and respondent. The case will be remanded, with instructions to dismiss this suit.

THE WYANDOTTE.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1906.)

No. 613.

1. SHIPPING—DRAFTS FOR ADVANCES—BOTTOMRY BOND.
Where the master of an English vessel lying in the port of New Orleans ready to sail with cargo was without funds, and was unable to hear either from the owners or the charterers, a draft drawn by the master to raise money for supplies and to pay legal obligations in such port, which was duly discounted at the instance of the ship's agents, was in the nature of a bottomry bond, and created a lien on the vessel enforceable in admiralty.
[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 362, 373–376, 391.]

2. SAME—DOMESTIC CHARTER.
Where the master of a foreign vessel lying in the port of New Orleans ready to sail executed a draft in the nature of a bottomry bond to raise money for expenses, the foreign character of the vessel was not affected by the fact that she was sailing under a charter executed in New York.

3. SAME—LIEN—ENFORCEMENT—WHAT LAW GOVERNS.
Where the charter of an English vessel executed in New York provided that it should be governed by the American law, and the vessel shipped her cargo and contracted debts for which a bottomry bond was executed at New Orleans, the liability of the vessel was governed by the law of the United States, and not by the law of the flag.

4. ADMIRALTY—APPEAL—RECORD—EVIDENCE.
On an appeal in admiralty, evidence not made a part of the bill of exceptions will not be considered.

5. SHIPPING—BOTTOMRY BOND—SUPPLIES—DEFENSES—BURDEN OF PROOF.
Where, on a libel in admiralty on a draft in the nature of a bottomry bond given for supplies, defendants claimed that the supplies might have been obtained on the personal credit of the owners, the burden was on such owners to show that they had credit in the port where the bond was executed.
[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 398.]

6. ADMIRALTY—APPEAL—ASSIGNMENTS OF ERROR—FORM.
An assignment that the court erred in not dismissing a libel against a vessel with costs was a mere expression of opinion of counsel as to the duty of the district judge, and not a sufficient assignment of error.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

In Admiralty.

For opinion below, see 136 Fed. 470. Affirmed.

J. Parker Kirlin (Floyd Hughes and Convers & Kirlin, on the briefs), for appellants.

H. H. Little (Hughes & Little, on the briefs), for appellees.

Before PRITCHARD, Circuit Judge, and PURNELL and KELLER, District Judges.

PURNELL, District Judge. Appellants in their appeal make only three assignments of error, as follows:

"(1) The court erred in holding that the libelants were entitled to recover in the proceedings in rem against the said steamship for any part of the demand set up in the libel.

"(2) The court erred in holding that the libelants were entitled to recover against the steamship in the sum of sixteen hundred and fourteen dollars and fifty-two cents ($1,614.52), with costs, and in holding that said sum, or any part thereof, should have been recovered against the steamship in a proceeding in rem.

"(3) The court erred in not dismissing the libel, with costs."

The libel alleged that in November, 1901, the firm of Baccich & Clement were engaged in the ship brokerage business at New Orleans. During the month the steamship Wyandotte was in the harbor of New Orleans, and was as to them a foreign vessel. The vessel was in need of money to pay her necessary disbursements, and to furnish her with provisions and necessary supplies for the prosecution of her intended voyage, and at the request of the owners of the steamship or her agents, Baccich & Clement furnished certain sums of money to the steamship for the purposes aforesaid, a schedule of which was attached to the libel.

The original schedule is as follows:

New Orleans, November 13th, 1901.

S. S. Wyandotte and Owners, for Hull, England. In Account with Baccich & Clement.

Disbursements.

Consul's fees, 1.25 2.65	$ 3 90
Towage W. G. Wilmot & Co.	50 00
Shipwright's acct. J. O. B. Ross	507 29
Capt. Laurie	10 00
Ship Chandlery, Woodward, Wright & Co., Ltd.	6 10
Medical attendance Dr. D. A. Ledbetter	20 00
Machinists acct. Schwartz Foundry	17 00
Attendance £10—10@4.87	51 13
Surveyor's certificates 5.00, 20.00	25 00
Crew notice, Times, Democrat	3 00
Butcher, Mrs. R. Cobden, 56.60, Northern 99.75	156 35
Cash advanced Captain 100, 25	125 00
Standard Oil Co.	15 53
Lambon & Noel	3 25
Postage and petties	25 00
2½% commissions on disbursements	40 75
2½ % commissions as per charter 5,700 tons @ 12s/6d., £3562—10= £89 ½ @ 4.87	435 82
Cables, ours, 17.50, Ocean 3.30, Maritime 6.25	26 85
1¼% ins. on diff. in freight £1235=£13—3—8, @ 4.87	75 15
	$1,614 52

E. J. Richards, Master.

The libel alleged that the charges shown in the schedule were just and reasonable, that the advances and charges were necessary and proper, and were furnished on the credit of the vessel as well as of her owners, and that they constitute a lien on the vessel by the general maritime law.

It was further averred that, in order to pay for these advances and disbursements, the master of the steamship executed his draft or bill of exchange in duplicate, dated New Orleans, November 15, 1901,

whereby he promised to pay to the order of himself, five days after the arrival of the vessel at the port of Hull, England, the sum of £336.7.2 in approved banker's demand bills on London, for value received, for necessary disbursements owed by the vessel at the port of New Orleans, "and for the payment of which he pledged the vessel and freight."

The original draft is in the following form:

Disbursements.

£336.7/2 stg.

New Orleans, November 15, 1901.

Five days after arrival (or upon the collection of the freight, if sooner made,) of the British S/S "Wyandotte" under my command at the Port of Hull, England, or any other place at which her voyage may terminate I promise to pay to the order of myself the sum of three hundred and thirty-six pounds 7/2 British sterling in approved Bankers demand bills on London for value received for necessary disbursements owed by my vessel at this port for the payment of which I hereby pledge my vessel and her freight and I hereby assign to the legal holder of this obligation all my lien and claim against freight vessel and owners with power to take in my name any and all steps necessary to enforce the same; and my consignees at Port of discharge are hereby instructed to pay this obligation; and deduct the amount thereof from the freight due said vessel; in case of non-payment the holder shall also be entitled to the benefit of all liens in law, equity or admiralty which the master or owners of the vessel may be entitled to against any part of the cargo or its owners for freight compress or other charges on cargo paid by the vessel or master at the port of loading.

This claim to have priority of payment over all others that may be presented against the said freight and vessel.

My vessel is now lying at the port of New Orleans loaded with grain and ready to sail for Hull, England.

Signed in duplicate one being accomplished the other to stand void.

Baccich & Clement, New Orleans and Galveston.

The indorsements are:

Pay to the order of Peter Wright & Sons,

E. J. Richards, Master S/S Wyandotte.

Pay to the order of Henry Schroder & Co.

Per pro Peter Wright & Sons, W. Wright.

[Stamps.]

The answer admitted that the vessel was in New Orleans in November, 1901, and that the master signed a draft in the form set forth; but it denied the other averments of the libel.

The district judge, sitting in admiralty, found the facts to be as stated in the libel; that the ship was owned by the British Maritime Trust, the claimant thereof, and by their representative at New York, on the 24th of September, 1901, was chartered to one W. W. Wilson, as agent for an undisclosed principal, under which she was to proceed to Port Eads for a cargo of wheat or maize, and upon arriving at said port to be loaded at Galveston or New Orleans, as directed by the charterers. The ship proceeded to Port Eads, reaching there on the 10th day of October, 1902, and immediately by telegram advised the charterer of her arrival, and that she was awaiting orders. No orders were given until the 9th day of November, 1902, when the ship was ordered to New Orleans, to which port she at once proceeded, and reported to Baccich & Clement, the charterer's agents, and to whom she

was consigned. The loading was concluded on the 15th of November, and she on that day sailed from New Orleans to the port of Hull, England, where the cargo was discharged. Respondent insists that the lay days expired on the 10th day of November, 1902, and that demurrage was due from that day to and including the 16th of November, as well as for time for detention in unloading from December 14th to December 23d, both inclusive. Also, that there was a shortage of cargo of 162 tons, for which she was entitled to recover, and on those two accounts there was due to them a sum in excess of the amount sued for. The charter party provided that the steamer should be consigned to the charterer's agents at the ports of loading and discharge, and should employ their broker to attend to the ship's business; that the cash for the captain's ordinary disbursements at the port of loading were to be advanced, if required—the steamer paying 2½ per cent. commissions and cost of insurance thereon—the amount advanced to be covered by the captain's draft, payable three days after the ship's arrival at the port of discharge out of the freight on which the draft formed a lien. Prior to the captain's departure from New Orleans, a statement was made and duly signed by him of the ship's disbursements, amounting to $1,614.52, for which he drew a draft on November 15th, payable to his own order five days after the arrival of the ship at the port of Hull, England, or wherever else the said voyage might terminate, unless the freight was collected sooner, as before stated, and recited the provisions of the draft. The draft was regularly discounted by the libelants' agents at New Orleans for Baccich & Clement, the agents for the charterers and for the ship at said port, and the proceeds arising therefrom applied to the payment of the ship's bills, as certified to by the master. Prior to sailing, the charterers accounted with the ship's master for the differences of freight due by them, amounting to 1,235 pounds, for which two drafts were given to the ship's master, and duly forwarded by him to the owners of the ship.

The defense interposed by the claimant is that certain items included in the draft, amounting to $702.70, were not claims of a maritime character, and the libel as to them could not be maintained; that under the terms of the charter party the ship's master was limited to drawing upon the freight money, as distinguished from the ship itself; that the claimant should have the right to offset against the draft sued on for any loss sustained either by reason of shortage in the cargo or demurrage; and that the damages in that respect more than covered the amount sued for.

The appellant contends that the instrument set out in the record is a bottomry bond, or a master's draft in the nature of a bottomry bond, and this court concurs in such contention, under the definition of the Chief Justice, who delivered the opinion in the Grapeshot Case, 9 Wall. 135, 19 L. Ed. 651, as follows:

"A bottomry bond is an obligation, executed generally in a foreign port by the master of a vessel for advances to supply the necessities of a ship, together with such interest as may be agreed on, which bond creates a lien on the ship which may be enforced in admiralty in case of her safe arrival

in port of destination, but becomes absolutely void and of no effect in case of her loss before arrival. Such bond carries usually a very high rate of interest to cover the risk of loss of the ship, as well as a liberal indemnity for other risks as well as for the use of the money, and will bind the ship only where the necessity for supplies and repairs in order to the performance of a contemplated voyage is a real necessity, and neither the master or owners have funds or credits available to meet the wants of the vessel."

There is no contention that the Wyandotte was not a foreign vessel. She hailed from and was owned in England, and while chartered in New York this did not and could not change her character in the port of New Orleans. It is equally well settled that the master was without funds, that he could hear neither from the owners or the charterers, and it is not disputed that the vessel had shipped her cargo and was ready to sail. The necessity for supplies seems to be the test, and not, as contended, that every item must be such as would maintain a libel for a maritime lien. It was not necessary, as said by the Chief Justice in the case above cited, to set out each item in the schedule accompanying the master's draft or bottomry bond, and no provision in the charter party could change the general maritime law, or relieve the owners of any lien on the vessel. If this could be done, it would open the doors for unlimited fraud by dishonest masters of foreign ships in the ports of this country. Being a bottomry bond, the claimants had a right to proceed thereon in rem against the property hypothecated, under admiralty rules 17 and 18.

The argument that a bottomry bond is governed by the law of the flag of the ship—an application of the popular saying that the law follows the flag—is without force, since the American law is adopted in the charter party, the vessel was chartered in New York, shipped her cargo and contracted the debts for which the bottomry draft or bond was executed at New Orleans; all in America—an American contract, governed by the laws of America—the United States.

The case of The Lulu, 10 Wall. 192, 19 L. Ed. 906, and The Kalorama and The Custer, 10 Wall. 204, 19 L. Ed. 141, cite and affirm The Grapeshot, 9 Wall. 135, 19 L. Ed. 651; and the doctrine is again declared that in the case of a lien asserted against a vessel supplied in a foreign port, necessity for credit must be presumed where it appears that the supplies for which a lien is set up were ordered by the master, and were necessary for an intended voyage, unless it is shown that the master had funds or the owners had sufficient credit, and that the furnisher or lender knew these facts, etc. Upon this the decision in Re The Grapeshot has been cited in a great many opinions, down to and including The Valencia, 165 U. S. 267, 17 Sup. Ct. 323, 41 L. Ed. 710, Norwegian S. S. Co. v. Washington, 57 Fed. 225, 6 C. C. A. 313; The Bertha M. Miller, 79 Fed. 366, 24 C. C. A. 641, and The Iris, 100 Fed. 106, 40 C. C. A. 301. In fact, the doctrine has never been seriously questioned. Baccich & Clement were, under the terms of the charter party, the agents of both the owners and the charterer, the master was the representative of the owners of the ship and the charterer, and both, with the ship, were in New Orleans, while their constituents were many miles away, and did not respond promptly to telegrams or cablegrams. The exact whereabouts of

neither are definitely disclosed. The ship was ready to sail. Who, then, was better able to judge of the necessity of executing a bottomry draft or bond? The agents and master were without money, either of the owner's or charterers'. True, drafts for the freight money were received by the master, but these drafts are omitted from the record. It is not disclosed by whom they were drawn, upon whom, or to whose order they were payable. They might or might not have been collected, but there is no satisfactory evidence as to those drafts, except that they were for freight, and were forwarded to the shipowners. The inference is they were payable to the owner's order. Like many exhibits necessary to a full understanding of the case referred to in the depositions and argument, they are not in the record. The record is in this respect unsatisfactory, does not comply with the rules or the stipulation of proctors, which includes expressly the exhibits as a part of the record to be sent to this court. Even the charter party is handed up in detached sheets, and not included in the record. Evidence not made a part of the bill of exceptions, though appended, is not regarded by the Supreme Court. Bank v. Kennedy, 17 Wall. 19, 21 L. Ed. 554; Mays v. Fritton, 20 Wall. 414, 22 L. Ed. 389. Admiralty seeks to do natural equity and justice is as a rule untrammeled by strict technical rules, and, of necessity, is liberal in the construction of contracts. The funds realized on the bottomry bond or draft were used in paying claims against the ship—claims created by the agents and master in good faith for what under the circumstances they deemed necessities. The owners and ship received the benefit, and it is just and equitable they should be held responsible. The objection to a bottomry bond that the supplies might have been obtained on the personal credit of the owners is not new, but it is settled that, when such defense is set up, the burden is upon the respondent to show that such owner or charterer had credit or funds at the port where the master obtains the supplies, etc., or executes the bottomry bond. This was held in Re The Virgin (in 1834), 8 Pet. 538, 8 L. Ed. 1036, and which has been cited with approval on this principle in Re O'Brien v. Miller, 168 U. S. 287, 18 Sup. Ct. 140, 42 L. Ed. 469, The Grapeshot, 9 Wall. 139, 140, 19 L. Ed. 651, and The Lulu, 10 Wall. 192, 19 L. Ed. 906. There was no attempt to show the owners had credit at New Orleans.

This disposes of the first two exceptions, and, without quoting from the opinion of the district judge, which we adopt, is conclusive of the case. Appellants, while only taking three exceptions, divide the argument into five heads, and make an argument which is technical, academic, and interesting, but without controlling force.

The third exception is more the expression of opinion of counsel as to the duty of the district judge than an exception. Under the rules governing the practice in appellate courts, and especially under the rules of this court, we cannot concur in this expression of opinion, but for the reasons stated affirm the decree entered by the district court.

Affirmed.

KERN et al. v. SNIDER.

(Circuit Court of Appeals, Seventh Circuit. April 10, 1906.)

No. 1,219.

1. EVIDENCE—SUFFICIENCY—QUESTION FOR JURY.
A verdict cannot rest on mere conjecture, but there must be some direct evidence of fact or circumstance from which a jury would be warranted in saying that the inferences therefrom clearly preponderate in favor of the existence of the fact, in order to take the case to the jury.
[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2446, 2449; vol. 46, Cent. Dig. Trial, §§ 338–340.]

2. TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE—TYING HORSE IN STREET—INJURIES TO PEDESTRIAN.
In an action for injuries to plaintiff, who was struck by a wagon drawn by a runaway horse, the cause of the horse's fright was not shown, but it appeared that the strap by which the horse was held was weak, that it was tied low, and was broken before the horse reared and started to run. *Held*, that a request to charge that, if the jury found that the fright of the horse was so great that no strap such as an ordinarily prudent man would have used would have been sufficient to hold the horse, then the verdict should be for defendants, was properly refused, as misleading the jury to conjecture that the fright might have occurred before the strap broke and was the result of some act or occurrence not proved.

3. MUNICIPAL CORPORATIONS—STREETS—NEGLIGENCE IN TYING HORSE—INJURY TO PEDESTRIAN—EVIDENCE.
Where a pedestrian was injured by a wagon drawn by a runaway horse, and it was shown that the strap by which the horse was tied was weak, that it was tied low, and was broken before the horse reared and started to run, it was sufficiently shown that the weak strap was the cause of the injury, to sustain a verdict for plaintiff.

4. APPEAL—DAMAGES—EXCESSIVENESS—REVIEW.
Where, in an action for personal injuries, a verdict in favor of plaintiff for $5,000 was cut down to $2,000 by the trial judge as a condition to denying a motion for a new trial, on the ground that the injury was not permanent, and plaintiff accepted such reduced amount, the judgment would not be reversed on appeal because such amount was still excessive.

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

Action to recover damages for a personal injury suffered through the alleged negligence of the servant of the plaintiffs in error. There was a verdict for defendants in error for $5,000. On motion for new trial the court below found that the injury was not permanent in its character, and ordered a new trial, unless defendants in error should elect to remit $3,000, and take judgment for $2,000. They so elected, judgment was entered accordingly, and writ of error to review the same sued out.

Frank M. Hoyt, for plaintiffs in error.

Morse Ives, for defendants in error.

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

SANBORN, District Judge. The injury complained of was sustained June 4, 1903, about 3 p. m. Defendants' servant, engaged in taking orders for the sale of flour, was using a horse and buggy in

the business. He visited a bakery at No. 1000 Lake street, Chicago, and hitched the horse in front of a saloon opposite the bakery, near the corner of Lake street and Western avenue. There was a double-track surface street railway on Western avenue, and the cars ran each way, some four or five minutes apart. There was also an elevated railway in Lake street, the cars running every five or six minutes, with from two to four cars to the train; also a surface street car line on Lake street, on which the cars run every six or seven minutes. The elevated trains make a great noise. The horse was 10 or 12 years old, very gentle, and accustomed to the sights and sounds of the city. He was accustomed to go between railroad tracks and between and about automobiles and never had given any trouble; was not afraid of electric cars, elevated trains, or automobiles; papers blowing towards him would not occasion fright. When left standing on business streets he was always hitched, but on others was often left without tying. On the day mentioned the horse was tied by putting the tie strap, hitched to the ordinary weight, through a ring in the cement sidewalk, about a foot above the roadway, and then up to the bridle. The strap had been in use about a year, and had been used some 2,000 times. It had been partly torn through, and, according to some of the testimony, was so rotten that it could be pulled apart with the fingers. At the time the horse was hitched some boys were playing near by, throwing small stones from one to the other, and were cautioned by the salesman not to hit the horse. Some of the witnesses noticed the horse standing hitched in front of the saloon, but no one noticed him when he broke away, after which witnesses in the saloon saw him on the cement walk, with his head close to the saloon window. He then sprang up or reared as if he was going through the window, and then turned and ran east on the sidewalk on Lake street. The plaintiff, a boy then seven years old, came out on the walk and was struck on the head by one of the buggy wheels, causing the injury complained of. After running a block or so the horse slowed down and was readily caught. After the accident the boy was unconscious for four days, but was out again in about three weeks. Plaintiff gave testimony to show a permanent injury, but the court charged the jury, and on the motion for new trial afterwards held, that all the evidence showed only a temporary injury; as already stated the plaintiff accepted a judgment for $2,000, which defendant insists is still too large.

Several errors are assigned, of which only two were pressed on the argument. No exception was taken to the charge, but defendants requested the following instruction:

"Even if you find that the defendants' servant Neumann was negligent in tying the horse in the manner in which, and with the strap with which, the horse was tied, yet, if you find that the fright of the horse was so great that no strap, such as an ordinarily prudent man would have used, would have held the horse, your verdict will be for the defendants."

The instruction asked and refused was not clearly applicable to the facts shown, or to any reasonable inferences from such facts, though perhaps as applicable as any which could have been drawn. Taking a view of the evidence most favorable to defendants in error, the fol-

lowing facts appear: The gentle character of the horse, the fact that he was not afraid of cars or automobiles, the noisy place, the boys throwing stones, the caution given them, the weak strap, tied low, broken before the horse reared, the season of the year, and the fright of the horse. These facts, and all reasonable inferences from them, were before the jury. Among the inferences which the jury might reasonably draw, it may be said that it is an unusual thing for a gentle horse, or any horse, to get on the sidewalk. In the absence of direct evidence of what caused the fright, it may have resulted from fighting flies, and thus getting a forefoot over the strap, followed by such a strain on the strap as would part it, in its weak condition, and cause the fright. The inference is at least as plausible as that the fright occurred before the strap was broken, from the noise, to which the horse was thoroughly accustomed, or a stone thrown by a boy, or some unknown sight, sound, or action.

The question is: Are sufficient facts shown to sustain the verdict? Meaning by facts not only the things shown by evidence, but all reasonable inferences from the things so shown, and shown, also, either by direct or circumstantial evidence. An event which no one saw may none the less be sufficiently explained, and responsibility located, accident rebutted, or a particular design established. A case in point, though generally regarded as an extreme one, is Johns v. N. W. Mutual Relief Ass'n, 90 Wis. 332, 63 N. W. 276, 41 L. R. A. 587. There an insured person was found dead in a cistern. No one saw the occurrence. Accident, and consequent liability on his policy, was alleged. The defense was suicide. The court found that death resulted from suicide, because the opening of the cistern was so small as to almost certainly exclude the possibility of accident.

Here we have several facts clearly established by the testimony, or some of the testimony—the fright, the broken strap, the defective strap, the gentle character of the horse, and that the rearing of the horse was after the strap was broken. Not only do these facts appear, but also all legitimate inferences from these facts. Putting them all together do they show both negligence and anticipation? That is, want of ordinary care, and a result reasonably to be anticipated by that ideal character, an ordinarily prudent man? "Judicial determinations must rest upon facts, and legal liability must be determined by law in application to facts. That does not exclude circumstantial evidence, for such evidence is often the strongest, but it must establish facts." Sorenson v. Menasha Co., 56 Wis. 338, 14 N. W. 446, approved in Clark v. Insurance Co., 111 Wis. 65, 68, 86 N. W. 549. Mere conjecture will not sustain verdicts. They must be founded on evidence which convinces the mind. They cannot rest on mere guess or speculation. Spencer v. Railway Co., 105 Wis. 311, 313, 81 N. W. 407. The mere unexplained fact that water, or some missile, entered a car and injured a passenger is not sufficient. Id.; Thomas v. Railroad Co., 148 Pa. 180, 23 Atl. 989, 15 L. R. A. 416. "Evidence, or an inference therefrom, showing the bare possibility of the existence of a fact in issue, will not do. Verdicts can be based only on reasonable probabilities. Mere possibilities cannot establish probability."

O'Brien v. Railway Co., 102 Wis. 628, 78 N. W. 1084. There must be some direct evidence of a fact, or circumstances from which a jury would be warranted in saying that the inferences therefrom clearly preponderate in favor of the existence of the fact, in order to take the case to the jury. There must be sufficient evidence to remove the question from the realm of mere conjecture. Hyer v. Janesville, 101 Wis. 371, 376, 77 N. W. 729. When there are sufficient facts to go to a jury its finding is conculsive, unless reasonable men must have drawn from the facts a different conclusion. M. K. & T. Ry. Co. v. Byrne, 100 Fed. 359, 40 C. C. A. 402.

A number of conjectures may be made from the evidence, as to the cause of the accident. The noise of an elevated train, or street car, of the boys playing or throwing stones, or some other noise or act, may have caused the fright, followed by such a pull as would have broken a good tie-strap. But these are all possibilities, of uncertain character. On the other hand, responsible facts appear—the weak strap, tied low, its being broken before the horse reared, the fright, and all reasonable inferences which the jury might draw from such facts, and others mentioned. These are enough, we think, to sustain the verdict. The request of defendant to charge that, if the jury found that the fright of the horse was so great that no strap, such as an ordinarily prudent man would have used, would have held the horse, then the verdict should be for defendants, does not tally with the fact that the fright appeared to be after the strap was broken. The instruction, if given, would have permitted conjecture by the jury that the fright might have occurred before the strap broke, and was the result of some noise or act not appearing in evidence, either directly or circumstantially. A responsible cause—the weak strap—appears, which might reasonably have caused the fright, and, in due course, the injury. This is enough to sustain the verdict. To have granted the request would, it seems, have been error against plaintiff.

But it is insisted that the verdict, standing at $2,000, is still excessive, as compensation for a temporary injury, though admittedly a violent and serious one. Here we have the judgment and discretion both of the jury and the trial court in favor of the lessened verdict. Appellate courts are always reluctant to act in such cases, and in no class of cases does the amount of damages rest so largely in the discretion of the trial court and jury as those for personal injuries.

The judgment of the Circuit Court is affirmed.

COMPTOGRAPH CO. v. MECHANICAL ACCOUNTANT CO.

(Circuit Court of Appeals, First Circuit. May 4, 1906.)

No. 612.

1. PATENTS—INFRINGEMENT.
Infringement is not avoided by the fact that the defendant's device performs some other function additional to that of the patented device.
[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 380.]

2. SAME—COMPUTING MACHINE.
The Felt patent, No. 465,255, for a computing machine, claims 7 and 8, which cover a subtraction cut-off, are for a combination and not merely an aggregation of parts and disclose invention. Also *held* infringed.

Appeal from the Circuit Court of the United States for the District of Rhode Island.

For opinion below, see 140 Fed. 136.

John W. Munday and Henry Love Clarke, for appellant.

Wilmarth H. Thurston (Warren R. Perce, on the brief), for appellee.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

COLT, Circuit Judge. This suit was brought for infringement of letters patent No. 465,255, dated December 15, 1891, granted to Dorr E. Felt, for improvements in computing machines. Computing machines are for performing arithmetical problems mechanically, thereby doing away with the mental operations incident to their performance in the ordinary way. Computing machines of the type of the patent in suit are simply mechanical adding machines.

The alleged infringement is limited to claims 7 and 8 of the patent. These claims cover a single feature of the Felt machine, known as the "subtraction cut-off." This cut-off is a simple mechanical device for the correction of the error of 1 on the left of the true remainder, which always appears in additive subtraction when the complement of the subtrahend is added to the minuend. The device consist of a series of pivoted levers so arranged with respect to the numeral-wheels and carrying mechanisms as to throw out of operation, in any given sum in additive subtraction, the particular carrying-pawl which causes this error of 1.

In adding machines prior to the Felt patent, when this error in the remainder appeared upon the reading line of the machine, it either had to be corrected on the machine or mentally disregarded. Felt was the first inventor to incorporate into an adding machine the mechanical means for the prevention of this error.

The error in question may be illustrated by the following example: For instance, to subtract 6 from 9, we first find the complement of the subtrahend, 6, by subtracting 6 from 10, which gives us 4; we then add 4 to the minuend, 9, which gives us 13, or the correct result. 3, plus an error of 1 on the left. In performing this example upon adding machines of the Felt type, we would first strike the 9 key of the units series of keys, which would bring the figure 9 on the

units numeral-wheel to the sight or reading line of the machine; we would then strike the 4 key of the same series, which would bring 13 to the reading line, the 3 being on the units numeral-wheel and the 1 on the tens numeral-wheel. By the operation of the Felt subtraction cut-off, this error of 1 on the tens numeral-wheel will be prevented, and only the true remainder, 3, will appear on the reading line of the machine.

The cause of this error is manifest when we look into the nature of the operation of additive subtraction. We have, as illustrated in the foregoing example, performed subtraction by adding the complement of the subtrahend, 6, which is 10—6, or 4, to the minuend, 9, making the result 13, or 10 in excess of the true remainder. In this operation we have committed the obvious error of increasing the minuend by 4 instead of decreasing it by 6, and the measure of this error is plainly the sum of 6 and 4, or 10. In other words, the measure of the error is the power of ten from which the subtrahend is subtracted to produce the complement. It follows that the error in the remainder in any given example of additive subtraction is 10, or 100, or 1000, or 10,000, according to the power of 10 from which the subtrahend may be subtracted, and, since naughts count for nothing, that this error will be represented by 1 on the left of the true remainder.

In referring to this feature of the Felt machine, the patent says:

"Another object of my invention is to prevent the carrying of tens from any column to the next higher whenever a subtraction is made by means of adding a complementary number, as hereinafter explained."

We have here the underlying conception of the Felt subtraction cut-off, which was so to organize his machine as to prevent the operation of the carrying mechanism whenever it is necessary to prevent it in performing additive subtraction. That the error in question is caused by the carrying mechanism, and may be prevented by preventing the operation of a particular carry, clearly appears from the following considerations:

As the tens are carried mentally in arithmetical addition, so an adding machine in its normal operation carries the tens mechanically by carrying 1 to the numeral wheel of the next higher order, as from the units wheel to the tens wheel, and from the tens wheel to the hundreds wheel, and so on throughout the series of wheels. Now, it is apparent that this error of 1 on the left of the true remainder is due in each example to the particular carry of 1 either from the units column to the tens column, or from the tens column to the hundreds column, or from the hundreds column to the thousands column, dependent in each case upon the power of 10 from which the complement is subtracted.

For instance, in the example already given of subtracting 6 from 9 by additive subtraction, the error of 1 in the tens column was caused by the carrying of 1 from the units column; and, if this carry had not taken place, the result would have been the true remainder, 3, on the reading line of the machine. So, if the example had been to subtract 66 from 99, the error of 1 in the hundreds column would have been caused by the carrying of 1 from the tens column to the hundreds

column. So, if the example had been to subtract 666 from 999, the error of 1 in the thousands column would have been caused by the carry of 1 from the hundreds column to the thousands column.

The patent then proceeds to point out the way this error had to be corrected in prior adding machines, including the machine covered by an earlier Felt patent. This correction was made on prior machines by striking once all the 9 keys to the left of the true remainder, and striking the last 9 key ten additional times. This operation was known as "running off the nines." For instance, in the example already given, the subtraction of 6 from 9, in which the remainder on the reading line is 13, the error of 1 in the tens column was corrected by first striking the 9 key of that column, which brought a 0 to the reading line of that wheel, but which at the same time, through the carrying mechanism, caused a 1 to appear on the hundreds wheel. This 1 must be got rid of in the same manner by striking the 9 key of that column, and so on through the entire series of wheels to the left. This would still leave the 1 on the extreme left-hand wheel, which has no series of keys attached to it. To cancel this 1 requires ten depressions of the 9 key of the last or adjoining series.

The patent then proceeds to describe the means employed for preventing this error, the mode of operating these means, and the result accomplished:

To save the carrying of the 1 above mentioned and afterwards adding the 9's as above described, the following device is provided: There is a series of levers, one for each carrying-pawl. Each lever is provided with a finger-piece, which extends upward within convenient reach of the operator. Each lever is also provided with an arm adapted to engage with the under side of its carrying-pawl and hold the carrying-pawl from engagement with its numeral-wheel. When the operator makes a subtraction, the lever at the left of the highest column or series of keys in which a key is struck in the subtrahend is pushed backward, which raises the carrying-pawl which carries from this highest series or column of keys to the next column to the left. By this construction and operation the carrying-pawl is held out of operation, so that the complementary number is added and the tens of the highest series are not carried, thereby making a proper subtraction.

Having thus clearly set forth the object of his invention, the way in which the error in question was corrected in performing additive subtraction on prior adding machines, and the mechanical means he has devised for the prevention of this error, the patentee then proceeds to claim this invention in the following claims of the patent:

"(7) The combination, with numeral-wheels, actuating devices therefor, carrying-pawls, and devices for actuating said carrying-pawls to carry the tens, of a device for preventing the operation of the carrying-pawls, whereby the operation of subtraction is accomplished, substantially as specified.

"(8) The combination, with numeral-wheels, 4, actuating mechanism therefor, and carrying-pawls, 27, of levers, 44, having arms, 46, substantially as and for the purpose specified."

These combination claims were intended to cover the mechanical device described in the patent for facilitating and perfecting the per-

formance of additive subtraction upon an adding machine. They were manifestly not designed to cover generally the operation of additive subtraction, since the patent expressly states that such problems had been performed on prior machines. Nor were they, when read in connection with the specification, designed to cover every device for preventing the operation of the carrying-pawls upon an adding machine. They plainly were intended to cover, and do in fact cover, as one of the elements of the combination, the subtraction cut-offs described in the patent. When claim 7 refers to this mechanism as "a device for preventing the operation of the carrying-pawls," these words must be read with what follows, namely, "whereby the operation of subtraction is accomplished, substantially as specified," that is, in the manner set forth in the patent. The terms of claim 8 are more specific, in that it mentions the "levers, 44, having arms, 46." The only proper and reasonable construction of both claims is that each is for the combination of elements for performing complementary subtraction upon an adding machine in the way described in the patent, that claim 7 covers as one of its elements the series of pivoted levers known as the subtraction cut-offs, and that claim 8 covers as one of its elements such levers when provided with the "arms, 46."

It is contended that these claims are for mere aggregations. This position, however, is obviously untenable, since the subtraction cut-offs, or pivoted levers, co-operate with the carrying-pawls in the production of a new and useful result. It is true that only one pivoted lever co-operates with one carrying-pawl in the performance of any given sum in additive subtraction. But it by no means follows from this circumstance that the claims are for mere aggregations, or even that the series of pivoted levers are mere aggregations. We are not dealing with a subtraction machine for performing a single sum, but with a machine for performing all like sums, and this problem could only be solved by the incorporation into such a machine of the means by which all such sums could be performed. The fact that only one pivoted lever happens to be called into operation in performing a given sum is immaterial. The whole series of levers are indispensable when we take into consideration the subject-matter with which we are dealing.

It is further contended that the subtraction cut-offs do not exhibit any patentable subject of invention, in view of the prior art. A large part of the present record, as well as the briefs of counsel, is devoted to a discussion of this branch of the case, and especially to the discussion of the so-called universal cut-off as an anticipation of the Felt device.

No prior patent contains any reference whatever to any kind of a subtraction cut-off. The so-called universal cut-off of the Kelso 1886 patent, the Shattuck & Thorn 1882 patent, and the Carroll 1876 patent, was for the sole purpose of throwing out of operation all the carrying mechanisms in order that the numeral wheels may be turned back to zero, and so cancel the reading line on the machine. If it had been found, as the defendant attempted to show, that the universal cut-off could be used upon an adding machine during the operation of addi-

tive subtraction in the same manner as the Felt subtraction cut-off, it would have had some bearing on the question of anticipation; but the fact is that, while it may be so utilized in performing certain sums, it cannot be so utilized in performing other sums. In performing many examples several of the carrying mechanisms operate simultaneously, and in these instances the effect of the universal cut-off is to throw out the useful and necessary carries as well as the objectionable one. It is manifest, therefore, that a universal cut-off is practically worthless for performing additive subtraction upon an adding machine after the manner of the Felt device.

There is, however, another use of the universal cut-off to which the defendant attaches great importance. In this case it is not used, like the Felt device, during the operation of additive subtraction, but it is applied to the machine before the operation is begun. It is apparent, however, that any such use of the universal cut-off, which means the simultaneous disengagement of all the carrying mechanisms, is destructive of the adding powers of the machine. It is no longer an adding machine, and is therefore incapable of performing additive subtraction mechanically. It reduces subtraction to a mere mental process, as is shown in the subsequent Turck patent of 1901. It is undoubtedly true that any sum in this kind of subtraction can be performed by this use of the universal cut-off. It is equally true, however, that this operation is not additive subtraction, since there are wanting the two essential elements of additive subtraction: First, the finding of the true complement of the subtrahend, and then adding it to the minuend. It is clear, therefore, that this form of subtraction and this use of a universal cut-off are entirely outside of the Felt invention.

In the consideration of the prior art as bearing upon the Felt invention, it is necessary to keep constantly in mind that the Felt invention is limited to a simple mechanical device attached to an adding machine for the prevention of the error of 1 in the performance of additive subtraction.

Additive subtraction consists of two distinct operations: First, the operation of finding the complement of the subtrahend by subtracting it from a higher power of 10; and, second, the adding of this complement to the minuend. The only part of additive subtraction which can be performed mechanically upon an adding machine is the second step in the process, which is merely an ordinary sum in addition. The performance of this second step results in the error of 1 on the reading line of the machine, and the whole scope and purpose of the Felt invention is to prevent mechanically the occurrence of this error. The Felt invention, therefore, has nothing to do with the finding of the complement of the subtrahend. It has no concern with the fact that, as a matter of convenience in finding the complement, the keys of some machines are complementarily marked with additional small red figures to indicate the difference between a given figure of the subtrahend and 10, or that the keys of other machines are co-digitally marked with small red figures to indicate the difference between a given figure of the subtrahend and 9. Nor has the Felt invention any concern with

the simultaneous throwing out of all the carrying mechanisms by means of a universal cut-off, either for the purpose of canceling the reading line by turning all the wheels back to zero, or for the purpose of performing subtraction in the ordinary way by the usual mental processes, and therefore without any carrying mechanisms. Nor has it any concern with the theory that a complementarily marked machine with a universal cut-off is especially adapted for performing the kind of subtraction just described. Nor has it any concern with the false theory that additive subtraction is facilitated by first destroying the adding capacity of the machine by means of the universal cut-off. Nor has it any concern with the false theory that, because the complement of 3 is 7, or the difference between 10 and 3, it follows that the complement of 33 must be 77, whereas in fact it is 67, or the difference between 100 and 33, and that it necessarily follows from this method of finding the complement that all the carries, when the complement of the subtrahend is added to the minuend, are erroneous carries, and that the universal cut-off prevents these erroneous carries from taking place. Nor has it any concern with the false theory that a co-digitally marked machine, as distinguished from a complementarily marked machine, by adding one less than the true complement, offsets the errors committed by the objectionable carries.

The Felt invention has no concern with any of these theories. The Felt invention relates to an adding machine whose carrying mechanisms, except in the single instance of the objectionable carry which causes the error of 1, operate in the usual and normal manner. In other words, the invention relates to a mechanism which embraces a series of numeral-wheels, means for actuating such wheels, carrying devices for automatically carrying the tens from one series of wheels to another, and a series of pivoted levers whereby the operator may selectively throw out of operation any one of the carrying mechanisms which causes the error of 1 in any given sum in additive subtraction, without affecting or interfering with the operation of any of the several carrying mechanisms that aid in the mechanical process of additive subtraction. Most of this extended, intricate, and highly speculative discussion of the prior art, instead of tending to anticipate or even to minimize the Felt invention, only tends to make more prominent its simplicity, novelty, and utility.

It is further contended that the Felt device is void for want of invention, because the error and the cause of it were well known, and because the means employed by Felt were not only old in the mechanical arts, but were also old in this art; these means consisting of pivoted levers for throwing out of operation carrying-pawls. In our opinion, upon full consideration, the Felt subtraction cut-off belongs to that class of inventions in which the invention resides, in the language of the Supreme Court in Hobbs v. Beach, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586, rather in "the idea that such change could be made than in making the necessary mechanical alterations." Other inventors had been engaged in perfecting these machines, and yet it never occurred to anyone before that the old, cumbersome, and troublesome method of running off the nines could be obviated by this simple de-

vice. Felt discovered the possibility of this new use of a series of pivoted levers in performing additive subtraction, and he adapted them to this new use. Such use was novel, and has proved of great utility. These circumstances negative the conclusion that the step taken by Felt was obvious to any skilled mechanic. Hobbs v. Beach, 180 U. S. 383, 393, 21 Sup. Ct. 409, 45 L. Ed. 586; Loom Co. v. Higgins, 105 U. S. 580, 591, 26 L. Ed. 1177; Krementz v. S. Cottle Co., 148 U. S. 556, 560, 13 Sup. Ct. 719, 37 L. Ed. 558; Potts v. Creager, 155 U. S. 597, 607, 15 Sup. Ct. 194, 39 L. Ed. 275; Dowagiac Mfg. Co. v. Superior Drill Co., 115 Fed. 886, 894, 53 C. C. A. 36; Brunswick-Balke-Collender Co. v. Thum, 111 Fed. 904, 50 C. C. A. 61; Schenck v. Singer Mfg. Co., 77 Fed. 841, 844, 23 C. C. A. 494.

Upon the question of infringement we entertain no doubt. The defendant's machine is provided with a series of subtraction cut-offs for the purpose of preventing the error of 1 in the performance of additive subtraction. These cut-offs, like the Felt device, are a series of pivoted levers; each lever being adapted to throw out of operation its carrying-pawl, and each being capable of selective operation independently of the others in the performance of any given sum. These levers are also provided with lateral arms. In the Felt device, the levers extend outside of the machine, and terminate in what are called finger-pieces, which are pressed by the operator. In the defendant's device, the levers do not extend outside of the machine, but they are connected through intermediate mechanism with the actuating keys, and operated by a partial depression of the keys. In other words, the partial depression of any one of the keys in any one of the several columns will cause the lever to throw out of operation its corresponding carrying-pawl. It thus appears that the defendant's cut-offs contain the substantive mechanical features of the Felt device. It is, of course, immaterial that the defendant's device is operated through intermediate mechanism. Under these circumstances, to hold that the defendant's device does not infringe, we must limit the Felt device to mere details of construction, such as the extension of the levers through the casing of the machine, and the form of the finger-pieces, which details are neither referred to nor included in the claims in issue. If the Felt invention were for a mere improvement in subtraction cut-offs, such a narrow construction might be warranted. This, however, is not the position of the Felt invention. The art of subtraction cut-offs began with Felt; and, if what he did involved invention, as we have found, that invention is entitled to protection, and to a reasonable application of the doctrine of equivalents in respect thereto.

The defendant further contends that its disengaging levers were originally introduced into its machine for another purpose. We are strongly inclined to the opinion, however, that, whatever may have been the defendant's original purpose, the main purpose for which these levers are now employed is the same as the Felt levers, to prevent the error of 1 in additive subtraction. But, assuming that the defendant's levers were originally inserted for another purpose, and in fact perform some other function, these circumstances, under the

state of facts presented in this case, will not relieve the defendant from the charge of infringement. If the infringing device performs the same function as the patented device, it is immaterial that it also performs some other function. It is still none the less an equivalent of the patented device, and an appropriation of the patented invention. Walker on Patents (4th Ed.) 308, 309; Norton v. Jensen, 49 Fed. 859, 868, 1 C. C. A. 452; Norton v. California Automatic Can Co. (C. C.) 45 Fed. 637, 638; Sarven v. Hall, 21 Fed. Cas. 512, 519; Masseth v. Palm (C. C.) 51 Fed. 824, 826; Wheeler v. Clipper Mower Co., 29 Fed. Cas. 881, 892; Kendrick v. Emmons, 14 Fed. Cas. 305, 306.

The decree of the Circuit Court is reversed, the case is remanded to that court with directions to enter a decree for the complainant on claims 7 and 8 of the Felt patent, and the appellee recovers its costs of appeal.

EQUITABLE LIFE ASSUR. SOC. OF UNITED STATES v. TOLBERT.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1906.)

No. 2,256.

1. WRIT OF ERROR—DISMISSAL—DELAY.

   Where, owing to a delay in the payment of the docket fee, the record on a writ of error, though lodged with the clerk in due time, was not filed until five days after the return day, but no continuance resulted or other injury to the defendant in error, the latter's motion to dismiss on that ground, not made until nearly four months after the record was filed, when the case had then been docketed and the record printed, will be denied.

2. MASTER AND SERVANT—DEATH OF SERVANT—OPERATION OF ELEVATORS—INSTRUCTIONS.

   Deceased, an assistant janitor in defendant's building, was killed while attempting to operate an elevator therein on the sixth day of his employment. Deceased was 51 years of age at the time, and on each day for the first three days of his employment the head janitor personally instructed him in the operation of the elevator. On the second and third days the head janitor permitted deceased to manage the elevator in his presence, and on the fourth and fifth days deceased operated it alone. Such janitor testified that he cautioned deceased about handling the cable, and told him to be careful to pull the cable slowly until he felt the elevator move, and then increase the speed if desired, and that deceased seemed able to operate the same as well as witness could himself. *Held*, that defendant was not guilty of negligence in failing to properly instruct deceased as to the operation of the elevator.

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

The administratrix sued the Equitable Life Assurance Society to recover damages for the death of Henry Tolbert, which she alleged was caused by the defendant's negligence. The defendant was the owner of an office building in Des Moines, Iowa, in the northwest corner of which was an elevator designed for the transportation of freight and for use in the janitor service. Tolbert was employed about May 4, 1903, as a janitor, and placed under the superintendence of Mills, the head janitor of the building. He met his death on the 9th day of May while operating the elevator, and while engaged in taking a desk and two men accompanying it to an office on an upper floor. The charges of negligence in the petition were that the deceased was wholly inexperienced in the operation of elevators, and that he did not receive sufficient instruction

to enable him to perform that service in safety; that at the entrance to the elevator upon the ground floor there was a sliding door which was out of order, in that it could not be made to close so as to form a barrier between the platform of the elevator and the exterior; that the motive mechanism of the elevator was in such defective condition that when deceased undertook to start it by the usual method it did not readily respond, but in what particular respect it was defective the plaintiff was unable to state. At the conclusion of the evidence the defendant requested the court to direct a verdict in its favor. The court declined to do so, and an exception was taken to its ruling. The jury returned a verdict in favor of the plaintiff.

George F. Henry, for plaintiff in error.

J. S. Campbell and Thomas A. Cheshire, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

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

The administratrix moves to dismiss the writ of error upon the ground that the record was not filed and the cause docketed in this court until after the return day of the writ of error and citation. It appears that the record was lodged with the clerk in due time, but, owing to a short delay in the payment of the docket fee, it was not filed until five days after the return day. The motion to dismiss, however, was not made until nearly four months thereafter. The cause had then been docketed and the record had been printed. No continuance of the cause resulted, and no other injury or hardship to the administratrix. The motion to dismiss is therefore denied. Bingham v. Morris, 7 Cranch, 99, 3 L. Ed. 281; Pickett's Heirs v. Legerwood, 7 Pet. 144, 8 L. Ed. 638; Owings v. Tiernan, 10 Pet. 24, 9 L. Ed. 333; Andrews v. Thum, 12 C. C. A. 77, 64 Fed. 149; West Chicago St. R. Co. v. Ellsworth, 23 C. C. A. 393, 77 Fed. 664; Altenberg v. Grant, 28 C. C. A. 244, 83 Fed. 244. See, also, Incorporated Town of Gilman v. Fernald (C. C. A.) 141 Fed. 940.

The freight elevator in the office building of the defendant in the use of which the deceased met his death was operated by hydraulic power. Its structure and operation was described as follows: A steel cable ran up the side of the elevator shaft close to the edge of the elevator platform, over a pulley above, and both ends were attached to a drum at the end of a shaft in the basement of the building. Upon the shaft was a fixed wheel, with 20 odd cogs, which engaged corresponding cogs upon a movable piston valve. The pulling of the cable by the operator on the elevator platform caused the drum and cogged shaft to revolve, and this in turn operated the piston, thereby admitting water for the movement of the elevator. The entrance to the elevator upon the ground floor was equipped with a sliding door. The door, being out of order, was pushed up, and the entrance was left open. This was not dangerous, however, because the door of the hall which led to the elevator was kept locked, and the well of the elevator shaft was but slightly below the level of the ground floor of the building. The sliding doors for exit and entrance to the elevator upon the other floors of the building were kept locked. Two men not in the service of the defendant brought a desk to the

building to be placed in an office on an upper floor. The deceased undertook to take them and the desk up on the elevator. When the three of them and the desk were safely upon the elevator platform as it rested at the ground floor of the building, the deceased grasped the cable at the side of the elevator, gave it a pull, and, as the elevator did not ascend, he pulled it hard. The elevator started to ascend more rapidly than he anticipated, and he held on to the cable, with the result that he was drawn to the floor of the elevator, thrown off to the side close to the wall of the shaft, his head and shoulders encountered a cross beam in the wall, and, as the elevator reached the second floor, the bottom of the sliding door guarding the entrance at that point was forced outward by his body, and the elevator passed him and went upwards a short distance, where it was stopped by one of the other men. After the elevator passed the level of the second floor, the deceased fell back into the shaft and to the bottom, where his body was subsequently found.

There is no foundation for the charge that the defendant negligently put the deceased to work at a dangerous occupation without sufficiently instructing him. The operation of the elevator was a simple task, which did not require much skill or explanation. The deceased was 51 years of age. The uncontradicted evidence showed that before the accident he had received instruction in his work, and such as he himself deemed sufficient. On each day for the first three days of his employment Mills, the head janitor, personally gave him directions in the operation of the elevator. He went up and down with him several times each day, and showed him how to start and how to stop it. On the second and third days Mills allowed him to manage it himself in his presence. On the fourth and fifth days the deceased used the elevator by himself. Mills also testified that he cautioned the deceased about the handling of the cable, and told him to be careful to pull it slowly until he felt the elevator move, and that he could then increase the speed if desired; also, that the deceased seemed to be able to handle it as well as he (Mills) could himself. On the sixth day, which was the day of the accident, Mills and the deceased were upon the eighth floor, when one of the men in charge of the desk came, and requested that it be taken up on the elevator. The head janitor started to go, but the deceased said: "Let me go. I know how to operate the elevator." He was allowed to go, and the accident occurred. In view of these uncontradicted facts, there was clearly no ground for this charge of negligence.

It is also said that the defendant was negligent in respect of the defective condition of the sliding door at the entrance to the elevator on the ground floor. But it is pure speculation that this condition had any connection at all with the accident. There was no proof that it did have, and the trial court so instructed the jury.

To substantiate the third charge of negligence the plaintiff offered evidence that some time before the accident two cogs were missing from the operating mechanism in the basement, and that the tendency of the defect when it came in conjunction with the cogs of the co-acting piece of machinery would be to prevent the elevator from starting

readily when the cable was pulled, and likewise prevent it from being readily stopped. The witness who so testified did not know whether this defect had been repaired or not. He was unable to say that it had not been. On the other hand, there was uncontradicted evidence on behalf of the defendant that an engineer was sent for, the elevator was shut down three or four days, and the defect was repaired. So, even if it could be said that the absence of the two cogs could have caused or contributed to such an accident, the evidence conclusively showed that there was no such defect when the accident happened. The request of the defendant for a directed verdict should have been granted.

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

In re SCHERMERHORN.

(Circuit Court of Appeals, Eighth Circuit. April 23, 1906.)

No. 53.

1. BANKRUPTCY—OWNERSHIP OF PROPERTY—BANKRUPTCY COURT—JURISDICTION.
On the filing of a petition in bankruptcy, followed by an adjudication, all property in the possession of the bankrupt of which he claims ownership passes into the custody of the bankruptcy court, subject to its jurisdiction to determine by plenary action or summary proceeding all adverse or conflicting claims with reference thereto, which jurisdiction cannot be impaired or destroyed by the unauthorized surrender of possession of the property by the officers of the bankruptcy court, or through a seizure thereof by an adverse claimant.

2. SAME—TRUSTEE—PERMISSION TO SUE IN STATE COURT—VACATION.
Where an ex parte order permitting a claimant of property in the possession of a bankrupt to sue the trustee in a state court to determine the claimant's right thereto was improvidently granted, the court, on being advised of all the facts, had power to vacate such order, and enjoin the claimant from proceeding further in the state court.

In Bankruptcy. On petition for review. Denied.

Thomas J. White, for petitioner.

W. S. McClintock (Joseph V. Karnes, Alexander New, and Edwin A. Krauthoff, on the brief), for respondent.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. This petition to revise in matter of law challenges the jurisdiction of the court of bankruptcy to determine the claim of the petitioner to 18 buggies, which had been part of the bankrupt's stock of merchandise, and its power to enjoin the petitioner from asserting such claim by an action against the trustee in a state court. The contention of the petitioner rests upon his representation that, when the proceedings in bankruptcy were instituted and the adjudication was had, he was the owner and in the actual possession of the buggies under a title not derived from the bankrupt, and he says that a seizure thereof by the trustee, acting under an order of the

referee, was wrongful, and therefore it could operate neither to deprive him of his rights, nor to confer jurisdiction to determine them upon the court of bankruptcy. But the record before us, consisting of the petition to revise, the response of the trustee, and the various exhibits comprising transcripts of the evidence and the proceedings in the cause, discloses that there is no basis of fact for the representation. At the time the petition in bankruptcy was filed and at the time of the adjudication on the following day, it was the bankrupt, not the petitioner, who was in the possession of the buggies under a claim of ownership. The buggies were entered by the bankrupt in his schedules as part of his estate. They were in a building which he had rented of the petitioner, of which he had the customary keys, and over which he was exercising dominion and control as a tenant. He had within the building other property than that in controversy. All that the petitioner had in the nature of possession was a key to the back door of the building, and this he had reserved to himself without the knowledge or consent of the bankrupt, his tenant. There had been no declaration of forfeiture of the bankrupt's tenancy for nonpayment of rent or other reason, and no surrender of the possession of the building. The tenancy still subsisted. The bankrupt did not know that the petitioner claimed to have purchased the buggies, nor did he agree to hold them for him. Some time after the adjudication the petitioner gained access to the building by his rear door key, changed the locks, and then asserted exclusive adverse possession. But the buggies were then in the custody of the court, and the petitioner could gain nothing by an interference therewith. It was therefore proper for the court to repossess itself of them.

Upon the filing of a petition in bankruptcy, followed by an adjudication, all property in the possession of the bankrupt of which he claims the ownership passes at once into the custody of the court of bankruptcy, and becomes subject to its jurisdiction to determine, by plenary action or summary proceeding, as the nature of the case demands, all adverse or conflicting claims thereto, whether of title or of lien; and that court may, by the process of injunction, protect its jurisdiction against interference. It may draw to itself the determination of all controversies over the property in its possession, and when it once lawfully attaches its jurisdiction cannot be destroyed or impaired by the unauthorized surrender of possession of the property by the officers of the court, or through a seizure thereof by an adverse claimant. Whitney v. Wenman (U. S.) 25 Sup. Ct. 778, 49 L. Ed. 1157; Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183; Chauncey v. Dyke Bros., 55 C. C. A. 579, 119 Fed. 1; In re Corbett, 104 Fed. 872. See, also, In re Rochford, 59 C. C. A. 388, 124 Fed. 182.

After various proceedings before the referee, the District Court made an order permitting the petitioner to sue the trustee in a state court, but it was upon an ex parte application and showing, and without notice to the trustee or his counsel of record. The District Court, upon being advised of the true situation as disclosed by the record,

found that its order was improvidently granted, and it promptly vacated it, and enjoined the petitioner from proceeding further in the state court. There can be no doubt of the power of the court to do this, nor that its power was well exercised.

In view of the foregoing, we need not consider the contention of the trustee that the petitioner voluntarily consented to the jurisdiction of the bankruptcy court by submitting to the referee his claim for the value of the buggies. Nor do we pass upon the merits of this controversy. We simply affirm the action of the District Court in determining the forum in which they should be litigated.

The petition to revise is denied.

UNITED STATES v. ROSENBERG.

(Circuit Court of Appeals, Second Circuit. January 17, 1906.)

No. 36 (3,551).

CUSTOMS DUTIES—CLASSIFICATION—RAMIE BRAIDS.

Held that, as to braids of ramie, the provision in paragraph 339, Schedule J, section 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662], for "braids * * * of * * * vegetable fiber," is more specific than that in paragraph 347, Schedule J, 30 Stat. 182 [U. S. Comp. St. 1901, p. 1664], for "all manufactures of * * * ramie" and other vegetable fibers; the latter provision being intended to embrace any manufactures of vegetable fiber that have been omitted elsewhere in the tariff.

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

In the decision below the Circuit Court reversed without opinion three decisions of the Board of United States General Appraisers, which, on the authority of G. A. 5,569 (T. D. 24,972), had overruled protests of Jules & Hugo Rosenberg against the assessment of duty by the collector of customs at the port of New York.

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

Waldon & Webster (Howard T. Waldon, of counsel), for importers.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. The goods in question consist of braids composed wholly or in chief value of ramie. They were returned as vegetable fiber braid, and assessed at 50 per cent. ad valorem, as "braids * * * composed wholly or in chief value of * * * vegetable fiber," under the provisions of paragraph 339 of Act July 24, 1897, c. 11, § 1, Schedule J, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662].

The importers claimed, and the court below, reversing the board without any opinion filed, held, that the goods should have been assessed at 45 per cent. ad valorem, as "manufactures of * * * ramie," under the provisions of pargraph 347, 30 Stat. 182 [U. S. Comp. St. 1901, p. 1664] of said act.

Paragraph 347 is as follows:

"All manufactures of flax, hemp, ramie, or other vegetable fiber, or of which these substances, or either of them, is the component material of chief value, not specifically provided for in this act, forty-five per centum ad valorem."

This paragraph is found at the end of Schedule J, which is entitled, "Flax, Hemp or Jute," but which, in fact, covers a large class of vegetable fibers and manufactures therefrom. The preceding paragraphs deal, respectively, with certain specific articles made from various vegetable substances. Paragraph 347 is merely a general catch-all clause, evidently inserted at the end of the schedule with the intention thereby of embracing any manufacture of vegetable fiber which may have been omitted from the other provisions of the act, and is sufficiently broad to include such manufactures. Paragraph 339, on the other hand, exactly covers this merchandise. It designates the particular manufacture "braid," and, while it does not in terms specify "ramie," it may be read as though there had been inserted, instead of the general designation, "vegetable fiber," the particular designations of the various kinds of vegetable fiber, such as ramie, which are subject to duty.

It must be held, therefore, that the particular designation under paragraph 339, of "braids composed of vegetable fiber," is more specific than the general term, "manufactures of ramie," in paragraph 347.

The decision of the court below is reversed.

OZAN LUMBER CO. v. UNION COUNTY NAT. BANK OF LIBERTY, IND.

(Circuit Court of Appeals, Eighth Circuit. April 4, 1906.)

No. 2,205.

CONSTITUTIONAL LAW—VALIDITY OF STATE STATUTE—DISCRIMINATION AGAINST PATENTED ARTICLES.

Act. Ark. April 23, 1891 (Sand. & H. Dig. §§ 493–496), which provides that every negotiable instrument taken in payment for any patented machine, implement, substance, or instrument shall be executed on a printed form showing upon its face that it was so taken, making its violation punishable by a fine, and all such negotiable instruments not so showing on their face absolutely void, is unconstitutional and void, as creating a discrimination between articles of property of the same class or character, based solely on the fact that those discriminated against are protected by a patent granted by the United States.

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

For opinion below, see 127 Fed. 206.

The lumber company, in the purchase from a manufacturer of a machine for loading logs upon cars, gave 11 promissory notes negotiable in form. The bank acquired the notes in the regular course of business for value and before maturity, and upon default in payment brought action against the lumber company. The latter asserted by way of defense that the machine was covered by letters patent of the United States, that the notes were not executed upon a printed form showing that the consideration was a patented machine or implement as required by an Arkansas statute, and that under the statute the bank was not an innocent purchaser, and the notes were absolutely null and void. The Arkansas statute referred to (sections 493–496, Sand. & H.

Dig.) provides that every negotiable instrument taken in payment for any patented machine, implement, substance, or instrument shall be executed on a printed form showing upon its face that it was so taken, no person shall be considered an innocent purchaser thereof though he may have given value for the same before maturity, the maker may interpose defense to the collection of the same in the hands of any holder, and, finally, that all such negotiable instruments not showing on their face for what they were given shall be absolutely void. A violation of the statute is punishable by a fine. A demurrer to this defense was sustained, and the bank had judgment.

T. C. McRae, W. V. Tompkins, and U. M. Rose, for plaintiff in error.

Morris M. Cohn, 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 presented is that of the validity of the Arkansas statute, which, as applied to this case, declares that the notes are nonnegotiable and are null and void in the hands of an innocent purchaser, because they were not executed upon printed forms showing on their face that they were given in payment of a patented machine. It will be noticed that the statute strikes directly at the protection afforded by a patent issued by the national government, and that it does not proceed upon any consideration of the character of the machine itself, or the use for which it is designed. If the manufacture and sale of the machine were not protected by letters patent, the statute would not be applicable, nor would it apply if a patent once issued had expired by limitation. In other words, were it not for the patent, the case would not be within the statute. If the notes had been given for a car-loading machine precisely like the one in question, but upon which no patent had been obtained, they would then be valid obligations free from all equities in the hands of an innocent purchaser. These observations narrow the inquiry, and the question is whether a state may so discriminate by hostile legislation against rights granted by the United States pursuant to the provisions of the Constitution.

This legislation has been upheld by the Supreme Court of Arkansas. Tilson v. Gatling, 60 Ark. 114, 29 S. W. 35; Wyatt v. Wallace, 67 Ark. 575, 55 S. W. 1105; Roth v. Bank, 70 Ark. 200, 66 S. W. 918, 91 Am. St. Rep. 80. And it is claimed that authority for it may also be found in Patterson v. Kentucky, 97 U. S. 501, 24 L. Ed. 1115, and Webber v. Virginia, 103 U. S. 344, 26 L. Ed. 565. There is a widespread misconception of the doctrine of these two cases, and it has been freely employed in support of conclusions which in our opinion are radically different from those announced by the Supreme Court. In the Patterson Case, a Kentucky statute, enacted in the rightful exercise of the police powers of the state, provided for the inspection and gauging of illuminating oils and fluids, recognized as standard those that ignited and permanently burned at a specified temperature, and condemned as unsafe for illuminating purposes those that more

quickly yielded to combustion. It was sought to exempt from the operation of this statute a certain patented oil which could not be made to comply with the test, and the exemption claimed rested solely upon the ground that the oil was protected by letters patent. The right was asserted to sell the patented oil in any part of the United States without regard to local statutes or regulations. It will be observed that there was no discrimination whatever against any right or privilege granted by and enjoyed under the Constitution and laws of the United States. On the other hand, there was an assertion by Patterson of a special immunity and exemption of the patented oil from local laws properly enacted with reference to all property of the class described whether possessing patented features or not. It was held by the Supreme Court that there was no such exemption from the operation of the police laws of the state.

In the Webber Case there was an attempt by an agent of a manufacturing company to escape the operation of the tax and license laws of Virginia, upon the ground that the machines sold by him were covered by a patent. The laws in question had a general application and did not relate exclusively to those who sold patented articles. It was held that the right conferred by the patent laws upon inventors to sell their inventions and discoveries did not remove the tangible property to which the invention or discovery was applied from the operation of the local laws.

Similar questions were presented in Jordan v. Overseers, 4 Ohio, 295, and Vannini v. Paine, 1 Har. (Del.) 65. In the first of these cases the assignee of a patent for making, using, and vending a certain medicine contended for the invalidity of an Ohio statute regulating the practice of physic and surgery, and in the second it was claimed that a statute prohibiting lotteries did not operate against a patented mode of conducting such prohibited business.

Some courts have upheld local statutes requiring that notes taken in the sale of patent rights, as distinguished from the corporeal articles in which the invention or discovery is exhibited, shall recite such facts upon their face under penalty of invalidity of the notes or the imposition of a fine (Tod v. Wick, 36 Ohio St. 370; Mason v. McLeod, 57 Kan. 105, 45 Pac. 76, 41 L. R. A. 548, 57 Am. St. Rep. 327; New v. Walker, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40; Herdic v. Roessler, 109 N. Y. 127, 16 N. E. 198; Hankey v. Downey, 116 Ind. 118, 18 N. E. 271, 1 L. R. A. 447; Sandage v. Manufacturing Co., 142 Ind. 148, 41 N. E. 380, 34 L. R. A. 363, 51 Am. St. Rep. 165; Haskell v. Jones, 86 Pa. 173; Pinney v. Bank, 68 Kan. 223, 75 Pac. 119); and in some of the cases Patterson v. Kentucky is cited in support of the conclusions reached. Other courts have denied the validity of such statutes (Pegram v. Alkali Co. [C. C.] 122 Fed. 1000; Reeves v. Corning [C. C.] 51 Fed. 774, 787; Castle v. Hutchinson [C. C.] 25 Fed. 394; Helm v. Bank, 43 Ind. 167, 13 Am. Rep. 395; Cranson v. Smith, 37 Mich. 310, 26 Am. Rep. 514; Crittenden v. White, 23 Minn. 24, 23 Am. Rep. 676; Woollen v. Banker, 2 Flip. 33, 30 Fed. Cas. No. 18,030, opinion by Justice Swayne at the circuit; State v. Lockwood, 43 Wis. 403; Wilch v. Phelps, 14 Neb. 134, 15 N. W. 361; Hollida v.

Hunt, 70 Ill. 109, 22 Am. Rep. 63; Ex parte Robinson, 2 Biss. 309, Fed. Cas. No. 11,932, opinion by Justice Davis at the circuit), and some of them have distinguished Patterson v. Kentucky by directing attention to the fact that it related to the tangible product of an invention which had become a part of the general mass of property within the state, while the statutes under consideration were leveled exclusively against the incorporeal patent rights granted by the United States.

The doctrine of the Patterson and Webber Cases is clear and well defined. It is that the tangible products of an invention become a part of the mass of property of the state and fall within the domain of its police power, and that immunity from the lawful exercise of that power cannot be claimed solely because of the incident of the patent. But it is an entirely different thing to say that, merely because articles are patented, they may for that reason be selected from the mass of other property of like character for invidious and hostile discrimination. If the Kentucky statue had been directed against certain oils solely because they were compounded under a patented formula, and had excluded from its operation unpatented oils of like character that would ignite and burn at the same temperature, a different question would have been presented from that determined by the Supreme Court; and in the Webber Case, if the Virginia statute had required those who sold sewing machines protected by a patent to obtain a license and pay a tax when such burdens were not imposed upon the vendors of unpatented machines, a different conclusion would, in our opinion, have followed. State v. Butler, 71 Tenn. 222; In re Sheffield (C. C.) 64 Fed. 833. In the case at bar the statute does not regard the character of the machinery as such, but is directed solely against the casual incident of the patent. To say that the protection afforded by letters patent, because of its peculiar characteristics, presents a subject for the exercise of the police power of the state which may be specially selected for discriminatory legislation is to say that the state has power to seriously burden and impair a right granted by Congress under the authority of the Constitution. There is no such difference between patented articles and those of like character not patented as will justify such hostile legislation against the former as is exhibited in the statute under consideration. It is the right of a patentee to use and enjoy the privilege granted to him, and to manufacture and vend the tangible property in which his discovery or invention is exhibited to the same extent and with the same freedom as those who deal in like but unpatented articles. Indeed, this view is expressed in one of the very cases relied on to reverse the judgment of the Circuit Court. In Webber v. Virginia it was said:

"The combination of different materials so as to produce a new and valuable product or result, or to produce a well-known product or result more rapidly or better than before, which constitutes the invention or discovery, cannot be forbidden by the state, nor can the sale of the article or machine produced be restricted except as the production and sale of other articles, for the manufacture of which no invention or discovery is patented or claimed, may be forbidden or restricted."

In the manufacture and sale of articles of commerce, the right to extend credit and to take negotiable paper which may readily be discounted and the proceeds turned back into the channels of the business, that its volume may be increased, is a valuable one, and is extensively and beneficially employed. That this right may, under an assumed exercise of the police power of a state, be denied those engaged in the manufacture and sale of articles covered by letters patent of the United States, and merely because of such fact, while its free exercise is permitted to all others, is inadmissible. With equal reason a state may destroy the negotiability of all notes taken by national banks, by other corporations organized under the laws of the United States, by citizens of other states, and in interstate commercial transactions, and may place all such notes in a special and discredited class for the better protection of its own citizens who may be the makers thereof. It is obvious that this cannot be done.

The judgment of the Circuit Court is affirmed.

H. C. COOK CO. v. LITTLE RIVER MFG. CO.

(Circuit Court of Appeals, Second Circuit. April 2, 1906.)

No. 149.

PATENTS—INFRINGEMENT—NAIL CLIPPERS.

The Wenger patent, No. 569,903, for finger nail clippers, while narrow in scope, was not anticipated and discloses invention. Also, *held* infringed as to claim 1, but not as to claim 2.

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

Appeal from an interlocutory decree (136 Fed. 414) on dismissing bill for infringement of complainant's patent No. 569,903, granted October 20, 1896, to Julius D. C. Wenger for a finger nail cutter.

James C. Chapin and George D. Seymour, for appellant.

A. M. Wooster, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. The court below in its opinion has discussed the construction of the patent, the devices in issue, and the prior art, and reached the conclusion that the patent covered such a narrow invention that it was not infringed. 136 Fed. 414. The patented cutter comprises a rigid and a resilient cutting member, doubled upon each other at their junction, and operated by a lever pivoted on the rigid member, having its short end extended through the resilient member. The departure from the prior art in which the invention resides consists in so constructing the combination that the lever passes down through a slot in the rigid member, and transmits its rigidity to a resilient member, at a point close to the cutting edges, by means of the short end of a lever extended through a perforation in the resilient member. The novel functional results of this construc-

tion, inter alia, are to give a powerful purchase, and, while providing for the separation of the members by the use of a flexible member, to make it as efficient in the cutting operation as though it were a rigid member by imparting to it a firm support, to prevent it from being bent or twisted in operation. That this construction was novel appears from the admission of defendant's expert, who says as follows:

"There is no patent among the patents of the prior art which shows two cutter-bearing members, the resiliency of the metal forming one or both of them serving to separate the cutters, and an operating lever pivotally mounted on the member which is more rigid than the other."

This admission is confirmed by an examination of the patents cited by defendant's expert as the closest references found in the prior art. These patents are patent No. 523,708, granted to La Casse in 1894, and patent No. 271,022, granted to Beckley in 1883. The defendant's expert has selected Fig. 9 of the La Casse patent as illustrating "the form of trimmer most pertinent to the subject-matter of this suit." But this cutter belongs to a distinct type, differing from that of the patent in suit, in that it consists of a rigid member arranged to slide back and forth upon another rigid member, which is stationary, and a lever pivotally mounted in a longitudinal slot in the stationary member. The short end of the lever, however, passes down through the movable member, as in the patent in suit. The cutting operation is accomplished by the lever forcing the sliding member along the surface of the stationary member until the cutting edges contact. There is no resilient member, no lever imparting rigidity in the sense of the patent in suit, and no such compression of the jaws of cutters mounted on opposed members or arms, as is shown in the patent in suit.

Defendant's expert says:

"The patent to Beckley shows a construction which is perhaps the closest embodiment of the particular construction specifically set forth in claim 1 of the patent in suit. * * * It is a somewhat closer embodiment of the construction specified in the claim than the construction shown in the patent to La Casse, for the reason that the movable member of the construction shown in Fig. 9 of La Casse is not a spring or spring-operated member, whereas the movable member in the Beckley patent is a spring-operated member."

This patent, granted in 1883, is for a lamp wick trimmer. Like Fig. 9 of La Casse it is operated by sliding one rigid member over the other. The spring referred to by defendant's expert consists of a piece of wire so engaged with the members as to cause the sliding member after being operated to automatically return to its retracted position. Its construction is so different from that of the patent in suit that it could not be adapted for use thereon, at least without the exercise of invention. In our opinion the closest references to the patent in suit are found in Fig. 11 of the La Casse patent and in the Heim & Matz reissued patent of 1881, No. 9,921, which may be considered together.

Complainant assumes in the discussion of these constructions that the members or spring arms are so resilient as to bend out of shape. But this is not necessarily so, especially to Heim & Matz, where the arms are preferably formed of a piece of plate steel. But its lever is

pivoted to a yoke. This yoke does not impart rigidity to a resilient member, and the short end of the lever does not extend through a perforation. The La Casse patent shows in Fig. 11 a lever attached to a bar which passes through openings in the two spring cutting members. There is, however, no means to impart rigidity to a resilient member. In both Beckley and La Casse the members are either both resilient or both rigid. If the former, the cam when operated with the yoke or bar would tend to bend both arms out of alignment, as there is nothing to support the resiliency of the members when the cutting pressure is exerted; if the latter, the invention of the patent in suit is wanting, for without the advantages of a spring action due to a resilient member there is no occasion for the strengthening operation of the short end of the lever. We conclude, therefore, that the construction of the patent in suit shows sufficient novelty to support the patent, although the invention is a very small and narrow one.

The defendant's nail cutter differs from that of the patent in having the short end of the lever located between the two members or arms, and so arranged as to operate in an upturned bail or staple extending from the lower or resilient arm. Its operation, so far as the issues herein are concerned, is identical with that of the patent. But defendant insists that its short end is not "extended through a perforation in the spring member," as claimed in the first claim. We cannot assent to this proposition. If the bail or staple consisted of an upturned perforated piece stamped out of the body of the lower member, instead of a separate piece, there would be no difference in construction. There is no difference in function, and, strictly speaking, the short arm does extend through a perforation in the spring member, namely, the eye of its staple. That the perforation is above instead of below the arm of the member is immaterial in view of its functional identity.

The second claim covers "means for confining the lever when turned down into the slot of the rigid member." The defendant does not use this means.

The decree of the court below is reversed as to the first claim, and affirmed as to the second claim, without costs of this court.

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

(Circuit Court of Appeals, Second Circuit. March 1, 1906. Rehearing Denied April 23, 1906.)

No. 237.

1. PATENTS—ABANDONMENT OF INVENTION.

Pending an application for a patent, the specification of which is broad enough to warrant the making of certain claims which are not made, the applicant, instead of inserting such claims by amendment, may at his election make them the subject of a new application, which in such case may fairly be considered a continuation of the first, and their omission therefrom will not operate as an abandonment.

2. SAME—INFRINGEMENT—GRAMOPHONE.

The Berliner patent No. 534,543, for improvements in talking machines, was not anticipated, and discloses patentable invention; nor is it invalidated by prior public use or abandonment. Claims 5 and 35 also *held* infringed.

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

This cause comes here upon appeal from a decree of the Circuit Court, Southern District of New York, sustaining the validity and finding infringement of U. S. letters patent 534,543, granted February 19, 1895, to Emile Berliner for the "Gramophone."

The opinion in the Circuit Court is reported in 140 Fed. 860.

Philip Mouro, for appellant.

Horace Pettitt, for appellees.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

Per CURIAM. In affirming this decree we do not find it necessary to add anything to the careful and exhaustive discussion of the issues which will be found in Judge Hazel's opinion, with one single exception. In disposing of the defense of prior public use based upon the lecture and exhibition before the Franklin Institute, the Circuit Court apparently relied mainly upon the proposition that what took place there was not a public use, but rather an experimental one. Without discussing the questions thus raised, or expressing any definite opinion either way, we prefer to dispose of the alleged prior public use by means of the application of Berliner, which was filed six months prior to the Franklin Institute lecture, and which eventuated in patent 564,586, issued subsequent to the patent in suit. The specifications in that application for 564,586 were full enough to warrant the making of the claims here in controversy (5 and 35). At any time the application might have been amended by adding such claims, and in our opinion it is immaterial that, instead of thus amending it, he took the broader claims on another application, filed while the first was pending. The second may fairly be considered a continuation of the first, and thus Berliner's application antedates the public use, and the facts will not sustain the contention that he abandoned his invention here in suit.

The decree is affirmed.

Leave to Amend Decree and to Apply for Rehearing on New Testimony.

There is no reason why the mandate should be amended because of any existing contract or stipulation as to licensing defendant. The decree does not operate to abrogate or modify any such agreement. As to the further relief prayed for, the motion is denied, on the ground of laches.

W. & J. SLOANE v. DOBSON et al.

(Circuit Court, S. D. New York. March 5, 1906.)

PATENTS—INVENTION—FASTENER FOR STAIR CARPETS.

The Adams patent, No. 587,633, for a fastener for stair carpets, is void for lack of patentable invention in view of the prior art.

Suit in equity for alleged infringement of United States letters patent No. 587,633, dated August 3, 1897, for a fastener for stair carpets. Complainant seeks an injunction and an accounting.

Emerson R. Newell, for complainant.

Frederick S. Stitt and Charles E. Brock, for defendants.

RAY, District Judge. Says the patentee, Harry C. Adams:

"My invention relates to an improvement in devices intended for fastening or holding stair carpets in place, which will readily permit of their being removed without removing the fastenings from the stairs. * * * My device consists, essentially, of two toothed bars or plates, which are fastened, one to the riser and the other to the tread near the junction of the same, and with their toothed edges removed somewhat from the surface of the riser and tread, and pointing towards the junction of the same."

Claim 1 reads:

"A fastener for stair carpets, comprising a bar having a serrated or toothed edge, and means for securing the same near the inner angle between the riser and tread, so that the toothed edge thereof projects across said angle, substantially as described."

Claim 2 reads:

"A fastener for stair carpets, comprising brackets or bars secured at intervals between the concave angle between the tread and riser and toothed bars or plates secured thereto, with their toothed edges raised from the tread and riser, and extending towards the apex of the angle between the two, substantially as described."

Claim 3 is as follows:

"A fastener for stair carpets, comprising two toothed bars or plates, and means connecting the same, whereby their toothed edges project towards each other, the whole being adapted to be secured in the inner angle between the riser and tread, and to secure the carpet by having a fold of the same inserted between the toothed edges, substantially as described."

I find nothing new or novel in the mode of attaching or means for attaching these toothed bars or plates or bars having serrated or toothed edges to the riser and tread of the stairs, respectively, or to the brackets or bars which may be and are to be attached to the riser and tread, or in the toothed bars or plates themselves, except it seems to be new to bring these toothed plates or bars into such close juxtaposition, with their toothed edges pointed towards each other and always open, forming an open jaw, that a fold of the stair carpet may be inserted between them in the jaw, and kept in place by the tension of the carpet above and below the bars and the spring of the fold of the carpet within the jaw itself. When this fastener and the stair carpet are in place the fastener is invisible, and the carpet is held firmly in place against ordinary walking thereon, but may be readily removed without disturbing the fastener itself. Utility cannot be de-

nied. These toothed bars are old, and had been used to fasten and hold carpets upon the floors of rooms. In these cases the toothed edge of the bar pointed to the sidewall of the room, and placed in opposite sides of the room the toothed edges pointed away from each other. They co-acted in the sense that, one end of the carpet being hooked or caught onto the teeth of one bar, and the carpet stretched or drawn taut, and the other end hooked or caught onto the teeth of the bar on the opposite side of the room, the two bars served to hold the carpet, spread upon the floor, in place. A stair carpet is not laid flat upon the floor, and fastened at each end thereof, but is or should be a continuous strip of carpeting, extending from the bottom of the stairs to the top. It is laid perpendicularly and horizontally, alternately covering the tread which is trodden upon and the riser which is not. The stair carpet must be securely fastened in the angle formed by the tread and the riser. It must be drawn and held taut. The fastening must be secure and strong and firmly in place. The feet of a person ascending the stairs first push the carpet in the tread towards the angle, and then push or pull it away. In descending this part of the carpet is pushed away from the angle. It is said that, in view of the prior art, there is no invention in so arranging these serrated or toothed edged bars, the one on the tread and the other on the riser, with their teeth pointed towards each other (whether first attached to the brackets or bars mentioned in claim 2 or not), as to hold a loop or fold of the carpet within the jaw, and maintain the carpet in place against constant treading thereon. I have carefully examined the prior art, and it seems to me that only a little thought in devising ways and means with appliances at hand was necessary to accomplish all that has been done. Almost any skilled mechanic would have done this. In the language of the Circuit Court of Appeals (Second Circuit) in Bradley v. Eccles, decided February 8, 1906 (143 Fed. 521):

"Its [these toothed bars] 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 that case the patentee did much more than was done here by way of invention. No invention is disclosed.

The defendants are entitled to a decree dismissing the bill, with costs.

BRUNSWICK-BALKE-COLLENDER CO. v. BEYER.

(Circuit Court, S. D. New York. March 5, 1906.)

PATENTS—INFRINGEMENT—BOWLING ALLEY.

The Wiggins patent, No. 623,933, for a bowling alley, discloses novelty, utility, and patentable invention. Also *held* infringed.

Suit in equity for infringement of U. S. letters patent No. 623,933, for improvement in bowling alleys, dated April 25, 1899, granted to complainant as assignee of William H. Wiggins.

Philipp, Sawyer, Rice & Kennedy, for complainant.
Louis C. Raegener and S. L. Moody, for defendant.

RAY, District Judge. I was convinced upon the argument, and a subsequent examination of the record and briefs of counsel has confirmed the impression, that complainant's alley discloses utility and novelty. I find invention in view of the prior art, which has been extensively considered.

I am also satisfied that infringement is made out. It is true that defendant's mode of construction is somewhat different, but he embodies all that is covered by complainant's patent. Defendant's mode of construction is the same in kind as complainant's, and is not found in the prior art. The results obtained are effected by adopting complainant's mode of construction and operation. It may be true, and I think it is true, that defendant's alley is inferior in some respects to complainant's, but infringement cannot be avoided by adopting a different mode of construction simply, so long as the principle or mode of operation is copied and adopted. The defendant says that his gutters are "flat gutters, with buffer strips in the corners thereof." He also says "they do not center the misplaced balls, nor do they even lessen the amount of wobble, except by lessening the width of the gutter, in exactly the same way as shown in Wiggins' own prior patents." With this contention this court cannot agree. The "buffer strips" of defendant are of such size and peculiar shape that his completed gutter is substantially the same as complainant's, and the effect upon the ball in centering it and in preventing damage to the alley bed is the same, although possibly not to the same degree; that is, it may not center the ball as quickly as does complainant's. I cannot find that Wiggins ever abandoned the construction shown in the patent in suit.

There will be a decree accordingly, and for an accounting and injunction.

NATIONAL ELECTRIC SIGNALING CO. v. DE FOREST WIRELESS TELEGRAPH CO. et al.

(Circuit Court, S. D. New York. April 7, 1906.)

PATENTS—INFRINGEMENT—WIRELESS TELEGRAPHING APPARATUS.

The Fessenden reissued patent, No. 12,115 (original No. 727,331) claims 11, 23, and 25, for a receiver for electro-magnetic waves consisting of an extremely fine terminal "projecting into" a liquid, are infringed by the use of a metal strip $1/32$ of an inch wide, but inclosed in glass to the extreme edge, leaving an extremely fine area the end of which touches the surface of a similar liquid, the fine edge of the strip being the equivalent of the fine wire of the patent and the projection of such wire into the liquid as explained by the specification of the patent being merely such as to insure a perfect contact which is made if it touches the liquid.

In Equity. On motion for attachment for contempt.

William Houston Kenyon, for plaintiff.
Philip Farnsworth and Edmund Wetmore, for defendant.

WHEELER, District Judge. This cause has now been heard on a motion for an attachment for contempt by violation of the injunction heretofore granted herein upon Fessenden's reissued patent, No. 12,115, for a receiver of electro-magnetic waves. Nat. Elec. Signaling Co. v. De Forest Wireless Tel. Co. (C. C.) 140 Fed. 449.

What was held to be an infringement and specifically enjoined was shown by stipulation, and consisted of the extremely fine wire terminal of the patent connected with the aerial wire and entering a liquid solution of caustic potash in the local circuit between this fine terminal and the larger electrode connecting to ground. There is some question as to whether or not use of the same devices has been continued by the defendants since the injunction; but the most important question now is whether use of a metal strip $^1/_{32}$ of an inch wide, but inclosed in glass to the extreme edge, leaving an extremely fine area touching the surface of a similar liquid to that of the patent, in the circuit of the local battery, is an infringement. As to this the prior De Forest and Smythe patent has been referred back to as showing this form to be within the description of that, and not within the injunction upon this, patent; and the varnishing of the surface of the bars to prevent short circuiting, is referred to as showing that the extremely fine terminal in question must have been thereby produced, and therefore was in that way shown. But varnishing about a point or line in space on a surface or edge would not appear to be any good way of showing that such an extremely fine terminal as that of this patent was being produced; and although that patent does not now any more than at the final hearing seem to show or hint at such a terminal in such an arrangement as that of this Fessenden patent. The statement that the inventors did "not intend to impose any limitation so far as the extent of area of the opposed surface is concerned," would not show anything further in that direction than had been set forth, nor seem to prevent a valid patent for any difference amounting to invention between what was so shown and what might afterwards be produced. Neither the claims of Fessenden's patent sustained nor the injunction appears to be limited in any way by this consideration.

The extremely fine aerial terminal appears to have been the invention of Fessenden in his hot wire barretter; the connection of it with this electrolytic liquid in the local circuit between the aerial and ground terminals appears to have been his invention in his liquid barretter, and covered by the claims upheld, and by the injunction.

It is argued now that these claims and the injunction are limited by their terms to a terminal extending into the liquid, and that the claims are not infringed nor the injunction violated by any arrangement of a terminal by which it merely touches the liquid. Each of the eleventh, twenty-third and twenty-fifth, does refer to the terminal as projecting into the liquid; but there is added to the eleventh "substantially as set forth"; and to the twenty-third and twenty-fifth each, "substantially as described." An immersion of platinum of a diameter of .0004 of an inch to the depth of .0002 of an inch is mentioned in the specification, "for example," but there is added: "The immersion of the terminals should be such as to insure what is known in the art

as a 'perfect contact' between the terminals and liquid." This perfect contact appears to be the operative and material thing, and the defendants' device in question appears to, and must to be of any use, have that.

The flat and extremely thin strip does not appear to operate any differently from the extremely fine wire of the patent; the shape whether flat or round is not material; nor does the touch of the fine strip to the surface of the liquid appear to act any differently from that of the extremity of the wire of the patent projecting such a short distance into the liquid; not the form, but only the fact, of the contact, is material. Here is the same arrangement of parts for which these claims of the patent were thought, and held, to be valid in the order of size that belongs to the minuteness of this art doing the same thing in substantially the same way.

It follows that this must be held to be an infringement, and a violation of the injunction. Let an account be taken of the extent of all of the infringements.

STANDARD ROLLER BEARING CO. v. HESS-BRIGHT MFG. CO.

(Circuit Court, E. D. Pennsylvania. May 4, 1906.)

No. 5.

PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction should not be granted to restrain an alleged infringement of a paper patent issued more than 16 years before suit, the validity of which has not been established by adjudication or public acquiescence, and where there is a strong showing of anticipation.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 474–477.]

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

Henry P. Brown and A. B. Stoughton, for complainant.

Wm. A. Gray and Robert Fletcher Rogers, for respondent.

HOLLAND, District Judge. In this motion for a preliminary injunction it appears patent No. 417,340, known as the "Scales Patent," for an improvement in journal bearings, was issued to William S. Scales, George G. Frost, and Joseph H. Clark on December 17, 1889, and by them assigned to the complainant on February 28, 1906. A few days after obtaining title this motion for a preliminary injunction was made. The respondents reply that the patent has never been adjudicated, nor is its validity established by a public acquiescence, and that it is invalid because of anticipation. It has been a mere paper patent, and up to the present time the device has not been manufactured or sold to the public by the patentees. About a year ago the respondents, through their own efforts, created a demand for a bearing similar to the one described in the patent. They have been engaged in selling them since that time, and after an examination of the Patent Office, to avoid interfering with other rights, they engaged in the manufacture

of ball bearings in the city of Philadelphia. They are importers of large quantities of a similar article from abroad. They admit that the ball bearings manufactured and imported by them are similar to those described in the complainants' patent, but aver, however, that the patent is invalid because of anticipation. The patent in question was issued on the 17th day of December, 1889, as applied for, without any objection in the Patent Office whatever. No one regarded the device patented of sufficient value to manufacture it, and not until the respondents created a demand for this kind of bearing did the complainants investigate the questions of existing patents, and, as a result, purchased the one in suit. They secured title to it in February 28, 1906, and are about to engage in the manufacture of ball bearings such as described in the patent. The respondents called the court's attention to two patents which they claim anticipates the one issued to Scales and others.

An inspection of these patents and an examination of the evidence leads the court to the conclusion that this injunction should not be awarded, notwithstanding the fact the respondents admit that the article manufactured and sold by them is similar to that described in the patent, because there has never been an adjudication, nor has there been such a public acquiescence in the patent sufficient to establish its validity, and the patents cited as anticipations so closely resemble the one in suit that the court is led to the conclusion that the respondents should not be restrained at this time from continuing the manufacture of their bearings, especially as the evidence indicates that they are able to respond in any damages which the complainants on a final hearing may be able to establish.

We think the conclusion arrived at in this case is amply sustained by the cases of Grover & Baker Sewing Machine Company v. Williams, 11 Fed. Cas. 83; Raymond et al. v. Boston Woven Hose Co. (C. C.) 39 Fed. 365; Ertel v. Stahl, 65 Fed. 521, 13 C. C. A. 31; Consolidated Fastener Co. v. American Fastener Co. (C. C.) 94 Fed. 523; Walker on Patents (4th Ed.) § 667; Blount v. Societe et al., 53 Fed. 102, 3 C. C. A. 455.

Motion for a preliminary injunction is overruled.

HAARMANN DE LAIRE-SCHAEFER CO. v. LUEDERS et al.

(Circuit Court, S. D. New York. March 27, 1906.)

PATENTS—INFRINGEMENT—AROMATIC KETONE.

The Tiemann patent, No. 556,943, for aromatic ketone and process for making same, claim 1 *held* not infringed.

In equity. Suit for alleged infringement of letters patent No. 556,943, granted March 24, 1896, to Johann C. W. F. Tiemann, on application filed May 11, 1893, for aromatic ketone and process of making same.

Elisha K. Camp (Philip Mauro and C. A. L. Massie, of counsel), for complainant.

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

RAY, District Judge. The patent in suit contains four claims, but claim 1 only is in suit. I think title in complainant is shown. Infringement must be proved; it is not presumed and the evidence ought to be satisfactory to the trial court. In this case I appreciate the difficulties under which complainants labored, but am far from convinced that defendants have infringed. I also doubt the validity of the patent, but will not pass on that point. Assuming it to be valid, infringement is not shown.

The defendants are entitled to a decree dismissing the bill of complaint, with costs.

HARTMAN v. JOHN D. PARK & SONS CO.

(Circuit Court, E. D. Kentucky. February 14, 1906.)

No. 2,440.

1. PROPERTY—SECRET PROCESS—INCIDENTS OF OWNERSHIP.

The patent and copyright statutes, in conferring upon an inventor or author the exclusive right to make use and sell articles embodying his invention or authorship, create in him a new right and do not extend or continue a previously existing right. The owner of a secret process, not patented, has no such exclusive right to make, use, and vend the article to which it relates, but he has the right to keep his knowledge to himself and to protection of the same as a property right against one, who, in violation of contract or through a breach of trust or confidence, undertakes to apply the secret to his own use or to impart it to others.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Property, § 2. Disclosure of trade secrets, see note to S. Jarvis Adams Co. v. Knapp, 58 C. C. A. 8.]

2. SALES—RIGHT TO RESTRICT FUTURE SALES—EFFECT OF PATENT.

The owner of a patent or copyright after an absolute sale of the article covered thereby may, by virtue of the exclusive right given him by statute, and his right to withhold or restrict licenses under his monopoly, retain control of future trade in the article sold, as to prices of resale, etc., irrespective of any condition in the contract of sale, but the right to reserve such future control by contract is not derived from the statute, but exists if at all by the common law, and may as lawfully be exercised by the seller of an unpatented article.

3. CONTRACTS—RESTRAINT OF TRADE—SALE OF ARTICLE MADE BY SECRET PROCESS.

Provisions in a contract for the sale of a secret process restraining its use or its communication to others are not invalid as in restraint of trade, because necessary to protect the property right in the subject-matter of the contract, but such considerations do not apply to contracts for the sale of the article produced by such process which are subject to the same rules as contracts for the sale of any other article of manufacture.

4. SAME.

A system of contracts made by the manufacturer of a proprietary medicine between him and wholesale dealers, to whom alone he sold his medicine, by which they were bound to sell only at a certain price and to retail dealers designated by him, and between him and the retail dealers by which, in consideration of being so designated, they agreed to sell to consumers only at a certain price, is not unlawful as in restraint of trade, but

is a reasonable provision for the protection of the manufacturer's trade, and he is entitled to an injunction to restrain a defendant from inducing other parties to such contracts to violate the same.

In Equity. On demurrer to bill.

F. W. Hinkle, F. F. Reed and E. S. Rogers, for plaintiff.
W. J. Shroder, Alton B. Parker, Morris & Fay, for defendant.

COCHRAN, District Judge. This case is before me on demurrer to the bill for want of equity. The bill alleges in substance that complainant is the manufacturer and seller amongst other medicines of one known as "Peruna"; that the formula by which it is made was discovered by him, and is known only to him and his trusted employés; that he puts it up in bottles, each of which is inclosed in a loose white wrapper bearing the words "Peruna the Great Tonic" and has pasted on it a label giving its history, the theory upon which it is based, the ailments for which it is recommended, and the directions for taking it, and is serially numbered, the number being stamped both on the wrapper and label in several places; that he sells the medicine to wholesale druggists only, who in turn sell to retail druggists, who in turn sell to consumers; that the wholesalers to whom he sells contract with him not to resell except to retailers designated by him and at certain prices, and the retailers whom he designates contract with him not to resell to consumers except at certain prices; that his prices to the wholesalers are uniform and so are the prices fixed by him of wholesalers to retailers and of retailers to consumers; that he alone advertises the medicine and creates the demand for it; that with each package of medicine is furnished a card containing the serial numbers of the bottles therein and the wholesalers are required to note thereon the retailers to whom same is sold, and to return it to complainant; that the defendant, a Kentucky corporation, is a wholesale druggist; that it obtains said medicine from complainant's wholesalers and retailers by false and fraudulent representations, surreptitious, and dishonest methods and persuading them to break their contracts with him, and sells same to retailers operating "cut rate drug stores" at less than the wholesale prices fixed by him, who in turn sell to consumers at less than the retail prices so fixed; that before the medicine is so sold to consumers the wrappers are removed and the labels are defaced so as to obliterate the serial numbers stamped thereon and the information thereby given; and that defendant gives out and announces that he will continue so to obtain said medicine and so dispose of it. The relief sought is an injunction against his so doing.

The defendant's contention is that complainant has no right to sell his medicine outright to the wholesalers, and at the same time retain a control over the subsequent trade therein as to the retailers to whom and prices at which the wholesalers may resell and as to the prices at which the retailers may resell to the consumers, and that, hence, the system of contracts by which he is attempting to retain such control is unlawful. It concedes that if this contention is not correct the complainant is entitled to the relief he seeks. The demurrer, therefore,

presents for determination the single question as to whether this contention is correct. Its counsel advance two arguments in support thereof. The first one presupposes that the owner of a patent or copyright has the right to sell the things patented or copyrighted outright, and, at the same time by such system of contracts, retain such control over the subsequent trade therein. It is that such owner has such right by virtue alone of the federal statutes as to patents and copyrights, and that as there is no statute giving any rights to the owner of a secret process he does not have such right. The argument has some plausibility and has bothered me somewhat—less, however, in concluding that it is not sound than in demonstrating that it is not in a lucid and convincing way, which I have aimed to do. In order to determine its validity it should be ascertained first what rights the owner of a patent or copyright has by virtue alone of the statutes as to patents and copyrights. They in express terms confer the exclusive right to make, use, and sell the things patented or copyrighted. Unquestionably the owner of a patent or copyright has this right by virtue alone of said statutes. It arises solely therefrom. If it were not for them he would not have the right. No other person has any such right in relation to any other articles. Complainant's counsel hesitate to concede this, if they do not actually dispute it. They contend, in effect, that an inventor or author who has not obtained a patent or copyright has, before publication, such right in relation to articles embodying his invention or authorship and that the owner of a secret process who may be an inventor and entitled to a patent, and who is in exactly the same position as an inventor or author who has not obtained a patent or copyright before publication has such right in relation to articles embodying his secret process. As to the former they say that he has precisely the same rights which an inventor or author who has obtained a patent has. To make sure of this I quote from their brief. They say:

"It is therefore proposed—to show that in case of inventors and authors—precisely the same exclusive monopolistic and all controlling property rights in inventions and literary products subsisted at common law before publication as are given by statute after publication. The right given by the federal copyright statute is the exclusive right to print, publish and sell the production. The right given by the patent statutes is the exclusive right to make, use and vend the invention. At common law and by natural right the author of a book or the discoverer of an improvement in machinery, art or manufacture has precisely the same rights before publication."

Again they say:

"The common-law right and the statutory right are identical in their natures."

As against these views many expressions from learned judges can be quoted. As for instance, in the case of Wheaton v. Peters, 8 Pet. (U. S.) 591, 8 L. Ed. 1055, Mr. Justice McLean, in referring to the federal statutes as to copyrights, said:

"Congress then by this act instead of sanctioning an existing right as contended for created it."

And in the case of Gayler v. Wilder, 10 How. (U. S.) 477, 13 L. Ed. 504, Mr. Chief Justice Taney said:

"The inventor of a new and useful improvement certainly has no exclusive right to it until he obtains a patent. This right is created by the patent."

And again in the case of In re Brosnahan (C. C.) 18 Fed. 62, Mr. Justice Miller said:

"The sole object and purpose of the laws which constitute the patent and copyright systems is to give to the author and inventor a monopoly of what he has written or discovered, so that no one else shall make or use or sell his writings or his invention without his permission; and what is granted to him is the exclusive right; not the abstract right but the right in him exclusive of everybody else."

Concerning these expressions complainant's counsel say:

"All that is meant or intended to be meant, when various courts have said that copyright and patent laws create new rights, must be simply that these statutes have continued and extended the old rights after publication or disclosure."

In this line they frequently speak of the rights of an inventor or author who has obtained a patent or copyright as being an extension, protraction, continuance, or prolongation of the rights he had in the absence of publication before he obtained his patent or copyright. Counsel for defendant, though taking issue here with complainant's counsel, at times use language implying what they contend. They speak of an inventor or author losing his exclusive right by publication and of his preserving it by obtaining a patent or copyright. I cannot concur in this contention. An inventor or author who has not obtained a patent or copyright does not have before publication the exclusive right to make, use, and sell articles embodying his invention or authorship. Nor does the owner of a secret process have exclusive right to make, use, and sell articles embodying his secret process. The statutes as to patents and copyrights in conferring upon an inventor or author the exclusive right to make, use, and sell articles embodying his invention or authorship create in him a new right, and do not extend, protract, continue, or prolong a previously existing right. An inventor or author who has not obtained a patent or copyright, has, before publication, a valuable right of another kind. He has the right to keep the knowledge of what he has invented or composed to himself. No one can lawfully obtain it from him without his consent. So, likewise, the owner of a secret process has the right to maintain the secrecy of his process. Both such an inventor or author and such owner have a right to sell their knowledge and their right to keep it a secret to another and vest him with the same rights in regard thereto as he has. They have the right to impart the knowledge to others with restrictions as to the use they shall make of it, and to have them make no greater use of it. Such knowledge as well as the articles embodying it is property, and entitled to the protection of the courts. From a commercial standpoint, the owner of a secret process may be in as good a position, if not better, than an inventor or author who has obtained a patent or copyright. But the exclusive right to make, use, and sell articles embodying his invention or au-

thorship which such an inventor or author has is not the same as the right to secrecy which the owner of a secret process or an inventor or author who has not obtained a patent or copyright has before publication. The two rights are entirely distinct.

In the case of Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664, Judge Gray said:

"If one invents or discovers and keeps secret a process of manufacture, whether a proper subject for a patent or not, he has not indeed an exclusive right to it as against the public or against those who, in good faith, acquire knowledge of it; but he has a property in it which a court of chancery will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use or to disclose it to a third person."

In the case of Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442, Judge Holmes said, with reference to a secret formula for making a medicine, that the owner thereof "had not the exclusive right to the use of the formula. His only right was to prevent any one from obtaining or using them through a breach of trust or confidence."

In the case of Tabor v. Hoffman, 118 N. Y. 31, 23 N. E. 12, 16 Am. St. Rep. 740, Judge Vann said:

"If a valuable medicine not protected by patent is put upon the market any one may, if he can by chemical analysis and a series of experiments or by any other use of the medicine itself aided by his own resources, discover the ingredients and their proportions. If he thus finds out the secret of the proprietor he may use it to any extent that he desires without any danger of interference by the courts. But because this discovery may be possible by fair means, it would not justify a discovery by unfair means, such as the bribery of a clerk who in the course of his employment has aided in compounding the medicine and had thus become familiar with the formula. The courts have frequently restrained persons, who have learned a secret formula for compounding medicines, beverages and the like, while in the employment of the proprietor, from using it themselves or imparting it to others, to his injury."

And in the case of Vulcan Detinning Co. v. American Can Co. (N. J. Ch.) 58 Atl. 290, Vice Chancellor Reed said:

"A patent protects its owner and his assignees and licensees against every one infringing it, while a trade secret protects its owner only against those who have learned the secret under a contractual or confidential obligation."

It must be accepted, therefore, as true that as to the exclusive right which the statutes as to patents or copyrights confer the owner of a patent or copyright has it by virtue alone of said statutes. It arises solely therefrom. If it were not for them he would not have it. And no other person has any such right in relation to any other articles. This right, however, is not the same as the right in question; that is, the right on the part of the owner of a patent or copyright to sell the things patented or copyrighted outright, and at the same time by a system of contracts similar to that involved herein retain control over the subsequent trade therein. As counsel for defendant say the two are essentially different. And this exclusive right is the only right which those statutes in express terms confer. It follows, therefore, that, if the owner of a patent or copyright has the right to sell the things patented or copyrighted and at the same time by such a

system of contracts retain control over the subsequent trade therein by virtue alone of said statutes, he does not have it directly therefrom. Said statutes do not in express terms confer it upon him. If he has it at all, he must come by it indirectly; that is, through said exclusive right. It must grow out of that right. And it must be conceded that if it does grow out thereof that he has it by virtue alone of said statutes, just as much so as he has the exclusive right by virtue alone thereof, which we have heretofore demonstrated. The question I have been considering, then, simmers down to this: Does the right which it is presupposed the owner of a patent or copyright has—that is, the right to sell the things patented or copyrighted outright, and at the same time by a system of contracts similar to that involved herein retain the control over the subsequent trade therein as to retailers to whom and prices at which the wholesalers may resell, and as to the prices at which the retailers may resell to the consumers—grow out of the exclusive right which those statutes confer, and which the owner of a patent or copyright has by virtue alone thereof?

To answer this question correctly it is essential that we look more deeply into this exclusive right so conferred, and ascertain its exact nature. No better definition of the nature of this exclusive right which the owner of a patent has by virtue alone of the statutes as to patents can be found than in these words of Mr. Chief Justice Taney, in Bloomer v. McQuewan, 14 How. (U. S.) 539, 14 L. Ed. 532, to wit:

"The franchise which the patent grants consists altogether in the right to exclude every one from making or using or vending the thing patented, without the permission of the patentee. This is all he obtains by the patent."

In other words, the right is the right to prevent every one from making, or using, or selling the thing patented without his consent. Or, to put it differently, it is the right to sue any one who so makes, uses, or sells the thing patented. It is not the right to make, or to use, or to sell the thing patented. That he has the right to do irrespective of the statute by virtue of the common law. That it is the former right, and not the latter which the statute grants, and the patentee has by virtue thereof, is pointed out in these words of Mr. Justice Harlan in Patterson v. Kentucky, 97 U. S. 506, 24 L. Ed. 1115, to wit:

"The right to sell the Aurora oil was not derived from the patent; that right existed before the patent, and unless prohibited by valid local laws could have been exercised without the grant of the latter's patent. The right which the patent primarily secures is the exclusive right in the discovery, which is an incorporeal right, or in the language of Lord Mansfield, in Millar v. Taylor, 4 Burr. 2303, 'a property in notion' which has no corporeal tangible substance."

Having the right to prevent every one else from making, using, or selling the thing patented, he has the right to permit any one else to make, use, or sell it. This right to license does not exist by virtue of the statute. It is a common-law right. In the case of United States v. American Bell Telephone Co. (C. C.) 29 Fed. 17–43, Judge Jackson said:

"The right of the patent owner to permit or license the use of the invention is not the creature of the federal franchise or statute, but of the common law."

Just as the exclusive right of the owner of the patent has been defined as the right to sue any one who makes, uses, or sells the thing patented, so the grant of a license to another by the owner of the patent may be said to be a grant of the right not to be sued for making, using, or selling the things patented.

Judge Lurton, in Heaton Peninsular Button Fastener Co. v. Eureka Specialty Co. (77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728), said:

"It has been said that the sole matter conveyed in a license is the right not to be sued."

Still further, it is to be noted that what the owner of a patent has a right to prevent every one else from doing, and to sue him if he does it, is either one of three separate and distinct things, to wit, making the thing patented, using the thing patented, or selling the thing patented. Likewise, the common-law right of doing which the owner of the patent has is of doing either one of these three things. And the like right of licensing others to do which the owner of the patent has is to make the thing patented, to use the thing patented, or to sell the thing patented. The statutory exclusive right of prevention and suing consists of these three separate and distinct things, and the common-law rights of doing and licensing to do consists also of these three separate and distinct things.

In the case of Adams v. Burke, 17 Wall. (U. S.) 453, 21 L. Ed. 700, Mr. Justice Miller said:

"The right to manufacture, the right to sell, and the right to use are each substantial rights, and may be granted or conferred separately by the patentee."

Hence, the patentee may license another simply to make the thing patented. If he licenses him to do no more he has no right to use or to sell the thing patented. He simply acquires title to the thing patented if he makes it under the license. He can neither use nor sell it. Walker on Patents, § 297, says:

"It is not to be presumed that a right so nugatory as a bare right to make was the only subject of a license for which a valuable consideration was paid."

But it is possible that the license may go no further and it is conceivable that a patentee might grant no greater license. So, in addition to licensing such other person to make the thing patented, he may license him to use it, or to sell it, or to both use and sell it. If he licenses him to use it only, he has no right to sell it, and if he licenses him to sell it, he has no right to use it. Again, the owner of the patent may, instead of licensing another to make the thing patented, make it himself, and sell it to such other person. If the sale covers the entire transaction, the purchaser acquires the title to the thing patented, but he can do nothing with it. He can neither use nor sell it, just as in the case of one who makes the thing patented under a license so to do only. Here, as there, it is not to be presumed that such is the entire transaction, but it is possible that it may be so, and it is conceivable that one might so limit it. The presumption, however, is, nothing else appearing, that the purchaser is licensed to either use or sell it. But there may be an express license simply to

use it, in which case he has no right to sell it, or it may be simply to sell it, in which case he has no right to use it. If he is licensed expressly or impliedly to both use and sell it, the thing patented is said to pass outside of the monopoly created by the statute, just as if he is licensed to make the thing patented and also to use and sell it. Whenever a licensee is limited to doing one or two of the three things which he may be licensed in relation to or with the thing patented, and he does one or two of the three things, as the case may be, which he is not licensed to do, he invades the exclusive right of the patent owner, and infringes the patent, just as much so as if he had had no license at all, and had done such thing or things. But such are not the only limitations which a patent owner may put upon his license. The limitations so far considered have to do only with the three fields of operation, to wit, making, using, and selling the thing patented. He may limit the licensee as to what he may do with the thing patented in either one of these separate fields of operation. He may limit the licensee as to when, and how, and the extent to which he may make the thing patented. He may limit the licensee as to when, and how, and the extent to which he may use the thing patented. He may limit the licensee as to when, and how, and to the extent to which he may sell the thing patented. If he so limits the licensee in any particular field of operation, and the licensee exceeds the limitations in that field, even though he does not go outside thereof into any other field, he invades the exclusive right of the patent owner, and infringes the patent, just as much so as if he had had no license at all, and had done the things which exceed the license.

We come, then, to this. The owner of a patent may make the things patented himself, and sell them to others and license such others to resell them, but may limit the license to resell to such persons as he may designate and at certain prices and the license of such persons to resell to others at certain prices. If he does so, and the first purchasers exceed the license either by selling the things licensed to persons other than those they were licensed to sell to or by selling at different prices from those at which they were licensed to sell at or the second purchasers exceed the license by selling the things licensed at different prices from those at which they were licensed to sell at, then, in either case, the purchasers so exceeding the license invade the patent owner's exclusive right, and infringe the patent. That this is so is established by several recent decisions. They are: Edison Phonograph Co. v. Kaufmann (C. C.) 105 Fed. 960; Same v. Pike (C. C.) 116 Fed. 863; Victor Talking Machine Co. v. The Fair, 123 Fed. 424, 61 C. C. A. 58; National Phonograph Co. v. Schlegel, 128 Fed. 733, 64 C. C. A. 594.

The first three of these cases are cited and relied on by defendant's counsel as supporting their contention herein that the owner of a patent or copyright has the right to sell the things patented or copyrighted, and, at the same time, by a system of contracts similar to that involved herein, retain such control over the subsequent trade therein. In the first two cases the complainant was the same. It was the owner of patents for phonographs and phonograph records which it made and

sold for resale. It sold only to jobbers and to them only under what was called a "Jobber's Agreement." That agreement contained a limitation as to the prices at which and the dealers to whom the jobbers could resell the things patented; the latter being dealers who would sign an agreement containing a limitation as to the prices at which they could resell to users, and who were not on their suspended list. In the Kaufmann Case, a dealer who had purchased certain of the things patented from one who had purchased them from complainant under a jobber's agreement with notice of the dealer's prices, but who had not signed a dealer's agreement was reselling them at cut prices; that is, at less than dealers' prices. In the Pike Case, a jobber resold to a dealer who had not signed a dealer's agreement, but who knew of the limitations in the jobber's agreement as to the persons he could sell to. It was held in each case that there had been an infringement of the patent, and that the complainant was entitled to an injunction; in the one case restraining defendant from selling at less than dealer's prices and in the other case from selling at all.

In Victor Talking Machine Co. v. The Fair, the complainant was the owner of a patent for gramophones which it made and sold for resale. On each gramophone which it sold was a notice limiting dealers from selling it to the public at less than a certain price. The defendant, a proprietor of a department store purchased certain of such gramophones from a jobber with notice of the limitation, and was reselling them to the public at less than the fixed price. It was held that he was infringing the patent, and that complainant was entitled to an injunction restraining him from so doing. Judge Baker said:

"By its terms the grant covers three separate or separable fields. The patentee may agree with one that he will not exclude him from making, with another from using, and with yet another from selling devices that exemplify the principles of his invention. 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 lease in the most fanciful parcels on the harshest terms; that whether purchasers and tenants come or not is purely his own concern; and that, if purchasers or tenants do not come, the courts will enforce the terms of the sale or lease. And how could it be otherwise. Owning the whole, he owns every part. The field being his property, and there being no law for seizing it and adjudging his damages, he cannot be compelled to part with his own except on inducements to his liking. The same conditions must prevail within the field of use, for how can it be distinguished? And the Circuit Court of Appeals for the Sixth Circuit, in a case we thoroughly approve (Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728), has ruled that a patentee may farm out such a part of the field of use as he pleases, and retain the balance and that whoever without permission enters the reserved portion is an infringer. This case has been followed and approved by the Circuit Court of Appeals for the Second Circuit in Cortelyou v. Lowe, 111 Fed. 1005, 49 C. C. A. 671. The field of sale is as much within the monopoly as the others, and so it has been decided. Bement v. National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058. And in Edison Phonograph Co. v. Kaufmann (C. C.) 105 Fed. 960; and Same v. Pike (C. C.) 116 Fed. 863, the holdings were that a patentee may reserve to himself as an ungranted part of his monopoly of sale the right to fix and control the prices at which jobbers and dealers may sell the patented article to the public, and that whoever without permission enters the reserved portion is an infringer."

In National Phonograph Co. v. Schlegel, the complainant was the exclusive licensee for sale of the complainant in the two Edison Phonograph Company cases. It carried on the business of selling phonographs to jobbers under the same system of agreements, as stated, in giving the facts of those cases. A jobber who had purchased certain of the things patented under a jobber's agreement was selling them at less than the prices stipulated, and to dealers who did not sign the required dealer's agreement. It was held that complainant was entitled to an injunction against the jobber restraining him from so doing. The complainant, though merely an exclusive licensee for sale, was treated as in the position of the patentee. Judge Vandevanter said:

"This is not a suit by the patentee or an assignee to enjoin the infringement of a patent, but it is a suit by an exclusive licensee for sale of articles embodying the patented invention or discovery to restrain the future violation of an under license or contract for the sale of such articles by a sublicensee. However, the validity of the under license or contract and the right of the licensee to restrain the future sales in violation thereof must necessarily be determined by the patent laws and by the rules applicable to a suit by a patentee or an assignee to enjoin the infringement of the patent."

And again he said:

"An unconditional or unrestricted sale by the patentee or by a licensee authorized to make such sale of an article embodying the patented invention or discovery passes the article without the limits of the monopoly and authorizes the buyer to use or sell it without restriction; but to the extent that the sale is subject to any restriction upon the use or future sale the article has not been released from the monopoly, but is within its limits, and as against all who have notice of the restriction is subject to the control of whoever retains the monopoly. This results from the fact that the monopoly is a substantial property right conferred by law as an inducement or stimulus to useful inventions and discovery, and that it rests with the owner to say what part of this property he will reserve to himself and what part he will transfer to others and upon what terms he will make the transfer."

These four cases, which all had to do with limitations within the field of selling were based upon the earlier and notable case of Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co. (77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728), which had to do with a limitation within the field of using. The complainant was the owner of a patent for machines to fasten buttons to shoes. To do their work it was necessary to use, in connection with them, staples adapted thereto, but which anybody could make. Complainant sold the machines through jobbers to purchasers for use, attaching to each machine a metal plate on which was expressed a limitation as to its use, that it was to be used only with staples made by it. The defendant was charged with persuading users of such machines to purchase from it staples not made by complainant for use therewith. It was held that such users were infringers of the patent, and the defendant a contributory infringer thereof, and that complainant was entitled to an injunction against defendant, restraining it from continuing so to do, notwithstanding thereby complainant was given a monopoly in staples adapted for use with such machines. Judge Lurton said:

"The buyer of the machine undoubtedly obtains the title to the machine embodying the invention, subject to a reverter in case of violation of the conditions of the sale. But, as to the right to use the invention, he is obviously a mere licensee, having no interest in the monopoly granted by the letters patent. A license operates only as a waiver of the monopoly as to the licensee, 'and estops the licensor from exercising the prohibitory powers in derogation of the privileges conferred by him upon the licensee.' Rob. Pat. §§ 806–808. * * * A licensee is one who is not the owner of an interest in the patent, but who has, by contract, acquired a right to make or use or sell machines embodying the invention. Gayler v. Wilder, 10 How. (U. S.) 477, 13 L. Ed. 504; Oliver v. Chemical Works, 109 U. S. 75, 3 Sup. Ct. 61, 27 L. Ed. 862; Rob. Pat. §§ 606–608. Alienations of a mere right to use the invention operate only as licenses."

Again he said:

"The control reserved by the patentee as to the use of the machine has the effect of continuing it within the prohibitions of the monopoly. The license defines the boundaries of a lawful use, and estops the licensee from the assertion of his monopoly contrary to its terms. On the other hand, a use prohibited by the license is a use in defiance of the monopoly reserved by the patentee, and necessarily an unlawful invasion of the rights secured to him by his patent. The license would be no defense to a suit for infringement by a use in excess of its terms. The patentee has the exclusive right of use, except in so far as he has parted with it by his license. The essence of the monopoly conferred by the grant of the letters patent is the exclusive right to use the invention or discovery described in the patent. This exclusive right of use is a true and absolute monopoly, and is granted in derogation of the common right, and this right to monopolize the use of the invention or discovery is the substantial property right conferred by law, and which the public is under obligation to respect and protect."

And again he says:

"If, then, the patentee has the exclusive right to the use of his invention or discovery, during the term of his patent, it would seem to follow that any use by another, unauthorized by the patentee, would be an infringement of his monopoly. If, therefore, he can find a purchaser for a machine subject only to certain specified uses, any violation of the privilege granted would be an infringement, for which the remedies granted patentees would be appropriate."

We must conclude, therefore, that the owner of a patent or copyright has the right to sell the thing patented or copyrighted outright, and, at the same time, retain the control over the subsequent trade therein as to the retailers to whom, and prices at which the wholesalers may resell, and as to the prices at which the retailers may resell to consumers; that this right on his part so to do grows out of the exclusive right which the statutes as to patents and copyrights confer and which such owner has by virtue alone thereof; and that this right of outright sale and retention of control which he has, he has by virtue alone of said statutes. The exclusive right in the field of selling the thing patented or copyrighted which the statutes confer, and which he has by virtue alone thereof is the right to prevent others from selling such thing. They have no right to do so unless he licenses them. He is not bound to give any greater license as to selling than he chooses. When he sells the things patented or copyrighted outright to others, therefore, he can or not, as he chooses, give a license to resell and, of course, if he chooses to give it, he can limit the license to resell as he chooses. If he sells to wholesalers,

he can limit it to reselling to such retailers as he designates and at certain prices; and the reselling of the retailers to consumers he can limit to certain prices. It is in this way that the right of the owner of a patent or copyright to retain the control of the subsequent trade in the thing patented or copyrighted at the time he sells them outright grows out of the exclusive right conferred by the statutes and which he has by virtue alone thereof. He has it by virtue alone thereof not directly, but indirectly through the exclusive right they confer. It follows from this that no other person has the right to sell any other personal property outright, and at the same time in this way retain the control over the subsequent trade in such personal property by the vendees and subvendees thereof. The owner of a secret process does not have the right to sell articles embodying said process outright, and at the same time in this way retain the control over the subsequent trade in such article by his vendees and subvendees. He can communicate the knowledge of his secret to others and limit the use that they are to make of it, and compel them to make no greater use thereof. If they make a greater use thereof, such conduct on their part is no invasion of an exclusive right on his part, but a breach of his confidence. If he sells the articles embodying the secret to others outright, he can, at the same time, retain no greater control over the subsequent trade therein by his vendees and subvendees than can the vendor of any other personal property, not a thing patented or copyrighted, who sells it outright can at the same time retain; and he cannot retain it in any other way than the owner of such other personal property can. Neither he nor the owner of such other property can sell outright, and, by a mere limiting license to resell, retain control, so that a reselling in excess of the license will be an invasion of any exclusive right on his part and liable to be proceeded against as such.

But the question I have been considering has not been so far answered. As heretofore stated, it is this: Does the right to sell the things patented or copyrighted outright, and, at the same time by a system of contracts similar to that involved herein retain control over the subsequent trade therein by his vendees and subvendees, in the particulars stated, which it is presupposed the owner of a patent or copyright has, grow out of the exclusive right which the statutes as to patents and copyrights confer; and hence, does such owner have such right by virtue alone of said statutes? It will be noticed that the question is not whether the right to retain such control in the way I have indicated—that is, by limiting the license to resell—grows out of such exclusive right or whether the patent or copyright owner has the right to retain such control in that way by virtue alone of said statutes, but it is whether the right to retain such control by a system of contracts similar to that involved herein grows out of such exclusive right, and whether the patent or copyright owner has the right to retain such control by such a system of contracts by virtue alone of said statutes. The question thus put must be answered in the negative. No right on the part of the patent or copyright owner to sell the thing patented or copyrighted outright, and at the same time retain control over the subsequent trade therein by his vendees and sub-

vendees by such a system of contracts, grows out of said exclusive right and the patent or copyright owner has no such right by virtue alone of said statutes. Such a system of contracts, nor any contract on the part of the licensee that he will not exceed his license, is necessary to enable the patent or copyright owner so to do. He is enabled so to do by limiting the licenses as heretofore indicated. The licensees are bound not to exceed the license, even though they may not have agreed so to do. They are bound so to do in such a case, because an excess of the license is an invasion of the exclusive right. It may be that in every case of a limited license, nothing else appearing, there is an implied contract on the part of the licensee that he will not exceed the license. And, of course, the licensee may, in every case, expressly contract not so to do. But, conceivably, there may be neither an express nor an implied contract—nothing more than the sale and the limited license to resell. Such would be the case if the parties should expressly agree that there was not to be any contract on the part of the licensee not to exceed the license and that the sale and limited license should cover the transaction between them. In such a case the control of the owner of the patent or copyright over the subsequent trade in the things patented or copyrighted would be as complete as it would have been had there been executory contracts on the part of the vendees and subvendees, express or implied, not to exceed the license. The sole effect of such contracts or of such a system of contracts as are involved herein applied to things patented or copyrighted is simply to afford another remedy for an excess of the license, and another forum in which it may be enforced. In the absence of such contracts or system of contracts, the sole remedy is in tort for an infringement of the patent, either at law for damages or in equity for an injunction and an accounting, and the federal courts alone have jurisdiction thereof.

Robinson on Patents, § 855, says:

"Jurisdiction on the ground of subject-matter has been vested in the federal courts over all cases arising under the patent laws. This jurisdiction is exclusive, and hence no suit arising under the patent laws, whatever may be the residence of the parties, can fall within the cognizance of any local court."

With such contracts or such a system of contracts the owner of the patent or copyright has a double remedy, either in tort for an infringement of the patent, or on contract for a breach thereof.

Robertson on Patents, § 1222, says:

"While the same persons may occupy a twofold relation toward the owner of a patent, one as his assignee or licensee within the scope of the conveyance, the other as a stranger outside the conveyance, and in the latter capacity may commit wrongful acts for which no contract suit would lie, yet when as a contracting party he has bound himself to respect the reserved rights of his grantor, his liability rests on a double basis and he may be pursued either upon his broken contract or for his tortious interference with the property of his grantor."

Of the remedy in contract, in the absence of diverse citizenship, the state courts alone have jurisdiction.

Robertson on Patents, § 865, says:

"Citizenship being the same, the state courts have sole cognizance of all actions based on contracts between the parties, whether to compel their performance, to rescind them or to award damages for their violation. Actions for breach of warranty, for fraud, for royalty or purchase money and for the nonfulfillment of other collateral contracts are also within their exclusive jurisdiction."

In the Button Fastener Case the right of the owner of the patent involved therein to control the use of his machine was not based upon the existence of any contract between the parties other than the executed contract of sale and license to use. The suit was one in tort for a contributory infringement of the patent. Judge Lurton, however, recognized the possibility of there being a contract not to exceed the licensed use in such a case, and that if there was one there would be a double remedy. He said:

"That the buyer enters into an implied agreement that he will not use the machine contrary to the terms of his license, and that there is in the agreement a provision for a reverter of the title to the structure may operate to give the patentee a remedy under the general principles of law, as for damages for a breach of contract, or for recovery of the machine. It may be that a suit for a breach of contract would not be a suit depending on the patent laws and would, therefore, be cognizable by the state courts, as intimated in Hartell v. Tilghman, 99 U. S. 547, 25 L. Ed. 357, and White v. Rankin, 144 U. S. 628, 12 Sup. Ct. 768, 36 L. Ed. 569. The remedy of complainant may be a double one; for liability may rest either upon the broken contract or for tortious use of the invention."

In each one of the four cases based upon the Button Fastener Case heretofore referred to and considered, there was an express executory contract on the part of the vendee, the jobber, not to exceed his license, but in the first three cases which were against the subvendees, the dealers, there were no such contracts on their part. The most that can be said is that there were implied executory contracts on their part to that effect. But, in each instance, the action was for an infringement of the patent, and was brought in the federal court. In the fourth case, though the action was against the vendee, the jobber, and he was under an express executory contract not to exceed the license, and the suit was by an exclusive licensee, and not by the owner of the patent, it was treated as if the action were by the patent owner to enjoin an infringement of the patent. An instance of where there was an express executory contract and the contract remedy was pursued may be found in the case of Bement v. National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058. That was an action for breach of a license contract, brought in the state court and carried from the highest court of the state to the Supreme Court of the United States. The National Harrow Company granted a license to E. Bement & Sons to make and sell float spring tooth harrows, their frames, and attachments under certain patents held by it. The license was contained in a license contract executed by the parties, and the terms upon which it was given were set forth in 18 different specifications. Amongst these was one to the effect that the licensee should not sell any of the patented articles made by it at a less price or on more favorable terms of payment and delivery to the purchasers than set forth in a schedule attached to the contract, and made part thereof,

and another to the effect that the licensee should pay to the licensor for each and every of the articles sold contrary to the strict terms and provisions of the license the sum of $5 in liquidated damages. The suit was to recover the liquidated damages for sales contrary to the terms and provisions of the license, to restrain the future violations of the contract, and to compel its specific performance. The defense was that the contract was a violation of the act of Congress of July 2, 1890, on the subject of trusts. At any rate, that was the only defense which presented a federal question justifying the case being carried from the state court to the Supreme Court of the United States. It was held by both courts that it was not a violation of said act, and was valid.

The sole effect, then, of the application of a system of contracts to things patented or copyrighted is, as stated, to afford another remedy for an excess of the license, which may be enforced in another forum. It does not effectuate any control over the subsequent trade in the things patented by the vendees and subvendees of the owner of the patent or copyright. That is effectuated by the sale of the patented or copyrighted things and the limited license to resell them. The presupposition that such control is thereby effectuated is untrue. Then, as to the right to put in force such a system of contracts in relation to things patented or copyrighted with such effect as it has, that does not grow out of the exclusive right which the statutes confer, and the owner of the patent or copyright does not have said right by virtue at all of said statutes. The right to sell the things patented or copyrighted, the right to license others to sell them, and the right to enter into contract with the vendee and subvendee that they shall not exceed the license are solely creatures of the common law and they arise therefrom alone. The sole creature of the statutes is a distinct property right, to wit, the exclusive right to make, use, and sell the thing patented or copyrighted; that is, to prevent others from making, using, and selling it, which may be made the subject-matter of contract. The right of contract here is limited by the statutes. As, for instance, as to the patent right. Mr. Justice Gray, in Waterman v. MacKenzie, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. Ed. 923, said:

"The monopoly thus granted is one entire thing, and cannot be divided into parts except as authorized by those laws. The patentee or his assigns may, by instrument in writing, assign the grant and convey either (1) the whole patent, comprising the exclusive right to make, use, and vend the invention throughout the United States; or (2) an undivided part or share of the exclusive right; or (3) the exclusive right under the patent within and throughout a specified part of Rev. St. U. S. § 4898 [U. S. Comp. St. 1901, p. 3387]."

But so far as the right of contract as to the thing patented or copyrighted or as to licensing others to make, use, or sell it, or as to the licensee not exceeding the license is concerned, the statutes prescribe no limit. What, then, is essential to the making of a contract as to any one of these matters, whether in fact a contract as to either has been made, the validity of any particular contract in regard thereto, and the obligations of the parties to such a contract is to be settled and determined solely and alone by the principles of the common law.

Robinson on Patents, § 1224, says:

"The reciprocal rights of assignors and assignees, of grantors and grantees, and of licensors and licensees rest upon express or implied contracts between the parties. The law no otherwise creates them than as it permits the parties to enter into the agreements out of which they spring, and it protects them on the same grounds that it enforces other obligations. The subject-matter of these contracts, being the patent privilege, or some immunity derived therefrom, the principles of patent jurisprudence form an important element in that body of law by which the contracts are interpreted, and the relations and duties of the parties are determined. Apart from this element, however, the general law of contracts furnishes the measure by which their rights are ascertained, and the method by which their wrongs may be redressed."

Inasmuch, then, as the right to apply such a system of contracts to things patented or copyrighted arises solely from the common law, and not to any extent from the statutes as to patents and copyrights, no inference whatever can be drawn from the fact that it is proper to apply the system thereto with such effect as it has, and that it has been so held, that the owner of a secret process, who cannot appeal to any statute for any right, has no right to apply it to articles made thereunder, or that it would be unlawful for him to apply it thereto.

I am therefore driven to the conclusion that the argument of defendant's counsel is not sound. It breaks down at two points. The presupposition that control over the subsequent trade in things patented or copyrighted is effectuated by such system of contracts applied thereto is incorrect. That control is not so effectuated. It is effectuated by the exclusive right and the limited license. The sole effect of the application of the system of contracts thereto is to supply a remedy on contract that may be enforced in the state courts. The other point of break-down is in the position that the right to apply such a system of contracts to things patented or copyrighted with such effect as it has arises solely from the statutes as to patents and copyrights. To no extent does it arise therefrom. It is the creature alone of the common law. Of course, it is a circumstance in favor of the lawfulness of such a system of contracts as applied to things patented or copyrighted that it does not effectuate the control, but simply provides another remedy for an excess of the limited license which effectuates the control. In view of this, it could not well be unlawful. As applied to things made under a secret process, it lacks this favoring circumstance. But it would be illogical to argue therefrom that so applied it was unlawful.

This brings us to the other argument put forward by defendant's counsel in support of the contention that the system of contracts under which he sells his medicine outright and attempts at the same time to retain the control over the subsequent trade therein is unlawful. It is that said system of contracts in so far as it attempts to retain such control contravenes the common-law rule invalidating contracts in restraint of trade. The general principle upon which this rule is based, as stated by Pollock on Contracts, p. 309, is "that a man ought not to be allowed to restrain himself from exercising any lawful craft or business at his own discretion and in his own way." It is thus stated in the quotation made by him from the opinion in Hilton v. Eskersley, 6 E. & B. 66, 74, 75:

"Prima facie, it is the privilege of a trader in a free country in all matters not contrary to law to regulate his own mode of carrying it [his trade] on according to his own discretion and choice. If the law has in any manner regulated or restrained his mode of doing this, the law must be obeyed. But no power short of the general law ought to restrain his free discretion."

The restraint, then, which the rule and the general principle upon which it is based have in view is a restraint which a man puts upon himself by contract with another, and not a restraint which another puts upon him. Another is without power to put any restraint upon himself except by force. He alone can otherwise put restraint upon himself, and that by contract. Such restraint in its initiation is put upon him by his own discretion and choice. The entering into the contract is voluntary on his part, and the law in relieving him from it relieves him from the consequences of his own free act. It is a restraint, not only as to whether he shall carry on any lawful craft or business, wholly or in part, but also as to the way or mode of carrying it on. The cases which have arisen under the rule have fallen into two well-defined classes. One class is where, as a rule at least, the contract is between two, and but one party thereto agrees to restrain himself in some particular for the benefit of the other party. Such contracts are usually termed contracts in restraint of trade. The most usual instance of cases belonging to this class is where the owner of a business sells it to another and agrees with such other not to engage in the same business anywhere or only in certain territory.

Mr. Justice Holmes in Northern Securities Co. v. United States, 193 U. S. 197–404, 24 Sup. Ct. 436, 48 L. Ed. 679, defines contracts of this class as "contracts with a stranger to the contractor's business [although in some cases carrying on a similar one] which wholly or partially restrict the freedom of the contractor in carrying on the business as he otherwise would." To the same effect, he says:

"Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business and the trade restrained was the contractor's."

The objection to a contract of this class is its tendency to harm both the contractor and the public. The way in which it may harm the contractor is in depriving him of his livelihood in whole or in part. The way in which it may harm the public is in making him a public charge, in depriving it in whole or in part of the benefit of his activity, and in furthering an attempt at monopoly. Justice Holmes, in the opinion already quoted from, said that the objection to such contracts at common law was primarily on the contractor's own account. In early times the chance of such a contract doing harm was much greater than now. Under existing conditions, in view of the abundant opportunities for one to earn a living and the abundance of capital to go into any profitable business and its eagerness to do so, the chance of such a contract doing harm in either direction is much lessened. But all contracts of this class are not invalid, because of the restraint which they put upon one party thereto. Some are invalid, and some are not. Out of the cases that have arisen involving contracts of this kind a rule has been evolved by which it may be determined whether the contract is invalid or not. The rule is

if the restraint is reasonable the contract is valid; if not, it is invalid.

As said by Judge Simonton in Hulse v. Bonsack Machine Co., 65 Fed. 869, 13 C. C. A. 180, the test is "as it is put in Ammunition Co. v. Nordenfelt (1893) 1 Ch. 630, and Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; 'Is it, in view of all the circumstances of the case, reasonable?'" In the most usual instance of such cases; that is, where the owner of a business sells it to another, and agrees with such other not to engage in the same business, what determines the reasonableness of the particular restraint involved is whether it is essential to protect the business from invasion by the contractor. If it is, it is reasonable; otherwise it is not.

Pollock on Contracts, p. 310, says:

"Public policy requires, on the one hand, that a man shall not by contract deprive himself or the state of his labor, skill, or talent; and, on the other hand, that he shall be able to preclude himself from competing with particular persons so far as necessary to obtain the best price for his business or knowledge when he chooses to sell."

Judge Severens, in Jarvis v. Knapp, 121 Fed. 34, 58 C. C. A. 1, says:

"The underlying principle upon which the modern cases upon this subject are grounded is that, although one cannot stifle competition by a bargain having that purpose only, yet when he purchases something or acquires some right, the value of which may be affected by the subsequent conduct of the seller, the purchaser may lawfully obtain the stipulation of the seller that he will refrain from such conduct."

The principle of absolute freedom of trade which in certain instances requires that a contract imposing restraint shall give way, in such a case, enforced by the principle of absolute freedom of contract requires that it shall remain binding. But whilst this is the most usual instance of cases involving contracts where the restraint imposed is reasonable and the contract therefore valid, there are other instances of such cases which often arise.

Judge Taft, in United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122, undertakes to specify the instances of such cases. They are as follows:

"Agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere by competition or otherwise with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant or agent not to compete with the master or employer after the expiration of his time of service."

As to what is essential to the validity of such agreements, he says:

"Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1 and 2) to the enjoyment by the buyer of the property, good will, or interest in the partnership bought; or (3) to the legitimate ends of the existing partnership; or (4) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (5) to protection from danger of loss to the employer's business caused by the unjust use on the part of the employé of the confidential knowledge acquired in such business."

Then, as to whether his classification embraces all the possible instances of such cases, he said:

"It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at common law; but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract or to protect him from the dangers of an unjust use of those fruits by the other party."

The other class of cases which has arisen involving the restraint of trade rule is where the contract is between two or more persons engaged in the same business, sometimes including all the persons so engaged in a particular locality or everywhere; but each one engaged separately, and with no concern or interest in the business of any other one, and each one agrees to restrain himself in some particular for the mutual benefit of all. Such contracts are termed by Page, in his work on Contracts, "monopoly contracts," and in Anti-Trust Act, June 10, 1890, c. 407, 26 Stat. [U. S. Comp. St. 1901, p. 1886], "combinations or conspiracies in restraint of trade." Mr. Justice Holmes, in the opinion already quoted from, defined them as "combinations to keep strangers to the agreement out of the business." This would seem, however, not to be full enough. They include combinations to enhance prices in other ways, as by dividing territory, limiting output, fixing prices, or in any other way. Judge Taft defines them as "contracts having no purpose but to restrain competition and maintain prices." Judge Severens, in the quotation already made from his opinion in Jarvis v. Knapp, refers to them as bargains having the purpose only to stifle competition. The objection to contracts of this class, as stated by Mr. Justice Holmes, is "not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm, and their supposed consequent effect upon the public at large." Where, however, the purpose of the contract is to enhance prices otherwise than by keeping strangers out of the business the objection to it is for its direct effect upon the public at large. It is in contracts of this kind that the modern disposition to reduce competition and create monopolies has mostly manifested itself.

Page, in his work on Contracts (section 373), says that such contracts are "always illegal." And such I understand to be the drift, at least, of Judge Taft's opinion in the Addyston Pipe & Steel Co. Case.

In view, then, of this difference between these two classes of cases as to the validity of the contracts belonging to them, in the one class, the contract being valid if the restraint is reasonable; in the other class, the contract probably being invalid without any reference to the question of reasonableness, it is important to determine to which class the system of contracts involved herein belongs. If it belongs to the second class, then probably we have nothing more to do than to locate it. If it belongs to the first class, then, if the restraint is reasonable, the system of contracts is certainly valid. In any event, it will add to clearness of thought to locate it. But before attempting to do this, a suggestion of complainant's counsel

should be considered and disposed of. It is that said system of contracts is not affected by the restraint of trade rule solely because complainant's medicine to which it is applied is an article made under a secret process. They would seem to contend that no contract by the purchaser of an article made under a secret process restraining himself as to what he should do with it is within the restraint of trade rule simply because it is made under such a process. That the nature of the property sold may of itself determine that a restraining contract in relation thereto is not affected by the rule, must be conceded. A patentee may assign his patent right and enter into a contract restraining himself with reference thereto.

In the case of Central Transportation Co. v. Pullman Palace Car Co., 139 U. S. 24–43, 11 Sup. Ct. 478, 35 L. Ed. 55, Mr. Justice Gray said:

"A covenant by the assignor of letters patent for an invention that he will not himself make, use, or sell the patented article is undoubtedly valid, because the act of Congress which creates the monopoly expressly authorizes it to be assigned as a whole."

The same is true as to a grant by a patentee of his patent right, which is an assignment for a particular territory, and for the same reason. So a patentee may grant a license and enter into such a contract with reference thereto.

In the case of Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510, 31 Pac. 581, 31 Am. St. Rep. 242, Judge McFarland said:

"As a patent is a sort of monopoly the owner may manufacture under it or not as he pleases, and may make either a partial or entire assignment of it, and may protect his assignee, not only by an agreement not to use the patent (which would be unnecessary, because such use would be an infringement), but by a covenant not to interfere in anyway with the profits to be derived from the assigned patent."

To the same effect are the following cases, to wit: Morse v. Morse, 103 Mass. 73, 4 Am. Rep. 513; Good v. Daland, 121 N. Y. 1, 24 N. E. 15; Bonsack v. Machine Co. (C. C.) 70 Fed. 383.

Likewise, in relation to the patented thing, as we have seen, the purchaser thereof may be restrained as to the use of it by him. This, however, is effected without any restraining contract on the part of the purchaser, simply by the seller, the owner of the patent, limiting the license as to what the purchaser may do therewith. Again, a restraining contract in relation to a secret process is valid simply because of the nature of the property to which it relates. The existence and value of a secret process as property depends upon the fact that its secrecy can be maintained by a restraining contract. Hence one to whom it is communicated by the owner may by contract restrain himself as to the use he is to make of it.

In the case of Harrison v. Glucose Sugar Refining Co., 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A., 915, Judge Jenkins said:

"In such a case it may well be doubted if the rule with respect to restraint of trade should apply, because these secrets of business are the property of the appellee, to which the public has no right, and may not justly insist that it shall receive the benefit of the appellant's services through breach of confidence. * * * In all such cases courts have uniformly enjoined the delin-

quent party from engaging in the business from which he has agreed to refrain and from disclosing the secrets of the business which he has thus acquired."

It was on this principle that it was held by the Supreme Court in Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, that contracts of telegraph companies with the Board of Trade of Chicago, by which said companies agreed not to communicate quotations of prices for wheat, corn, and provisions offered and accepted in its exchange which they received from it, to persons who were not in contractual relations with it and approved by it, were valid. Mr. Justice Holmes said:

"But so far as these contracts limit the communication of what the plaintiff might have refrained from communicating to any one, there is no monopoly or attempt at monopoly and no contract in restraint of trade, either under the statutes or at common law."

So, likewise, the owner of a secret process in selling it to another may, by contract, restrain himself not thereafter to use it or to divulge it to others. In the case of Central Transportation Co. v. Pullman Palace Car Co., supra, Mr. Justice Gray said:

"Upon the sale of a secret process, a covenant, express or implied, that the seller will not use the process himself or communicate it to any other person, is lawful, because the process must be kept secret in order to be of any value, and the public has no interest in the question by whom it is used."

In the case of Ammunition Co. v. Nordenfeldt, 1 Ch. 630, L. J. Bowen said:

"Sales of secret processes are not within the principle or the mischief of restraint of trade at all. By the very transaction in such cases, the public gains on the one side what it lost on the other, and, unless such a bargain was treated as outside the doctrine of general restraint of trade, there could be no sale of secret processes of manufacture."

To the same effect are the cases of Vickery v. Welch, 19 Pick. (Mass.) 523; Jarvis v. Peck, 10 Paige (N. Y.) 125; Hard v. Seeley, 47 Barb. (N. Y.) 428; Alcock v. Giberton, 5 Duer. (N. Y.) 76; Tode v. Gross, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475; Simmons Medicine Co. v. Simmons (C. C.) 81 Fed. 163; Fowle v. Parke, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67.

It is therefore true, as stated by Judge Scott, in Standard Fire Proofing Co. v. St. Louis Co., 177 Mo. 559, 76 S. W. 1008, that:

"Patented inventions and secrets of art or trade not patentable are not within the purview of the rule against restraint of trade."

But what we have to do with here is not the secret process by which complainant's medicine is made. It is the medicine itself, made under the process. The secret process and the medicine made under it are separate and distinct things, and each is a subject of ownership. One person may own one and another person the other. The question has been argued whether a sale of an article made under a secret process is a publication of the process. It is and it is not. It is, if and when one can by his own ingenuity ascertain therefrom the process by which it is made. Until he so ascertains it, there has been no

publication of the process; and in the meantime the ownership of the secret and the right to its protection is as full and complete as if no sale had ever been made of the article embodying the secret process. But still, as stated, such article is not the process and the rights with reference to each are different. What is there, then, in the nature of the articles made under a secret process to occasion any difference between them and articles not so made or between them and articles which one may not have made at all, but simply owns, in the matter of the validity of restraining contracts entered into by purchasers thereof from the owner? It is hard to conceive of any. It is true that the manufacturer and owner of the articles made under the secret process may refrain from making them and selling them to purchasers, and thus putting them upon the market. Equally so, the manufacturer and owner of any other articles may refrain from so doing. So, also, the owner of articles that he has not made, but has purchased, or otherwise obtained from the manufacturer may refrain from selling them to purchasers, and thus putting them upon the market. Suppose that the owner of a patent should sell all the articles made under it to another with license to use or resell them, thus passing them outside of the monopoly of the patent in the hands of the purchaser, would the mere fact that they had been made under the patent lend any sanctioning force to a restraining contract entered into with reference thereto by a subpurchaser thereof? I must conclude, therefore, that the fact that complainant's medicine has been made under a secret process has no effect whatever on the validity of the system of contracts involved herein. He has no greater rights in relation thereto, as distinguished from the secret process under which it was made, than the owner of any other tangible personal property, whether made by him or not, would have in relation to such property. Nor can the fact that he sells it under a trade-mark and a certain dress, which no one else has the right to use, even if he did by his own ingenuity ascertain the secret process by which it is made and thus became enabled to make and sell it, make any difference. No reason occurs to me why the owner of goods trade-marked and peculiarly dressed should have the right to obtaining a restraining agreement from the purchaser of his goods, and the owner of goods not so marked or dressed should not have such right. All goods have some dress, and if not trade-marked are marked with the name of the seller. If, then, such a system of contracts is valid, as applied to complainant's medicine, it would be equally valid as applied to any other article of tangible personal property owned by the one so applying it. The validity of that system depends entirely, therefore, upon the question as to which of the two classes of contracts involving the restraint of trade rule it belongs, and if it belongs to the first class, whether under all the circumstances it is reasonable.

To which class, then, does it belong? The only ground for claiming that it belongs to the second class is that its purpose is to maintain the prices of complainant's medicine to the retailers and consumers. There is nothing in them, beyond the uniformity of price

provided for, to affect competition amongst different wholesalers and amongst different retailers. The contracts are not between persons engaged in the same business. One set of them is between complainant, who is a manufacturer, and wholesale druggists; and the other set is between him and retail druggists. A separate contract is entered into between complainant and each wholesaler and between him and each retailer. In each contract between complainant and a wholesaler, there is a purchase of medicine by him and an agreement on his part to restrain himself as to the persons to whom and the price at which he resells. And in each contract between complainant and a retailer, there is an agreement on his part that if he is designated as a purchaser from wholesalers to restrain himself as to price at which he resells to consumers. It is true that these contracts cover the entire trade in complainant's medicine, which fact defendant's counsel emphasize, but there is here no combination between persons engaged in the same kind of business to regulate their respective businesses for their mutual benefit to the harm of strangers or the public at large. It would seem that each of the contracts in complainant's system comes within the fourth of the five subclasses into which Judge Taft divides the first class of contracts. If complainant sold his medicine to consumers as well as manufactured it, and should make a single contract with a retailer in the market where he sold by which he sold to the retailer a lot of his medicine to resell to consumers, and the retailer agreed not to resell it at less than the price at which complainant was selling it, and thus undersell and compete with him for consumers, it would present a case clearly within said fourth subclass, and the validity of the restraint which such retailer thus put upon himself would depend upon its reasonableness, that in turn depending upon whether the restraint was reasonably necessary to the prevention of possible injury to complainant from use by the retailer of the medicine sold to him. The cases cited by Judge Taft in illustration of this fourth subclass each involved a single sale and agreement. Those cases are as follows, to wit: American Strawboard Co. v. Haldeman Paper Co., 83 Fed. 619, 27 C. C. A. 634; Hitchcock v. Anthony, 83 Fed. 779, 28 C. C. A. 80; Oregon Navigation Co. v. Winsor, 20 Wall. (U. S.) 64, 22 L. Ed. 315; Dunlop v. Gregory, 10 N. Y. 241, 61 Am. Dec. 746; Hodge v. Sloan, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816.

In the American Strawboard Co. Case, that company owned and operated a number of strawboard mills. It conveyed one of them to the Haldeman Paper Company, which agreed not to manufacture strawboard at said mill for 20 years. In the Anthony Case, Anthony was lessee of a dock upon which he conducted the business of dealing in coal and fish and conveyed another dock near by to Hitchcock, a dealer in lumber, who agreed not to engage in the coal or fish business or do anything that would conflict with the grantor's business for seven years. In the Oregon Navigation Company Case, that company was engaged in navigating the Columbia river in Oregon and Washington. It had purchased the steamer New World from the California Navigation Company, which was engaged in navigating Cali-

fornia waters, and had agreed with it not to employ said steamer in California waters. It sold the steamer to Winsor, who was engaged in navigating Puget's Sound. He agreed not to use it in California waters or Columbia river for 10 years. In the Gregory Case, Gregory who was engaged in navigating Hudson river between New York, Albany, and Troy, sold a two-thirds interest in steamboat Robert L. Stevens to Dunlop, who agreed not to use it at any time thereafter as a passage boat on Hudson river, above the village of Saugerties. In the Hodge Case, Hodge's testator, who was engaged in the business of selling sand from land he owned, conveyed a piece of the land to Sloan who agreed he would not sell any sand from it. In each case it was held that the restraining agreement was valid. Had there been in each case any number of similar sales of similar property with similar restraining agreements, each transaction would have belonged to the fourth subclass and the restraining agreement in each would have been dependent upon its reasonableness for its validity. Their numerousness would not affect their nature. It may be said, however, that complainant does not sell save to wholesalers to resell to retailers and that therefore neither the wholesalers nor retailers are possible competitors of complainant and the restraining agreements entered into by the wholesalers and retailers are not to prevent or affect their using the medicine in competition with him, and, hence, do not come within the letter of that fourth subclass, which covers agreements by the buyer of property not to use the same in competition with the business retained by the seller. This may be true. But the spirit of the subclass covers restraining agreements by the buyers of property to prevent their using it in any other way than by competition so as to injure the business of the seller. The principle involved in this subclass is that, if one in business sells property to another and such property may be used by the purchaser in a way to injure the business of the seller or to render it less profitable than it would otherwise be, a restraining agreement on the part of the purchaser as to the use of it may be reasonable under the circumstances of the case, and if so, valid.

Judge Taft, in Addyston Pipe & Steel Co. Case, in leading up to the classification which he made of the cases coming within the first class, said:

"When one in business sold property with which the buyer might set up a rival business it was certainly reasonable that the seller should be able to restrain the buyer from doing him an injury which, but for the sale, the buyer would be unable to inflict."

It would be equally reasonable that the buyer should be able to restrain himself from using the property in any other way than setting up a rival business, so as to do the seller an injury which but for the sale he would be unable to inflict. But whether or not the system of contracts involved here comes within said fourth subclass, they are certainly covered by the language used by Judge Taft to take in any possible omissions from the classification he made. In each contract the restraining agreement is ancillary or collateral to the main purpose of a lawful contract, to wit, a sale of the medicine,

and, according to complainant's claim, it is necessary to protect him from an unjust use of the legitimate fruits of the contract by the purchaser. I therefore conclude that the system of contracts involved herein belongs to the first class, and that its validity depends solely upon its reasonableness. Is it reasonable, then, that complainant should have the right to put in force the system of contracts involved herein and obtain from his vendees and subvendees restraining agreements from the vendees, as to whom and prices at which they shall resell, and from the subvendees, as to the prices at which they shall resell? A question arises here as to the party on whom lies the burden as to the reasonableness. Is it on complainant to show that the restraint in question is reasonable, or is it on defendant to show that it is unreasonable?

Judge Simonton, in Hulse v. Bonsack Machine Co., supra, says:

"This is not literally an agreement in restraint of trade. It is simply a contract which by analogy can be likened to one, and the analogy should not be pushed beyond the reason for it. There is no presumption that such a contract is void. The presumption is in favor of the competency of the parties to make the contract and the burden is upon the party who alleges that it is unreasonable or against public policy."

On the other hand, Beach on Contracts, vol. 2, § 1562, says:

"Many authorities declare in substance that all restraints are presumed to be bad, but, if the circumstances are set forth, that presumption may be excluded, and the court judges of these circumstances whether the contract be valid or not."

I do not find it essential to this case to locate the burden, as I hold that under the allegations of the bill, which are admitted by the demurrer, said system of contracts as applied to complainant's medicine is reasonable. The circumstances which lead me to this conclusion are these: That complainant's vendees and subvendees should be so restrained is advantageous to complainant's business. It would be an injury to it for them not to be so restrained. Exactly how it is so advantaged and how it would be injured by a removal of the restraint has not been developed in the argument; and I do not feel sufficiently advised as to such matters to say as to this. It would seem that the existence of such a system of contracts in relation to complainant's medicine would tend to prevent demoralization in the trade therein through competition amongst his vendees and subvendees, and enable him to maintain the prices for his medicine. But, however this may be, it is alleged in the bill that before complainant established and put said system in force the "cut rate" or "cut price" system had resulted in much confusion, trouble, and damage to complainant's business, and had injuriously affected the reputation and depleted the sale of his medicine, and that it was established and put in force to protect his trade, custom, and business, and the manufacture and sale of his medicine; that it prevents cutting of prices and demoralization of trade both wholesale and retail, greatly benefits him by increasing the sales of and demand for his medicine, and is of great value to him in his business; and that it has been of great benefit and advantage to him and his business, and has increased his

trade and business. It is further alleged that the prices which he and his vendees and subvendees get for his medicine are reasonable. These allegations must be accepted as true. The vendees and subvendees would not have the opportunity to sell his medicine if he did not make and sell it. He thus brings trade to them. By fixing a uniform price on his medicine on sales by himself to the wholesalers, on sales by wholesalers to retailers and by retailers to consumers, all purchasers, wholesalers, retailers, and consumers are treated alike, the large wholesalers have no advantage over the small ones, nor the large retailers over the small ones. All sellers and all consumers are treated alike. Complainant creates the demand for the medicine, as he alone advertises it. And, finally, complainant could accomplish the very same result by a different system, against which no legal complaint could be made. This would be by a system of agencies. Though the nature of complainant's medicine; i. e., its being an article made under a secret process, may not, without more, determine the validity of the system of contracts in question, it cannot be said that it does not add to the reasonableness of said system as applied to it. Complainant not only owns it and makes it, but no one else can make it, and if they could they could not sell it under his trade-mark and dress.

How, then, does the matter stand upon authority? The whole trend of authority is favorable to the validity of the system. The sweeping principle which has taken form in Judge Taft's five classes and in the general statement to cover any omissions therefrom upholds it. But there are a number of decisions more directly in point. They are as follows, to wit: Elliman v. Carrington (1901) 2 Ch. 275, 84 L. T. (N. S.) 853; Garst v. Harris, 177 Mass. 72, 58 N. E. 174; Walsh v. Dwight (Sup.) 58 N. Y. Supp. 91; Park & Sons Co. v. National Wholesale Druggists, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578; Whitwell v. Tobacco Co., 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689.

In Elliman v. Carrington, the plaintiffs were manufacturers of Elliman's Royal Embrocation for horses and cattle and Elliman's Universal Embrocation for human beings. They sold it to the defendants, who bought wholesale to sell to others at retail. The latter agreed not to sell below certain prices and not to sell to others unless they agreed not to sell below certain prices. They broke the latter part of the agreement which was the occasion of the suit. It was held that the agreement was valid. Mr. Justice Kekewich said:

"The [plaintiffs] are not bound to sell the embrocation at all; they are not bound to manufacture it. They are at liberty to do so as they please, and when they have manufactured it, they are at liberty to sell it at whatever price they choose to fix, it may be a prohibitive one or it may be such a small price that they cannot make any profit out of it. That is entirely for their consideration. There are no goods which the owner thereof may not lawfully retain or sell at such price as he pleases."

Again he says:

"Why should not Elliman's Sons & Co. be at liberty to fix the price in that way? Nobody has argued and it could not possibly be argued that they are not at liberty to fix the price in the first sale to Carrington & Son. Why

should they not be at liberty to make the further bargain with Carrington & Son that they shall not sell it below a certain price? It is said that the contract is in restraint of trade. In one sense it is, but it is just as much and no more in restraint of trade for Elliman's Sons & Co. to say that they will not sell at all. It seems to me to say the least, that what is restraint of trade as regards Carrington & Son is really the liberty of trade as regards Elliman's Sons & Co. The cases which have been cited are well-known authorities expounding a great principle, and showing what exceptions there are to that principle. But this case seems to me not to fall within any principle or exception. I do not think that it is touched by the authorities at all. It is merely a question of whether a man is entitled when he is selling his own goods to make a bargain as to the use to be made of them by the purchaser. It is said that the contract is against public policy, but that phrase merely embodies for the present purpose the great principle of restraint of trade. and to say that it is to prevent Elliman's Sons & Co. from exercising their own discretion, seems to me to be applying a well-settled principle of law to facts to which it cannot have any possible application."

It is to be noted that though the article which was sold in this case was probably made under a secret process no emphasis was laid upon the fact. The reasoning applies equally well to any article which one may own, whether he made it or not, and which he sells for purpose of resale.

In Garst v. Harris, the plaintiff sold Phenyo-Caffein, a proprietary medicine, to defendant, who agreed not to sell it below a stipulated price, and a certain sum was agreed on as liquidated damages. The action was brought for a breach of this agreement to recover said sum. It was held that the agreement was valid.

Holmes, C. J., said:

"It is said that the contract was unlawful as in restraint of trade. * * * When, as here, there is a secret composition, which the defendant presumably would have no chance to sell at a profit at all, but for the plaintiff's permission, a limit to the license, in the form of a restriction of the price at which he may sell, is proper enough."

It is true that the fact that the article sold was a secret composition was emphasized. But the reasoning used was equally applicable to any other article; as to any other article sold the purchaser would not have had any chance to sell that particular article, however it may have been as to other articles of the same kind, at a profit at all, but by the seller's permission.

Point is made as to these two cases that in each but a single contract was involved, and not a system of contracts as here. That is true, but no doubt there was a system of contracts in each of those cases as here. A single contract; i. e., a contract with a single purchaser would hardly have been of any value to the seller. It was only by a system of contracts; i. e., a contract with every purchaser, that he could hope to accomplish anything. This must have been had in view by the court, as no point was made of the fact that there was but a single contract involved, and the reasoning was applicable to a system.

In Walsh v. Dwight, the defendants were manufacturers and sellers of saleratus and soda, articles in common use and capable of being manufactured by any one, which was known on the market as "Dwight's Cow Brand Saleratus and Soda." They sold these articles to job-

bers under contracts, whereby the latter, in consideration of a certain discount, agreed not to resell same or any other saleratus or soda at less than certain prices. The plaintiffs were rival manufacturers of saleratus and soda and the suit was to recover damages sustained by them because of defendant's system of contracts. It was assumed that plaintiffs had a right of action if the system of contracts was invalid and the disposition of the case was made to turn on its validity. It was held to be valid. Judge Ingraham said:

"It is difficult to see upon what ground it can be claimed that such a contract is illegal. That the defendants would have the right to establish agencies for the sale of their goods, or to employ others to sell them, at such prices as the defendants should designate, cannot be disputed. Nor can it be that a manufacturer of merchandise cannot agree to sell to others upon condition that the vendee, in selling at retail, should charge a specified price for the goods sold, or should sell only the manufactured product of the manufacturer. If a dealer in articles of this kind, for his own advantage, agrees to confine his business to a particular line of goods, or agrees with the manufacturer to charge a particular price for the articles which he sells in his business, such an agreement is not illegal, as in restraint of trade or as tending to create a monopoly, as there is nothing in the agreement to prevent others from engaging in the business, or the manufacturers of other articles from selling their products to any one who is willing to buy. There is nothing to prevent any individual from selling any property that he has at any price he can get for it. Nor is there any reason why an individual should not agree that he will not sell property which he owns at the time of making the agreement, or which he thereafter acquires, at less than at a fixed price; and certainly a contract of this kind is not one which exposes the parties to it to any penalty, or subjects them to any action for damages by those whose business such a contract has interfered with."

The case of John D. Park & Sons Co. v. National Wholesale Druggists Association was a suit by by the defendant herein against an association of wholesale druggists to recover damages alleged to have been occasioned by said association causing manufacturers of medicines to refuse to sell to this defendant on the same terms as it sold to members of said association unless it would enter into a contract by which it agreed not to resell same at less than certain prices, a contract similar to that which each member of said association had entered into with said manufacturers. It was held that the system of contracts was valid, and this defendant was not entitled to recover. There was a dissent by three of the judges. One dissent was based upon the ground that, though the manufacturers had a right voluntarily to put in force such a system of contracts, it was illegal for the jobbers to drive them to put in force said system by refusing to deal with them unless they did. Another dissent was based upon the ground that jobbers required the manufacturers not only to sell at the same price to each jobber, but to compel each jobber to sell to the consumers at the same price. "It is in this respect" it is said "that the agreement is vicious and operates in restraint of trade for it destroys competition among the jobbers." The force of the decision is weakened somewhat by the consideration that it is not entirely clear that the court did not think that the medicine to which the system of contracts was held lawfully applicable had been patented. The reasoning of the opinions rendered on behalf of the majority of the court, how-

ever, is not based on the fact that they had been patented. It is equally pertinent to proprietary medicines. This case suggests that possibly complainant was driven to adopt its system of contracts by the organization of wholesale druggists.

In Whitwell v. Tobacco Co., the defendant was a manufacturer of tobacco and the plaintiff a jobber therein. The defendant's method of doing business was to fix the prices of its goods so high to those who did not agree to refrain from dealing in the commodities of its competitors that their purchase was unprofitable, while it reduced the prices to those who did so agree so that the purchase of the goods was profitable to them. The plaintiff applied for a purchase, but refused to so agree, and, upon his so refusing, the defendant refused to sell to him. He then brought the action to recover damages for the refusal. It was held that he could not, that such an agreement on the part of a jobber was legal, and that the defendant had a right to refuse to sell to him unless he would enter into it. Judge Sanborn said:

"The tobacco company and its employé sold its products to customers who refrained from dealing in the goods of its competitors at prices which rendered their purchases profitable. But there was no restriction upon competition here, because this act left the rivals of the tobacco company free to sell their competing commodities to all other purchasers than those who bought of the defendants, and free to compete for sales to the customers of the tobacco company by offering them goods at lower prices or on better terms than they secured from that company. The tobacco company and its employé were not required, like competitors engaged in public or quasi public service, to sell to all applicants who sought to buy, or sell to all intending purchasers at the same prices. They had the right to select their customers, to sell and to refuse to sell to whomever they chose, and to fix different prices for sales of the same commodities to different persons. In the exercise of this right they selected those persons who would refrain from handling the goods of their competitors as their customers, by selling their products to them at lower prices than they offered them to others. There was nothing in this selection, or in the means employed to effect it, that was either illegal or immoral. It had no necessary effect to directly and substantially restrict free competition in any of the products of tobacco, and it did not unlawfully restrain interstate commerce, because it in no way restricted the exercise of the rights of the competitors of the tobacco company to fix the prices of their goods and the terms of their sales of similar products according to the dictates of their respective wills."

Besides these cases there is that of Dr. Miles Medical Co. v. Goldthwaite (C. C.) 133 Fed. 784. The force of this decision, however, is weakened by the fact that there no argument was made on behalf of defendant. I have also been referred to certain unreported decisions upholding the validity of complainant's system of contracts. They are decisions by Judge Lochren in the case of Hartman v. Hughes, pending in the United States Circuit Court for the District of Minnesota, rendered July 14, 1905 (no opinion); by Judge Kohlsaat, in the case of Dr. Miles Medical Company v. Platt, pending in the United States Circuit Court for the Northern District of Illinois, Eastern Division, rendered 19th day of January, 1906 (142 Fed. 606); and by Judge Tuley, in the case of Platt v. National Association of Retail Druggists, pending in the circuit court of Cook county, Ill., rendered January 24,

1905. But in none of these cases apparently did the judges have to reckon with the line of argument that is presented here, and though reaching the same conclusion, I have proceeded along different lines. It is to be noted that this is not a case where the manufacturer undertakes to maintain retail prices for the sale of his goods by a direct restrictive agreement with the wholesaler, and by affixing labels to the goods charging all subsequent transferees with notice of the conditions under which they were originally sold. A case of that sort presents the interesting question whether in this way the manufacturer can maintain the retail prices of his goods; i. e., whether the doctrine laid down in Tulk v. Moxhay, 2 Ph. 774, by which covenants restricting the use of land are enforced against purchasers with notice should be extended to chattels.

The cases of New York Bank Note Co. v. Hamilton, etc., Co., 28 App. Div. 411, 50 N. Y. Supp. 1093; Murphy v. Christian Press, etc., Co., 38 App. Div. 426, 56 N. Y. Supp. 597, have been cited as holding that it should, and the cases of Taddy & Co. v. Stevens & Co., 20 T. L. R. 102, Eng. Ch. D.; Garst v. Hall & Lyon Co., 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631; as holding that it should not. In the case of De Mattos v. Gibson, De Gex & Jones, 276, the doctrine was applied to a steamboat. Lord Justice Knight Bruce said:

"Reason and justice seem to prescribe that, at least as a general rule, where a man by gift or purchase acquires property from another with knowledge of a previous contract, lawfully, and for a valuable consideration made by him with a third person, to use and employ the property for a particular purpose, and in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to his contract, and inconsistent with it, use the property in a manner not allowable to the giver or seller. The rule applicable alike in general, as I conceive, to movable and immovable property, recognized and adopted, as I apprehend, by the English law, may, like other general rules, be liable to exceptions arising from special circumstances; but I see at present no reason for any exception in the instance before us."

Here, however, the retailers enter into a contract directly with the complainant upon a valuable consideration, to wit, their being designated as retailers to whom the wholesalers may sell, and the question is whether they are bound by such contract. I therefore conclude that the complainant's system of contracts is valid. The position is taken in brief on behalf of defendant that the system of contracts is invalidated by the federal anti-trust act of 1890; but I understand that this position is not insisted on. I therefore make no further reference thereto.

The general demurrer is overruled. There is a special demurrer to so much of the bill as seeks an injunction restraining defendant from removing the dress from complainant's bottle and mutilating the label. It is urged that if the system of contracts is upheld and enforced the complainant will have no occasion for such relief. This does not occur to me as sufficient reason for his not obtaining it.

The special demurrer is also overruled.

In re CUTTING.

(District Court, W. D. New York. May 7, 1906.)

1,472.

1. CHATTEL MORTGAGES—VALIDITY—NEW YORK STATUTE.
The failure of a chattel mortgagee to file a copy of the mortgage, together with a statement showing the mortgagee's present interest, within 30 days next preceding the expiration of a year after it was given, as required by the New York statute (Laws 1883, p. 402, c. 279, and amendments), does not render the mortgage invalid as between the parties, nor as against general creditors of the mortgagor.
[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, § 152.]

2. BANKRUPTCY—ACTS OF BANKRUPTCY—RENEWAL OF MORTGAGE.
The giving of a chattel mortgage to secure an antecedent debt is not a preferential transfer which constitutes an act of bankruptcy, where it is given in good faith in renewal of a prior mortgage and covering the same property, and in such case the fact of the mortgagor's insolvency is immaterial; nor does the including of additional property render it preferential, where the mortgagor receives a further present consideration sufficient to warrant the additional security.

3. CHATTEL MORTGAGE—VALIDITY—SALE OF PROPERTY BY MORTGAGOR.
A chattel mortgage is not rendered void by the mere fact that the mortgagor sold certain of the mortgaged property, where the mortgage contained no provision permitting such sale for his benefit, and it does not appear that it was not made for the benefit of the mortgagee and by his authority.

In Bankruptcy. On motion to confirm report of special master.

Nelson J. Palmer, for petitioners.
Thayer, Tuttle & White, for objecting creditors.

HAZEL, District Judge. The report of the special master herein finds that the alleged bankrupt, Benjamin W. Cutting, committed an act of bankruptcy in transferring, while insolvent, certain personal property, by executing and delivering chattel mortgages thereon, with intent to create an unlawful preference under the bankrupt act. The undisputed facts are as follows: The opposing creditors, Lazell & Co., at different times, beginning in the year 1899, loaned and advanced money to the bankrupt, accepting as security therefor a chattel mortgage upon specified personal property. Such chattel mortgage was executed and delivered on April 24, 1901, and on February 8, 1902, another mortgage was given in renewal thereof to secure amounts due and to become due covering the property specified in the former mortgage. Subsequently, on March 12 and 13, 1903, respectively, the debtor gave to said secured creditors two chattel mortgages to secure the sum of about $3,000, the amount then due, as appears by the testimony of Cutting, which mortgages covered the property theretofore mortgaged to them, and in addition a so-called Hartman machine, not enumerated in the prior incumbrance. The mortgage liens were duly recorded or filed in the town clerk's office, as required by the statute of the state. It is claimed, however, that the mortgages of March 12 and 13, 1903, were not continued of force

against the creditors of the mortgagor or subsequent purchasers or mortgagees in good faith, in that chapter 528, p. 460, of the Laws of 1896, which requires that a statement describing the mortgage, and the time and place of its filing, be filed within the 30 days, was not complied with. There exists some contrariety of decisions in relation to the effect of an omission to strictly comply with the provisions of the statute as to whether a mortgage ceased to be valid against a creditor at large of the mortgagor, or if a creditor must be in a situation to seize the mortgaged property pursuant to a lien upon it. This proposition I conceive to be definitely decided in the Matter of New York Economical Printing Co., 110 Fed. 514, 49 C. C. A. 133, where the state court authorities are cited and examined by the Circuit Court of Appeals for this circuit, and which holds that:

"Only such creditors can take advantage of it [the statute] as are armed with some legal process authorizing the seizure of the mortgaged property, and are thereby in a position to enforce a lien upon it."

The cases hold that a trustee in bankrutcy takes the property in the same plight and condition that the bankrupt himself held it, assuming the transaction free from fraud and subject to the existing equities. 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. And as between the alleged bankrupt and the mortgagees, giving due consideration to the facts of this case, it is thought that the mortgages in question were neither void nor fraudulent. The contesting creditors contend that such mortgages were practically renewals and covered the identical property; that they were not void as against the mortgagees, though given as collateral security for a pre-existing debt owing from the bankrupt, and no statement having been filed in accordance with the state enactment mentioned. The evidence satisfies me that the transaction was not in bad faith, and that no intention existed to defeat the operation of the bankrupt act. Hence, it is immaterial that Cutting was, or that the mortgagees had reason to believe him, insolvent. The bankrupt act does not forbid the giving of other or different security within the four months period to replace security previously given, if such security is a valid one and of equal value as that previously given. The mortgagor might have surrendered the possession of the property of the mortgagees just prior to making the new mortgages. Indeed, the mortgagees could legally have taken possession thereof in payment of their lien, though there had been no compliance with the statute regarding refiling. As said in Sawyer v. Turpin, 91 U. S. 114, 23 L. Ed. 235:

"The mortgage covered the same property. It embraced nothing more. It withdrew nothing from the control of the bankrupt, or from the reach of the bankrupt's creditors, that had not been withdrawn by the bill of sale. Giving the mortgage in lieu of the bill of sale, as was done, was therefore a mere exchange in the form of the security. In no sense can it be regarded as a new preference. The preference, if any, was obtained on the 15th of May, when the bill of sale was given, more than four months before the petition in bankruptcy was filed. It is too well settled to require discussion that an exchange of securities within the four months is not a fraudulent preference within the meaning of the bankrupt law, even when the creditor and the debtor know

that the latter is insolvent, if the security given up is a valid one when the exchange is made, and if it be undoubtedly of equal value with the security substituted for it."

This language, in a case where the facts were only slightly different, is not thought inapplicable here. It was held in Re Shepherd, 6 Am. Bankr. Rep. 725, that where a new chattel mortgage, which was duly recorded, was given within four months of filing the petition, in place of a prior mortgage and for a valuable consideration, the new mortgage operates as a continuance of the prior incumbrance, and, as no lien intervened before the bankruptcy, there was no illegal preference. In Asbury Park Building & Loan Association v. Shepherd, 6 Am. Bankr. Rep. 725, it is stated that:

"The mere exchange of securities within four months is not a preference within the meaning of the bankrupt law; the reasons being that the change takes nothing from the other creditors."

There a new mortgage was substituted for a prior security within four months of the filing of the petition in bankruptcy. The facts of that case are similar to those here presented. See, also, Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816. In this case the same property was included in the mortgages given by Cutting to replace prior ones to secure an indebtedness already existing, and, as already stated, in addition thereto the Hartman machine, which inclusion was warranted by a present consideration of $125, subsequently used by the bankrupt in payment of insurance. True, the referee found that the later mortgage included property not enumerated in the earlier, but a careful comparison of the two instruments indicates otherwise. Various of the items were a little differently described, but the schedule of personal property attached to the mortgage reasonably identifies the articles as practically the same, with the exception of the Hartman machine and the offspring of the stock mentioned in the earlier mortgage.

The finding of the referee in relation to the disposition of sale of certain property, consisting of fodder, logs, baskets, etc., is not thought to be sustained by the evidence. It does not appear that the mortgagor sold any of the property to customers, nor that he diverted or retained the proceeds of any sales for his individual benefit. In the absence of testimony to that effect, the Lazell mortgage cannot be held void; it containing no provision permitting the mortgagor to sell the mortgaged property, nor requiring an accounting of the proceeds. If such facts were shown, perhaps a different question would be presented. Brackett v. Harvey, 91 N. Y. 214; In re Burnham (D. C.) 140 Fed. 926. The implication of such acts on the part of Cutting is not warranted from the mere fact that he was in possession of the property and continued the operation of the mill or factory. As argued by counsel for the opposing creditors, such an implication might be rendered nugatory by proof that a sale or disposition of mortgaged property was not only authorized by the mortgagees, but also that the mortgagor acted as agent in its disposition or sale. The mortgagees were not required to explain the covenant in the mortgage or to give evidence in relation to any presumed sales.

The mortgages to Taylor & Wakeman, claimed to have been unlawful transfers in contravention of the bankrupt act, were also executed and delivered by the bankrupt as substitutes for prior unpaid mortgage liens, and come under the views herein expressed.

The questions touching the jurisdiction of the court and the evidence in relation to the bankrupt's chief occupation as a farmer or tiller of the soil need not be considered. Upon the evidence presented, I am of opinion that the provisions of section 3 of the bankrupt act have not been violated.

The petition for adjudication of Benjamin W. Cutting as a bankrupt is therefore dismissed. So ordered.

TICE v. HURLEY et al.

(Circuit Court, W. D. Kentucky. April 26, 1906.)

1. COURTS—DISTRICT OF SUIT IN FEDERAL COURTS—MODE OF OBJECTING TO VENUE.

   The objection of a defendant to the maintenance of an action against him in a federal court on the ground that neither he nor plaintiff is a resident of the district may be taken by demurrer under the Kentucky practice where the facts appear on the face of the petition.

2. SAME—NONRESIDENT DEFENDANT.

   Under section 1 of the federal judiciary act March 3, 1887, c. 373, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], an action cannot be maintained in a federal court against a defendant who is a nonresident of the district, over his objection where the plaintiff is also a nonresident, and jurisdiction is founded only on the fact of diversity of citizenship, although the court has jurisdiction of the action by reason of the residence within the district of other defendants.

   [Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 813.]

On Demurrer to Petition.

J. Mark Worten, for plaintiff.

Flournoy & Reed and T. B. Harrison, for defendants.

EVANS, District Judge. The first section of the judiciary act of March 3, 1887, c. 373, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], after providing that the Circuit and District Courts of the United States shall have original jurisdiction concurrent with the courts of the state of certain suits of a civil nature, both in law and in equity, further provides that:

"No civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

In this action the plaintiff's claim to jurisdiction is founded only on the fact that the action is between citizens of different states. The plaintiff is a citizen and resident of Tennessee, the defendant,

Aaron T. Hurley, is a citizen of Kentucky, and a resident of this district, and the defendant, The Title Guaranty & Surety Company, hereafter called the "Guaranty Company," is a citizen of Pennsylvania, and is neither a resident nor an inhabitant of this district. This being the situation, the defendants have filed a demurrer to the petition in which they object that the court has no jurisdiction over the action. While the citizen of Kentucky who is sued is not entitled to raise an objection of this character, the Guaranty Company has the express sanction of the statute for claiming, upon the facts stated, that it cannot be sued in this court without its consent. Here there is literally a diversity of citizenship, but as the defendant, the Guaranty Company, is not a resident nor an inhabitant of this district, the question raised by its demurrer is not, according to the authorities, one of "jurisdiction," but one which relates to mere venue, and that is held to be a matter of personal privilege only. No express mode of making objection to the "venue" is prescribed, but we think we may fairly treat the demurrer as sufficient to show the objection of the Guaranty Company to being sued in a district of which neither itself nor the plaintiff is an inhabitant or a resident. As the plaintiff's petition shows the essential facts for the determination of that question, we must give force to the objection thus raised by that company by sustaining its demurrer. This practice is convenient. Our Code of Practice prescribes no such pleading as a plea in abatement as distinguished from an answer or demurrer, but we think its section 92, relating to special demurrers, should be applied.

The law in the premises has been discussed in Whitworth v. I. C. R. R. (C. C.) 107 Fed. 557, Empire Mining Co. v. Propeller Towboat Co. (C. C.) 108 Fed. 902, Burch v. Southern Ry. Co. (C. C.) 139 Fed. 350, and Central Trust Co. v. McGeorge, 151 U. S. 130, 14 Sup. Ct. 286, 38 L. Ed. 98. If the case had been brought in a state court in such form as to be removable, and the Guaranty Company had removed it, it could not then have objected to the venue, as pointed out in the Whitworth Case in 107 Fed. 557. But aside from these cases, the statute is express, and upon its provisions the defendant Guaranty Company is entitled to be exempt from being sued by this plaintiff in this district without its consent. Having by its demurrer manifested its objection to being sued here, the court must enforce the statutory provision in its favor. Its demurrer will accordingly be sustained, and the plaintiff will be given to and including the 8th day of May, 1906, within which to file an amended petition, if so advised.

The demurrer of the defendant Hurley will be overruled. As to this defendant, the "jurisdiction" is undeniable.

UNITED STATES v. HYDE et al.

(Circuit Court D. Nevada. May 7, 1906.)

No. 825.

EQUITY—EXCEPTIONS TO BILL—IMPERTINENCE.

Exceptions to a bill by the United States to recover lands of which plaintiff was alleged to have been defrauded, on the broad ground that the substance of the matters alleged was impertinent, considered and overruled.

In Equity. On exceptions to bill.

Samuel Platt, U. S. Atty.

Campbell, Metson & Campbell and James A. Mackenzie, for defendant John A. Benson.

HAWLEY, District Judge (orally). This is a suit in equity to obtain a decree adjudging the defendants guilty of having defrauded plaintiff of certain lands in the state of Nevada; that the patents issued to them for such lands be declared void, etc. The bill of complaint is very lengthy and contains 17 distinct averments. To this complaint 27 specific exceptions have been filed by the defendant Benson for impertinence:

"For that the whole of the matter contained in each of the passages of said bill of complaint referred to in the following respective exceptions is impertinent, and has and can have no bearing on any of the issues involved or which may be involved in said suit."

From this brief statement it will readily be observed that to formulate an opinion which would make the questions involved clear would require an extended synopsis of the averments contained in the bill and a specific statement of the various exceptions taken thereto. I do not deem it necessary to enter into a discussion of the various questions discussed by the respective counsel. The contention of defendant is based largely upon the views expressed by Judge Lacombe, in Re Benson (C. C.) 131 Fed. 968, while the government relies upon the opinion of Judge De Haven, in United States v. Hyde (D. C.) 132 Fed. 545, and the decision in Hyde v. Shine, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. Ed. ——. Those were criminal cases, while the present one is a civil suit. They give, however, a clear outline of the general facts upon which the present case is based, and many of the principles of law therein discussed are applicable to the present case. After the decision in 132 Fed., supra, the defendants Hyde and Dimond applied to Judge Morrow upon a writ of habeas corpus for their discharge. This was denied, and they appealed the case to the Supreme Court, and Judge Morrow's order was there sustained; three of the Justices dissenting. Hyde v. Shine, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. Ed. ——.

In the light of the principles announced in these authorities, it seems only necessary for me to say that I have carefully read the bill of complaint and considered in detail the exceptions taken thereto, the distinctions existing between criminal cases by indictment and

civil suits of the present character, and my conclusion is that the proper course to pursue is to overrule the exceptions in toto. In so doing I deem it proper to state that the general criticism of Judge Lacombe as to the language used in the indictment in the case before him is not applicable to the averments in the bill of complaint. This is a civil, not a criminal, case. The bill of complaint seems to have been carefully drawn. Absolute perfection in pleadings is not often obtained, and there may be some averments in the bill that might perhaps have been more clearly stated, and some sentences might with propriety have been left out, but this character of criticism could be urged in all cases. Courts should deal with the substance, not the mere form of language used in a pleading. The exceptions are based on the broad ground that the matter—that is, the substance—of the paragraphs in the bill to which they are directed "is impertinent, and has and can have no bearing on any of the issues involved or which may be involved in this suit." If, therefore, the matter which is of substance does have a legal bearing on the case that would render it admissible as evidence on the trial, the exceptions should be overruled, and in consideration of this question the court is compelled to view the entire case. The charges alleged against the defendants are many in number and cover a wide field as to the manner and course pursued by them, and the transactions had with them by many individuals. At first blush some of these matters might appear irrelevant, but the mind of the court must keep pace with the broad ground covered, and if it can see any relevancy or pertinency of particular averments which shed light upon the conduct and acts of the defendants—which is the vital point to be reached—it should not sustain the exceptions.

I am of opinion that the matters alleged in the bill of complaint, to which the exceptions are directed, are germane to the issues that may be involved in this suit.

Exceptions overruled.

ELECTRIC VEHICLE CO. et al. v. GALLAGHER.

(Circuit Court, S. D. New York. February 17, 1906.)

COSTS—REQUIREMENT OF SECURITY—RULES OF COURT.

Under rule 53 of the circuit court for the Southern District of New York, a nonresident plaintiff, although joined with a resident, is required to give security for costs.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, § 433.]

Betts, Sheffield & Betts, for complainants.

Jos. L. Levy, for defendant.

LACOMBE, Circuit Judge. All the questions presented on this motion were disposed of at the argument except as to security for costs. The authorities cited on the brief of complainant have been since examined. The proposition to be settled is not what may be the ordinary chancery practice nor the rule in England, nor the provision

of the New York Code, but solely what is the meaning of the Fifty-third rule of the Circuit Court in the Southern District of New York. The intention of the rule seems to be that when a nonresident plaintiff brings suit in this court he or it shall give security for costs. The language of the rule warrants such construction, and it is a righteous and wholesome one. Without it a nonresident, joining with him some resident who might be impecunious, might bring hundreds of suits here, incumbering our calendars, and, in the event of defeat, leaving defendants without even the inadequate compensation of the taxed costs, unless they should go to a foreign jurisdiction to sue. The residence of the complainant for the purposes of this motion must be settled by the bill. The usual security—$250 in each suit—should be filed.

In re BILLING.

(District Court, M. D. Alabama. March 29, 1906.)

1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—NOTICE TO CREDITORS.
Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], not having provided for notice to creditors of the filing of a petition in involuntary bankruptcy, such notice is not necessary, but the filing of the petition by proper parties in the proper court and making the requisite jurisdictional allegations in itself operates as a lis pendens, and notice to all the world.

2. SAME—CONCLUSIVENESS OF ADJUDICATION.
The clearly expressed purpose of Bankr. Act July 1, 1898, c. 541, § 18, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429], is to require the court in involuntary proceedings, when no defense is interposed by the bankrupt or by any creditor within the time fixed, promptly to dispose of the petition by dismissal or by an adjudication, according to the sufficiency of the petition. If the petition contain the proper allegations and is not contested, or the parties contesting withdraw their contest, an adjudication follows as of course, and is binding on all parties in interest.

3. SAME.
When an adjudication is passed in an involuntary proceeding, upon a petition filed in the proper district, for want of contestation by the debtor or any creditor within the time prescribed, or where such contestation was made and subsequently withdrawn, the adjudication cannot be assailed for error intervening, or upon any other ground save for fraud in the procurement of the adjudication, injurious to creditors generally, or for want of jurisdiction apparent on the face of the proceeding.

4. SAME.
A creditor who has not controverted a petition before adjudication is in no position to assail it for error, and cannot get the benefit of an appeal for that purpose, which the statute requires to be taken within 10 days, by afterwards moving to vacate the adjudication on the ground of error in the proceeding, which would be an indirect mode of appealing after the time had elapsed.

5. SAME—ADJUDICATION BY CONSENT—WHEN NOT COLLUSIVE.
If a debtor against whom an involuntary proceeding is filed be insolvent and has committed an act of bankruptcy, his consent at the instance of petitioning creditors, or agreement with them to withdraw resistance and to be adjudicated a bankrupt, is neither unlawful nor immoral, and an adjudication passed on such consent, when no one but the bankrupt had contested the petition, cannot be attacked by other creditors as collusive.

6. SAME—WITHDRAWAL OF CONTEST BY DEBTOR—NOTICE.
A debtor who contests an involuntary proceeding in bankruptcy against him does so in his own behalf, and not in the interest of his creditors, and is at liberty to withdraw his opposition at any time when done in good faith without notice to his creditors.

7. SAME—ACTS OF BANKRUPTCY—SUFFICIENCY OF PROOF.
When creditors of an insolvent grantor in a petition in bankruptcy assail the transfer as an act of bankruptcy, and it is shown that the alleged bankrupt was indebted to the grantee, and neither testify, and nothing relating to the transaction appears in the debtor's books, a finding is justified that the transfer was preferential and constituted an act of bankruptcy.

8. SAME—ESTOPPEL.
The failure of a creditor to enter an appearance in involuntary proceedings in bankruptcy against his debtor during the two years which elapsed before such creditor's death and during which time no adjudication had been made estops his administrator from assailing the adjudication after it has been made and the estate has been partially administered.

In Bankruptcy. On petition to vacate adjudication.

On the 15th of January, 1903, a petition was filed against F. M. Billing by certain of his creditors, praying that he be adjudged a bankrupt, the act of bankruptcy charged being the making of a conveyance of a part of his real estate, on December 22, 1902, while insolvent, etc. Billing appeared and contested. The matter was referred to the referee to ascertain and report the facts. Upon the coming in of his report and finding, on the 18th of August, 1905, the court adjudged Billing a bankrupt. Mrs. S. H. Downer, a creditor, died on the 16th of February, 1905, Teasley qualified as her administrator on the 11th of January, 1906, and 13 days thereafter filed his petition to vacate the adjudication. The petition, in the main, correctly stated the proceedings, except that it did not recite the order of reference to the referee, and stated there was never any trial of the contest raised by Billing's answer. It stated, among other things, that on the day of adjudication Billing filed the following paper in the clerk's office:

"To the Hon. Thos. G. Jones, Judge of the District Court for the Middle District of Alabama:

"The undersigned, F. M. Billing, against whom a petition was filed on the 15th day of January, 1903, asking that he be adjudged an involuntary bankrupt, respectfully showeth unto your honor: That on account of the changed condition of affairs affecting his estate, and believing that it is to the best interest of his creditors so to do, does hereby unconditionally, consent that the court may enter up an order adjudging him a bankrupt. In taking this action the undersigned feels called upon to state to the court, and to his creditors that in doing so he denies that he, at any time, committed any act of bankruptcy, nor has he allowed any creditor to obtain any preference over any other creditor; but since the filing of said petition some few of his creditors have obtained judgment upon the unpaid instalments due on the agreement with all his creditors, and being advised that an execution issued under these judgments could be levied on his property, in the event the petition in this cause should be denied, he prefers to be declared a bankrupt, rather than allow the impatient creditors to get any advantage over the great number of his creditors who have been so patient. While the undersigned feels greatly disappointed that he was unable to meet the instalments at the time specified in the agreement signed by all the creditors, as they became due, he feels that all his actions up to the present time have been to the best interest of his creditors, and that his creditors have obtained more by their decision to allow him to try to work it out, than they would have done had his estate been put in bankruptcy at the time of his suspension in January, 1901. The undersigned wishes to further state that he is still willing to render any assistance possible in the management of his estate to the end that as much as possible may be realized from it. . . . .

"Very respectfully, F. M. Billing."

The petition further averred that there was filed in the clerk's office at the same time with the above paper, what "purported" to be the following report of a reference:

"In the District Court of the United States, Middle District of Alabama.

"In the matter of F. M. Billing, Bankrupt. In Bankruptcy.

"To the Honorable Thomas G. Jones, Judge of Said Court:

"I respectfully beg leave to report that pursuant to the order of reference heretofore made in said cause, wherein I was directed to take evidence under the original petition in said cause, and report whether said F. M. Billing had committed an act of bankruptcy, I have held said reference and have taken evidence touching the matters at issue, and I find that said F. M. Billing is insolvent and has committed an act of bankruptcy, and that the prayer of said petition should be granted.

"Asa E. Stratton, Referee in Bankruptcy."

It was further alleged that upon the filing of these papers, the court made an order "purporting to adjudge Billing a bankrupt," as follows:

"District Court of the United States, Middle District of Alabama.

"In the Matter of F. M. Billing, Bankrupt. In Bankruptcy.

"This cause coming on to be heard upon the petition of The Central of Georgia Railway Company, et al., praying that F. M. Billing, lately doing business in the name and style of 'Josiah Morris & Company,' be adjudged a bankrupt, and upon the report of Asa E. Stratton, referee, to whom was referred the petition with directions to take testimony, and report whether said F. M. Billing was insolvent and had committed an act of bankruptcy, and the said Billing also making no objection and having filed his consent in writing to such adjudication, and the court being of opinion that the petition should be granted, and the adjudication ordered as prayed, it is, thereupon, ordered, adjudged, and decreed by the court that the said F. M. Billing be, and he is, hereby adjudged a bankrupt, within the purview of the act of Congress relating to bankruptcy, and the matter is hereby referred to the referee, to take such further steps in the administration of the estate as are required by law. This August 18, 1905."

The petition then concludes: "Your petitioner avers that said adjudication was procured by and with the consent and collusion of said Billing and of said petitioning creditors, and without any notice to the other creditors of said Billing, who are and were numerous, and without any opportunity being afforded them to be heard in opposing said adjudication, and without any proof of any alleged act of bankruptcy on the part of said petitioner." It prayed that notice be given Billing and the petitioning creditors, etc.; that on the hearing, the order adjudging Billing a bankrupt be vacated and annulled; and that the petition in bankruptcy be dismissed. The petitioning creditors and the bankrupt demurred to the petition on numerous grounds, among others, that it was not alleged that said Billing was not, in fact, insolvent, and had not committed an act of bankruptcy; that the creditors were not entitled to any notice of Billing's withdrawal of his contest of the petition or of his consent to adjudication, and were bound by the adjudication; that the averment that the adjudication was procured by collusion was the averment merely of the conclusion of the pleader, without stating the facts to support it. The creditors also answered, setting up the appointment of a receiver on the filing of the petition, the expenditure by him of some $10,000 in discharging liens and incumbrances on the estate and in preserving the same, and the disposition of some $50,000 of property under the orders of the court. They also set up the meeting of creditors, the examination of the bankrupt, the election of a trustee, and the conveyance and sales of large amounts of real and personal property under the orders of the court; that the intestate in her lifetime never appeared in the proceeding, or made any objection thereto, and that her administrator was not appointed until some months after her death, and filed his petition six months after the order of adjudication, etc. These various matters were set up in separate pleas to which Teasley demurred.

The court, being of opinion that the issue as to the failure to take proof of an act of bankruptcy, could not be raised in the manner attempted, but that if it could, the issue must be tested by the record, which spoke for itself on that point, and not by the allegations of the pleader, and the admissions by the demurrers as to what the record contained, and that the petition to vacate the adjudication brought the record of the case in which it was rendered before the court, declined to pass upon the matter, as presented by the demurrers to the petition, or those interposed to the pleas, but inspected the record to determine every issue sought to be raised, except as to the alleged collusion between the bankrupt and the petitioning creditors, as to which the court heard evidence. The trustee and the petitioning creditors, however, formally offered the record of the proceeding up to the time when the petition to vacate the adjudication was filed, including the evidence taken before the referee, and reported by him to the court along with his finding. It was shown that the bankrupt made no agreement with the petitioning creditors to withdraw resistance to the petition, and they were not aware of his purpose until after the paper consenting to be adjudged a bankrupt was filed. This step was taken by the bankrupt after consultation with his counsel, because he felt if the petition were defeated, it would result in preferences to some of his creditors which he desired to avoid.

Martin & Martin, for the motion.
Steiner, Crum & Weil and Ray Rushton, opposed.

JONES, District Judge. 1. The Constitution vests broad power in Congress "on the subject of bankruptcies," and it has a wide field of discretion as to the modes of procedure for ascertaining and declaring the status of bankruptcy. If a bankruptcy statute provides for proper notice and fair opportunity to the debtor to defend against adjudication in an involuntary proceeding, due process is not denied creditors, although no provision be made for giving them notice, or, for that matter, for allowing them to become parties to the proceeding. Congress, not being bound to provide for notice to creditors of the institution of involuntary proceedings, has made no provision for such notice, other than that which results by operation of law from the filing of the petition. The proceeding is in a large sense in rem. What is done therein is binding upon creditors, whether or not they have actual notice or knowledge of the pendency of the proceeding. The filing of the petition by proper parties, making the jurisdictional allegations, operates as lis pendens, and is notice to all the world. Bank v. Sherman, 100 U. S. 406, 25 L. Ed. 866; Mueller v. Nugent, 184 U. S. 14, 22 Sup. Ct. 269, 46 L. Ed. 405. Moreover, it seldom happens in these days of newspapers, and the activity of collection and commercial agencies, that creditors do not, in fact, have ample knowledge of the filing of the petition, in time to contest the adjudication against their debtor, if they so desire, within the 20 days allowed them, after the filing of the petition, in which to appear and "controvert the facts."

Section 18, Bankr. Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429], provides for service upon the alleged bankrupt of the petition with subpœna, etc., and subdivision "b" of the same section declares that any creditor may appear and plead to the petition within five days after the return day. Subdivision "d" provides, if the bankrupt or any of his creditors fail to appear within

the time limited and "controvert the facts alleged in the petition," the judge shall determine, as soon as may be, the issues presented by the pleadings without the intervention of a jury, except in cases where a jury trial is given by the act, "and make the adjudication or dismiss the petition." Subdivision "e" provides if, on the last day within which pleadings may be filed, none are filed by the bankrupt or any of his creditors, "the judge, shall, on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition." Subdivision "f" provides "if the judge be absent from the district or division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee." The statute is mandatory and insistent that the adjudication be had or the petition be dismissed as soon as possible, after the time has expired in which the debtor and creditors may plead. It is quite foreign to its purpose to give the right to notice of the proceeding to a creditor, or to permit one who has not made himself a party, within the time prescribed by law, to be heard as to the adjudication.

The bankruptcy statute carefully selects and specifies the instances in which it intends to give the creditor the right to notice. The only instance in which any right to notice is given the creditor, as to the disposition of an involuntary petition, is when it is proposed to dismiss the proceeding by consent of parties, or for want of prosecution. Sections 58 and 59, 30 Stat. 561, 562 [U. S. Comp. St. 1906, pp. 3444, 3445]. Controversies in bankruptcy would never end, and adjudications would amount to little more than mere interlocutory orders, if creditors, who did not make themselves parties, could afterwards come in, claiming they had no notice of the adjudication or petition, and then move to upset the judgment on the ground of error intervening after jurisdiction attached. Aside from this, the theory of the argument that when the bankrupt after making a contest subsequently withdraws it, the creditor has rights which he would not have if the bankrupt had not contested in the first instance, is wholly unfounded. The creditor has no vested interest or property rights in the debtor's appearance and contest, and cannot prevent the debtor's withdrawing his contest at any time he sees fit. The adjudication passes the debtor's title, save as to his exempt property, to the trustee, and imposes certain duties upon the debtor, and may radically affect the rights of creditors as between themselves, and puts certain duties upon them if they desire to share in the insolvent's estate. The law makes the debtor the sole judge whether he will resist the adjudication, in order to avoid its consequences to him and his rights; and it likewise makes the creditor the sole judge whether he will resist the adjudication, in order to avoid its effect upon him and his rights. A creditor who wishes to prevent an adjudication but fails to contest the petition, is none the less in default, because the debtor, who has appeared and contested the petition, afterwards withdraws his contest, without notice to the creditor. The debtor's contest, in the eye of the law, is for himself, and not for the creditor. The debtor is not

bound to resist the adjudication in the interest of any of his creditors, and has the same right to withdraw a contest once begun, as he has to refuse to contest in the first instance.

When an involuntary petition is filed and proper service made upon the bankrupt, and there is no appearance by the debtor or any of his creditors, the court must thereupon either pass an adjudication of bankruptcy or dismiss the petition. If the petition be unresisted, there is no question before the court except as to the sufficiency of the petition. That raises an issue of law. It must be tested solely by the averments of the petition, and the law does not permit, much less require, the taking of proof on such an issue. When, as here, the petition is filed by the proper parties, in the proper district, and makes all the jurisdictional allegations, and is uncontested, the failure to contest the petition by any person having the right, so to do, establishes the truth of the allegations of the petition. The law, thereupon, demands an adjudication of bankruptcy which, when thus rendered, is binding on all the world. Every creditor was conclusively charged with notice of the pendency of the proceeding and what was being done to bring about adjudication, and no creditor can be heard to set up want of knowledge or notice of the proceeding as an excuse for not controverting the petition before adjudication, or as a reason why it shall not bind him.

2. The District Court of the United States is a court of limited, but not inferior jurisdiction. Congress has conferred upon it original and exclusive jurisdiction to adjudge bankruptcies, and its judgments therein are supported by the same presumptions which are indulged in favor of the judgments of all superior courts of general jurisdiction. When jurisdiction is shown to have attached, the indisputable presumption, save when the question is raised by appeal or an attack upon the adjudication for fraud in its procurement, is that there was sufficient evidence to support the judgment. The petitioner here, who has not appeared, cannot, by indirection, by motion to vacate the adjudication, obtain the benefit of an appeal or other revisory writ, and thus compel the court to go behind the petition and the adjudication, and search the evidence to see if it justified the judgment. If, however, the petitioner were in position to raise the question in the way here attempted, it would not avail in the state of this record. The adjudication is based upon a finding of fact, on evidence reported by the referee as a special master. A motion to vacate the adjudication on the ground that the proof did not sustain the finding, must, necessarily, stand or fall upon the evidence taken and reported by the referee. Here, the insolvency was admitted. The execution and delivery of the conveyance charged to constitute an act of bankruptcy were proved. The bankrupt did not testify as to this matter. The books of the bank were put in evidence. No entry could be found in the cash account or elsewhere, concerning the receipt of the sum mentioned in the deed. No entry was discovered, which could be traced to the sale or to any transaction relating to it. It may be, as argued, that the bankrupt received the cash consideration mentioned in the deed, and failed to enter its receipt upon the books of the bank.

The absence of such entry is certainly no proof that the money was paid to him; and the burden is upon him, or those claiming under him, to show that the sale was for cash, and that the bankrupt received the money. The recital in a deed of the receipt of the purchase money is a mere admission of the grantor, which is not at all binding upon his creditors. The burden of proving payment of the consideration, named in the deed, is upon the bankrupt, when a creditor of an insolvent grantee assails the transfer as an act of bankruptcy. The bankrupt had been in failing circumstances for many months prior to the making of the deed. He suspended his banking business in January, 1901, for four months, and then resumed after obtaining an extension from his creditors, upon an agreement with them to pay the principal of his debts installments, without interest. Many of these installments were afterwards paid; while a goodly number remain unpaid. The grantee in the deed had rendered professional service to the bankrupt prior to the making of the deed. There was no entry or other reference upon the books as to this indebtedness, or that the grantee had been paid for these services, or that any settlement whatever had been had with him in relation thereto. The presumption that the particular conveyance was made to settle this past indebtedness, and not for a cash consideration as stated in the deed, was not at all unreasonable, under all the circumstances. Neither the grantee nor the bankrupt, upon whom rested the burden to show the payment of a cash consideration for the property, testified upon that point, although both had opportunity and incentive to make the proof, if it were a fact that the consideration named had been paid in cash. The grantor and the grantee lived in the same city. The insolvency of the banking business which Billing conducted had been a matter of general notoriety for months before the deed was made. The situation was such that the parties must have known that the sale of the property mentioned in the deed in satisfaction of an antecedent debt would inevitably give the grantee an unlawful preference. Reasonable men, in view of the known facts, could not have expected or intended any other result, and the law, upon the facts, imputed a purpose and intent to give and receive an unlawful preference, which constituted an act of bankruptcy. It would have been better if the finding had specifically responded to the particular act of bankruptcy charged. Only one act was specified in the original petition, and the general finding of the referee, under the terms of the reference, cannot possibly be referred to, or relate to, any other act. Many of the authorities attach the same effect to the finding of a master on the facts, as to the verdict of a jury. In no event, can such a finding be disturbed, unless it be manifestly erroneous, and that, in view of the facts disclosed in the record, cannot be fairly maintained here.

3. Petitioner also assails the adjudication as collusive. The evidence does not sustain that charge. The provision of the statute giving a creditor a right to resist the petition of other creditors to force their common debtor into bankruptcy, unless the debtor be insolvent and has committed an act of bankruptcy, is part and parcel of the same

statute which gives that same debtor, whether he be solvent or insolvent, and whether or not he has committed an act of bankruptcy, the absolute right, at his own election, to be adjudged a bankrupt upon his own petition, whether or not his creditors consent, and whatever may be the effect of the adjudication upon their rights. These provisions are in pari materia. Thus construed, the provision allowing the creditor to contest the involuntary proceeding cannot be held to take from the alleged bankrupt the right or privilege, if he chooses to exercise it, of withdrawing his defense after it is begun, to an involuntary petition, or, for that matter, filing a voluntary petition while the involuntary petition is still pending against him. In re Stegar (D. C.) 113 Fed. 978.

It is often vital to the interests of creditors that the debtor's business, though in a critical condition, be not taken out of his control. The owner, left to the conduct of the business, may mend his fortunes, and save loss to the creditors, when a trustee or receiver could not take the business and do as well. In recognition of this interest of the creditor in his debtor's remaining in control of his own affairs, the statute authorizes the creditor to intervene in involuntary proceedings, to prevent his debtor from being put in bankruptcy, unless he be insolvent and has committed an act of bankruptcy. This provision intended to arm the creditor with effective means, placed directly in his own keeping, of assisting the debtor to resist an improper effort to force him into bankruptcy, and also to give the creditor like effectual means of preventing his debtor and petitioning creditors from colluding to bring about the adjudication, when the debtor is not insolvent and has not committed an act of bankruptcy, and is unwilling to institute voluntary proceedings. It was not within the contemplation of the statute, when the debtor is, in fact, insolvent, and has committed an act of bankruptcy, to give to the creditor the right to contest the adjudication, merely to keep alive a lien or levy, which would be destroyed if the petition be not defeated; for that is contrary to the spirit and purpose of the bankruptcy law. The contest of the petition for the latter purpose is an abuse of the statute. So long as he appears within the time prescribed by law, the creditor may wage his contest as to the insolvency and the act of bankruptcy, whatever his ulterior motive; but when, as here, it is not denied that the bankrupt was insolvent, and has committed an act of bankruptcy, a creditor who has not appeared within the time prescribed by law, ought never afterwards to be allowed to assail the adjudication, for anything short of fraud in its procurement, injurious to creditors generally, or for want of jurisdiction apparent on the face of the record in the court which rendered the adjudication.

It is neither immoral nor illegal nor contrary to public policy for petitioning creditors to urge upon their debtor, who is in fact insolvent, and has committed an act of bankruptcy, not to resist the adjudication in an involuntary proceeding, or for such a debtor to heed the importunity of creditors at any stage in the proceeding against him. When such a debtor does no more than abandon resistance once begun to an effort to adjudicate him a bankrupt, and consents to be

adjudged, because he deems it for the best interest of all his creditors, his conduct whether induced solely by his own volition and judgment, or inspired by the solicitation of creditors, and whether or not there be any formal agreement between the debtor and the petitioning creditors as to his consent to an adjudication, does not work any fraud or wrong upon creditors. The law gives the creditors the right to force such a debtor into bankruptcy. Having the right under the law and facts of this case to force the debtor into bankruptcy, his creditors had a perfect moral and legal right to seek to end the prolonged litigation, by agreement to that end between themselves and the bankrupt. The bankrupt could lawfully consent in advance to a decree, which the law, on the evidence, would surely pronounce against him, if the litigation continued. In such a case the law seeks to bring about the equitable pro rata distribution of his estate among his creditors, according to the provisions of the bankruptcy statute. His consent only aids in carrying out the policy of the statute, and in bringing about a status, which the law, under the circumstances, declares ought to exist. Aside from this, the consent of the bankrupt to be adjudicated was made after the finding of the referee, who took evidence on the subject, that the debtor was insolvent and had committed an act of bankruptcy. The debtor, therefore, neither conceded nor consented to anything which had not already been adjudged against him, in a trial while the proceeding was still adversary. The paper filed by the bankrupt in the clerk's office, simultaneously with the filing of the referee's report, was intended to subserve no other purpose than an explanation to the bankrupt's creditors of his conduct in the premises. The bankrupt, from the beginning, denied his insolvency and the commission of an act of bankruptcy. His iteration of that denial in this paper added no force to the former denial, and could not invalidate or lessen the effect of the referee's adverse finding on that point. The bankrupt took no exceptions to the adverse report. The order of adjudication was passed upon the referee's finding and report, which abundantly supported the adjudication, as well as upon the bankrupt's consent to be adjudged a bankrupt. The paper could serve no other legal purpose than evidence of consent, and was not authorized as pleading of any sort, at that stage of the proceedings. It was filed without leave. The court might properly have ignored it altogether. In its discretion, it allowed it to remain on file, and treated it as a consent to adjudication, which by no means depended on that consent, because of the conviction that it was for the interest of all concerned to take away all excuse for further protracting this litigation. Whatever else may be said of the paper, or the reasons given by the bankrupt for the course he took, it is clear that it was an unconditional abandonment of the bankrupt's contest of the adjudication. It put an end to all resistance to the petition by the only party before the court, and in that state of the case the law demanded the adjudication, even if it rested solely on the consent.

4. There are other reasons equally fatal to the petitioner's right to maintain this petition. The proceeding had been pending for nearly two years before the intestate died. Aside from the fact that the law

conclusively charged the intestate with notice of the filing of the petition and what was being done in the proceeding, it is a just inference from the facts that the intestate had actual knowledge. The proceeding related to a large banking business which had failed in January, 1901, and then started up again, and was carried on for some months before the bankruptcy proceedings were instituted. The intestate, who lived in another state, must have heard of the suspension, for the claim was afterwards put in the hands of a leading resident attorney here, and he corresponded with his client about the status of the claim. It is certainly a fair, if not an irresistible, inference, from the facts that the intestate actually knew of the bankruptcy proceeding, and what was being done therein, months before the adjudication. The intestate had ample time and opportunity to become a party and contest the adjudication if she so desired, but remained content to stand aside and watch the proceeding, and leave the final direction it should take to the bankrupt, so far as she was concerned. The diligence of the personal representative, after his appointment, cannot excuse intestate's negligence in failing to become a party and controvert the petition. The effort to vacate the adjudication was not made until hundreds of creditors had proved their claims, and had elected a trustee, who qualified and entered upon the discharge of his duties. The bankrupt had been examined. Property had been sold. Orders had been made and rights had attached on the faith of the adjudication, and the bankrupt had proposed a composition, which had been accepted by the great majority of his creditors, and was then awaiting the action of the court. If the adjudication be now set aside, contest of the petition would have to be gone over anew. If the petition be not dismissed on a second trial, nothing would result from vacating the adjudication but vexatious delay, and additional and fruitless expense. On the other hand, if the adjudication be vacated, and the petition be finally dismissed, it would result in the saving of preferences to a few, to the detriment of the great body of creditors. If this creditor ever had the legal right to put the other creditors to delay and expense, by insistence upon his legal right to oppose adjudication, in order to save preferences by defeating the petition, it was incumbent upon him to see to it that his right was promptly asserted, in the time and mode prescribed by law, before the adjudication was made. A creditor cannot sit still until an adjudication is made, if he might have obviated it by timely objection, and then complain of a situation which has grown up in consequence of an unresisted adjudication, which cannot now be undone, without prejudice to the bankrupt estate, and rights which have grown up on the faith of the adjudication and the orders made thereunder.

5. Again, the prime object of the statute is the speedy disposition of involuntary proceedings, and the prompt distribution of the estate of persons who are found to be insolvent. To that end, the statute exacts speedy decision upon the petition, and specifically requires that appeals from adjudications shall be taken within ten days. It would be a palpable evasion of the letter, and a plain nullification of the spirit, of this provision to entertain a motion made to vacate months after the ad-

judication by a creditor who never made himself a party to the proceeding. Moreover, if we concede, which was clearly not the case here, that the adjudication passed without proof of an act of bankruptcy, upon the wrongful consent of the debtor to the adjudication, and that a creditor who had not made himself a party because ignorant of the pendency of the proceeding, could upon being advised promptly raise the question by a motion to vacate the adjudication, the petitioner is still met with the objection that the conduct of the intestate in this matter was such as necessarily led the court to believe, so far as she was concerned, that there was no objection to the adjudication, and that she was content that the proceeding take such course as the bankrupt might elect to give it. It is too late, after the bankrupt has abandoned resistance, and the court has acted on the view that petitioner did not desire to contest, for petitioner to come forward now, for the first time, and object to the adjudication, because the court failed to take proof, which it was not required to exact, except when the petition is resisted. A litigant cannot put a court in error in that way.

For all these reasons the petition must be dismissed.

UNITED STATES v. WOOD et al.

(District Court, E. D. Pennsylvania. April 2, 1906.)

1. CARRIERS—FOREIGN SHIPMENTS—THROUGH RATES UNDER JOINT SCHEDULES.
Through shipments of iron pipe were made from points in New Jersey and Pennsylvania to Winnipeg, Canada, part over the Baltimore & Ohio Railroad and part over the Philadelphia & Reading to the Great Lakes; thence by the Mutual Transit Company, a water carrier, to Duluth; and thence by the Great Northern Railway and its connections. There was no through joint rate filed or published, but there was a joint rate of 24½ cents per 100 pounds between the initial points and Duluth published and filed by participating carriers, and one of 25 cents per 100 between Duluth and Winnipeg filed by the Great Northern Railway Company. *Held*, that the lawful rate for the through carriage was the sum of such two rates, or 49½ cents per 100, and that under the interstate commerce law, as amended by Act March 2, 1889, c. 382, 25 Stat. 855 [U. S. Comp. St. 1901, p. 3156], neither line over which the shipments passed could lawfully charge a greater or less sum than was specified in the filed and published schedule of rates to which it was a party.

2. SAME—RECEIVING REBATE FROM JOINT RATE.
The Elkins act of February 19, 1903 (chapter 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]) makes it unlawful for a carrier to grant a rebate from a joint tariff rate which it has filed with the Interstate Commerce Commission or published, or in which it participates when filed or published by another carrier, but it does not make it a criminal offense to receive a rebate from a joint rate unless such rate has been both filed and published.

3. SAME—PARTIES TO THROUGH SHIPMENT.
When a carrier unites with one or more others in making a rate for interstate or foreign shipments, and a through bill is issued therefor, it is subject to the interstate commerce act. An express agreement for the through rate is not required, but the successive receipt and forwarding in the ordinary course of business by two or more carriers under through bills, or any arrangement for a continuous carriage, constitutes assent to

such common arrangement, and makes the carrier a party to the contract, within the meaning of the act.

4. SAME—ACCEPTANCE OF REBATE—CRIMINAL LIABILITY.
The fact that a shipper who contracts for and receives a rebate in violation of the statute personally receives no benefit therefrom, but turns the same over without consideration to another, does not relieve him from criminal liability.

5. SAME—ACCEPTANCE OF REBATE BY CORPORATION—LIABILITY OF STOCKHOLDER.
The fact alone that a defendant is a stockholder in a corporation which has accepted rebates in violation of law does not render him subject to the penalty imposed by the statute therefor.

Criminal Prosecution for Acceptance of Rebates in Violation of the Interstate Commerce Act.

J. Whitaker Thompson, U. S. Atty., and John C. Swartley, Asst. U. S. Atty.

William A. Glasgow, Jr., for defendants.

HOLLAND, District Judge (charging jury). The defendants Walter Wood and Stuart Wood, are charged in this indictment with having received a rebate and concession from a common carrier, engaged in interstate commerce, whereby 1,500 tons of iron pipe were transported from Florence and Camden, in the state of New Jersey, and from Emaus, in the state of Pennsylvania, to Winnipeg, in the province of Manitoba, Dominion of Canada, at a less rate than that named in the lawful tariffs published and filed by the common carriers over which the property was transported; that is to say, they are charged with having received a rebate or concession prohibited by the act entitled "An act to regulate commerce as amended by what is known as the Elkins Act," passed February 19, 1903 (chapter 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]).

The charge in detail, as set forth in the indictment, is that Walter Wood and Stuart Wood, copartners, trading under the name of R. D. Wood & Co., at 400 Chestnut street, in the city of Philadelphia, sold to the city of Winnipeg, 1,500 tons of iron pipe, and entered into a contract on October 1, 1904, with C. E. Campbell, the Philadelphia general freight agent of the Great Northern Railway, a common carrier, subject to the provisions of the commerce act, to transport this pipe from Florence and Camden, in the state of New Jersey, and Emaus, in the state of Pennsylvania, to Winnipeg, part over the Baltimore & Ohio Railroad and part over the Philadelphia & Reading Railway to the Great Lakes, thence by the Mutual Transit Company to Duluth, in the state of Minnesota, and thence by the Great Northern to Winnipeg, for the price or sum of 49½ cents per 100 pounds, in accordance with the rates fixed by the joint tariffs published and filed by the Baltimore & Ohio Railroad Company and the Philadelphia & Reading Railway Company of 24½ cents per 100 pounds from the initial point of shipment to Duluth over their roads, and the Mutual Transit Company's line, and the joint tariff filed by the Great Northern Railway Company of 25 cents per 100 from Duluth to Winnipeg over its road and the Canadian Northern Railway. That the defendants, in accordance with their contract, paid these

common carriers 49½ cents per 100 for the transportation of this pipe, which was the sum of the two joint tariffs mentioned at that time in effect, and the only lawful rate for the transportation of this class of property, and that subsequently, on January 20, 1905, the defendants received from one of these common carriers mentioned in the joint tariffs a rebate or concession of $1,230.59 on the total shipment of 1,500 tons. This is the charge in the indictment, and it is made in accordance with the provisions of the commerce act and its amendments; a brief reference to the reasons for the enactment of which will aid us in understanding what a rebate or concession is, and the better enable us to determine whether or not the defendants violated the provisions of the act in this regard. The different views of the scope and meaning of the act as amended and as applicable to this case have been ably considered and presented by both sides, and both counsel for the government and the defense agree as to the evil which the law was intended to suppress.

Prior to February 4, 1887, the date of the enactment of the original act (chapter 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), a practice was indulged in by the managers of railroad traffic, and many favored shippers along their lines, which became so intolerable to a great number of other shippers not so favored that a demand for the enactment of a law to prohibit the continuance of this commercial offense was demanded. Prior to that time the railroad traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. The evils which grew up under a policy of unrestricted competition took the shape of inequality in charges made or of facilities furnished, and were usually dictated by a desire to promote the interest of favored shippers along the lines of railways, to the great disadvantage of the competitors of those shippers who were not able to secure the same advantages as the shipper who received these concessions, and it frequently resulted that those who could get better rates for the transportation of their property than their competitors were able to drive their competitors out of business. These cases were so numerous that they became intolerable, and Congress enacted this interstate commerce act for the purpose of prohibiting these unjust discriminations by the railroads, to prevent undue and unreasonable preferences to certain favored persons, and for the general purpose of placing all shippers upon an equal footing, and to make it unlawful for a railroad, by any device, to give a less rate to one for similar services than to another. The devices by which these lower rates or advantages were given to the favored shippers were numerous and ingenious, and easily carried into effect, when the railroads were not required to keep a published tariff of rates open to the inspection of all, and prohibited by law from deviating therefrom. So Congress, in response to the popular demand, enacted the interstate commerce law. In the first section we find that the act shall apply to any common carrier or carriers engaged in transportation of passengers or property wholly by rail or partly

by rail and partly by water, when both are used under a common control, management, or arrangement, for a continuous carriage from one state or territory of the United States to any other state or territory of the United States, or from any place in the United States to an adjacent foreign country. It further requires that charges made for any services rendered in the transportation of property shall be reasonable and just, and every unreasonable and unjust charge for any such service is prohibited and declared to be unlawful. The act further provides 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. It then provides that every common carrier, subject to the act, shall print and keep open to public inspection schedules showing the rates, fares, and charges for the transportation of passengers and property which it has established and which are in full force upon its route. And this printed schedule is required to plainly state the places upon its railroad to which property, etc., will be carried, and this public schedule shall contain the classification of freight. This schedule must be plainly printed, and copies posted in two conspicuous places in every depot, station, or office of such carrier where freight is received for transportation, in such form that they shall be accessible to the public, and can be conveniently inspected, and copies of the same must be filed with the Commission. This provision applies to single lines.

In addition to these schedules of rates, on a single line of a common carrier, subject to the act which they are required to file and publish, the act requires that in cases where freight passes over continuous lines or routes, operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or charges for such continuous lines or routes, copies of such joint tariffs shall in like manner be filed with the Commission, and such joint rates and charges on such continuous lines so filed shall be made public by such common carrier when directed by said Commission in so far as may, in the judgment of the Commission, be deemed practicable. You will notice that the schedules of rates which a carrier subject to the act adopts for its own line must be posted in public and conspicuous places in the depot and other places, and a copy filed with the Commission; but the schedules of joint tariffs over continuous lines, operated by more than one common carrier, are required to be filed with the Commission, and such rates are only required to be made public by the common carrier in so far as the Commission, in its judgment, may deem practicable, and no advance shall be made in these joint rates so established, except upon 10 days' notice, and no reduction shall be made except after 3 days' notice to be given to the Commission, and the Commission may make public such proposed reduction in such manner as it may deem practicable, and it shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of property, or for any services in connection therewith, between any points as to which a joint rate, freight, or charge is named thereon,

than is specified in the schedule filed with the Commission in force at the time. You will notice that a carrier cannot charge more or less compensation than that specified in the schedule filed with the Commission in force at the time.

Under the act, as amended March 2, 1889 (chapter 382, 25 Stat. 855 [U. S. Comp. St. 1901, p. 3156]), the carrier was required to charge the rate specified in the schedule of tariff passing over its line, and when it found that it was necessary to modify this rate to shippers shipping property beyond its line in a continuous route, in order that there might not be any discrimination, the act required that these carriers subject to the act, and joining to make up a continuous line, should file a joint tariff, specifying the charges for the transportation over the continuous line; and so long as such joint tariff was not filed by some one of the lines making up the continuous route, the different carriers were confined to the charges in their schedule covering their respective lines as to the classified property therein mentioned. And in a case like the one at bar, if a joint tariff had been established by arrangement and filed with the Commission, covering the lines of the Baltimore & Ohio and the Mutual Transit Company to Duluth, neither the Baltimore & Ohio nor the Mutual Transit Company can deviate from that joint tariff, except upon the usual notice to be filed with the Commission; and where, as in this case, there was no joint tariff filed from Philadelphia to Winnipeg, neither company over which this shipment of iron pipe passed could lawfully charge or demand or collect a greater or less compensation for the transportation of property than was specified in its schedule of its joint rates filed with the Commission. In other words, if these carriers desired to form a continuous line from Philadelphia to Winnipeg, and to make a lower rate for the transportation of property than they were collecting on the two joint tariffs then in force covering the same route, then they should have given notice, according to the act, and filed their schedule with the Commission; and so long as they did not do this, they could not lawfully deviate from the rate established, which is the sum of the two joint rates mentioned.

Under the original act, as amended in 1889, as to the carrier, any deviation from the joint rates specified in the schedule filed was unlawful, and the Elkins act so amended this as to the carrier that any departure from a joint tariff filed by it, or any departure from a joint tariff published by it, or any departure from a joint tariff filed or published in which it participated in the rates so filed or published, was made unlawful. That part of the Elkins act which makes it unlawful for the carrier to offer, grant, or give any rebate, concession, or discrimination in respect to the transportation of property, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariff published and filed, may be extended by the subsequent clause as to the carrier so as to make it unlawful to offer, grant, or give a rebate on joint tariffs in which such carrier participated, but as to the shipper or a person receiving a rebate the tariff must be filed and published. In other words, it may be unlawful for a carrier to give a rebate, concession, or discrimination on a joint tariff filed by it, or on a joint tariff published by it, or on a joint tariff

in which it participated when filed by another, or on a joint tariff in which it participated when published by another, but it is only unlawful for a shipper to receive a rebate on a joint tariff which is both filed and published. The act, so construed, works no injustice to either the carrier or the shipper. The carrier knows whether it has either filed or published a joint rate, or whether it has participated in a joint rate filed or published by another, and if it departs therefrom it does so willfully and with knowledge; and if a shipper receives a rebate on a joint tariff which has been both filed and published, he does so with notice of the lawful rate, and as to him, when the rate is filed and published, he is bound to take notice, and the law will not excuse him if he fails to inform himself when the opportunity is afforded, which the law provides by requiring the filing and the publishing of the rates for his information. And as to the question of actual notice to the shipper in this case, you will say from the evidence of Mr. Morton, who was the representative of the defendants in carying out the transaction, together with the other evidence, whether or not the defendants knew of their own knowledge, or through their agent, what the joint rates were as filed and published at the time the contract was made. You will recall what knowledge Mr. Morton showed with regard to rates—not only those involved in this controversy, but the rates, both local and through, on property transported across the entire continent from Philadelphia to California. But aside from the question of the defendants' actual knowledge, they are bound to take notice of joint tariffs filed and published, and if they receive a rebate, concession, or discrimination, either themselves or by their traffic manager, they are responsible.

It is contended on the part of the defendants that the Mutual Transit Company is an independent water line, and that a contract with it was entered into by the defendants separate and apart and entirely independent from any connection whatever with the railroads which took part in the transportation of this property, and that in consequence of this separate and distinct agreement they are not subject to the interstate commerce act, or its amendments, and could do as it saw fit with regard to a return of its charge for the transportation. The government contends that this is not so, but, on the other hand, that the Mutual Transit Company, while it is a corporation engaged in water transportation, yet it was engaged in such transportation involved in the case at bar under a common control, management, or arrangement for a continuous carriage or shipment, within the meaning of the language as used in the act to regulate commerce, making its provisions apply to carriers engaged in transportation of property partly by rail and partly by water when both are used, the Mutual Transit Company being the part by water used in this case. You will recall what the facts are as testified to on this point. Mr. Morton testified that he was the traffic manager of the defendants, and contracted with Mr. Campbell, the general freight agent of the Great Northern in this city, for the transportation of this freight from the point of shipment to Winnipeg, agreeing with Mr. Campbell at the time upon the initial roads which were to carry it to be delivered to the Mutual Transit Company, thence to the Great Northern on to Winnipeg; that he arranged for the prepayment of

the freight, and approved the bills for the freight at 49½ cents per 100 pounds, the amount, as you will recall, of the sum of the joint tariffs filed by the initial roads and by the Great Northern, which were put in evidence here. He says the freight was to be carried for 45 cents, and that he agreed with Campbell that the difference between 45 cents and 49½ cents should be refunded, and that he knew that there was to be an overcharge, which was to be refunded, which was to be 4½ cents per 100, and the arrangement with Campbell, he says, was that this refund should be made by the Mutual Transit Company, which arrangement was made before the contract was secured, and that this refund was paid, in accordance with Campbell's arrangement, by the Mutual Transit Company. He also said, in direct examination, that he did not recall having any conversation with Mr. Lake in regard to the refund of the 4½ cents per 100. He further states, on cross-examination, that before Campbell made the arrangement with him, that he (Campbell) telephoned Mr. Noble, who represents the Mutual Transit Company, and after this telephone communication Campbell reported to the witness (Mr. Morton) that the Mutual Transit Company would make them a rate of 45 cents, and at the same time Campbell told Morton to pay the bills when rendered at 49½ cents, and that the Mutual Transit Company would pay back the overcharge.

This is the evidence as to the contract, together with whatever evidence you may remember was introduced into the case. You will say whether there is any other evidence at all as to a separate and independent contract with the Mutual Transit Company, and it is for you to say whether or not this transaction, as a whole, tends to show an independent contract with the Transit Company, or a contract for transportation under a common control, management, or arrangement for a continuous carriage or shipment; and further, on this question of independent contract, whether they were transported by an arrangement for a continuous carriage or shipment, you will take into consideration the contract as testified to by Morton; the fact that the Transit Company entered into the carriage of this interstate traffic by agreeing to receive the goods by virtue of a through shipment, and having participated in the joint rates charged according to the published tariff, although it refunded part afterwards, whether or not it did become part of this transportation line by arrangement for the continuous carriage or shipment of the property from the initial point to Winnipeg. The test of subjection to the act is through routing in interstate commerce. When a carrier unites with one or others in making a rate for interstate traffic, and a through bill is issued therefor, it is subject to the act. An express agreement for a through rate is not required, but the successive receipt and forwarding in the ordinary course of business by two or more carriers in interstate traffic, under through bills, or any arrangement for a continuous carriage over their lines, constitutes assent to such common arrangement for the carriage within the meaning of the act. If you find there was no independent contract with the Mutual Transit Company, but that the contract was to pay the lawful joint tariff rates of 49½ cents per 100, and that the arrangement was accepted by the Transit Company and the other carriers named for that rate on a through

shipment, with agreement on the part of the Transit Company to refund, and the Mutual Transit Company and the others participated in this through rate and charge, then all of them become a part of the continuous line by arrangement for the continuous carriage or shipment from one place in the United States to an adjacent foreign country and all subject to the provisions of the commerce act and its supplements.

In this case, if you believe the uncontradicted evidence of the government, the lawful rate from the initial point to Duluth is 24½ cents a 100, and from Duluth to Winnipeg 25 cents per 100, and from the initial point to Winnipeg the sum of the two, or 49½ cents per 100. They were published and filed, and both the carriers and the shippers were bound by the commerce act to observe them. The carriers were in duty bound to the shippers generally to charge these rates, and the shipper was required to pay these rates; they were open to all shippers alike, and upon them, as a basis, all dealers in iron pipe could fairly compete. If the shippers and transportation companies had concluded it was necessary, in order to compete with any other country or parts of this country, to have a lower rate, the act points out a lawful way by which it can be secured—that is, by giving three days notice of any reduction in joint rates—and this reduction would be given such publicity as the Commission directed, and all dealers in articles of commerce, such as these in question, would then have fair treatment, and no special favor to any one. The necessities of the particular case cannot excuse a failure to observe the provisions of this act. If the joint rates for classified property scheduled and filed and made public, as required by law, to different points, is too high to enable a business man to compete in the market, the act points out the remedy, and it must be followed; and if it is not followed, and the shipper receives a rebate, concession, or discrimination, he has offended against the act as amended by the Elkins act of 1903, which prohibits any person, persons, or corporations from soliciting, accepting, or receiving a rebate, concession, or discrimination in respect to the transportation of any property whereby any such property shall by any device whatever be transported at less rate than that named in the tariffs published and filed.

If you find that this property was transported partly by rail and partly by water by common management, and that a rebate was paid, contrary to law, by the Mutual Transit Company, the next question is whether or not the defendants received such rebate. The defendants say they did not make this contract, they did not know of its terms, nor that a refund had been agreed upon or made, until their attention was called to it, long after the transaction, by the Interstate Commerce Commission. They say they permitted the Florence Iron Company and the Camden Iron Works, two corporations, to use the name of R. D. Wood & Co., because it was well known, for the purpose of obtaining business, and R. D. Wood & Co. acted as selling agent for both corporations. The defendants' evidence further shows that the office of R. D. Wood & Co. is the office of both corporations, and the employés in R. D. Wood & Co.'s office are also the employés of both the Camden Iron Works and the Florence Iron Company, and paid by them. R. D. Wood & Co. are the sole agents of these corporations, and the employés in their

office are authorized to sign the name of the corporations to contracts such as the one in question, and that of the Camden Iron Works was signed to the contract made by the employés in R. D. Wood & Co.'s office; that the freight was paid by the Florence Iron Works and Camden Iron Works on the contract made by Morton, and that Morton was the traffic manager for the defendants and both of these corporations; that Walter Wood only, prior to the making of the contract, knew that Morton was going to undertake to get a through rate of freight from the foundries to Winnipeg, and that he was successful in securing one, but that he (Walter Wood) did not know the price at that time, and that he (Walter Wood) did not hear of the overcharge coming in until between October, 1904, and January, 1905, probably before the contract had been awarded. The defendants were not consulted when the overdraft came in, as the men in their office he claims knew where it was to go, and as the bookkeeper of the two corporations is the bookkeeper of R. D. Wood & Co., and there is only one set of books kept for both, the overcharge was turned over to the Camden Iron Works, and that the defendants do not receive any commissions on these sales; that the amount received belonged to the Camden Iron Works, was turned over to them and received by them, and was never received by the defendants.

You will recall that no act done by any of the representatives of R. D. Wood & Co. and the iron companies testified to here is repudiated by R. D. Wood & Co. The facts are submitted as they really are, with no disposition on the part of the defendants to qualify them. They contend that the facts stated make it appear that they did not receive the rebate, but that the iron company received it. It was no device or scheme on their part to so arrange their business for the purpose of evading this act; it was their method of arranging their business as the most profitable and convenient scheme to conduct it, and this transaction, like all others, was conducted in accordance with their joint plan of management.

On the other hand, the government contends that this contract was made by the defendants, and the rebate received by them. There is no dispute about the fact that Morton made the contract he says for R. D. Wood & Co.; that the draft was sent to R. D. Wood & Co.'s representative; that the check for the amount was drawn to the order of R. D. Wood & Co., the defendants, and through their employés indorsed over to the Camden Iron Works, deposited by it, and by it the amount was collected; and the government further says that the voucher accompanying it was also sent to R. D. Wood & Co., and turned over in the same way. This, together with all the other fatcs and circumstances, the government says establishes the fact that the rebate was received by the defendants. It is for you to say whether or not under the arrangement and the facts of this case they received this rebate or the iron company received it. If they contracted for it and received it, and saw fit to turn it over to the iron company without any consideration whatever, or if in this transaction the defendants contracted for a rebate, received it, and turned it over in settlement of that transaction with the iron company, they would not be excused; but if the defendants had

nothing to do with the contract made by Morton—no interest in it whatever—and if the rebate was to be paid to the Camden Iron Works, and it was paid to the Camden Iron Works, then the defendants should be acquitted. I may say that, under the peculiar facts and circumstances of this case, if Morton made this contract representing R. D. Wood & Co., with what knowledge Mr. Walter Wood had of the transaction, as testified to by him, and the rebate was accepted by the defendant company—that is, R. D. Wood & Co.—and turned over to this iron company without any consideration, or for nothing, and the fact that R. D. Wood & Co. received no benefit directly as a firm, and turned it over for nothing, Mr. Stuart Wood, while he is a partner, but takes no part in the management of the business, and knows absolutely nothing about it, and having received absolutely no interest from it directly as a member of the firm—if you find these to be the facts—then, under the peculiar circumstances of this case, he should not be found guilty; but it is for you to say whether or not you will find these to be the facts as to him in this case. The fact that they own the controlling stock in one corporation, and probably in the other, has nothing to do with the case. There are more than 80 stockholders in these corporations, and if you could hold one owner of stock in these corporations you could hold every other owner of stock in them. You will see at once to what an absurd and unjust conclusion you would come if the owner of stock in a corporation could be prosecuted because the corporation accepted a rebate. I therefore charge you that, if you find that the defendants did not receive this rebate, and that the Camden Iron Works did receive it, they are entitled to be acquitted, and the fact that they are stockholders does not bring them within the provisions of this act, and the verdict should be in their favor; but you will take into consideration the intimate business relations and all the other facts and circumstances shown here in connection with the refund and say whether the Camden Iron Works or the defendants received the amount, and if they received it you should return a verdict in manner and form as they stand indicted.

The defendants are entitled to the benefit of any reasonable doubt. If, upon examining any of the questions that have been submitted to you, you find that you have a reasonable doubt as to the guilt of either or both of the defendants, it would be your duty to render a verdict of acquittal. If, however, from the evidence as a whole, you are convinced beyond a reasonable doubt that the defendants are guilty as charged in the indictment, then you should find a verdict in manner and form as they stand indicted. And in the examination of the questions submitted you should not be influenced by any considerations of whether or not this is a good law or bad law, whether or not the government has prosecuted others who may have taken part in its violation, nor should you take into consideration who the defendants are. If we are to be a law-abiding people, it is our duty to enforce the laws as they have been written upon the statute books, regardless of any outside considerations, and be controlled, and controlled only, by the law and the evidence in each particular case.

MUTUAL LIFE INS. CO. OF NEW YORK v. LANGLEY.

(Circuit Court, D. South Carolina. May 8, 1906.)

1. REMOVAL OF CAUSES—BONDS—SUFFICIENCY.

Civ. Code S. C. 1902, §§ 599, 600, authorizing the giving of surety company bonds, declares that any foreign company, empowered by its charter to issue bonds or policies of suretyship, may, with the consent and approval of the Governor, Comptroller General, and Secretary of State, issue such bonds within the state. A removal bond tendered with a removal petition was signed by M. as attorney in fact for the foreign corporate surety, authorized to do business within the state, and was sealed with the seal of the corporation. It also contained an affidavit that the affiant saw the corporate seal of the company affixed, saw M. sign as attorney in fact for such surety, and witnessed the execution and delivery thereof as the act and deed of such surety. *Held*, that the bond was sufficient, though it was not accompanied by a power of attorney authorizing M. to sign the bond.

2. SAME—ORDER OF REMOVAL—NECESSITY.

Where a proper petition and bond for the removal of a cause to a federal court is filed in proper time with the clerk of the state court where the cause sought to be removed is pending, and a certified copy of the record is filed in the federal court, the latter court acquires jurisdiction without an order of the state court transferring the cause.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 198.]

3. SAME—STATE COURT PROCEEDINGS—INJUNCTION.

Where a cause was properly removed to a federal court, but the state court erroneously denied a motion for an order transferring the cause, the federal court had jurisdiction on the application of the party removing the cause to grant an ancillary injunction restraining the opposite party from taking further proceedings in the state court, without violating Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], forbidding a federal court from enjoining proceedings in a state court.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 206.]

Mordecai & Gadsen, for complainant.
W. A. Holman, for defendant.

BRAWLEY, District Judge. The complainant above named filed its bill of complaint, duly verified, March 26, 1906, alleging, among other things, that Eliza J. Langley commenced an action against the Mutual Life Insurance Company of New York September 6, 1905, in the court of common pleas for the county of Lancaster in this state, on a policy of life insurance of $4,000. Thereafter, and within the time prescribed by the act of Congress in such case made and provided, the defendant filed a petition in the court of common pleas for Lancaster county for the removal of said cause to this court, and filed therewith a bond, which petition and bond was received by the clerk of the court of common pleas for the county of Lancaster September 22, 1905, and on October 14, 1905, the petitioner procured from the clerk of said court a transcript of the record, which said transcript was filed October 17, 1905, with the clerk of this court. The bill further alleges that thereafter, in due time, the Mutual Life Insurance Company filed its answer in this court, and that the same was served

upon the attorneys of Eliza J. Langley, and service thereof duly acknowledged by them; that at the next succeeding term of the state court application upon due notice was made to the presiding judge of said court for his approval of said petition and bond, and that said application was refused, on grounds which will be hereafter stated; that complainant immediately gave notice in open court and in writing of its intention to appeal from said order, but that counsel for Eliza J. Langley moved for an order for judgment by default against the complainant, upon the ground that the cause had not been removed into this court; yet, nevertheless, the presiding judge of said state court did proceed, and gave an order for judgment to be entered by default for the full amount claimed by the plaintiff, and that under the law and practice in the state courts a judgment will be entered, and execution will issue thereupon, and levy be made upon the property of the defendant in that cause. The prayer of the bill is that a writ of injunction be issued, restraining the said Eliza J. Langley, her agents, servants, or attorneys, from doing any other or further act or thing to avoid, oust, or ignore the jurisdiction of this court, and from the further prosecution of her suit in the state court.

Upon the filing of this bill, an order was entered requiring the defendant, Eliza J. Langley, to show cause in this court on the 4th day of April why a perpetual injunction should not issue enjoining and restraining her and her agents and attorneys from doing any act or thing to avoid the jurisdiction of this court over the suit or cause instituted in the court of common pleas for the county of Lancaster in the state aforesaid, copy of which order and of the bill of complaint, as appears by the return of the marshal, was served upon Eliza J. Langley, the defendant named, and upon T. Yancey Williams, Esq., D. Reece Williams, Esq., and Ernest Moore, Esq., attorneys for Mrs. Langley, and on the 4th day of April W. A. Holman, Esq., appeared for the parties named, and made a return to the rule. Argument was heard thereon, but, having been continuously occupied since that date in holding a term of the Circuit Court, I have been unable until now to arrive at a satisfactory conclusion.

The case has given me much concern, because comity and every consideration of propriety demands that all due respect should be paid to the state courts, and I am very unwilling to do anything which might have the appearance of grasping at jurisdiction which properly belonged to them; but the Constitution and laws of the United States give to nonresident defendants in all cases where the jurisdictional amount is involved the right to remove their causes into this court, and, if they have complied with the removal acts, and the jurisdiction of this court has therefore attached, my oath of office binds me to protect parties entitled to the jurisdiction of this court from any invasion of their rights. If the defendant in the state court has complied with the provisions of the statute relating to removal, the case was removed, and if it was within the jurisdiction of this court, the judgment of the state court was absolutely null and void.

The removal act (Act Aug. 13, 1888, c. 866, 25 Stat. 435 [U. S. Comp. St. 1901, p. 582]), in the first part of section 3 provides:

"That whenever any party entitled to remove any suit * * * may desire to remove such suit from the state court to the Circuit Court of the United States he may make and file a petition in such suit in such state court at the time or at any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the Circuit Court to be held in the district where such suit is pending, and shall make and file therewith a bond with good and sufficient surety for his or their entering in such Circuit Court on the first day of its then next session a copy of the record in such suit and for paying all costs that may be awarded by the said Circuit Court if said court shall hold that such suit was wrongfully or improperly removed thereto, and for the future appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit, and the said copy being entered as aforesaid in the Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court."

No question is made that the petition in this cause, filed in due time, showed a case that was properly removable, and the transcript of the record has been duly filed here. The only question is whether "a bond with good and sufficient surety" was filed in the state court. It may be observed that the bond required by the statute is not a bond for the payment of any judgment that may be recovered, but the condition of the bond simply requires the party making it to file a copy of the record in this court, and for paying all costs that may be awarded by the Circuit Court if said court shall hold that such suit was wrongfully or improperly removed thereto. One of the conditions has already been complied with, and a copy of the record has been duly filed, and the only remaining condition is that the removing party shall pay the costs in the event that this court should decide that the case was improperly removed. The Hon. J. C. Klugh, presiding judge in the state court, in his order refusing to accept the bond, says:

"That it is not a bond good at law, and such as is required by the statute. It appears upon an inspection of the bond that the signatures to the bond are made by T. Moultrie Mordecai, styling himself the attorney in fact for the parties whose names are subscribed as principal and surety on said bond, but there is no power of attorney or other evidence in the record or before me to show authority by T. Moultrie Mordecai to make the signatures of the obligors upon the said bond."

He therefore dismissed the petition for removal, and thereafter entered a judgment by default against the defendant. The statute does not require that the bond should be signed by the party seeking the removal, and it has been repeatedly held that it may be signed by his attorney. It simply requires "a bond with good and sufficient surety." No objection is made to the sufficiency of the surety. The objection is that there was no power of attorney or other evidence to show authority by T. Moultrie Mordecai to make the signatures of the obligors upon said bond. The surety on the bond is the American Bonding Company of Baltimore, and on the face of it it is stated that this is a body corporate under the laws of the state of Maryland, duly authorized and licensed to do business in the state of South Carolina, and to become surety in the courts of the United States and of the state of South

Carolina. Sections 599 and 600 of the Civil Code of 1902 of South Carolina provides for the giving of bonds by surety companies, and that "any foreign company empowered by its home charter to issue bonds or policies of suretyship may by the consent and approval of the Governor, the Comptroller General and Secretary of State, issue said bonds in this state." No objection appears to have been made to the bond on this score. The sole objection stated in the order of the state judge is that it does not appear that T. Moultrie Mordecai had any authority to sign the bond. The original bond is not before me, having, of course, been filed with the clerk of the state court, but the copy purports to have the seal of the surety company, and the probate on the bond is as follows:

"State of South Carolina, Charleston County. Before me, the subscribing notary public, personally appeared E. M. Dibble, and made oath that she saw the corporate seal of American Bonding Company of Baltimore affixed to the then written bond, and that she saw T. Moultrie Mordecai, attorney in fact of said American Bonding Company, sign the same, and that she witnessed the execution and delivery thereof as the act and deed of said American Bonding Company of Baltimore.

"[Signed] E. M. Dibble.

"Sworn to before me this 21 day of September, 1905.

"William Austin, Notary Public. [Seal.]"

On the face of it, therefore, the bond seems to be regular. Corporations can only act through officers or agents, and where the corporate seal of the corporation is affixed, and the subscribing witness makes oath that she saw the corporate seal of the company affixed, and that she saw T. Moultrie Mordecai, attorney in fact of said company, sign the same, there is a presumption that the execution was duly authorized. Upon the hearing before me a power of attorney of the American Bonding Company appointing and authorizing T. Moultrie Mordecai to make, sign, and acknowledge as surety any and all bonds, obligations, and undertakings required in judicial proceedings in any of the courts of the state of South Carolina and in the United States courts was produced, bearing upon its face the statement, under the hand of M. R. Cooper, Secretary of State, that the same was recorded in Miscellaneous Record Book, page 659, M. M. M. M. M., and it was stated upon the hearing that the same had been offered for the inspection of Judge Klugh, but this circumstance does not affect my judgment, which is that the bond of the surety company, signed as this bond was signed, with the corporate seal attached, is on the face of it a sufficient bond under the removal act. This, of course, would not prevent the surety company, or any party interested from showing by matter dehors the record that the attorney in fact was not in reality authorized to sign bonds for the company, and that the corporate seal was improperly attached; but that would raise a question of fact which must be decided in this court. In a late case decided by the Supreme Court of South Carolina (Furness v. Calhoun, 70 S. C. 537, 50 S. E. 194), a warrant of attachment had been issued by the clerk of the court for Beaufort county against the defendant as a nonresident, and under it certain real estate in that county was attached. The undertaking was signed: "Christopher Furness and J. H. Wellsford, by Thomas

Talbird, Their Attorney in Fact," and attached to the undertaking was a telegram addressed to Thomas Talbird, signed by W. S. Monteith, attorney: "Plaintiffs authorize you to sign undertaking on their behalf." W. S. Monteith and Thomas Talbird were attorneys of record of the plaintiffs. In August, 1904, the defendant gave notice of a motion to dissolve the attachment, upon the ground that such undertaking was not signed by the plaintiffs, nor by any one thereunto authorized by them. Judge Klugh dissolved the attachment upon the ground stated, and upon appeal to the Supreme Court that court says (page 538 of 70 S. C., page 195 of 50 S. E.):

"The requirement of the Code (section 251) is that the officer before issuing the attachment 'shall require a written undertaking on the part of the plaintiff, with sufficient surety. Three things, therefore, are essential requirements: (1) The undertaking must be in writing; (2) on the part of the plaintiffs; (3) with sufficient surety. The question here is whether the second requirement has been made.' The case of Bank v. Stelling, 31 S. C. 369, 9 S. E. 1028, shows that an undertaking to appear on the part of plaintiff must be signed by the plaintiff or in his name by his authorized agent. The undertaking need not be under seal, and the failure to file the authority to sign the plaintiff's name thereto is not fatal to the judgment. Grollman v. Lipsitz, 43 S. C. 340, 21 S. E. 272. The general rule is that, where a seal is not necessary to the instrument, a parol appointment to sign is sufficient, in the absence of a statute to the contrary. In Ferst Sons v. Powers, 58 S. C. 409, 36 S. E. 749, the court held that the name of plaintiff could be signed by persons named as agents, under the authority of telegrams which were attached to the undertaking. This does not mean that such telegram must be attached, because, as we have seen, it is not essential to file any written authority of the agent."

The judgment of the circuit court was therefore reversed.

The next question is whether an order of the state court was necessary in order to effect the removal. It is not disputed that the defendant, being a nonresident, was entitled to remove the case to the federal court, and that the petition filed within due time stated sufficient grounds for removal, and that a certified copy of the record has been filed in this court. Foster's Federal Practice (section 365e) says:

"No order of the state court is essential to the removal. An order of the state court denying the prayer of the petitioner for removal has been held to be a breach of comity."

Mr. Justice Field on circuit, in Wilson v. Western Union Telegraph Company (C. C.) 34 Fed. 562, says:

"The statute makes the removal upon the filing of the petition with the necessary bond. The order of the state court directing the removal would have been a proper proceeding; it would have been record evidence of the court's acceptance of the bond, and of its acquiescence of the transfer of the action from its jurisdiction; but its refusal to make the order could not take from the circuit court its rightful jurisdiction."

In Noble v. Mass. Ben. Association (C. C.) 48 Fed. 337, Judge Wallace says:

"The statute is satisfied when the petition and bond are filed with the official custodian of the records of the court. The statute requires him to make and file a petition and bond in the suit in the state court. It does not, in terms, require him to make any other presentation of them to the court, and, if he moves the consideration of the court or of the judge upon them, his rights are not enlarged or abridged by the action of the court or judge. The

statute requires the state court to 'accept' the petition and bond, and proceed no further in the suit. As is pointed out by Justice Field in Wilson v. Telegraph Company, no order of the state court respecting them is contemplated to transfer the jurisdiction of the action. * * * Certainly, it is a decorous practice for the removing party to present a petition and bond to the judge of the state court, and obtain a formal acceptance of the court. It is also the safer practice, because he can thereby have an opportunity to obviate any remedial objections which are suggested to their sufficiency in case the court refuses to accept them; but it is not indispensable, and when they are brought to the attention of the court in the manner prescribed by the statute, by filing them in the suit, the court can proceed no further if they are sufficient. When filed they become a part of the record in the cause, and the court is judicially informed that its power over the case has been suspended."

In Eisenmann v. Delamar Gold Mine Co. (C. C.) 87 Fed. 248, Judge Hawley says:

"The law is now well settled, although a few stray cases may be found to the contrary, that when the petition calling for removal is made in the state court its jurisdiction ends, and no order of the state court for removal is necessary; in other words, upon the filing of the petition for removal, accompanied by a proper bond, the suit being removable under the statute, jurisdiction of the federal court immediately attaches in advance of the filing of a copy of the record, and whether that court should retain jurisdiction is for it and not for the state court to determine."

In Loop v. Winter's Estate (C. C.) 115 Fed. 362, there was an application to remand the case, because there was no seal affixed to the paper called the bond, and that for that reason it was not a legal bond. Judge Hawley says:

"It has been held that the omission of the seal of a removal bond is a mere formal defect, which can be cured by amendment. The omission of the seal furnishes no sufficient ground to justify the court in remanding the case. Counsel for plaintiffs claims that there was no order for removal made by the state court. None is necessary."

In Groton Bridge & Manufacturing Co. v. American Bridge Co., (C. C.) 137 Fed. 284, Judge Ray says:

"But should the court arbitrarily refuse to approve the surety, it cannot be doubted that the removing party would have the right to file a bond and petition, procure the filing of the record on removal, and proceed in the Circuit Court of the United States. The remedy of the plaintiff in such a case would be to move to remand and show the insufficiency of the surety, and that the judge of the state court was justified in refusing to approve the bond."

In the "Removal Cases," 100 U. S. 457, 25 L. Ed. 593, the court was considering a case where one of the persons who signed the bond as a surety was an attorney of the court, which was forbidden by the laws of Iowa, and says:

"If the state court refuses to accept the bond offered by a petitioner for removal, which has good and sufficient surety in law, it is error that may be reviewed here. That court has no discretion in such a matter. Its action is governed by fixed rules."

In Kern v. Huidekoper, 103 U. S. 492, 26 L. Ed. 354, the court says:

"It has been expressly held by this court that when a case has been properly removed from a state into a United States court, and the state court still goes on to adjudicate the case, against the resistance of the party at whose instance the removal was made, such action on its part is a usurpation.

* * * After the filing in the United States Circuit Court on July 27, 1877, of the record of the proceedings in the state court, the latter lost all jurisdiction over the case, and, being without jurisdiction, its subsequent proceedings and judgment were not, as some of the state courts have ruled, simply erroneous, but absolutely void. * * * Notwithstanding the refusal of the state court to make an order for the removal of the case, the defendants in error, within the time prescribed by the statute, filed a transcript of the record of the state court in the Circuit Court of the United States. This invested the latter court with full and complete jurisdiction of the case. * * * If the cause is removable, and the statute for its removal has been complied with, no order of the state court for its removal is necessary to confer jurisdiction on the court of the United States, and no refusal of such an order can prevent that jurisdiction from attaching."

In Railroad Co. v. Koontz, 104 U. S. 14, 26 L. Ed. 643, the Supreme Court says:

"It is also a well-settled rule of decision in this court that when a sufficient case for removal is made in the state court, the rightful jurisdiction of that court comes to an end, and no further proceedings can properly be had there unless in some form its jurisdiction is restored. Gordon v. Longest, 16 Pet. (U S.) 97, 10 L. Ed. 900, and other cases. The entering of a copy of the record in the Circuit Court is necessary to enable that court to proceed, but its jurisdiction attaches when under the law it becomes the duty of the state court to proceed no further."

From this brief review of the decisions it seems to be clear that when a petition has been filed in due time in the state court, which on its face shows the right to remove, and a bond has been filed there, and a copy of the record is filed in the United States Circuit Court, the removal under the statute is effected, and the jurisdiction of this court at once attaches, and all questions affecting such jurisdiction must be made here. The main object of the bond in a case like this is to provide against unnecessary delay of the party seeking the removal in filing a transcript of the record in the United States court, and to secure the costs in the event that the case is remanded. I am of opinion that upon the face of it the bond is sufficient for that purpose, but this does not preclude the parties concerned from making any motion which may be advised to impeach the validity of said bond. From this conclusion it follows that the jurisdiction of the state court has terminated, and it remains, therefore, only to consider whether the injunction prayed, restraining said parties from further proceeding in the state court, should be granted.

In French, Trustee, v. Hay, 22 Wall. (U. S.) 252, 22 L. Ed. 857, the court considered a case of this character. French had commenced a suit in the state court which had been removed to the United States court. After such removal he obtained a decree in the state court, and sent the transcript of it into Pennsylvania, and brought suit on the judgment in the latter state, and it was objected to a bill filed in the Circuit Court of the United States for Virginia, praying for an injunction restraining French from suing on such transcript, which had been annulled in Virginia, that the bill was, in effect, to restrain the proceedings of the state court, contrary to the inhibition of the judiciary act, which enacted: "Nor shall a writ of injunction be granted to stay proceedings in any court of the state." The Supreme Court says:

"This bill is not an original one; it is auxiliary, and dependent in its character, as much so as if it had been a bill of review. The court, having jurisdiction in persona, had power to require the defendant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of said territory. Having the possession and jurisdiction of the case, that jurisdiction embraced everything in the case, and every question arising which could be determined in it, until it reached its termination, when the jurisdiction was exhausted. While the jurisdiction lasted, it was exclusive, and could not be trenched upon by any other tribunal. * * * If it could not be given in this case, the result would have shown the existence of a great defect in our federal jurisprudence, and have been a reproach upon the administration of justice."

In Dietzsch v. Huidekoper, 103 U. S. 494, 26 L. Ed. 497, plaintiffs in a replevin suit, which had been removed to the United States court, commenced an action upon the replevin bond in the state court of Illinois. A bill was filed praying an injunction to restrain them in the prosecution of such suit, and the court held that, as Dietzsch had been a party to the action of replevin which had been pending in the United States Circuit Court, that court had jurisdiction of his person, and the bill was sustained upon the authority of French v. Hay. Abeel v. Culberson (C. C.) 56 Fed. 329; Gardner v. Bank, 67 Fed. 833, 16 C. C. A. 86, and Central Trust Company v. Western Carolina Railroad Company (C. C.) 89 Fed. 25, may be cited as illustrations of the doctrine, but it is useless to multiply authorities, as the Supreme Court of the United States has in a very recent case (Traction Co. v. Mining Co., 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462) stated that, among the principles settled by former adjudications:

"It is competent for the Circuit Court, by a proceeding ancillary in its nature, without violating section 720 of the Revised Statutes [U. S. Comp. St. 1901, p. 581], forbidding a court of the United States from enjoining proceedings in a state court, to restrain a party against whom a cause has been legally removed from taking further steps in the state court."

The return to the rule and the argument of counsel make no question on this point. For cause why the injunction should not issue, the return states that the complainant has an adequate and complete remedy at law to correct the error, if any, made by the state court by appeal to the Supreme Court of the state, and from there by writ of error to the Supreme Court of the United States; and for further cause it is stated that there was nothing in the record showing that T. Moultrie Mordecai, who signed the bond as attorney in fact, had authority to make and execute the bond on file. The alleged defect in the bond has been already considered, and it has been held that the affixing of the corporate seal is, of itself, prima facie evidence that the attorney in fact was duly authorized to execute it. If, as was held by the Supreme Court of South Carolina in Furness v. Calhoun, supra, an undertaking in an attachment proceeding, which has been decided to be jurisdictional, may be signed by attorneys or agents, and it is not essential to file any written authority of the agent, surely it cannot be held that the bond of a corporation, with its corporate seal affixed, is on the face of it invalid because the written authority of the attorney does not appear. In this case the main condition of the bond, to wit, that the removing party would file a copy of the record in the Circuit Court of

the United States, had already been performed, for the record had already been filed here, and the only remaining condition was that the defendant would pay the costs in the event that the cause was remanded to the state court. If such bond was defective in form, it was in the power of the court to allow an amendment to remedy the alleged defect, and to permit the filing of the power of attorney. Judge Dillon, in the Removal of Causes (section 134), says:

"The formalities prescribed by the act of 1875 are not conditions precedent to the jurisdiction of the federal courts, and a defect in the bond required by that act may be cured by the substitution of a new bond upon motion in the federal court to amend."

The jurisdiction of the federal courts depends upon the citizenship of the parties and the subject-matter of the controversy, whether it is one arising under the Constitution and laws of the United States between citizens of different states, of the character and amount described in the statute. The filing of the petition and bond are the instrumentalities devised by Congress to facilitate the removal of the cause from one court to the other, and where it clearly appears, as it does here, from the petition, that the defendant company had the constitutional right to have its case transferred, and has done what the law required it to do to effectuate the removal, it will be going very far to hold that a mere omission to comply with some provisions of the statute, directory in their nature and not jurisdictional, should be fatal to its rights, and that such defect could not be cured by an amendment either in the state or in the federal court. The Supreme Court of the United States in Kinney v. Columbia Savings Association, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103, says:

"A petition and bond for removal are in the nature of process. They constitute the process by which the case is transferred from the state to the federal court. Congress has made ample provision for the amendment of process"—quoting sections 948 and 954, Rev. St. [U. S. Comp. St. 1901, pp. 695, 696].

In that case the petition for removal was defective, but, inasmuch as diverse citizenship existed, and the amount in controversy was over $2,000, it was held that the defect in the petition could be amended. The revelations of the last year concerning the misconduct and malversation of some of the officials of the Mutual Life Insurance Company have aroused universal resentment and reprobation, but the company itself is not an outlaw, and cannot be deprived of the right to defend itself in that forum to which under the laws of the country it is entitled to remove its cause.

The injunction prayed for in the bill will be granted.

SHARPSBURG SAND CO. v. MONONGAHELA RIVER CONSOL. COAL & COKE CO.

(District Court, W. D. Pennsylvania. May 1, 1906.)

No. 7.

1. COLLISION—BOATS BREAKING FROM WHARF IN FLOOD—SUFFICIENCY OF MOORING.

Respondent had a fleet of 93 empty coal barges tied up at a landing on the Ohio river a short distance below Pittsburg, the most of which broke loose when the river was in flood and struck and destroyed or damaged certain sand boats of libelant which were moored at a landing below. Respondent's fleet was divided into three sections, the upper, which first broke away, having 17 boats, 7 of which were abreast in each of the first two tiers. At the head of the landing was a breakwater which extended into the stream a sufficient distance to protect 4 of the inner boats from the current. They were made up and tied in a customary manner, and secured by more than the usual number of lines. The river was high when they were placed there, and during the succeeding two days rose thirteen feet, and at the time of the accident, boats were engaged in removing the outer barges. *Held*, that it was not chargeable with negligence; it appearing that the fleet was not only moored and tied in the usual manner, but was being constantly looked after by experienced men who had not previously deemed it necessary to change the position of any of the boats, and, further, that the breaking way was in fact caused by certain overturned barges which came down from above, and were carried by the current under those of the fleet.

2. SAME—NEGLIGENCE—REASONABLE AND ORDINARY CARE.

The measure of the respondent's duty was reasonable care, the standard of which is that of the man of average foresight and prudence, which in the situation here is to be determined by that which was usual and ordinary.

In Admiralty.

Samuel B. Griffiths, for libelants.
Harry A. Jones and Charles C. McIlvaine, for respondents.

ARCHBALD, District Judge.* The libelants seek to recover compensation for the loss of two sand flats or flat bottomed boats, together with the sand with which they were loaded, which were destroyed; and the expense of recovering two others, which were carried away, on the night of December 15, 1901; by reason of the alleged negligence of the respondents. These four sand flats were tied up at Petty's Landing on the Ohio river near McKee's Rocks, a little below the city of Pittsburg, where they were being unloaded; the sand having been sold to William Petty, the owner of the landing, by whom it was being removed and put on board cars. They were run into and torn from their moorings by certain empty coal boats or barges, belonging to the respondents, which had been fastened up at the Walton or Snyder Landing, about a mile above, but had broken their tie lines and got away. The respondents had some 93 empty coal boats and barges in that vicinity awaiting distribution, divided up into three independent fleets or sections, each separately tied. The upper one of these was composed

*Specially assigned.

of 17 boats, the first two tiers of which were 7 boats wide, and it was fastened at the head of the landing, immediately below the breakwater abutments by which the landing was protected. The breakwater was only wide enough to cover 4 of these abreast—or at the stage of the water when the break occurred, possibly 5—so that as originally arranged 3 of them were outside in the current. But 1 of these from the front tier had been removed, and put in down below, so that there were only 2 at most in that position in the end. The river was in flood, having risen from a 12-foot stage on Friday when the boats were brought there (8 feet being the ordinary height) to a 23-foot stage Sunday evening when they broke away. The head fleet went first, and bearing down against the other two, they all went off together, carrying with them also a few flats belonging to the Iron City Sand Company, which were tied up below them. Out of the whole number there, only seven pieces on the inside of the second fleet were left. It was this conglomeration of runaway boats and barges, or some part of it, which was precipitated upon the libelants' flats at the landing where they were fastened, riding over and sinking two of them, and sweeping away the others in the flood. There is some controversy as to whether these flats were fastened with both head and stern lines, or with head lines only, allowing them to swing out broadside into the stream from the effect of the eddy, thus getting in the way of the oncoming barges which they would have otherwise escaped. But I have no doubt, as testified by Mr. Petty, that they were properly and securely tied, and that whatever their position when finally struck and destroyed, it was not due to any want of care in this respect, but to their having collided with the advance section of the respondents' escaping barges, by which they were left exposed to those which followed.

The real question in the case is whether the respondents were negligent, and that depends of course upon whether proper care was exercised. It is claimed that the head fleet was too wide, the abutments of the landing where it was moored being sufficient to cover and protect but four boats abreast, leaving the outside three to bear the brunt of the current and the drift which came down with it; and that if they had been strung out as they should have been, so that all were inside—either originally when they were first brought there, the river even then being on the rise, or subsequently, on the day of the disaster, when the danger was obvious—the accident would not have happened. It is contended on the other hand, that the fleet was not of an unusual or unsafe width, and that it was not required to be wholly within the protection of the abutments in order to be so; furthermore, that at the time of the break an effort was being made to reduce the width by taking off the outside barges, one of which had been already removed and another was about to be so. It is pointed out that the fleet was securely tied, and it is conceded that there were lines enough out, extra ones having been added from time to time until there were 11 head lines in all, including a three-quarter inch wire, and two or three breast lines. Accounting for the accident, it is claimed by the respondents, that it was brought about by certain upturned coal bottoms,

which came down the Monongahela and got under the fleet, making it impossible to hold it, with the result which followed. These are the questions at issue between the parties which are now to be disposed of.

The measure of the respondents' duty was reasonable care, and if this was exercised, they are not liable. Neel v. Blythe (D. C.) 42 Fed. 457. McCauley v. Logan, 152 Pa. 202, 25 Atl. 499. The standard is that of the man of average foresight and prudence; Titus v. Railroad, 136 Pa. 618, 20 Atl. 517, 20 Am. St. Rep. 944. And in such a situation as here, is to be determined by that which is usual and ordinary. If, therefore, the usual course was taken with regard to the assembling and mooring of this fleet at the outstart, and everything within reasonable bounds was done in the care and oversight of it afterwards, it cannot be said that the respondents were culpably negligent. As already stated, the negligence charged consists in tying up the fleet seven abreast, so that nearly one-half of it was out in the current; and in failing to remove the barges which were outside the abutments, when the danger from leaving them there became manifest. But if there is one thing clear in the case it is, that this disposition of the fleet was entirely within the usual and ordinary. Originally this landing had no breakwater, that being a later construction put in by the railroad, when it came along there, to compensate for crowding the landing out into the stream. For a number of years, therefore, boats and barges were tied up at it, as they are at many others, without any such protection, exposed to the force of the current in times of high water equal to this, and that, without question. The size of this fleet was not an extraordinary or improvident one, 24 being the recognized complement of this part of the landing, and the whole combined landing—Walton's, Brown's, and Snyder's—being capable of taking care of considerably over 100. Seven pieces at the head also was not unusual, fleets wider than that, and loaded where these were empty, having been safely held there, both before and since. The fleet, as an additional circumstance, was admittedly well tied, it being conceded, as already stated, that the lines upon it were sufficient to hold it if anything could. These facts are proven by the libelants' own witnesses, as well as those of the respondents, and are not therefore in dispute. No doubt, as a matter of argument, a fleet which is in behind a breakwater where nothing can get at it is in a safer position than one which projects beyond it and has some of its pieces exposed. But the question is not one of absolute, but of comparative safety, and it is not to be expected, nor is it indeed practicable, that in the ordinary affairs of life every possible risk shall be covered. All that can be asked, as already pointed out, is that those precautions shall be observed, which are usually taken by persons who are engaged in and have experience of the needs of the particular business in question; and so far as the assembling and tying up of this fleet are concerned, this degree of care seems to have been exercised.

The question remains with regard to the removal of the outside boats, as the flood increased. The necessity for this was eventually recognized and steps taken to meet it, but apparently not soon enough. The complaint is that the danger was obvious, and that action should

have been taken earlier. But even though we should reach this conclusion now, looking back upon the event, it does not necessarily follow that it was negligence not to realize it at the time. Was it prompted by ordinary prudence and foresight as the case then and there presented itself? That is the question. And I am not prepared to say under all the evidence that it was. The representatives of the respondents were on the ground in force, alive to the situation and endeavoring to look after it closely. Although it was Sunday, William Johnson who had charge of the landing, a man of long experience, was there all day with four or five assistants, and Mr. McKinley, a member of the transportation department, went there the middle of the afternoon. About the same time two of the company's steamboats were also sent there. How then can it be said, with any confidence, that a step which did not suggest itself to men of such experience was so manifestly called for by the conditions, which were under their eyes, but which we can only get at second hand, by hearsay, that they were lacking in ordinary care in not recognizing it and acting accordingly? It is no doubt true, as said by Mr. Johnson, that if they had begun in the morning, they could have strung out the fleet so that it would have been entirely within the breakwater; but they did not think it was necessary at the time, and when they did it was too late to do so successfully. This is the sum and substance of the whole matter, and it justifies the conclusion, that if they did not realize the necessity for earlier action, there was no apparent occasion for it, and nothing therefore upon which to convict them of negligence in not doing so.

This is conclusive of the case, but there is another feature of it, equally so, which is still to be adverted to. It is clear from the evidence that this fleet never would have broken away from its moorings, as it did, except as it was run into by the upturned coal bottoms which came down the river about that time. We may not be able to identify these with those which got away from Jutte & Co. at the mouth of the Youghiogheny; but they are no myth, as argued. Neither is it necessary to consider whether it was possible for them to have come over the top of the breakwater. Mr. Johnson, to whom reference has already been made, says that there were upturned barges and boats of all kinds that came down the river just before the fleet broke loose, one of them hitting the steamboat "T. J. Woods" on which he was, which was out in the river trying to take off some of the outside barges. It is to this cause that he ascribes the accident, declaring that the fleet was lying perfectly safe until then, and that if this drift had not got under it, as it did, they could have held it. So Capt. Lenhart, who was on the same boat, testifies that he also saw the overturned flat which hit them, and heard the grinding and crashing of the drift under the barges; as did also Mr. McKinley, who says, that the fleet buckled and broke away just as the upturned flat and the other drift went by. This evidence comes from both sides of the case, and accounts for the accident as nothing else does. Partially sheltered and tied as the fleet was, with the extraordinary number of lines holding it the force of the current alone was not sufficient to tear it away, and it must have resulted therefore from some superior and irresistible

force, such as these upturned runaway bottoms; which the respondents were not required to anticipate or guard against, if indeed they could.

From whatever point of view, therefore, we look at the case, there is no liability on the part of the respondents, and the libel must be dismissed, with costs.

DUNBAR-SULLIVAN DREDGING CO. v. TROY & WEST TROY BRIDGE CO.

(District Court, N. D. New York. May 19, 1906.)

NAVIGABLE WATERS—DRAWBRIDGES—COLLISION BETWEEN TOW AND BRIDGE.

On a libel in personam against a bridge company for injuries to a derrick scow in collision with a portion of the draw of a bridge, opened to permit the passage of a tug and tow, evidence *held* to require a finding that the bridge was fully opened, and that the collision was caused by the negligent navigation of the tug in charge of the tow and another tug belonging to libelant while passing through the bridge passage at the same time.

Libel in personam for damages to a derrick scow at Troy, N. Y., by reason of alleged negligence of defendant in not properly opening its bridge, which crosses the Hudson river at that place.

John F. Murray, for libelant Dunbar-Sullivan Dredging Company.

Lewis E. Griffith, for defendant Troy & West Troy Bridge Company.

RAY, District Judge. June 23, 1903, the tug boat Shaun Rhue, owned and operated by the libelant, Dunbar-Sullivan Dredging Company, having lashed to her port side two scows (a dump scow and a derrick scow), the derrick scow outermost, left Green Island in the Hudson river, several hundred feet above and north of the bridge of the defendant, and proceeded southerly, intending to take the scows to Watervliet. The bridge of defendant crosses the river at the city of Troy, and is used as a highway bridge for street cars, trains, and foot passengers. It has a central or pivot pier on which the drawbridge, over 200 feet in length, turns in or near the center of the river, and two other piers also standing in the river—the east and west piers—each distant about 110 feet from this central or pivot pier. When the draw is open there are two passages for vessels—the east and the west passages—each at least 100 feet in width in the clear. Except at very high water it is not necessary to open the draw for the passage of small tugs or low craft. The draw is operated by hand power. Two men can operate it in calm weather, but four are used for the purpose. The ends of the drawbridge when open rest upon or hang over guard piers, one north and the other south of the central or pivot pier. Guard piles extend into the river northerly of the west pier, and also into the river northerly of the north guard pier, on which the end of the open draw rests or over which it hangs when open. From this most northerly center or guard pier guard piles extend along its easterly side to near the pivot pier. Low craft and small tugs can pass under the bridge west of this westerly pier, and

between it and the west end abutment of the bridge. The south end of the west pier is quite a distance north of, or up river from, the southern guard pier, on or over which the south end of the draw, when open, rests or hangs. When open the foot track or walk for foot passengers of the draw extends over or overhangs the water some 8 feet, leaving 100 feet of clear water between the pivot pier and the west pier. On the day in question there was a flood raising the river from 5 to 7 feet. This flood lessened the distance between the surface of the river and the planking of the bridge, but did not interfere with the operation of the tug and scows attached thereto. The tug whistled for the draw to open, which it did, and the tug Shaun Rhue, lashed to the scows, proceeded south to take the west passage. There is a current in the river tending to set craft approaching the west passage over to the west and towards the west pier, but the captain of the Shaun Rhue says that this is met by a counter current from the west, so that there is a good current through the west passage. It is evident from the evidence, and I find that there was no necessity for the tug to voluntarily hug the pivot pier, or crowd to the east and close to the center or pivot pier. Nor was it good or safe navigation so to do, under the circumstances of this case. The tug Shaun Rhue passed into and through the west passage, leaving about 8 feet between the easterly side of derrick scow and the westerly side of the pivot pier. The tug and scows occupied not more than 60 feet in width, leaving all of 30 feet of clear water between it and the west pier. It is contended by the libelant that the draw was not swung fully open, so as to rest on or hang over the southern support or guard pier, but that it was stopped and stood so that it projected diagonally over and partly across the southerly end of the west passage to a distance of from 20 to 25 feet. The libelant further contends that on passing through the west passage the upper end of the mast of the derrick scow was caught in one of the iron parts of the draw so extending over the west passage, and that same was split and broken, and that the scow was otherwise seriously damaged. The claim is that the agents and servants of the libelant were free from negligence or fault, and that the collision and consequent damage were the proximate and necessary results of the negligence of the defendant, by its servants in charge of the draw, in not fully opening the draw.

The defendant insists: First. That it was not in any respect or to any degree in fault or negligent, and that it fully opened the draw in time. Second. That the libelant was the negligent party, and that the Shaun Rhue was crowded or pushed to the eastward while in, or as it was about to enter, the west passage, by another tug (the Spalpeen), also owned and operated by the libelant, and that the mast or derrick of the derrick scow was in this way brought in contact with the overhanging foot walk of the drawbridge, and that the pilot and captain of the Shaun Rhue and the captain of the Spalpeen were both negligent in managing their tugs, and that such negligence was the sole cause of the collision and consequent damage. Third. That, even if the draw was not fully open at the time the Shaun Rhue

passed through the west passage, there was an abundance of room for it to pass. That the captain of that tug saw, before entering the passage, that it was not fully open, and took no measures or pains whatsover to avoid the projecting end or prevent a collision, although he had time, opportunity, and means so to do. That he deliberately, carelessly, and negligently ran upon or against the projecting end of the draw, and that all the damage to the Shaun Rhue was the direct and proximate result of the negligence of those in charge of that tug. The evidence shows and I find that, shortly after or about the time the Shaun Rhue blew for the opening of the draw, the Spalpeen, going up the river from some point below the bridge, passed under it between the west pier and the west abutment, and then turned and ran alongside of the Shaun Rhue for the purpose of transferring some men. It then passed and proceeded on ahead of the Shaun Rhue, and in so doing passed through the west passage. The contention is, and I so find from the evidence, that the draw was promptly swung fully open; that the tug Spalpeen ran alongside of the tug Shaun Rhue just as she was about to enter the west passage, and proceeded by her side and was by her side on the west as she was entering between the center or pivot pier and the west pier, and that the Spalpeen either crowded the Shaun Rhue to the east, or that the Shaun Rhue, to make room in the passage for both tugs and the scows, kept dangerously and unnecessarily to the east, so that the derrick scow was partly under the westerly side of the bridge as its westerly end swung southerly and then easterly in opening, and that in consequence of these careless and negligent movements of the tugs the mast of the derrick scow was brought in contact with the overhanging footbridge of the draw or bridge. Some of libelant's witnesses, who claim to have seen the accident and to have seen the movements of the Shaun Rhue from about the time she left the island until she passed the bridge, make no mention of the Spalpeen, and claim they did not see this tug. Still her captain and others say that she did come north and pass under the bridge west of the west pier, and then turn and go alongside the Shaun Rhue. It is evident these persons who did not see the Spalpeen either were not looking, and did not see what they claim to have seen, or they did not observe the transaction with sufficient accuracy and attention to give reliable testimony. One witness for the libelant, who testified with some detail as to the accident and the manner of its occurrence, and especially as to the alleged fact that the draw was not fully open, testified that the scows were being towed, the one after the other, and this he repeated. At a later date he said he meant the tug Shaun Rhue, and the scows were side by side, the stern of the one being further to the rear or north as they proceeded south than the stern of the other. The evidence of such a witness cannot safely and even properly be relied upon to sustain a finding of negligence on the part of defendant. Several of the persons on the tugs and scows at the time of the accident were not called as witnesses, nor was their absence accounted for. On the other hand, those in charge of the draw, and whose duty it was to operate the bridge, say the draw was fully open. There

was no defect in the draw or the machinery with which it was operated, no wind to impede its opening, and a full crew of four were operating it.

I am fully aware of the libelant's contention that the Spalpeen ran alongside the Shaun Rhue quite a distance above the bridge, and not near the northern entrance to the west passage. I do not think this is the correct version of the transaction. I am satisfied, and find as before stated, that they entered the west passage together. Quite likely the Spalpeen pushed ahead and emerged clear of the piers first. On his own statement the captain of the Shaun Rhue ran into the west passage before the draw was open, and while it was opening, and when at the southerly end it was projecting over the passage about 25 feet or more. He had no difficulty in turning with the scows when up the island, and I am convinced he might have turned, and would have turned before entering the west passage at all, had he, as he claims, seen the draw only partly open, and projecting over the easterly side of the passage. He says, seeing it only partly open and at a standstill, he, with 30 feet of clear water to the west, or on the starboard side, did not sheer to the west, but kept straight ahead until the iron pin on the top of the derrick's mast came in contact with the end of the bridge. Seeing the danger, the overhanging of the bridge, if there was any such condition, and having the ability with a turn of the helm to avoid it, he kept willfully and recklessly on until the damage was done. His statement of the occurrence, his confession of unnecessarily reckless conduct, discredits his entire testimony.

I find that the damage to the derrick scow was caused wholly by the negligence of the captain and the others in charge of the Shaun Rhue in managing that tug with the scows in charge, coupled with the negligence of those in charge of the Spalpeen; in short, by the negligence of the libelant itself, and that the defendant was free from any fault or negligence whatever that in any way or degree contributed to or produced the collision and consequent injury.

There will be findings and a decree accordingly, dismissing the libel, with costs.

In re SPICER.

(District Court, W. D. New York. May 18, 1906.)

BANKRUPTCY— AMENDMENT OF SCHEDULES—OPENING PROCEEDINGS.

Bankr. Act July 1, 1898, c. 541, § 17, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], provides that a discharge shall release the bankrupt from all provable debts except those not scheduled in time for proof and allowance, unless the creditor had notice or actual knowledge of the proceedings in bankruptcy, and section 57, subd. "n" (30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]), declares that claims shall not be proved against a bankrupt estate subsequent to a year after the adjudication, except in the case of infants and insane persons, without guardians, who are allowed six months more. Section 2, subd. 12, 30 Stat. 545, 546 [U. S. Comp. St. 1901, p. 3421]), confers on courts of bankruptcy jurisdiction to discharge or refuse to discharge bankrupts, and to set aside dis-

charges, and reinstate the cases, and subdivision 15 authorizes the making of orders, the issue of process, and entry of judgments, in addition to those specifically provided for necessary for the enforcement of the provisions of the act. *Held*, that, where more than 18 months had elapsed after the granting of a bankrupt's discharge, it was too late for the bankrupt to have the proceedings opened in order to permit him to amend his schedules by including an omitted creditor, who was not made a party to the proceedings prior to the granting of the discharge, who had no notice or knowledge of the proceedings, though there were no assets belonging to the estate.

W. B. Van Allen, for the bankrupt.
W. A. Porter, for the creditor.

RAY, District Judge. The bankrupt filed his petition in this court to be adjudged a bankrupt on the 16th day of March, 1904, and was duly adjudicated such on the 5th day of April, 1904. W. W. Sweet was duly appointed trustee of the bankrupt's estate, but no assets came to his hands. June 14, 1904, said Spicer was duly discharged. In the schedules and proceedings N. W. Maxwell, a creditor in fact of the bankrupt, was not named, nor was his claim, and he had no notice or actual knowledge of the proceedings at any stage thereof. The bankrupt claims that he did not know of the claim of Maxwell against him. In 1906 Maxwell commenced suit on his claim, the validity of which is now substantially admitted, and the bankrupt moves to open the proceeding, amend the schedules, permit the creditor to prove his claim, and so procure a discharge from this debt with the others.

This court is of the opinion that it has no power to grant the application. There was no error in the proceedings, and no fraudulent concealment of any fact by the creditor Maxwell. The proceeding was a voluntary one, instituted by the bankrupt, and on him rested the burden of making schedules, giving notice as to who his creditors were, and he omitted the name and debt of a creditor at his peril. He was required by subdivision 8 of section 7 of the bankruptcy act of July 1, 1898 (c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425]), to file with his petition—

"A schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown that fact to be stated, the amount due each of them, the consideration thereof, the security held by them, if any," etc.

When the adjudication has been made, the matter is referred to a referee, who by section 39 (30 Stat. 555 [U. S. Comp. St. 1901, p. 3436]), is required "to give notice to creditors as herein provided," and by section 58 (30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]), creditors are to have notice of "all meetings." Creditors may participate in the selection of a trustee, oppose or contest claims, the granting of a discharge, etc. Sections 55 and 56 (30 Stat. 559, 560, [U. S. Comp. St. 1901, p. 3442]). By section 17 of the act (30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), it is provided:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts except such as * * * have not been duly scheduled in time for

proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy," etc.

Section 2 of the act (30 Stat. 545, 546 [U. S. Comp. St. 1901, pp. 3420, 3421]), defines the jurisdiction of courts of bankruptcy, and, among other powers, we find:

"(12) Discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases. * * * (15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act."

By the last clause of this section (section 2) it is provided:

"Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

I am of opinion that clause 12, above referred to, relates to the reinstatement of cases when a discharge has been set aside, that clause 15 has no application here, as the court is not called on to enforce some provision of the act, and that the final clause cannot be invoked, as the final judgment is in favor of, and not against, the bankrupt. There was no fraud, and several terms of this court have intervened. The court has acted on the record made and presented by the bankrupt. Compositions must be set aside on applications made within six months after confirmation. Section 13 (30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]). Discharges may be revoked on application filed within one year. Section 15 (30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]). Subdivision "n" of section 57 (30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]) provides that "claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication," but in the case of infants and insane persons without guardians, etc., the time is extended six months. This creditor (Maxwell), should this case be opened, could not prove his claim.

It seems to me clear that the law contemplates that after a discharge it is too late for the bankrupt to come in and include creditors not named by him in his schedules or brought in and made parties prior to the granting of the discharge. Otherwise, the matter is interminable. It is immaterial that in this case there were no assets. The same rule should be applied here as in a case where there are assets. In such a case the expense, confusion, and delay that would follow a reopening of the case are apparent.

The application is denied, and the stay vacated.

CHAPMAN DECORATIVE CO. v. SECURITY MUT. LIFE INS. CO.

(Circuit Court, S. E. D. Pennsylvania. June 22, 1906.)

No. 23.

DAMAGES—LIQUIDATED DAMAGES AND PENALTIES—CONSTRUCTION OF STIPULATION.

A provision of a building contract reciting that in case of delay in the completion of the building the damages sustained by the owner will be difficult of computation, and that it is therefore agreed that the contractor shall pay a stated sum per day for the time which may elapse after a date fixed before the completion of the building as liquidated damages, where it is shown that in fact the damages actually sustained by the owner by reason of the delay cannot be calculated, will be construed as one for liquidated damages, and not for a penalty, and so enforced.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 164, 167.]

At Law. On motion for new trial.

Charles A. Chase and Reynolds D. Brown, for plaintiff.

Thomas Earle White, for defendant.

HOLLAND, District Judge. This is a suit on a building contract. It was tried in this court, and a verdict rendered April 16, 1906, in favor of the plaintiff for the sum of $18,495.06. A motion and reasons for a new trial were filed in due time by the plaintiff, which raised, as tersely stated by the plaintiff's counsel, three main grounds or reasons why a new trial should be granted, viz.:

"(1) That at the outside the $50 a day clause should only have been enforceable until the date of substantial completion, and not until the date when the work was accepted by the defendant."

The court was requested by the plaintiff, in its first point submitted, to instruct the jury that in no event could liquidated damages of $50 a day be allowed to the defendant beyond the date when the work under the contract was substantially completed by the plaintiff. The court added "and accepted by defendant," and in this shape affirmed the proposition, so that the jury were instructed that it was not only necessary to substantially complete the work, but that it was necessary that it should be accepted as substantially completed by the defendant. If we were to assume that the court was wrong in instructing the jury that it was necessary that the building should be accepted by the defendant after it had been substantially completed, the plaintiff was not injured by this instruction, for the reason that the plaintiff made no claim that the building was completed before the 23d day of August, the date upon which the plaintiff claims the defendant accepted the building, and this was the date fixed by the plaintiff's secretary, Mr. Biddle; and considerable evidence, both direct and substantial, was offered to establish the fact that upon this date the acceptance occurred, and Mr. Biddle also testified, and was corroborated by other witnesses, that the building was completed on that date. At the argument, however, counsel for the plaintiff claimed that it was substantially completed on July 8th. There is no evidence in this case sufficient to support such a finding.

The only evidence there is in the case with reference to this latter date is by the witness Josiah Whittacamp, on page 180, where he says that, with the exception of a number of things necessary to do on the marble work, it was "practically finished" on the 8th day of July, but he also says (on page 181) that he was there on "this job" until about the middle of August, and the witness Otto Heyline testified (on page 186) that he did not go to Binghamton until the last week in July to do the decorating on the ceiling of the eighth floor, and did not finish that work until in August; so that the plaintiff's own evidence fixes the time of acceptance at the time of completion. There was, therefore, no injury done the plaintiff by the instruction of which it complains, because, if the defendant is entitled to a per diem amount as liquidated damages fixed by the contract, it is entitled to this amount up to the time of the substantial completion; and, as this was coincident with the time the plaintiff claims the defendant accepted the building, it could not be injured.

"(2) That the clause in article 11 constituted a penalty, and not liquidated damages."

The clause is as follows:

"It is mutually agreed and understood that in the event of said interior finish herein contracted for not being entirely finished on or before the 15th day of March, 1905, that the actual damages sustained by the owner will be difficult of computation; therefore it has been agreed, and hereby is agreed, by and between the parties hereto that in the event of the failure of said contractor to have all of said interior finish of main entrance and eighth floor completed on or before the 15th day of March, 1905, there shall be due and payable, and said contractor shall pay, to the said owner the just and full sum of $50 per day for each and every day after March 15, 1905, that the same or any part thereof remains unfinished and incomplete, and that said sum is hereby agreed upon as liquidated damages."

This building of the defendant company was a large office building, and was being erected for its own use and for that purpose. At that time there was a large building, of the same kind and for similar purposes, being erected in this town by another company. The defendant had made contracts of rental with tenants, who were permitted to occupy the building without rent until it was finished. How many more prospective tenants deferred moving in because of the unfinished condition of the building and the number the defendant company lost by reason of the delay cannot be calculated; in other words, there was such a condition of affairs that it would "be difficult of computing" the damages, and the provision of this clause expressly stipulated that the sum of $50 should be liquidated damages. The jury were so instructed, and found that the delay was 161 days, for which they allowed a set-off at the rate of $50 per day against plaintiff's claim. In this the court is convinced the instructions were proper, and the verdict of the jury right.

"(3) That, even if it is properly interpretable as liquidated damages, nevertheless, under the evidence, the delay was due, in part, at least, to the act of the defendant, and that therefore the clause falls, and the jury should only have been permitted to deduct such actual damages, if any, as the defendant could prove."

The plaintiff at the trial substantially requested the court to instruct the jury to this effect. It was refused, because there was no evidence to submit to the jury that the plaintiff was delayed in the work by the defendant, but, upon the other hand, the evidence of the plaintiff was overwhelming to the effect that, whenever there was any request made to the defendant to prepare the building or the part of the building where the plaintiff intended to work, it was immediately done, and in no case was the plaintiff delayed by reason of any obstruction placed in its way in the performance of its contract by the defendant, and, even if there had been any delay caused by the defendant, there is a provision in the contract by which the plaintiff could have procured an extension of time for completion, and it would be compelled to show that it had complied with the terms of this provision before it could now be heard to complain that it had been delayed by reason of any obstruction placed in its way by the defendant; but there is neither evidence to show that it was delayed by the defendant, nor a request made for an extension of time, so that the point raised in the third proposition of the plaintiff was not at all applicable to the facts in this case, and the court is not required to instruct the jury on abstract propositions of law, which have no application to the facts before them.

New trial refused.

STRATTON v. ESSEX COUNTY PARK COMMISSION.

(Circuit Court, D. New Jersey. May 12, 1906.)

JUDGMENT—RES JUDICATA—DECREE DISMISSING BILL—EXTRINSIC EVIDENCE.

When, by the decree in a suit in equity, the bill is dismissed without reserving to the complainant the right to institute other proceedings, the dismissal is presumed to have been on the merits; but this presumption may be overcome by parol or other extrinsic evidence, when the decree is set up in bar of a subsequent suit, and does not show the grounds of the dismissal.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1031, 1824.]

At Law. On demurrer to replication.

Kellogg & Rose, for plaintiff.

Collins & Corbin, for defendant.

LANNING, District Judge. This is an action at law to recover the balance alleged to be due on a contract. By the first plea the defendant sets up in bar of the action a decree of the Court of Chancery of New Jersey dismissing the bill of complaint filed in that case. The plea sets out quite fully the substance of the bill of complaint, the answer thereto, and the replication, and further states that:

"The said cause came on to be heard upon pleadings and proofs in the said Court of Chancery and on the 9th day of March, nineteen hundred and four, the cause having been duly heard and testimony having been taken, the said bill of complaint was, by the decree of the chancellor in the said Court of Chancery, on application of the said plaintiff as complainant, ordered to be, and the same was thereby, dismissed with costs to the said defendant."

The plea further shows that the plaintiff in this case was the complainant there, that the defendant here was the defendant there, and that the subject-matter of the chancery suit was the same as the subject-matter of this action. The plea was demurred to, and on a former hearing the demurrer was overruled on the ground that, as the decree in the Court of Chancery did not show that the bill was dismissed "without prejudice," and did not in any wise reserve to the complainant therein the right to institute other proceedings, it was, in the then state of the pleadings, necessarily presumed to have been a disposition of the case on its merits. Leave was given to the plaintiff, however, to withdraw his demurrer and to file a replication. That has now been done. The replication avers that the cause in chancery was "voluntarily withdrawn" by the complainant, that "the judgment entered therein was one of nonsuit simply, and not a judgment upon the merits of the matters in controversy," that the Court of Chancery "did not pronounce any judgment against the said complainant upon any matter in issue," and that the Court of Chancery was without jurisdiction to try the merits of the cause "which was cognizable only in a court of law, and not in a court of equity, and for which reason solely the complaint was dismissed." To this replication the defendant has now demurred, and the present hearing is on this demurrer.

The case is very different from what it was on the former hearing. It is true that, when by the decree in a suit in equity the bill is dismissed without in any wise reserving to the complainant the right to institute other proceedings, the dismissal is presumed to have been on the merits. But I think this presumption can be overcome by parol evidence. In Baker v. Cummings, 181 U. S. 117, 21 Sup. Ct. 578, 45 L. Ed. 776, a case in which the plaintiff by replication set up as a bar to the defendant's set-off a decree in equity dismissing a former bill between the same parties and concerning the same subject-matter without reserving to the complainant the right to commence other proceedings, the Supreme Court examined not only the record of the equity case, but the opinion of the court rendered therein in order to determine on what ground the bill was in fact dismissed. It is true that in that case the court assumed that it might look at the opinion to ascertain the ground of dismissal without deciding the question of its right to do so. But it seems to me that, where a bill in equity is dismissed by a decree, without setting forth the grounds upon which the dismissal was made, those grounds may be ascertained in a subsequent suit between the same parties upon the same subject-matter, provided the party who insists that the decree was not a disposition of the case on its merits raises that issue by proper pleadings. See, also, National Foundry v. Oconto Water Supply Company, 183 U. S. 216, 234, 22 Sup. Ct. 111, 46 L. Ed. 157; United States v. Norfolk & Western Railway Company (C. C.) 114 Fed., 682, 686; and Clark v. Bernhard Mattress Company (C. C.) 82 Fed. 339.

Without considering the other questions presented on the argument, the conclusion is that the demurrer must be overruled.

UNITED STATES v. GREAT NORTHERN RY. CO.

(District Court, E. D. Washington, E. D. June 11, 1906.)

RAILROADS—SAFETY EQUIPMENT OF CARS—SCOPE OF FEDERAL STATUTE.

Act March 2, 1893, c. 196, 27 Stat. 531, as amended by Act April 1, 1896, c. 87, 29 Stat. 85 [U. S. Comp. St. 1901, p. 3174], and by Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1905, p. 603], requiring common carriers engaged in interstate commerce to equip their cars with automatic couplers, etc., applies to all cars regularly used on any railroad engaged in interstate commerce not only while actually in use in such commerce but at all times when in use on such road.

On Demurrer to Complaint.

A. G. Avery, U. S. Atty., and J. B. Lindsley, Asst. U. S. Atty.
M. J. Gordon and Charles A. Murray, for defendant.

WHITSON, District Judge. This action is brought to recover penalties provided by the act of Congress approved March 2, 1893, c. 196, 27 Stat. 531, as amended by the act approved April 1, 1896, c. 87, 29 Stat. 85 [U. S. Comp. St. 1901, p. 3174], and as amended by the act approved March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1905, p. 603]. The title of the original act reads as follows:

"An act to promote the safety of employés and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with drive wheel brakes, and for other purposes."

An issue of law is raised by demurrer aimed at the fourth, fifth, and sixth causes of action. It is alleged in the fourth cause of action that defendant hauled on its line of railroad out of Spokane in the state of Washington, a car regularly used in the movement of interstate traffic, without the equipment provided by law, although empty at the time. In the fifth cause of action it is alleged that the defendant hauled over its railroad in Hillyard in the state of Washington, a car loaded with and used in moving interstate traffic, consigned from St. Cloud in the state of Minnesota to Hillyard in the state of Washington, without being equipped as required by the acts mentioned.

The allegations of the sixth cause of action are that the defendant used on its line of railroad in Hillyard in the state of Washington a locomotive engine in moving a car containing interstate traffic, consigned from St. Cloud in the state of Minnesota to Hillyard in the state of Washington, when the coupling and uncoupling apparatus of the locomotive was out of repair and inoperative. The sufficiency of these several allegations is challenged upon the sole ground that it does not affirmatively appear that the cars and locomotive were being used in interstate traffic, for the reason that reliance must be made upon the allegations that they were used only in the state of Washington. Having reference to the constitutional powers of Congress, the argument is that a common carrier is not affected by the legislation which the plaintiff would invoke, because it does not apply to traffic within the states.

The title of the act of 1893 fully reflects the legislative intent as expressed in the act, and it is manifest that the purpose in view was the

regulation of commerce between the states by requiring common carriers to conform to certain requirements regarded as essential to the safety of employés and passengers. To sustain the demurrer would be to hold that it is beyond the power of Congress to control the instrumentalities through which interstate commerce may be carried on. But the prerogative necessarily carries with it the authority to prescribe the rules and regulations which shall apply to those engaged in it. Illustrations of the futility of any effort on the part of Congress to exercise its constitutional powers in this regard, if the contention made by the defendant can be sustained, are not far to seek. An interstate carrier might haul traffic from one state to another, there transfer it, and from thence transport it, without any of the safety appliances provided by law. If it be answered that this would be an evasion of the law, the result is susceptible of further illustration. Cars containing state traffic could be commingled with those containing interstate traffic, and thus defeat the purposes of the legislation upon the subject. The effect of this would be to endanger the train engaged in interstate traffic. Again, a carrier could use trains engaged entirely in state traffic upon its lines, without the requisite equipment, which might result in injury to passengers by coming in collision with a train engaged in interstate traffic. It is the carrier which the acts seek to regulate, and it is by this method that Congress has undertaken to bring the matter under control.

The Supreme Court in Johnson v. Southern Pacific Company, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, held that a dining car left on a track, which was being used by the defendant between different states, was within the prohibition of the legislation under consideration, although not being used in interstate traffic at the time of the occurrence of an accident to an employé. In reversing the Circuit Court of Appeals for the Eighth Circuit which held to the contrary view (117 Fed. 462, 54 C. C. A. 508), Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715, was distinguished in this language:

"The distinction between merchandise which may become an article of interstate commerce, or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different states, renders this and like cases inapplicable. Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used for the movement of interstate traffic and so within the law."

Referring to the purpose of the act it was said:

"If the language used were open to construction we are constrained to say that the construction put upon the act by the Circuit Court of Appeals was altogether too narrow."

It must be held that the allegations of the complaint bring the defendant within the acts of Congress, and the demurrer will accordingly be overruled.

JONES v. PATRICK et al.

(Circuit Court, D. Nevada. May 7, 1906.)

No. 788.

SPECIFIC PERFORMANCE—PAROL CONTRACT—MEASURE OF PROOF REQUIRED.

To entitle a complainant to a decree for the specific performance of a parol contract, the evidence must be clear and satisfactory both as to the existence of the contract and as to its terms.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 389.]

In Equity.

Haven & Haven and Harvey Yeamon, for complainant.
Key Pittman and Curtis H. Lindley, for defendants.

HAWLEY, District Judge (orally). The general character of this case is stated in Jones v. Patrick (C. C.) 140 Fed. 403, to which reference is here made. At the trial there was a conflict in the testimony of the respective parties as to the precise terms of the oral agreement. On October 8, 1903, before this agreement was made, which was on the 18th of October, 1903, Patrick had secured an option on certain mines (now owned by the combination company), the price therefor being $75,000; $5,000 of said sum was to be paid on or before October 26, 1903, the date of the expiration of the option. After securing this option Patrick made an agreement with one Hubbard of Chicago to sell seven-eighths of the mining claims, reserving an eighth interest; Hubbard to pay the money on the option at the times therein specified. A short time prior to the date fixed for the payment of the $5,000, correspondence between Patrick and Hubbard (acting for himself and other parties) had developed the fact that he wished Patrick to obtain an extension of time; this could not be secured, and it became extremely uncertain whether Hubbard could or would raise the $5,000 within the time mentioned in the option. Patrick had throughout the entire transaction acted in the belief that if this payment was made there would be no trouble in securing the money for the other payments as they became due, because he thought it could be taken out of the mine, but he was worried and troubled over the prospects of his getting the $5,000. He endeavored to secure this money from other persons, without success, so as to be prepared if Hubbard failed to meet his agreements. He had offers from two or more other parties to take the option off his hands on substantially the same terms, but then considered he was under obligation to Hubbard, if their original agreement was complied with. As the time approached for the payment, he feared the deal with Hubbard would fall through; in this extremity he called in Jones, they being friends, and having confidence in each other, and they were interested together in a similar enterprise. Patrick knew Jones was a great rustler, and thought he might be able at the last moment to get the $5,000. They talked the matter over, with the result that Jones went to San Francisco. While there he claimed to have secured a purchaser, and was to get the money the

next day; but on that evening, after the arrangement was made, he received a dispatch from Patrick that Hubbard had closed the agreement. The question whether Jones could have secured the $5,000, if no such dispatch had been received, is, from all the testimony given upon this point, left doubtful and uncertain.

The admitted agreement between Jones and Patrick was on somewhat different lines, and more favorable to Patrick, than the agreement Patrick had made with Hubbard. Jones' testimony was substantially to the effect that they should work together, and if either of them secured a purchaser, they should share equally.

"Q. With regard to that contract made between you and Mr. Patrick * * * what was Mr. Patrick to do in relation to the matter, what were his duties? A. He was to stay in Tonopah, and I was to go to San Francisco, we were both to work hand in hand; he had absolutely failed to place it, he had no one to place it with; he could not get away himself, he had to stay there, and he thought that I was better, it was better for me to go to San Francisco, with the understanding that we were to divide whatever interest we secured in the property. Q. When you say 'we' you mean both together, or you separately? A. Both of us; if I placed it or if he placed it, it didn't make any difference who placed it; he took me into the partnership; he was worrying because he was afraid the option would fall through, and it would give him a bad standing. * * * I was to share equally, it didn't make any difference who took the property; as soon as he got his telegram from Mr. Hubbard he took me in on the deal with him."

Patrick's version of the agreement with Jones is, in substance, that if Jones succeeded in raising the $5,000, he was to have an eighth of the property, and that he (Patrick) was to have one-fourth, and that the agreement between them "was contingent on his making the deal." There was one witness, who had been called in as a stenographer to typewrite letters of recommendation from Mr. Patrick to certain parties calculated to aid Mr. Jones in his efforts to get a purchaser. In his testimony, among other things, he said:

"Q. Was there any discussion between Mr. Jones and Mr. Patrick at the time these letters were dictated with reference to the contents of these letters? A. Yes, there was, they discussed the deal and discussed the fact that they intended to sell a five-eighths interest and retain a three-eighths interest, and Mr. Patrick stated that he wanted a quarter, and Mr. Jones said that he wanted an eighth, and there was further discussion with reference to how much money they expected to raise, and the merits of the property, and so forth. * * * Q. Was there anything said in the conversation there to the effect that Mr. Jones should receive any interest in this property unless he made a sale? A. Not in my presence there was nothing said about that. * * * The Court: State what was said by them in regard to that? A. Well, I can't remember exactly, the substance of the conversation was that Mr. Jones was to go to San Francisco, I don't know whether that was mentioned—apparently it had been discussed before, and the substance of it was that Mr. Patrick stated that he wanted to retain * * * a quarter * * * and there was no discussion as to any possible contingency if Mr. Patrick was to place the property, in my presence. * * * Q. Was there anything said at that conversation with regard to what, if anything, Mr. Jones was to do in consideration of receiving an eighth interest? A. Well, Mr. Patrick stated if he sold the property, if he could place the property he could have an eighth interest, or words to that effect."

In a letter from this witness addressed to Mr. Jones, in answer to inquiries made of him, he said:

"It was discussed between Patrick and Jones that a five-eighth interest was to be placed with any one putting up the initial payment of five thousand, after which the mine would pay for itself, and that they, Patrick and Jones, would retain a three-eighths interest. Patrick told Jones to do the best he could. Patrick had advice from the Marquette Exploration Company that they could not handle the property, which was discussed. Patrick's efforts to place the property had failed up to that time. The matter was discussed at length between Patrick and Jones and it was my understanding that Jones was in on the deal."

There were many details in the testimony as to statements made by Patrick and Jones at different times to divers persons, and as to other matters, tending more or less, to corroborate, strengthen, or weaken the testimony of Patrick and Jones. The credibility of the respective witnesses is equal. None of them can be said to be unworthy of credit. Weighed in judicial scales the testimony of each side stands upon a level. Complainant is not required to prove his case beyond a reasonable doubt, but the law imposes upon the complainant the necessity of establishing his case by a preponderance of evidence. It is equally well settled that in cases of this character, resting solely upon oral agreements, the evidence to justify the court in enforcing them, must be clear, satisfactory, and convincing. If parties making agreements of this character thoroughly understood the importance of this question, they would take the pains to make a memorandum in writing in clear and definite terms just what the agreement was, so as to avoid the shoals of danger and difficulty of proving their agreements by the uncertain memories of witnesses depending solely on their recollection.

In Morrow v. Matthew (Idaho) 79 Pac. 197, 201, which was of a similar character to the case in hand, the court said:

"The courts have quite generally held that, in order to enforce the specific performance of a parol contract, it must be clearly and satisfactorily shown to the trial court as to its execution and the terms and conditions thereof. If the contract has not been reduced to writing, it must of necessity require a greater weight of evidence to establish its existence, and the terms and conditions thereof, and in those respects satisfy the mind of the court, than if the contract were in writing and produced in evidence. * * * Neither the amount of testimony, nor its contradictory or corroborative nature, constitute the leading or controlling elements in satisfying a court or jury as to the existence or nonexistence of the fact in issue. It is rather the convincing character and quality of the evidence concerning the particular fact in dispute."

In Pressed Steel Car Co. v. Hansen (C. C.) 128 Fed. 444, 446, the court said:

"Where it is doubtful whether an agreement has been concluded, and unless the proof is clear and satisfactory both as to the existence of a contract and as to its terms, specific performance will not be enforced. * * * Turning, then, to the proof, we inquire whether the complainant has met this standard. The answer traverses the allegation of a contract, and the burden is therefore upon the complainant to overcome such denial, and prove the contract by a preponderance of proof."

This case was affirmed upon appeal in Pressed Steel Car Co. v. Hansen (C. C. A.) 137 Fed. 403, 406.

In McKee v. Higbee, 180 Mo. 263, 297, 79 S. W. 407, the court said:

"It must be conceded that if the contract was in fact made, as alleged in the petition, a court of equity will specifically enforce it, but in actions to enforce contracts of that character, there is but one uniform expression by this court—that the proof of the contract must be clear, cogent and convincing. The rule, as to the nature and character of the proof, which will authorize the chancellor, in decreeing a specific performance of a contract, is a very strict one, and correctly so. The party who comes into a court of equity asking a contract specifically enforced, must come prepared to make it clear that such a contract not only exists, but, as well, the terms of it, that the court may intelligently, by its decree, enforce such contract strictly in accordance with its terms. No case for specific performance can rest upon doubtful or uncertain testimony."

The testimony in this case, taken in its entirety, does not, in my opinion, march up to the standard of proof required by the rules of law applicable to such cases in order to enable complainant to sustain the averments in his bill.

Let judgment be entered in favor of defendants for their costs

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BURCH v. SOUTHERN PAC. CO.

(Circuit Court, D. Nevada. May 7, 1906.)

No. 813.

1. NEW TRIAL—GROUND—EXCESSIVE VERDICT.
   A court is not authorized to set aside a verdict for damages as excessive unless the amount is so large as to indicate passion or prejudice on the part of the jury.
   [Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 153–155.]
2. SAME—SUFFICIENCY OF EVIDENCE.
   Where there was direct and positive evidence in support of a verdict the court is not authorized on a motion for a new trial to consider the question of the number or credibility of the witnesses.
3. MASTER AND SERVANT—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.
   Where there was evidence tending to show that an employé of defendant to whom plaintiff complained of a defective appliance had authority to make or order repairs, the question of such authority if disputed is one for the jury.

On Motion for New Trial.

See 140 Fed. 270.

H. R. MacMillan and H. H. Henderson, for plaintiff.

S. Summerfield and E. E. Roberts, for defendant.

HAWLEY, District Judge (orally). A new trial is asked for upon three grounds: (1) Excessive damages appearing to have been given under the influence of passion or prejudice; (2) insufficiency of the evidence to justify the verdict; (3) "errors in law occurring at the trial and during the instruction of the jury by the court and excepted to by the defendant."

1. It must be admitted that the jury were exceeding liberal in the amount of damages allowed, and marched up near the border line;

but I do not feel authorized to say that the amount is so excessive as to indicate passion or prejudice upon the part of the jury, which seems to be the only ground that gives authority for the court to interfere with the amount of the verdict.

2. Can it judicially be said that there was "a clear preponderance of evidence" against the verdict? The court instructed the jury "that it devolves upon the plaintiff in making out his case to establish by a preponderance of evidence all of the essential affirmative allegations in his complaint which are denied in the answer." Again, "you are the sole judges of the credibility and weight that is to be given to the different witnesses who have testified upon this trial," and further instructed the jury as to the methods they should use "in judging of the credibility of the respective witnesses in this case, there being a conflict upon some points." The testimony of the plaintiff was clear, direct, and positive upon all the material points in the case. There was nothing in his manner, conduct, or appearance to reflect upon his credit. It may be admitted, as is claimed, that this could not be said of all the witnesses who testified in his favor. The jury might, under the instructions, have disbelieved, and for that reason have discarded, some of their statements, but this is a matter solely within the province of the jury. The preponderance of evidence does not depend upon the number of witnesses. This is not the governing question. The truth is, there was a direct conflict upon the controlling point as to whether the plaintiff gave notice to an agent of the defendant of the defective switch stand, who was authorized, or whose duty it was, to see that the repairs were made. There was ample evidence to sustain the verdict. In such cases courts would not, in my opinion, be justified in granting a new trial upon the ground stated.

3. At the trial I was impressed by the testimony of the witnesses that there was some conflict as to whether or not the yardmaster was given authority to make repairs when notified that anything in his department was in a defective and dangerous condition, and hence left it to the jury "as a question of fact to be decided by you, to be determined from the evidence, as to whether or not the yardmaster had the power or authority, by virtue of his position, or by express authority from his master, to make repairs, and gave a promise that he would do so. This question is to be determined by you from all the facts whether he had authority from the corporation—whether he had authority from one possessing the power to give him authority—or whether it was the custom or duty of such an officer to perform such duty."

Mr. Burch, the plaintiff, testified:

"Q. To whom had you made that report [defect of the switch stand]? A. To the yardmaster on one occasion when working by the switch. * * * Q. Who was the yardmaster you made the report to? A. Mr. Fridley, William Fridley, I believe. Q. Do you know what the duties of the yardmaster were? A. Well, he has to exercise a general jurisdiction over the yard work. Q. Does he hire and discharge men? A. Yes, sir. Q. Does he have the authority to order repairs? A. Yes, sir. * * * Q. * * * I will ask you, do you know, of your own knowledge, whether the yardmaster ever ordered repairs? A. Yes, sir. * * * Q. You say you know of your own knowledge

of the yardmaster giving orders for repairs? A. Yes, sir. Q. Do you know whether afterwards the repairs were made? Yes, sir; they were afterwards made."

Mr. Fridley, the yardmaster, testified as follows:

"Q. As yardmaster there will you explain to the jury what your duties were? * * * A. I was supposed to look after the business that was carried on in the yard there during these particular hours that I was on duty, and to hire and discharge the men. Q. Was one of your duties to order repairs made? A. Yes, sir. * * * Q. You never had any specific instructions as to what your duties were out there in the yard? A. No, sir. Q. And you assumed the duties there that you had seen other men assume? A. Yes, sir. * * * Q. Was that the custom there in that yard? A. Yes, sir. Q. That the yardmaster gave instructions for repairs? A. Yes, sir. Q. And you followed out that custom? A. I did, sir."

Without quoting any further testimony, I am still of the opinion that there was sufficient evidence to justify the leaving of this question to the jury. My attention has not been called to any authorities which hold to the contrary.

The charge given by the court in Parody v. Chicago, M. & St. P. Ry. Co. (C. C.) 15 Fed. 205, 206, supports the instruction under review. Judge Nelson, among other things, said:

"There is evidence tending to show that the drawbar was an improper one, and not in ordinary use by the company in the yard; that the switch engine upon which plaintiff worked when first employed did not have it attached; and that shortly after he worked upon this engine he complained to the yardmaster, telling him that it was dangerous, who promised to remove it, but did not, and that he remained at work after complaint and unfulfilled promise until * * * he was injured. * * * In regard to the notice required to inform defendant of this, it is sufficient that notice was given to that agent or servant of the defendant, who made a requisition for the appliances necessary to be used in the yard of the defendant, and whose duty it is to guard against injurious consequences of defects in the particular appliances used therein. Such a person is the yardmaster. He represents the company, and since it delegated to him the authority to make requisitions for engines, etc., for the use of the yard, notice to him of dangerous drawbars will be notice to the defendant. He is the proper person, and if after such notice he promised to remedy it, a failure to do so is the negligence of the defendant."

In Pieart v. Chicago, R. I. & P. Ry. Co., 82 Iowa, 148, 159, 47 N. W. 1017, 1019, the court said:

"But plaintiff claims that deceased protested against using the engine without such board, and that the agent of defendant promised that that engine should soon be removed, and that deceased would not be required to work but a short time with it, and, by promises and assurances given, induced him to continue in his position as switchman. Appellant contends that there is no evidence of such promise, and that the court erred in submitting that inquiry to the jury. Numerous authorities are cited to show that there must have been an express or implied promise, and, upon the other hand, that a mere assurance upon which the employé relied is sufficient. If, upon objection to the employer or one authorized to act for him, the employé is given to understand that the defect will be remedied, he has a right to act upon that assurance. This brings us to inquire whether complaint was made to one having authority in such matters. The two conversations relied upon were with Cain, the yardmaster, under whose orders deceased performed his duties as switchman. It appears that the yardmaster had no authority to direct repairs on the engine, but, if an engine was furnished him lacking

some appliances necessary for switching, it was his duty to report to the trainmaster, who would determine the advisability of furnishing whatever was required. We think under this showing the yardmaster was the proper person to whom deceased should complain. * * * Defendant's business is transacted by many officers, agents, and servants of different grades. It being the duty of the yardmaster to report such complaints to another, the complaint was properly made to him, though he may not have had authority to remedy the difficulty complained of. * * * No particular form of words is required to constitute a complaint or assurance. If, by any acts or expressions, the deceased gave the proper agent of defendant to know that he was unwilling to continue in the employment without running boards on the engine, that was a sufficient complaint; and, if by any acts or expressions the agent gave the deceased reason to believe that running boards would be furnished, that was a sufficient assurance or promise. * * * If such assurance was made, and deceased was induced thereby to continue in the employment, then, as we have seen, the defendant assumed the risks incident to the performance of the work without running boards until such boards should be furnished. The foregoing views of the law are so uniformly sustained by the authorities that we do not deem it necessary to make citations. We think there was no eror in submitting the inquiry as to the complaint and promise or assurance to the consideration of the jury."

See, also, Homestake M. Co. v. Fullerton, 69 Fed. 923, 928, 16 C. C. A. 545; Dells Lumber Co. v. Erickson, 80 Fed. 257, 259, 25 C. C. A. 397; Swift & Co. v. O'Neill, 187 Ill. 337, 342, 58 N. E. 416.

In 1 Labatt on Master and Servant, cited by the defendant, at section 420, under the head of "Whose promise is binding on the master," the author said:

"The question whether the employé in question was authorized to make the alterations requisite to secure the servant's safety is for the jury, whenever evidence has been adduced which is reasonably susceptible of the construction that he was so authorized."

Motion for new trial denied.

THE MARS.

(District Court, E. D. Pennsylvania. June 22, 1906.)

No. 47.

SEAMEN—INJURY IN SERVICE—EXPENSE OF CURE.

A seaman injured in the service of a vessel is entitled to recover from the vessel all expense necessary to effect his cure, including board, medicines, and treatment so far as ordinary medical means extend, but not for extraordinary treatment, nor for attention which he can himself give.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seamen, §§ 39–44.]

In Admiralty. Suit for personal injury.
See 138 Fed. 941.

Howard M. Long, for libelant.
John F. Lewis, for respondent.

HOLLAND, J. On the authority of McCarron v. Dominion Atlantic Railway Company (D. C.) 134 Fed. 762, I have allowed Dr. Roe's

bill of $69, and the claim of Spira Serrias for medicine furnished Manides, amounting to $42, and board for the 26 weeks after he came out of the hospital, at $5 per week and $50 for future treatment which he seems to require, making a total of $291. The claimant was treated at the German Hospital, and was discharged from there not entirely cured, and he would be entitled to be paid for any necessary expense to effect a cure so far as the ordinary medical means extend, but not for extraordinary treatment or attention which he could himself give.

Decree accordingly.

MILLS v. PROVIDENCE BELTING CO.

(Circuit Court, D. Rhode Island. May 12, 1906.)

No. 2,720.

DISCOVERY—INSPECTION OF PREMISES BY ADVERSE PARTY—STATE STATUTE.

Section 372, p. 107, of the court and practice act of Rhode Island of 1905, which requires a defendant to allow a reasonable inspection of its premises, is applicable to actions at law for a personal injury in a federal court within the state, and violates no constitutional right of a defendant.

On motion by plaintiff to view and examine place and cause of injury.

John A. Tillinghart, for plaintiff.

Vincent, Boss & Barnefield, for defendant.

BROWN, District Judge. The plaintiff moves that the attorneys of record of the plaintiff may be permitted, with experts, to view and examine the place and cause of the injury mentioned in the declaration. The plaintiff relies upon section 372, p. 107, of the Court and Practice Act of the state of Rhode Island, passed by the General Assembly at its January session, 1905. I am of the opinion that that section is applicable to actions at law pending in this court, and that a requirement that the defendant shall allow a reasonable inspection of its premises violates no constitutional rights of the defendant. Camden Ry. Co. v. Stetson, 177 U. S. 172, 20 Sup. Ct. 617, 44 L. Ed. 721; Montana Co. v. St. Louis M. & M. Co., 152 U. S. 160, 14 Sup. Ct. 506, 38 L. Ed. 398. It is familiar practice to order a view of private premises; and, if it be permissible to require a defendant to submit to an examination of its premises by a jury at the time of trial, I see no reason for applying a different rule to an application of this character, made before the actual trial. The defendant is, of course, entitled to insist that this examination shall be at a reasonable time, and upon suitable terms and conditions. In case such time, terms, and conditions cannot be agreed upon, they will be determined by the court.

Motion granted.

FIRST NAT. BANK v. GEBBIE & CO.

(Circuit Court, E. D. Pennsylvania. June 22, 1906.)

No. 2.

BILLS AND NOTES—ACTION—PLEADING—AFFIDAVIT OF DEFENSE.

In an action on a note, an affidavit of defense is sufficient which expressly denies that plaintiff is a bona fide holder of such note, or that it paid any value whatever therefor, and alleges that the note was delivered by defendant to a third person to be discounted by him, but that he did not procure it to be discounted, but in collusion with others fraudulently delivered it to plaintiff without consideration for the sole purpose of having suit brought thereon in plaintiff's name to avoid defense on the ground of the fraud.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1530–1532, 1559–1561.]

On Rule for Judgment for Want of Sufficient Affidavit of Defense.

Myles Higgins, for plaintiff.
Humbert B. Powell, for defendant.

HOLLAND, District Judge. The affidavit of defense in this case contains an express denial that the plaintiff became the holder or purchaser of the note in question for a valuable consideration, either before the maturity of the same or at any other time, and further avers that the plaintiff is "not the bona fide holder of said note and has paid no value whatever therefor."

The defense further alleges that one T. fraudulently represented that he could have the note discounted for the defendant company for their use, and the note was delivered to T. for this purpose, who fraudulently delivered it to P. without consideration, and the latter fraudulently delivered it to B. without consideration; that neither T., P., nor B. ever had the note discounted, but together fraudulently delivered it to the plaintiff without consideration, and for the sole purpose of using plaintiff's name in its collection to avoid the defense which defendant has against the parties participating in the fraud. Surely this is a complete defense, if it can be established.

Rule for judgment dismissed.

HARRIS v. ROSENBERGER.

(Circuit Court of Appeals, Eighth Circuit. May 9, 1906.)

No. 2,245.

1. COURTS—JURISDICTION—DISTRIBUTION BETWEEN SUPREME COURT AND CIRCUIT COURTS OF APPEALS—CASES INVOLVING CONSTITUTIONAL QUESTIONS.

A suit, although not one of diversity of citizenship, which, according to the complainant's bill, depends not only upon the construction and application of the Constitution of the United States and the constitutional validity of an act of Congress, but also upon the proper construction of the act of Congress, is one in respect of which the appellate jurisdiction of the Supreme Court is not exclusive, and an appeal from the final decree may be taken to the Circuit Court of Appeals. Spreckles Sugar Refining Co. v. McClain, 24 Sup. Ct. 376, 192 U. S. 397, 407, 18 L. Ed. 496, followed.

[Ed. Note.—Jurisdiction of cases involving federal questions, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore Purchasing Co. v. Boston & M. C. C. S. Min. Co., 35 C. C. A. 7.

Jurisdiction of Supreme Court and of Circuit Court of Appeals, see note to Lau Ow Bew v. United States, 1 C. C. A. 5.]

2. SAME—TO GIVE RIGHT TO DIRECT APPEAL TO SUPREME COURT CONSTITUTIONAL QUESTION MUST BE REAL AND SUBSTANTIAL

Not every assertion of a right under some claimed construction or application of the Constitution, nor every claim that a pertinent act of Congress is violative of the Constitution, is efficient to establish a right to a direct appeal to the Supreme Court, under the statute distributing the appellate jurisdiction between that court and the Circuit Court of Appeals. The claim must be real and substantial, not merely colorable or without reasonable foundation.

3. SAME—CONSTITUTIONAL QUESTION CEASES TO BE REAL AND SUBSTANTIAL AFTER IT HAS BEEN SOLEMNLY AND DIRECTLY DETERMINED BY SUPREME COURT.

Whether the question of the construction or application of the Constitution, or of the constitutional validity of an act of Congress, is real and substantial, or is merely colorable and without reasonable foundation, depends, inter alia, upon whether it is an open one in the Supreme Court, or has been solemnly and directly determined by that court. If it has been so determined, it no longer constitutes a ground for a direct appeal to that court, under the statute distributing the appellate jurisdiction between it and the Circuit Courts of Appeals.

4. FRAUD—FALSE PRETENSES—PUFFING STATEMENTS OF VENDOR.

The doctrine in respect of the latitude which is accorded to a merchant in commending or puffing his goods has no application to false representations of material facts which are in their nature calculated to deceive and are made with intent to deceive.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, §§ 8–14.]

5. POSTOFFICE—FRAUD ORDERS—STATUTES CONSTRUED.

The provisions of sections 3929 and 4041, Rev. St. [U. S. Comp. St. 1901, pp. 2686, 2749], empowering the Postmaster General to issue so-called fraud orders as a means of stopping the use of the mails as an agency in conducting schemes or devices for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, are not restricted to schemes or devices which are wanting in all the elements of a legitimate business, or in which it is intended to return nothing whatever or nothing at all equivalent in value for the money obtained, but embrace those whereby a business, otherwise legitimate, is systematically and designedly so conducted that, by means of false representations, its patrons are induced to part with their money in the belief that they are purchasing something different from, superior to, and worth

more than, what is actually being sold, although that may approximate in commercial value the price asked and received.

[Ed. Note.—Use of mails for schemes for frauds and counterfeiting, see note to Timmons v. United States, 30 C. C. A. 86.]

(Syllabus by the Court.)

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

For opinion below, see 136 Fed. 1001.

A. S. Van Valkenburg, U. S. Atty., for appellant.

J. C. Rosenberger, for appellee.

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

VAN DEVANTER, Circuit Judge. This is an appeal from an interlocutory decree enjoining the appellant, as Postmaster at Kansas City, Mo., from executing two fraud orders issued to him by the Postmaster General under sections 3929 and 4041 of the Revised Statutes, as amended by the act of September 19, 1890, c. 908, 26 Stat. 466 [U. S. Comp. St. 1901, p. 2686], and by section 4 of the act of March 2, 1895, c. 191, 28 Stat. 963 [U. S. Comp. St. 1901, p. 2749]. One of the orders reads:

"It having been made to appear to the Postmaster General, upon evidence satisfactory to him, that the Haydock Distilling Company and its officers and agents as such at Kansas City, Mo., are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of the act of Congress entitled 'An act to amend certain sections of the Revised Statutes relating to lotteries, and for other purposes' approved September 19, 1890: Now, therefore, by authority vested in him by said act and by the act of Congress entitled 'An act for the suppression of lottery traffic through international and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States,' approved March 2, 1895, the Postmaster General hereby forbids you to pay any postal money order drawn to the order of said concern and parties, and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden and that the amount thereof will be returned upon the presentation of the original order or a duplicate thereof applied for and obtained under the regulations of the department. And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said concern and parties to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the word 'Fraudulent' plainly written or stamped upon the outside of such letters or matter. Provided, however, that where there is nothing to indicate who are the senders of letters not registered or other matter, you are directed in that case to send such letters and matter to the Dead Letter Office with the word 'Fraudulent' plainly written or stamped thereon, to be disposed of as other dead matter under the laws and regulations applicable thereto."

The other order is the same, save that it applies to Becker Bros. & Co., instead of the Haydock Distilling Company. These are mere trade-names adopted and used by the appellee. He and the appellant are both citizens of the state of Missouri, and the grounds upon which the jurisdiction of the Circuit Court was invoked and upon which relief therein is sought, as is shown by the bill, are that the

statutes, under which the orders were issued by the Postmaster General, are violative of the Constitution of the United States, and that, even if valid, they do not, when rightly interpreted, comprehend or have application to the state of facts disclosed before the Postmaster General when the orders were issued. The Circuit Court, in passing the interlocutory decree, sustained the appellee's contention in respect of the interpretation of the statutes but expressed no opinion in respect of their validity. 136 Fed. 1001.

The first question which claims our attention relates to the jurisdiction of this court. Section 7 of the act of March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 550], which gives a right of appeal from an interlocutory decree granting or continuing an injunction or appointing a receiver, restricts it to cases "in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals," so the question resolves itself into this: Is the case one in which an appeal from a final decree may be taken under the act of 1891 to this court? The appellee insists that it falls within the exclusive appellate jurisdiction of the Supreme Court, because it involves the construction and application of the Constitution of the United States and draws in question the constitutionality of a law of the United States. We need not refer at length to the statutory provisions or the cases which are claimed to sustain this insistence (City of Owensboro v. Owensboro Water Works Co., 53 C. C. A. 146, 115 Fed. 318; Filhiol v. Maurice, 185 U. S. 108, 110, 22 Sup. Ct. 560, 46 L. Ed. 827; Union & Planters' Bank v. Memphis, 189 U. S. 71, 73, 23 Sup. Ct. 604, 47 L. Ed. 712), because further consideration and discussion of the subject are foreclosed by the recent decision of the Supreme Court in Spreckles Sugar Refining Co. v. McClain, 192 U. S. 397, 407, 24 Sup. Ct. 376, 48 L. Ed. 496. That was a case in which diversity of citizenship did not exist, and where it was sought to recover certain moneys exacted and paid under protest as war revenue taxes the right to their recovery being asserted upon the grounds that the act of Congress imposing them was violative of the Constitution, and that, even if valid, it did not, when rightly interpreted, authorize their collection. The contention was made that the judgment of the Circuit Court was not subject to review by the Circuit Court of Appeals, but only by the Supreme Court. It was ruled otherwise. We quote from the opinion:

"Was the judgment of the Circuit Court subject to review only by this court, or was it permissible for the plaintiff to take it to the Circuit Court of Appeals? If the case, as made by the plaintiff's statement, had involved no other question than the constitutional validity of the act of 1898, or the construction or application of the Constitution of the United States, this court alone would have had jurisdiction to review the judgment of the Circuit Court. Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290, 295, 22 Sup. Ct. 452, 46 L. Ed. 546. But the case distinctly presented other questions which involved simply the construction of the act, and those questions were disposed of by the Circuit Court at the same time it determined the question of the constitutionality of the act. If the case had depended entirely on the construction of the act of Congress—its constitutionality not being drawn in question—it would not have been one of those described in the fifth section of the act of 1891, and, consequently, could not have come here directly from the Circuit Court. As, then, the

case, made by the plaintiff, involved a question other than those relating to the constitutionality of the act and to the application and construction of the Constitution, the Circuit Court of Appeals had jurisdiction to review the judgment of the Circuit Court, although, if the plaintiff had elected to bring it here directly, this court would have had jurisdiction to determine all the questions arising upon the record. The plaintiff was entitled to bring it here directly from the Circuit Court, or, at its election, to go to the Circuit Court of Appeals for a review of the whole case. Of course, the plaintiff, having elected to go to the Circuit Court of Appeals for a review of the judgment, could not thereafter, if unsuccessful in that court upon the merits, prosecute a writ of error directly from the Circuit Court to this court."

As the present case, according to the bill exhibited in the Circuit Court, involves the proper construction of the statutes under which the fraud orders were issued and is not made to depend entirely upon constitutional questions, it follows, from the decision to which we have just referred, that the case is one in respect of which the appellate jurisdiction of the Supreme Court is not exclusive, and that an appeal from the final decree may be taken to this court.

There is yet another reason why an appeal from that decree will lie to this court. Not every assertion of a right under some claimed construction or application of the Constitution, nor every claim that a pertinent act of Congress is violative of the Constitution, is efficient to establish a right to a direct appeal to the Supreme Court. The claim must be real and substantial, not merely colorable or without reasonable foundation. Millingar v. Hartupee, 6 Wall. 258, 18 L. Ed. 829; Wilson v. North Carolina, 169 U. S. 586, 595, 18 Sup. Ct. 435, 42 L. Ed. 865; McCain v. Des Moines, 174 U. S. 168, 181, 19 Sup. Ct. 644, 43 L. Ed. 936; New Orleans Water Works Co. v. Louisiana, 185 U. S. 336, 344, 22 Sup. Ct. 691, 46 L. Ed. 936; Sawyer v. Piper, 189 U. S. 154, 23 Sup. Ct. 633, 47 L. Ed. 757; Newburyport Waterworks Co. v. Newburyport, 193 U. S. 561, 576, 24 Sup. Ct. 553, 48 L. Ed. 795. In the last case it is said:

"If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions, there was, of course, jurisdiction. But that is not the sole criterion. On the contrary, it is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial, but is without color of merit."

Whether the question of the construction or application of the Constitution, or of the constitutional validity of an act of Congress, is real and substantial, or is merely colorable and without reasonable foundation, depends, inter alia, upon whether it is an open one in the Supreme Court, or has been solemnly and directly determined by that court. As was said by Mr. Justice Brewer, then circuit judge, in State of Kansas v. Bradley (C. C.) 26 Fed. 289:

"When a proposition has once been decided by the Supreme Court, it can no longer be said that in it there still remains a federal question. More correctly it is said there is no such question, state or federal. This is the only fair starting point for consideration of a case like this."

The question claimed to be involved in that case, and by reason of which it had been removed from the state court, was whether or not a state law absolutely prohibiting the manufacture or sale of intoxicat-

ing liquors within the state was violative of the national Constitution, and, because that question had been determined by the Supreme Court of the United States in favor of the state law, it was held that the case involved no real question under the national Constitution, was not removable, and should be remanded to the state court. The decision has been approvingly followed in many cases. Austin v. Gagan (C. C.) 39 Fed. 626, 5 L. R. A. 476; Inez Mining Co. v. Kinney (C. C.) 46 Fed. 832, 834; Bluebird Mining Co. v. Largey (C. C.) 49 Fed. 289, 291; Montana, etc., Co. v. Boston, etc., Co., 29 C. C. A. 462, 85 Fed. 867; People v. Brown's Valley District (C. C.) 119 Fed. 535, 538; State of Arkansas v. Choctaw, etc., Co. (C. C.) 134 Fed. 106; Myrtle v. Nevada C. & O. Ry. Co. (C. C.) 137 Fed. 193, 195. To the same effect are Dillon's Removal of Causes (5th Ed.) § 79, and 1 Foster's Fed. Pr. (3d Ed.) § 17.

We do not stop to here enumerate or discuss the several constitutional questions sought to be raised by the bill. Considering the manner in which this branch of the case has been presented to us, it is deemed sufficient to say that such of these questions as could originally have been said to possess any color of merit had been fully considered by the Supreme Court and by it determined adversely to the appellee's contention prior to the institution of this suit. Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877; In re Rapier, 143 U. S. 110, 12 Sup. Ct. 374, 36 L. Ed. 93; Public Clearing House v. Coyne, 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092. In the last case it is said of the statutes under which these fraud orders were issued: "We find no difficulty in sustaining the constitutionality of these sections." In his brief, which treats other questions at considerable length, counsel for the appellee has been content to say of the constitutional questions:

"In conclusion, we call the attention of the court to the constitutional objections to this statute, raised in the bill of complaint. These objections we still insist upon. We do not believe that this court, in view of those questions, has jurisdiction to entertain this appeal, and we ask that it be dismissed."

And in oral argument there was no attempt to elaborate or enforce this insistence. We regard the constitutional questions as merely colorable and without any reasonable foundation.

Our conclusion upon the subject of jurisdiction is that the case is one in which an appeal will lie to this court from the final decree, and therefore that we may take cognizance of the appeal from the interlocutory decree.

The fraud orders complained of were issued by the Postmaster General after actual and reasonable notice to the appellee, and after he had made and submitted a written statement in his behalf in response to the notice. The state of facts disclosed before the Postmaster General, and which was substantially conceded by the appellee, was this: Under the trade-names of Haydock Distilling Company and Becker Bros. & Co., the appellee was engaged in the prosecution of a mail-order liquor business at Kansas City, Mo. By means of circulars, circular letters, order blanks and letter-heads, distributed through the mail, he represented that the Haydock Distilling Company was a distiller of fine whiskies, with a distillery at Newport, Ky., and

a distributing warehouse and office at Kansas City, Mo.; that it had been engaged in producing carefully distilled rye whisky for 30 years, possessed every natural advantage therefor, and used only selected grain; that its whisky had been sold for many years only to the largest wholesalers and jobbers, but owing to the spread of prohibition it had decided to place upon the market a nine year old whisky and to sell it direct to the consumer at a price (4 full quarts for $3, in plain boxes, express charges prepaid) that would save him the "exorbitant profits of the middleman"; that it distilled this whisky, matured it, and would ship it in its original purity, mellowed by age; that its whisky was under United States government supervision from the time of distillation until the moment of shipment to the consumer, and that it employed no salesmen, did not advertise in expensive newspapers, and was enabled to give the fullest value in ripe old whisky. Orders and remittances by mail were solicited. By like means the appellee represented that Becker Bros. & Co. were distillers of whisky, with a distillery at Cynthiana, Ky., and a distributing warehouse and office at Kansas City, Mo.; that their distillery was established in 1867 and produced only high grade rye whisky; that they had a famous whisky called "Old Storage Rye," which was 14 years old, and which they were selling direct to the consumer (4 full quarts for $3.50, in plain boxes, express charges prepaid); that this whisky was distilled by them in their distillery at Cynthiana, Ky., was held by them in bond until mature, and kept under government supervision until bottled; that they had no soliciting agents and were not paying commissions to any one. Orders and remittances by mail were solicited. The advertising material set forth cuts or pictures of buildings purporting to be the distilleries and warehouses in which the whiskies before named were distilled and matured, declared that a long period of maturing is essential to the production of a fine stimulant, and contained these statements:

"We will guaranty the finest satisfaction."

"If you don't receive the best and most satisfactory article that you ever obtained, return your shipment to us at our expense and we will promptly refund your money."

In truth the Haydock Distilling Company and Becker Bros. & Co., as before said, were mere trade-names adopted and used by the appellee. He had not owned or operated a distillery anywhere and did not then own or operate one, but was a "middleman," As he well knew, the whisky which he was selling under his trade-names was not 9 years old, or 14 years old, nor kept under government supervision until shipped to the consumer or bottled, but was comparatively new whisky purchased by him from distillers and then rectified. But, although it was not as represented and was materially inferior in quality and value to what it would have been if the representations had been true, it was perhaps of as good a grade as could be obtained in the market for the price asked and paid. Not more than half a dozen of those to whom sales had been made had complained to the appellee that the whisky did not conform to the representations, and these complaints had been adjusted by a return of the purchase price.

The Postmaster General, being of opinion that this state of facts constituted satisfactory evidence that the Haydock Distilling Company, as also Becker Bros. & Co., were conducting a scheme or device for obtaining money through the mails by means of false representations within the meaning of the statutes, issued the fraud orders now in question. The appellee, while conceding that this action of the Postmaster General, if within the scope of his authority, is not subject to review by the courts, insists that it was beyond the scope of his authority, because in no possible view of the facts was the case covered by the statutes. Three propositions are advanced in support of this insistence: (1) The representations, although false, were permissible trade exaggerations: (2) the promise to refund the purchase price if the goods were not satisfactory and were returned, and the fulfillment of that promise in the instances where it was requested, show there was no intention to defraud; and (3) the statutes, rightly interpreted, do not embrace all schemes or devices for obtaining money through the mail by means of false representations, but only those in which it is contemplated that nothing whatever or nothing at all equivalent in value to the money obtained shall be given in return therefor.

Of the first of these propositions it is sufficient to observe that the doctrine in respect of the latitude which is accorded to a merchant in commending or puffing his goods has no application to false representations of material facts which are in their nature calculated to deceive and are made with intent to deceive, and that it was a permissible, if not a necessary, view of the facts disclosed before the Postmaster General, that some of the appellee's representations were of that character. The second proposition is not more tenable. The falsity of the representations and the appellee's knowledge of their falsity being established, as they were, it was not an inadmissible view that the promise to refund the purchase price, if the goods were not satisfactory and were returned, was cleverly devised to give apparent color and support to the representations. True, it appeared that, in a few exceptional instances where customers discovered and resented the deceit which was practiced upon them, the appellee refunded the purchase price in fulfillment of his promise, but it cannot be said that this necessarily or conclusively disproved any intent to defraud, particularly when it was not questioned that in all other instances he retained the money obtained by means of the deceit which he was practicing.

The third proposition proceeds upon the theory that sections 3929 and 4041 are to be read in connection with cognate criminal statutes (sections 3894 and 5480, as respectively amended September 19, 1890, c. 908, 26 Stat. 465, and March 2, 1889, c. 393, 25 Stat. 873 [U. S. Comp. St. 1901, pp. 2659, 3697]), and in the light of the maxim "noscitur a sociis," and that, when they are so read, the provisions therein against "conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false and fraudulent pretenses, representations or promises," although broad and comprehensive, are restricted to schemes which are wanting in all the elements of a legitimate business, or in which it is intended to return nothing whatever or nothing at all equivalent in value for the

money or property obtained. And, applying this theory to the facts disclosed before the Postmaster General, it is contended that, as selling whisky is a legitimate business, and as the appellee was giving an equivalent in value for the money obtained, the case was not within the statutes, although the settled plan upon which the business was being conducted was that of obtaining orders and remittances by means of intentional and gross misrepresentations calculated to induce purchasers to believe that they were buying something different from that which was actually being sold and worth more than what they were parting with.

While not doubting that the statutes named are to be read together, we do not accede to the interpretation sought to be placed upon them. They have been frequently considered by the courts, and because of the comprehensive language in which they are expressed the efforts to narrow them by construction have not been successful. In Durland v. United States, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709, in disposing of a contention that to make out a scheme or artifice to defraud within the meaning of section 5480 there must be a misrepresentation as to some existing fact, and not a mere promise as to the future, it was said by Mr. Justice Brewer, in speaking for the court:

"We cannot agree with counsel. The statute is broader than is claimed. Its letter shows this: 'Any scheme or artifice to defraud.' Some schemes may be promoted through mere representations and promises as to the future, yet are not the less schemes and artifices to defraud. * * * But beyond the letter of the statute is the evil sought to be remedied, which is always significant in determining the meaning. It is common knowledge that nothing is more alluring than the expectation of receiving large returns on small investments. Eagerness to take the chances of large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than is parted with appeals to the cupidity of all. In the light of this the statute must be read, and so read it includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose."

Another case arising under the same section is that of Horman v. United States, 53 C. C. A. 570, 116 Fed. 350, in which it was said by Mr. Justice Day, then circuit judge:

"The phrase 'scheme or artifice to defraud' is to be construed bearing in mind the underlying purpose of the statute to preserve the use of the mails to legitimate ends. The use of the mail by sending letters to others must be in aid of the scheme designed to defraud. What is here meant by 'to defraud'? Obviously the statute is dealing with the wrongful purpose to injure, with which the scheme or artifice must be connected. These words, in the phrase quoted, are not descriptive of the character of the artifice or scheme which has been devised, but rather of the wrongful purpose involved in devising the same, and putting it into operation by means of the mail."

The same court, speaking through Judge Richards, uses this language in O'Hara v. United States, 64 C. C. A. 81, 129 Fed. 551, which also arose under section 5480:

"The intention to make false and fraudulent representations by means of circulars and letters transmitted through the mails, and thus obtain money from the credulous, constituted the scheme itself. The objection that on its face the scheme was impossible of execution, and therefore should have de-

ceived no one, is without merit. Weeber v. U. S. (C. C.) 62 Fed., 741. Schemes to defraud depend for success not on what men can do, but upon what they may be made to believe, and the credulity of mankind remains yet unmeasured."

And in the recent case of Miller v. United States, 66 C. C. A. 399, 133 Fed. 337, it was held by this court that the schemes or artifices to defraud covered by that section are not limited to the swindling transactions specifically described therein, nor to those of a similar character, but embrace the intentional use of a legal contract or transaction for the purpose of defrauding another, although the use of the same contract or transaction with an honest intent to accomplish a laudable object would be lawful and innocent.

The case of Missouri Drug Company v. Wyman (C. C.) 129 Fed. 623, like that now before us, was one in which it was sought to enjoin the execution of a fraud order issued under sections 3929 and 4041. The complainant was engaged in selling medicines, which was in itself a legitimate business, but to create a demand for and to induce the purchase of one of its medicines, called "Vitality Pills," it was intentionally and grossly misrepresenting their ingredients and curative properties. But, although the pills had some medicinal value, in that they were compounded in part of old and well-known drugs possessing tonic properties, it was held by Judge Thayer that the case came within the scope of the Postmaster General's authority, and an injunction was refused.

Another case somewhat like that last cited is Fairfield Floral Company v. Bradbury (C. C.) 89 Fed. 393. The complainant was engaged in selling instructions and materials for making artificial flowers, which was in itself a legitimate business, but, to create a demand for and to induce the purchase of its instructions and materials, it was falsely representing that it was prepared to give steady employment to the purchasers by taking the flowers which they would make and selling them through wholesale stores. The fraud order was permitted to stand, it being held by Judge Putnam that sections 3929 and 4041 include any scheme by which, through artful and untruthful statements, the cupidity of various persons in the community may be unduly excited and money or property obtained from them.

While the arrangement of the several parts of sections 3929 and 4041 and the use of the word "other" in the part relating to schemes or devices for obtaining money or property by means of false or fradulent pretenses, representations, or promises may seem to give some color to the appellee's contention, an examination of the other sections, with which they are conceded to be in pari materia, shows that no importance is to be attached to the matters mentioned. Thus, while sections 3929 and 4041 deal first with other objectionable enterprises and then with schemes or devices for obtaining money or property by false pretenses, section 5480 deals first with schemes or artifices to defraud; and, while sections 3929 and 4041, after mentioning lotteries, gift concerts, and similar enterprises, are directed against any "other" scheme or device for obtaining money or property by false pretenses, section 3894 in its second part is directed

against "schemes devised for the purpose of obtaining money or property under false pretenses," the word "other" not being used, and section 5480, as before seen, is directed against "any scheme or artifice to defraud."

Our conclusion is that when a business, even if otherwise legitimate, is systematically and designedly conducted upon the plan of inducing its patrons, by means of false representations, to part with their money in the belief that they are purchasing something different from, superior to, and worth more than, what is actually being sold, it becomes an objectionable scheme or device within the intendment of sections 3929 and 4041, although what is being sold may approximate in commercial value the price asked and received. The difference between such a scheme or device and those where nothing whatever or nothing at all equivalent in value is intended to be returned for the money obtained is one of degree only, but not of principle. Both are grounded in deceit, operate injuriously upon the public, and constitute the obtaining of money by means of false pretenses. A purchaser is entitled to receive what he is induced by the vendor's representations to believe he is ordering and paying for, and not something which he does not order and may not want at any price.

The decision of the Circuit Court of Appeals of the Seventh Circuit, in O'Neil v. United States, 56 C. C. A. 584, 120 Fed. 236, which is relied upon by the appellee, is not in point. That was a prosecution under section 5480, and because the proof failed to sustain the charge in respect of an essential part of the scheme or artifice to defraud, as specifically set forth in the indictment, the judgment of conviction was reversed, but the court, speaking through Judge Grosscup, was careful to say of a question like that presented in the case before us: "The question thus mooted would be interesting, if it were fairly involved in this case. But it is not."

As the Postmaster General appears to have acted within the scope of his authority in issuing the orders of which complaint is made, the interlocutory decree granting an injunction against their execution by the appellant is reversed.

WETZEL & T. RY. CO. v. TENNIS BROS. CO.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1906.)

No. 638.

1. CORPORATIONS—WORKMEN'S LIENS—RIGHT OF CORPORATION TO LIEN—STATE STATUTE—CONSTRUCTION.

Under W. Va. Code 1899, c. 75, § 7, providing that every workman, laborer, or "other person," who shall do or perform any work or labor by virtue of any contract for any incorporated company doing business within the state shall have a lien therefor on the real estate and personal property of the company, and chapter 13, § 17, subd. 9, declaring that the word "person" includes corporations, if not restricted by the context, a corporation employed to supervise the construction of an electric railway by means of the personal services of its officers and servants is entitled to a lien therefor.

2. SAME—AMOUNT OF COMPENSATION.
That a contract employing a corporation to superintend the construction of an electric railway provided that the compensation should be measured by a percentage on the actual net cost of all materials and labor necessary for the construction of the railway, instead of a specific sum, did not affect the corporation's right to a lien for the amount due which was susceptible of definite ascertainment by calculation.

3. SAME—FOREIGN CORPORATIONS—NONCOMPLIANCE WITH STATE LAW—RIGHT TO SUE.
Under W. Va. Code 1899, c. 54, § 30, as amended by Acts 1901, p. 108, c. 35, § 31, providing that a foreign corporation not having complied with the laws of the state shall not be entitled to maintain any action in the courts of the state, and that the failure of a foreign corporation plaintiff to so qualify may be pleaded in abatement in any action, suit, or proceeding, such failure, so far as the federal courts are concerned, does not affect the jurisdiction of the court in which the suit is pending nor the validity of a contract sued on, but is a matter which the defendant is entitled to raise or waive at its election.

4. APPEARANCE—PLEADING—FILING DEMURRER.
In the federal courts, the filing of a demurrer amounts to a general appearance.

5. PLEA—ABATEMENT AND REVIVAL—CAPACITY TO SUE—ABATEMENT—TIME.
Where, in an action by a foreign corporation, defendant demurred and after the demurrer was overruled, filed an answer to which replication was had after which defendant filed a cross-bill, and after a demurrer to this was overruled plaintiff answered the cross-bill and a replication was filed to this on which issue was joined and a trial had on the merits, it was then too late for defendant to plead in abatement plaintiff's alleged disability to sue because it had not complied with the laws of the state.

6. CORPORATIONS—WORKMEN'S LIENS—RIGHT TO LIEN—PAYMENT IN BONDS.
Where an option contained in a railroad construction contract by which plaintiff was entitled to take one-half of the amount due it thereunder in bonds of the railroad company at a reduced rate instead of money was not availed of, but instead of tendering the bonds defendant canceled the contract, prevented plaintiff from further performing the same, and denied all liability thereunder, such option did not deprive plaintiff of the right to a lien given by a state statute for the amount due under the contract.

7. SAME—PRIORITY—OBJECTIONS—ESTOPPEL.
Where defendant railroad company had broken a construction contract sued on, and was itself in the hands of a receiver, it was estopped from itself objecting to the amount found due the contractor, and to the order of priority of the lien awarded to it.

8. RAILROADS—CONSTRUCTION CONTRACT—BREACH—LIEN—SALE OF PROPERTY.
Where a railroad contractor was entitled to a lien on the road on the railroad's breach of a construction contract and the appointment of a receiver of the railroad's property, it was proper for the court on foreclosing such lien to decree a sale of the property to pay the indebtedness found to be due.

9. APPEAL—OBJECTIONS NOT RAISED AT TRIAL—OTHER ACTION PENDING.
In a suit to foreclose a lien on the property of a railroad company, an objection to an order of sale because of receivership proceedings pending in a federal court sitting in another state could not be raised for the first time on appeal.

Cross-Appeals from the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

For opinion below, see 140 Fed. 193.

George R. Wallace (V. B. Archer, on the brief), for Wetzel & T. Ry. Co.

H. P. Camden, for Tennis Bros. Co.

Before PRITCHARD, Circuit Judge, and WADDILL and McDOWELL, District Judges.

WADDILL, District Judge. On the 23d day of September, 1903, the Tennis Bros. Company filed its bill in equity in the United States Circuit Court for the Northern District of West Virginia, against the Wetzel & Tyler Railway Company, to enforce its mechanic's lien for the amount of the agreed price of certain labor actually performed by the plaintiffs in behalf of the defendant in the construction of its railway pursuant to a contract theretofore entered into between them, and also for the recovery of damages for breach of contract in not permitting the plaintiff to wholly perform such contract. To this bill a demurrer was filed and overruled by the court; and thereupon the defendant railway company duly answered, denying generally the allegations of the bill, and particularly that there had been a modification made in the contract after its execution, relating to the supervision and construction of certain car barns, powerhouse, and supplies furnished therefor; and also that said plaintiffs had failed to keep the contract on its part; the defendants contention being that C. C. Tennis had not personally supervised the construction of the road as was contemplated; that the work done was negligently performed; that the track as completed was imperfect and defective, caused by the failure of the plaintiff to personally supervise the same as aforesaid; to employ competent men for the work, and to furnish sufficient and suitable implements and materials for the same. A general replication was duly filed to this answer, and issue joined thereon; and thereafter, on the 23d day of June, 1904, a cross-bill was filed by the railway company praying for affirmative relief against the plaintiff, the Tennis Bros. Company, and asking damages in the sum of $50,000, against it for its failure to properly perform the contract entered into by it in connection with the construction of said road, and on account of which the railway was forced into the hands of a receiver subsequent to the institution of this suit. To this cross-bill the Tennis Bros. Company demurred, which demurrer was overruled; and thereupon an answer was duly filed denying generally the averments of said bill. To such answer, a replication was made, and issue joined thereon, and, without reference to a master, a mass of evidence was taken by the parties respectively, and the cause submitted to the court for hearing on the merits; and a final decree was duly entered on the 23d day of August, 1905, from which both parties appealed.

The decision of the lower court was, in effect, that no recovery could be had upon the cross-bill, and the same was dismissed; that the plaintiff, the Tennis Bros. Company, were entitled to recover only for the amount of labor and work done under their contract of the 15th of April, 1903, up to the time of the cancellation thereof by the defendant, to wit, for the sum of $12,898.45, being principal and interest due as of the date of the decree; and that no recovery could be had

by it, either on account of its estimated profits, arising by reason of the failure of the defendant to allow it to perform the contract on its part, or because of the alleged work and labor done and supervision and construction of the car barns and power house, because of an alleged modified agreement; and said court further decreed that for the amount above specified, said Tennis Bros. Company was entitled to a lien upon the property of the defendant railway company, enforceable in this cause, and for which the defendant's property should be sold. In the view we take, it will not be necessary for this court to enter into a discussion of all of the various assignments of error made upon the appeal and cross-appeal by the parties respectively, further than to say that the same have been fully considered, and except as herein specifically referred to, are believed to be without merit.

At the threshold, we deem it proper to say that we fully concur in the action of the lower court in its ruling upon the four questions specifically passed upon by it, namely, in the dismissal of the cross-bill; the ascertainment that the plaintiff was only entitled to recover, under the circumstances of this case, for the actual work and labor done and performed under its contract, as distinguished from what it claimed on account of estimated profits; that nothing should be allowed it on account of its rights arising from the so-called "modified contract" respecting the construction of the car barns and power-house of the defendant company; and that the amount decreed the plaintiff was properly ascertained by the lower court. We shall likewise not attempt to give reasons in detail for these conclusions; or review the voluminous evidence contained in the record, but will content ourselves in this regard upon these four questions, by a reference to the able and convincing opinion of the learned judge of the court below, as containing our views thereon.

Coming to the right of the plaintiff to recover at all by reason of the contract, and the mechanic's lien claimed pursuant thereto, it is earnestly insisted that the plaintiff corporation is not entitled to the benefit of the mechanics' liens act of West Virginia; that it had no standing in court to maintain such a suit, if entitled to such relief, because of its failure properly to qualify itself as a corporation to do business under the laws of the state of West Virginia; that it had forfeited its right to a mechanic's lien by reason of the agreement to accept bonds in lieu of money, in part payment of the amount to become due; that it did not have the first lien upon the property of the defendant company; and in no event, should the lower court in this proceeding have decreed in its favor, because of the pendency of a suit in the federal court sitting in the state of Pennsylvania, and in which the property of the defendant company was being administered. These questions we will consider in the order named:

First. It is earnestly insisted that the Tennis Bros. Company is not entitled to a mechanic's lien, because it is a corporation; that only individuals are given such lien under the West Virginia statute; and that in no event can a lien be sustained for a claim arising under the contract of employment involved here, or for the character of service contemplated by the contract. The lien is claimed under sec-

tion 7 of chapter 75 of the Code of West Virginia of 1899, which provides that:

"Every workman, laborer, or other person, who shall do or perform any work or labor, by virtue of any contract, for any incorporated company doing business in this state, shall have a lien for the value of such work upon all the real estate and personal property of said company, and such lien shall have priority over any lien created by deed or otherwise on such real estate, or personal property, subsequent to the time when the said labor was performed, but there shall be no priority of lien as between the parties claiming under the provisions of this section; provided, that no lien shall be created under this section for labor performed more than nine months before such lien was recorded."

The lien was duly claimed under the statute, and no contention is made on that account; but it is insisted that the same cannot be maintained for the reasons above stated. Can a corporation claim the benefit of this statute, and secure a lien thereunder? This depends upon the interpretation to be given to the language "or other person" in the act, and whether corporations are embraced therein for a claim otherwise entitled to the benefits of the act. The Code of West Virginia, 1899, § 17, c. 13, subd. 9, says:

"The word 'person' includes corporations, if not restricted by the context."

There is nothing in the context of the act under consideration, section 7, c. 75, Code, supra, that would either preclude a corporation from claiming the benefit of the act, or indicate that the words, "or other person" were used in any narrower or restricted sense. The word "person" used in the statute has not unfrequently been under review by the courts; and certainly so far as the states of Virginia and West Virginia are concerned, the use of such word "person" includes a corporation. This is undoubtedly the rule in civil proceedings. Quesenberry v. People's B. & L. Ass'n, 44 W. Va. 512, 30 S. E. 73; Railroad Co. v. Gallahue, 12 Grat. (Va.) 655, 663, 65 Am. Dec. 254; Miller v. Commonwealth, 27 Grat. (Va.) 110; Portsmouth Gas Co. v. Sanford, 97 Va. 125, 33 S. E. 516, 45 L. R. A. 246, 75 Am. St. Rep. 778. And in the courts of the states of New York, Georgia, Nebraska, and Utah, the word "person" used in the mechanic's lien acts of those states, has been specifically held to include corporations. Gaskell v. Beard, 58 Hun, 101, 11 N. Y. Supp. 399; Loudon Assur. v. Coleman, 59 Ga. 653; Chapman v. Brewer, 43 Neb. 890, 62 N. W. 320, 47 Am. St. Rep. 779; Doane v. Clinton, 2 Utah, 417. At common law, a corporation is deemed a "person" when the circumstances in which it is placed, are identical with those of a natural person, which, irrespective of the statute, and the construction placed thereon by the court, under the circumstances of this case, would include such a claim as the one sought to be enforced here. It is true that in this case, the claim is in behalf of a corporation; but it is for work of an individual character, as distinguished from corporate service; and it is quite clear that the real purpose and intent of the contract was to have the personal supervision and service of C. C. Tennis, and such of his corps of general engineering and office force, as was necessary to intelligently "supervise the construction for the party of the second

part, of its electric railway line," proposed to be constructed. Indeed, one of the defenses here is that the contract was broken because of the failure of said Tennis sufficiently to devote his personal service to the construction of the work; and there would seem to be no good reason why a corporation or person thus performing such "work or labor" should not be entitled to the benefit of the mechanic's lien law. To supervise the construction of a street car line, as well individually as by and through assistants, is to perform "work or labor".; and the person so rendering the same, is entitled to the benefits of the mechanic's lien law of West Virginia; and there is nothing in the contention that the plaintiff should be disentitled to the benefit of this lien because his compensation was measured by a percentage on the actual net cost of all materials and labor necessary for the construction of the electric railway, instead of a specific sum; the manner of arriving at the amount due being matter of calculation, and has no bearing upon the right to the same.

Counsel for the defendant referred to quite an array of authority bearing upon persons entitled to claim the benefit of the mechanic's lien laws, which the court has not failed to carefully note, including the case from West Virginia of Richardson v. Norfolk & Western Railroad Co., 37 W. Va. 641, 17 S. E. 195; the contention being that only employés of the corporation should be entitled to the benefit of such lien, as distinguished from persons having contractual relations therewith. These, however, will not affect this case; for here, the plaintiff, in the very language of the act, is a "person," who by virtue of a contract, performs work and labor for the defendant company; the work being of a character for which a right of lien existed. Architects, engineers, and others who superintend the erection and construction of buildings, have frequently been held entitled to the benefit of the mechanic's lien law; and we think it quite clear that a person doing similar work of a personal character on the construction of a railroad, is entitled to a like lien. Phœnix Co. v. Hotel Co. (C. C.) 66 Fed. 683; Couper v. Gaboury, 69 Fed. 7, 16 C. C. A. 112; Mulligan v. Mulligan, 18 La. Ann. 20; Wanganstein v. Jones, 61 Minn. 262, 63 N. W. 717; Stryker v. Cassidy, 76 N. Y. 50, 32 Am. Rep. 262; Willamette v. Remick, 1 Or. 169.

Second. The right of the plaintiff to maintain this suit is seriously controverted, because of its failure to qualify under the laws of the state of West Virginia, as a corporation to do business in that state. Code W. Va. § 30, c. 54, as amended by section 31, c. 35, p. 108, of the Acts of 1901. It is admitted that at the time of performing the work, taking out the mechanic's lien, and the institution of the suit, the corporation had not conformed to the law in this respect; and that prior to the determination of and entry of the final decree therein, it had so qualified. We are asked to pass upon the effect of this failure. In the view we take, it is not essential that we do so, so far as this suit, upon its pleadings, is concerned; though we think it is quite apparent that this omission on the part of the plaintiff does not operate to end a suit otherwise regularly instituted, or to destroy a right in other respects validly existing (Toledo Co. v.

Thomas, 33 W. Va. 556, 569, 570, 11 S. E. 37, 25 Am. St. Rep. 925), and that the greatest effect, so far as the federal courts are concerned, would be to suspend the prosecution of such suit until compliance was had with the statute. The right of the defendant to raise this question of the plaintiff's ability to sue, was a personal one. It did not relate to the jurisdiction of the court, in which the suit was pending; or to the validity of the contract sought to be enforced; but was a matter which the defendant could place in issue, or not, at its option; the express provision of the act being that the plaintiff's failure to so qualify itself "may be pleaded in abatement of any such action, suit or proceeding." If the defendant saw fit, as it did in this case, not to present the technical question affecting the plaintiff's right to sue, but go to trial on the merits, it had manifestly the right so to do. A demurrer was filed and overruled; an answer was filed; replication was had thereto; a cross-bill was filed, and a demurrer by the plaintiff to that overruled; answer to the cross-bill and replication thereto; and upon the issue thus joined, a trial was had upon the merits of the case; and it is too late after this, to avail itself of such defense by pleading in abatement the disability of the plaintiff to sue. In the federal practice, a demurrer is a general appearance (Jones v. Andrews, 10 Wall. [U. S.] 327, 19 L. Ed. 935; Foster, Fed. Prac. [3d Ed.] 270); and under the laws of the state of West Virginia (Code, c. 125, § 16), objections to the jurisdiction of the court have to be pleaded in abatement; and are not allowed, after the defendant has pleaded in bar, or answered to the declaration or bill; or after a rule to plead, or a decree of conditional judgment, nisi. Nothing is better settled than that after a plea in bar, a plea in abatement will not be received, except for new matter arising after the commencement of the suit. 1 Chitty (16th Am. Ed.) bottom page 569; 4 Min. Inst. (1st Ed.) 625. In this case, no plea in abatement has ever been filed, and none could have been received after the filing of the demurrer; and certainly not after the filing of the answer, the demurrer having been overruled. Livingston v. Story, 11 Pet. (U. S.) 351, 9 L. Ed. 746; Cook v. Burnley, 11 Wall. (U. S.) 659, 661, 20 L. Ed. 29; Spencer v. Lapsley, 20 How. (U. S.) 264, 267, 15 L. Ed. 902; Insley v. United States, 150 U. S. 515, 14 Sup. Ct. 158, 37 L. Ed. 1163; Hollins v. Brierfield Coal Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113; Riley v. Jarvis, 43 W. Va. 43, 49, 26 S. E. 366; Simpson v. Edmiston, 23 W. Va. 675; Abell v. Penn, 18 W. Va. 400; Washington v. Hobson, 15 Grat. (Va.) 122; Middleton v. White, 5 W. Va. 572.

Third. The contention that the right of lien was lost by the Tennis Bros. Company, because of the agreement to receive one-half of the amount to be paid it under the contract, in first mortgage bonds of the defendant company, at 90 cents on the dollar, is, to our minds, clearly untenable. This privilege on the part of the defendant to pay one-half of the amount agreed on in bonds at a reduced rate, instead of money, was an optional one, which was not availed of by it; but, on the contrary, instead of tendering bonds, it canceled the contract with the plaintiff, deprived it of the right to further carry out the contract, and at the same time denied all liability either because of any

service rendered under the same, or by reason of the cancellation thereof; and after a long and bitter controversy between them, growing out of these conditions, upon the court's ascertainment of the sum actually due to the plaintiff at the time of the breach of the contract by the defendant, for work and labor performed under the contract, such amount became a debt due unconditionally, and payable in money; and the defendant should not for a moment be allowed at the end of such a contest, then to avail itself of the benefit of discharging its liability by tendering its own securities, which might prove valueless, and probably were greatly depreciated. Upon its electing to cancel the contract, making it impossible for the plaintiff to execute same, and its refusal to pay the plaintiff for the work it had actually performed, thereby forcing it to resort to the courts to secure relief under its contract, the defendant company then and there ceased to occupy the favored position of having the right to tender its obligations under the provisions of the contract between them, as distinguished from paying the amount finally ascertained to be due by it, as any other litigant would have to do. Marlor v. Texas & P. R. Co. (C. C.) 21 Fed. 385; McNitt v. Clark, 7 Johns. (N. Y.) 465; Gilbert v. Danforth, 6 N. Y. 585; Stephens v. Howe, 2 Jones & S. (N. Y.) 133; Stewart v. Donelly, 4 Yerg. (Tenn.) 177; Choice v. Moseley, 1 Bailey (S. C.) 136, 19 Am. Dec. 661; Butcher v. Carlile, 12 Grat. (Va.) 520; Church v. Feterow, 2 Pen. & W. (Pa.) 301; Trowbridge v. Holcomb, 4 Ohio St. 38; Perry v. Smith, 22 Vt. 301; Mettler v. Moore, 1 Blackf. (Ind.) 342. As to whether the complainant had a lien for the amount thus found to be due it, and the order of priority of such lien, the defendant company having broken the contract, and being itself in the hands of a receiver, should at least be estopped from gainsaying it; and so far as this litigation is concerned, no other lienor has appeared to interpose such objection.

Fourth. It is finally insisted that the plaintiff is not entitled to the first lien upon the property of the defendant company; and that in no event should the lower court in this proceeding have decreed in its favor, and for the sale of the property, because of the pendency of the suit in the federal court in Pennsylvania, in which the affairs of the defendant company were being wound up, and its estate administered. So far as the first lien is concerned, while the opinion of the court does say that the right to the first lien existed in behalf of the plaintiff, the decree does not specifically so adjudicate; but merely that there exists a lien, and directs sale of the property. We think that so far as this record shows, this plaintiff was entitled to a first lien upon the property sought to be subjected to its lien; but that the court below was right in decreeing in favor of the plaintiff, and for a sale of the property to pay the indebtedness adjudged to be due, there can be to our minds no serious question. What might have been the duty of the court respecting the ascertainment of liens, or the consideration to be shown to the pendency of the suit in the federal court in Pennsylvania, is a matter that we do not feel called to pass upon; since the question of the existence of other liens, and the determination of rights arising under them between the holders of the same, and the plaintiff, was

not asked at the hands of the court below. Nor was the pendency of the receivership suit in the federal court in Pennsylvania, set up until after the decree of sale herein in favor of the plaintiff; and it is too late to raise these questions for the first time upon appeal. To give consideration to them, would enable the defendant to withhold such defense until after the decision upon the merits of the case; and then avoid the effect of an adverse determination, by raising matters in no way in issue before the trial court. We think that the plaintiff was clearly entitled to the relief afforded it in the collection of its debt, by the decree of the court below, and that there was no error therein, as against which relief can be obtained in this court.

The decree of the lower court will be affirmed, with costs.

Affirmed.

MORGAN et al. v. FIRST NAT. BANK OF MANNINGTON et al.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1906.)

Nos. 616, 642.

1. BANKRUPTCY—REVIEW—MODE—APPEAL—PETITION TO REVISE.

Where the validity of a trust deed given by a bankrupt within four months of the institution of bankruptcy proceedings, as against other creditors, arose in the bankruptcy proceedings in determining the priority of claims, such question was reviewable by the Circuit Court of Appeals on a petition to superintend and revise, as authorized by Bankr. Act July 1, 1898, c. 541, §§ 23, 24, 30 Stat. 552, 553 [U. S. Comp. St. 1901, p. 3431], and not by appeal.

2. SAME—PREFERENCE—TRUST DEEDS—VALIDITY.

Where a trust deed was executed by a bankrupt to secure an antecedent debt without any actual fraud within four months prior to the institution of bankruptcy proceedings, and was intended to create a preference, and was accepted for that purpose at a time when the bankrupt was insolvent, and it resulted in giving a preference, it was avoided by the bankrupt's adjudication as a bankrupt, as provided by Bankr. Act July 1, 1898, c. 541, §§ 60a, b, 67e, 30 Stat. 562, 564 [U. S. Comp. St. 1901, pp. 3445, 3449].

3. SAME—INVALIDITY UNDER STATE LAWS.

A trust deed securing an antecedent debt without a new consideration, executed by a corporation while insolvent for the purpose of prefering one creditor over another, which was accepted for that purpose, and operated as a preference, was void provided it was assailed within four months of the recordation thereof, as provided by Code W. Va. 1899, c. 74, § 2, and was therefore also void as against the grantor's creditors in bankruptcy, as provided by Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449].

4. SAME—CONTRACT—RELATION.

Where a contract providing for the execution of a trust deed to secure bonds of a corporation given for advances was not recorded, a trust deed executed pursuant to such contract within four months prior to the institution of bankruptcy proceedings could not take effect by relation as of the date of the contract, in order to sustain the same as against unsecured creditors of the bankrupt.

5. COURTS—FEDERAL COURTS—RULES OF DECISION.

In determining the validity of a mechanic's lien in a bankruptcy proceeding, the federal courts will be governed by the state laws.

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

On the 16th day of May, 1903, five gentlemen of the town of Cameron, W. Va., consisting of A. E. Fox and others, as parties of the first part, entered into an agreement with the Mannington Realty Co., party of the second part, and the First National Bank of Mannington, W. Va., and others, parties of the third part, to construct, build, and equip a pottery plant. Said Fox and others were to construct the plant, the said Mannington Realty Company to donate and convey on or before the 26th day of May, 1903, three acres of land to said Fox and others, promoters, and the First National Bank of Mannington and others, parties of the third part, were to furnish the money. The contract provided that the deed for the three acres of land should be made to A. E. Fox and others, the parties of the first part, and upon the charter and organization of the pottery company said Fox and others were to convey said land to the pottery company. The said Fox and others, parties of the first part, were to execute to the said parties of the third part their interest-bearing gold bonds, to become due on the 1st day of January, 1904, and to be dated and delivered to the parties of the third part as money was needed in the construction and equipment of the plant; and the agreement further provided that the said bonds so executed should be taken up and canceled, and the stock or gold bonds of the pottery company, or both such stock and bonds, to be secured by deed of trust upon the whole property, should be substituted, and the said parties of the first part released from all responsibility for their said notes. Most of the provisions of said agreement were carried out. The deed to Fox and others, however, was not made, and said Fox and others waived this requirement; and, some months after the same was to have been executed, directed that the Mannington Realty Company make the conveyance direct to the Augusta Pottery Company, which was done on the 29th day of December, 1903, and recorded on the 15th day of January, 1904. The plant was built and equipped during the summer and fall of 1903 in the name of the Augusta Pottery Company; the company having been incorporated in that name by the said Fox and others shortly after the contract was entered into of the 16th day of May, 1903, and pursuant to said agreement. The deed to the land was not made and recorded until the dates above mentioned, and the said contract was kept in the possession of the parties in interest, was not known of, and never put to record until it was incorporated in the deed from the Mannington Realty Company of the 29th day of December, 1903, and admitted to record on the 15th day of January, 1904, eight days after the deed of trust had been executed and recorded by the said Augusta Pottery Company, as contemplated in the said agreement, mortgaging its property to cover its bonded indebtedness. The mortgage bore the date of the 1st of January, 1904, and was recorded on the 7th day of the same month, was executed pursuant to a resolution passed at a meeting of the board of directors and of the stockholders of said Augusta Pottery Company held on the 16th day of November, 1903, and secured a bond issue of $45,000. During the construction of the plant, the parties of the third part to said agreement, being the appellees in this appeal, from time to time advanced money, according to the terms of the contract of the 16th day of May, 1903, to the said A. E. Fox and others, and accepted the notes of said Fox and others for the amount of their advances, as aforesaid, and as was contemplated by said agreement; and after the execution of the mortgage aforesaid, all of said notes of said Fox and others were duly taken up by said Augusta Pottery Company, and the bonds of said company so secured regularly substituted in their place, and the said pottery company assumed the interest-bearing gold bonds of said Fox and others to the banks and others, the parties of the third part to the said contract furnishing the money, all of which was done long after the money was furnished under said contract, and used in the construction and equipment of the said plant, and within four months of the time of the inauguration of the involuntary bankruptcy proceedings herein on the 23d day of April, 1904. The said plant was duly constructed and equipped in the name of the Augusta Pottery Company, and the said company contracted

debts at various times, for some of which the creditors were entitled to mechanics' liens under the laws of the state of West Virginia, and upon the recordation of the mortgage aforesaid and the title deeds to the property, and within the time provided by the statutes of West Virginia, filed their mechanics' liens, claiming a lien upon the property of the said pottery company prior to said bonded indebtedness. These debts amounted in the aggregate to some $12,000, of which $6,025.22 was covered by mechanics' liens. The unsecured creditors having filed their involuntary petition in bankruptcy against the pottery company, the same was regularly adjudged bankrupt, and pending such proceedings the said real estate and plant was sold, from which was realized the sum of $38,000. The case was duly referred to the referee, who decided that out of the $38,000 should first be paid the costs of sale, certain unpaid taxes, and costs of the bankruptcy proceedings; second, two labor claims, aggregating $66.01; and, third, the mechanics' liens aforesaid; and that the amount remaining, of $29,297.73, should be distributed pro rata between the unsecured creditors and the bonded indebtedness of $45,000, on the basis of 61.68 per cent.; the referee's conclusion being that said mortgage was avoided by reason of the bankruptcy proceedings, it having been executed to secure payment of an antecedent debt. From this decision of the referee an appeal was taken by the holders of the mortgage bonds, the appellees herein, to the United States District Court, and that court reversed the action of the referee in as far as he held that the mortgage given by the bankrupt company was avoided by the bankruptcy proceedings, and that the mechanics' lien took precedence over such mortgage indebtedness, and placed the unsecured creditors upon a footing with the mortgage bondholders. From this decision the supply lien creditors, the bankrupt's trustee, and certain of the unsecured creditors appealed to this court. After the appeal was taken, a motion was regularly made to dismiss the same, because an appeal was not the proper method of presenting the questions involved in this court, and thereupon the appellants regularly filed their petition for review, and presented the same record, which is case No. 642, the number of the case on appeal being 616.

Scott C. Lowe, for appellants.

C. A. Snodgrass, 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.

We are first called upon to determine whether this court can afford the relief sought, either by appeal or on motion for review under the bankruptcy act; and, if so, which is the appropriate proceeding. Just when one or other of the remedies referred to is applicable may be said to be not free from doubt under the existing bankruptcy act, and as to which there has been much diversity of view by the different courts. But, so far as the questions arising in this case are concerned, it does not seem to the court that there is room for serious controversy as to which is the proper remedy to be adopted, and we shall not therefore enter into any general discussion thereof, or attempt to harmonize the apparently conflicting views of the courts on the subject. The question here is one arising in bankruptcy proceedings; that is, in the administration of the estate in bankruptcy, as distinguished from a controversy at law or in equity arising in the course of bankruptcy proceedings, such as is clearly contemplated by sections 23 and 24 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 552, 553 [U. S. Comp. St. 1901, p. 3431]. Denver Nat. Bank v.

Klug, 186 U. S. 202, 205, 22 Sup. Ct. 899, 46 L. Ed. 1127; In re Friend, 134 Fed. 778, 67 C. C. A. 500. The debt is not disputed, and the point sought to be reviewed is one of law, arising upon the determination of the validity of a trust deed executed by the bankrupt company within four months of the institution of the bankruptcy proceedings, and hence belongs clearly to the class of cases made subject to review by this court under its general power to "superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy." Bankr. Act July 1, 1898, c. 541, 30 Stat. 553, § 24b [U. S. Comp. St. 1901, p. 3432]. This view has been taken by the Circuit Courts of Appeals of several of the circuits, notably, in the First, Sixth, and Seventh. In re Rouse, Hazard & Co., 91 Fed. 96, 33 C. C. A. 356; In re Richards, 96 Fed. 935, 37 C. C. A. 634; Courier Journal Co. v. Schaefer-Meyer Brewing Co., 101 Fed. 699, 41 C. C. A. 614; In re Worcester County, 102 Fed. 808, 42 C. C. A. 637; Note to In re Eggert, 102 Fed. 735, 43 C. C. A. 13, 14, 16, 17; In re Mueller, 135 Fed. 711, 68 C. C. A. 349. The latter is a decision of the Circuit Court of Appeals for the Sixth Circuit, and to the opinion of President Lurton of that court reference is especially made, as containing an able and interesting discussion of the general subjects of appeals and review in bankruptcy cases from the District Courts of the United States.

Second. Coming to the merits of the case, we are called upon to pass upon the effect of bankruptcy proceedings on the trust deed on its plant and other property, given by the bankrupt within four months of the institution of the bankruptcy proceedings, and whether the bonded indebtedness secured under such deed of trust takes precedence over certain mechanics' liens duly perfected and recorded in the proper courts of West Virginia against the bankrupt company for debts incurred during the construction of its plant, as well as the effect of the same upon the unsecured creditors of the company. The following extracts from the provisions of the present bankruptcy act as amended have special reference to the case.

"Sec. 60a. Preferred creditors. A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after filing the petition, and before the adjudication, * * * made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. * * *" Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445].

"Sec. 60b. If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

"Sec. 67e. That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act, and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair con-

sideration; * * *. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory, or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt." 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449].

There appears to be nothing in this record to indicate that any actual fraud was contemplated or had in the making of the trust deed in question and the acceptance of the securities thereunder, but that the same was intended to create a preference; and the securities accepted for that purpose, and at a time when the grantor in the deed was insolvent, and resulted in giving such preference, is manifest; and it is equally clear that the trust deed, having been made within four months of the filing of the bankruptcy petition, is avoided by the adjudication of the grantor therein as a bankrupt. Nothing is better settled under the present bankruptcy act than that all conveyances, transfers, or incumbrances, other than for value or a present consideration, given by a bankrupt within four months of the filing of the petition in bankruptcy against him, either for the purpose of hindering, delaying, or defrauding creditors, or giving one a preference over another, or the effect of which is to enable any one creditor to obtain a greater percentage of his debt than any other of such creditors of the same class, become inoperative and null and void upon the adjudication in bankruptcy. Wilson v. Nelson, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147; In re Richards, 96 Fed. 935, 37 C. C. A. 634; City National Bank v. Bruce, 109 Fed. 69, 48 C. C. A. 236; Stedman v. Bank of Monroe, 117 Fed. 237, 54 C. C. A. 269; Pollock v. Jones, 124 Fed. 163, 167, 61 C. C. A. 555; Collier on Bankruptcy (5th Ed.) 454, 456, 530, and cases cited. The trust deed was, moreover, void under the statute of West Virginia to the extent that it sought to prefer one creditor over another, provided the same was assailed within four months of the recordation thereof (section 2, c. 74, Code W. Va. 1899), and by reference to section 67e of the bankruptcy act, supra, such invalidity is expressly recognized.

Third. Nothing that has been said herein is intended in any way to militate against the right of the bankrupt company to execute the trust deed in question for a present consideration; but confessedly in this case the deed was executed to secure an antecedent debt, and there was no claim that at the time of its execution there was a new or present consideration moving from the beneficiaries under the deed to the said company. On the contrary, the money due to the appellees herein, who accepted the bonds secured by said mortgage or trust deed, had long theretofore been advanced to the original promotors of the bankrupt company for and on account of said company, and had been used by said promotors in the construction and equipment of the plant of the bankrupt company.

Fourth. The suggestion that the trust deed in this case should relate back and become effective as of the date of the contract of the

16th day of May, 1903, and therefore be treated as a transaction not void by the bankruptcy proceedings, is entirely untenable. Such would not be the result if the grantor in such trust deed had been a party to the contract, if for no other reason than because of the nonrecordation thereof; and, not being a party, it assuredly could not serve to give such extension, and enable the bankrupt company to avoid the provisions of the bankrupt law, and secure its creditors one over another. The case of City Nat. Bank v. Bruce, 109 Fed. 69, 48 C. C. A. 236, supra, a decision of this court, would seem to be conclusive of this question had the bankrupt been a party to the contract. In that case three notes were secured by the bankrupt in October, 1899, by trust deed upon his property, the last of which notes fell due on the 9th of January, 1900, and on that day a new trust deed was executed, securing the last note of $919 and $2,681 in addition. Upon bankruptcy proceedings inaugurated within four months after the latter conveyance, the court held the deed only good for the amount advanced at the time of its execution on the 9th day of January as the present consideration, and rejected the $919; the October deed securing the same never having been admitted to record. The contract of the 16th day of May, 1903, giving it the greatest possible effect, and treating it as an undertaking of the bankrupt company to make a conveyance, assuredly would have no greater effect than one actually made in the case referred to and not recorded. In re Ronk (D. C.) 111 Fed. 154; Pollock v. Jones, 124 Fed. 163, 166, 61 C. C. A. 555; In re Dismal Swamp Contracting Co. (D. C.) 135 Fed. 415. What is the effect of an executory agreement in writing, stipulating for the execution in future of a mortgage or deed of trust, has been the subject of review by the courts; and in Atkinson v. Miller, 34 W. Va. 118, 11 S. E. 1007, 9 L. R. A. 544, it was expressly held that to give effect to such instrument, even as an equitable mortgage, it was necessary it should be recorded to become effective against creditors and purchasers without notice. In Feely v. Bryan, 55 W. Va. 586, 588, 589, 47 S. E. 307, in interpreting section 2 of chapter 74 of the Code of 1899 of that state, supra, the court decided that if one loaned money to a solvent person, with an agreement that a mortgage was to be made on certain property to secure the loan, and later, when insolvent, the borrower makes the mortgage, it is not a good lien as to creditors existing at the time of the recordation of the mortgage. These latter decisions are of special importance in this case, since the courts of bankruptcy follow the state law in ascertaining the validity and priority of liens against property of bankrupts. Collier on Bankruptcy (5th Ed.) 522; Loveland (2d Ed.) 582, 595.

Fifth. In argument counsel for appellees question the sufficiency of the several mechanics' liens reported upon favorably by the referee. No specific review seems to have been asked of the district judge from the decision of the referee in this respect, and certain it is the district judge in the order now under review does not appear to have questioned the action of the referee in passing upon the validity of the mechanics' liens themselves, but, on the contrary, treated them as

valid, and determined only the order of priority of the bonded indebtedness of the bankrupt over said mechanics' liens. It is not entirely clear, therefore, that this question is before the court at all; but upon the assumption that it is, the conclusion reached by us is that the said several mechanics' liens allowed by the referee, with the exception of the lien of the Pittsburg Gage & Supply Company, have been perfected and secured in substantial conformity with the laws of West Virginia, and that they constitute valid liens, enforceable in bankruptcy against the estate of the bankrupt company. The laws giving this class of lien should be liberally construed, so as to secure rights intended to be preserved; and certainly, so far as these particular liens are concerned, there is no such defect in them as would justify their rejection. The statute securing liens to mechanics, laborers, materialmen, and others will be found in sections 2 and 3 of chapter 75 of the Code of 1899 of West Virginia, and Cushwa v. Improvement L. & B. Ass'n, 45 W. Va. 490, 32 S. E. 259, is a comparatively recent and interesting discussion of the subject of such liens and their order of priority.

Regarding the claim of the Pittsburg Gage & Supply Company for $2,193.15, the mechanic's lien in that case does not appear to conform to the laws of the state of West Virginia as construed by the Supreme Court of Appeals of that state, by which decision we feel bound in determining upon the validity of the statutory lien enforceable in bankruptcy. The precise question raised as to this lien—namely, whether the affidavit supporting this lien, taken before a notary public in the state of Pennsylvania, was properly authenticated—was decided in the case of Lockhead v. Berkley Springs W. & I. Co., 40 W. Va. 553, 21 S. E. 1031, and such an authentication as we have in this case was therein declared to be insufficient under the laws of West Virginia, and the mechanic's lien declared on that account invalid. The claim of the Pittsburg Gage & Supply Company will therefore be treated only as an unsecured claim in the future conduct of this case.

Sixth. It follows from what has been said that case No. 616, being the appeal, should be dismissed, and the relief afforded herein given in No. 642, being the case coming under the section of the bankrupt act "to superintend and revise, in matter of law, the proceedings of the several inferior courts of bankruptcy," that the action of said court be reversed, and the cause remanded thereto, to be proceeded in hereafter in accordance with the views herein expressed.

MOORE v. GREEN et al.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1906.)

No. 615.

1. BANKRUPTCY—LIENS—ENFORCEMENT—PETITION TO SUPERINTEND AND REVISE.

Where, prior to the institution of bankruptcy proceedings, a general creditor brought suit in a state court to have a deed of trust on certain of the bankrupt's property declared a lien for the benefit of creditors

generally, as provided by Code W. Va. 1899, c. 74, § 2, and on institution of bankruptcy proceedings both the referee and district court held that the institution of such suit became inoperative to affect the deed because the bankruptcy proceedings were not instituted within four months subsequent to the execution thereof, petitioner was entitled to have such decision reviewed on an application to the Circuit Court of Appeals to superintend and revise.

2. SAME—PROCEEDINGS IN STATE COURT—INSTITUTION OF BANKRUPTCY PROCEEDINGS—EFFECT.

Prior to the institution of voluntary bankruptcy proceedings by a farmer, suit was instituted by a general creditor to have a deed of trust executed by the bankrupt while insolvent, but more than four months prior to the bankruptcy proceedings, declared for the benefit of all the bankrupt's creditors, as is authorized by Code W. Va. 1899, c. 74, § 2. *Held*, that the creditor prosecuting such suit thereby acquired a statutory lien on the property covered by such deed, which was not affected by the commencement of the bankruptcy proceedings under Bankr. Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448] § 64b. subsec. 5, prescribing the priority for the payment of debts, including debts owing to any person who "by the laws of the state" is entitled to priority.

3. SAME—PROCEDURE.

On the institution of bankruptcy proceedings, the bankruptcy court had jurisdiction to stay the prosecution of the suit in the state court, or in its discretion to permit the suit to proceed to judgment; the bankruptcy proceeding being suspended in the meantime only as to that portion of the estate involved in the proceedings in the state court.

4. SAME—EQUITABLE MORTGAGE—LIEN.

Where a wife from time to time before her husband's insolvency loaned him money, with the understanding that he would secure her for the same on his real estate, which he subsequently did after he became insolvent, and there was nothing in the wife's debt entitling it to special equitable consideration over other debts of the husband, such facts did not entitle the wife to an equitable mortgage operating to give her a valid lien, irrespective of a trust deed in her favor, which was not affected by Code W. Va. 1899, c. 74, § 2, authorizing a creditor of an insolvent to apply to a court of equity to vacate a preference in favor of a particular creditor, and to have the conveyance declared for the benefit of all creditors properly joining, etc.

5. SAME—TRANSFERS FRAUDULENT AS TO CREDITORS—CONSIDERATION FOR CONVEYANCE—DOWER—RELINQUISHMENT.

A postnuptial settlement made in behalf of a wife in consideration of her relinquishment of dower is only valid as against the husband's creditors to the extent of the dower released.

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

For opinion below, see 138 Fed. 192.

James M. Mason, Jr., for petitioner.

Forest W. Brown and A. W. McDonald (Brown, McDonald & Beckwith, on the briefs), for respondents.

Before PRITCHARD, Circuit Judge, and WADDILL and KELLER, District Judges.

WADDILL, District Judge. On the 10th day of November, 1902, George Porterfield, a farmer, filed his voluntary petition in bankruptcy in the District Court, and was on the 12th day of November, 1902,

duly adjudged bankrupt. Prior thereto, to wit, on the 11th day of June, 1902, he executed a trust deed upon his real estate to secure a debt of $12,500, in which his wife, Susan E. Porterfield, joined, and on the 13th day of the same month he executed a second trust deed to secure a debt of $4,976.73 to his said wife, being the aggregate of sundry loans made by her to him from time to time since the year 1884, and interest. On the 11th and 13th days of June, 1902, the said George Porterfield was insolvent, though his wife did not know, or have reasonable cause to believe, the existence of such condition. That the trust deed in favor of said Susan E. Porterfield was made pursuant to promises from time to time given her to secure her debt, and upon the express agreement and as the consideration for the release of her dower by joining in the deed to secure the $12,500; she having on a previous occasion waived her dower upon a like understanding to secure $2,500 on the property, which debt, however, was paid out of the proceeds of the $12,500 loan; the purpose of said latter negotiation being to extinguish all prior liens upon the property, amounting to some $5,000, and for the payment of other obligations, including an indebtedness to the state of West Virginia. The District Court proceeded with the bankruptcy case, and possessed itself of the estate of the bankrupt, consisting of the farm known as "Cassilis," mortgaged as aforesaid, which was subsequently sold in said proceedings, and the proceeds arising therefrom, amounting to $19,420.50, brought into court. An account of the bankrupt's liabilities was regularly taken, showing an indebtedness of $44,264.25, of which $25,766.20 was unsecured. After the execution of the deed of the 13th day of June, 1902, in favor of Mrs. Porterfield, to wit, on the 30th day of August, 1902, G. D. Moore, trustee under a certain deed of assignment from Eugene Baker, deceased, a creditor of said bankrupt for some $3,700, duly filed his bill in equity in the Circuit Court of Jefferson County, W. Va., assailing the deed to secure Mrs. Porterfield, because under section 2 of chapter 74 of the Code of West Virginia of 1899 it constituted a preference, and inured to the benefit of all creditors when so assailed within the period specified in said statute.

Section 2, so far as applicable, is as follows:

"Every transfer or charge made by an insolvent debtor attempting to prefer any creditor of such insolvent debtor, or to secure such a creditor, or any surety or indorser for a debt to the exclusion or prejudice of any other creditor, shall be void as to such preference or security, but shall be taken to be for the benefit of all creditors of such debtor, and all the property so attempted to be transferred or charged shall be applied and paid pro rata upon all the debts owed by such debtor at the time such transfer or charge is made; provided, that any such transfer or charge by an insolvent debtor shall be valid as to such preference or priority unless a creditor of such an insolvent debtor shall institute a suit in chancery within one year after such transfer or charge was made, to set aside and avoid the same and cause the property so transferred or charged to be applied toward the payment pro rata of all the debts of such insolvent debtor existing at the time such transfer or charge is made, subject, however, to the provision hereinafter contained with reference to creditors uniting in such suit and contributing to the expenses thereof. But if such transfer or charge be admitted to record within eight months after it is made, then such suit to be availing must be brought within four months after such transfer or charge was admitted to record. Every

such suit shall be deemed to be brought in behalf of the plaintiff and all other creditors of such insolvent debtor, but the creditor instituting such suit or proceeding, together with all creditors of such insolvent debtor, who shall come into the suit and unite with the plaintiff before final decree and agree to contribute to the costs and expenses of said suit, shall be entitled to have their claims first paid in full pro rata out of the property so transferred or charged, in preference to any creditor of such debtor who shall before final decree decline or fail to so unite, and agree to contribute to the cost and expenses of said suit, but not in preference to such creditor as may attempt to sustain the preference given him by such transfer or charge; provided further, that nothing in this section shall be taken to prevent the making of a preference as security for the payment of purchase money, or a bona fide loan of money, or other bona fide debt contracted at the time such transfer or charge was made or as security for one who at the time of such transfer or charge becomes an endorser or surety for the payment of money then borrowed. * * *"

During the pendency of this suit, other creditors having tendered their petitions therein, the bankruptcy proceedings were inaugurated as aforesaid.

A preliminary question has been presented by the respondent's motion to dismiss the proceedings, because the application to this court "to superintend and revise in matter of law" the action of the lower court is not the proper remedy to secure the relief asked by the petitioner. A careful consideration of this subject has been had by this court at its present term in Re Augusta Pottery Co. (Morgan v. First Nat. Bank of Mannington et al.) 145 Fed. 466, and for the reasons there given, which need not be added to here, the motion to dismiss should be overruled.

The real controversy in this case turns upon what was the effect of the institution and pendency of such suit in equity in the state court, how far the same affected the debt secured in favor of Mrs. Porterfield under the deed assailed, and to what extent the suit inured to the benefit of creditors other than the plaintiff and petitioners therein at the time of the bankruptcy. The bankruptcy proceedings having been commenced more than four months after the execution of the deed of the 13th day of June, 1902, in favor of Mrs. Porterfield, the deed was unaffected thereby, unless as the result of said suit in the state court. The referee and the District Court were both of opinion that the institution of such suit became inoperative to affect said deed, since the bankruptcy proceeding was not inaugurated within the four months period provided by the bankrupt act after the execution of the deed, and each accordingly held the deed securing the debt to Mrs. Porterfield a valid preference, to be paid in the distribution of the estate next after the $12,500 debt secured on the 10th day of June; and it is as to the correctness of these conclusions that we are to decide.

Two questions are presented at the threshold: What was the proper course for the District Court to pursue in dealing with the case before it, so far as the litigation pending in the state court was concerned? and, secondly, what was the legal effect of the proceeding in the state court? These questions we will consider in inverse order.

First. The proceeding in the state court was one instituted under

the statute of West Virginia, which enabled a creditor of an insolvent debtor to apply to a court of equity to vacate a preference in favor of a particular creditor, and have the conveyance declared to be for the benefit of all creditors properly joining in such suit. This suit was regularly instituted by the petitioner here, the holder of an unsecured debt of some $3,700, and the same under said statute clearly inured to the benefit of himself and all other creditors authorized thereunder to intervene in the suit; and such rights could not, and should not, be destroyed by the subsequent act of the grantor in the trust deed in favor of his wife voluntarily waiting beyond the four-month period, and then availing himself of the benefit of the bankruptcy act. Certainly such a result ought not be brought about unless the interpretation of the bankruptcy law imperatively requires it. Until the husband chose to go into bankruptcy, his creditors had no right under the bankrupt law to require him so to do, he being a person "engaged chiefly in farming or tillage of the soil," and they had to look to the state law alone to ascertain their status respecting his property by assailing the deed made in favor of his wife, which they did. They could not anticipate that he would subsequently go into bankruptcy. Having thus availed themselves of the remedy prescribed by the state statute to enforce a right secured to them consequent upon the grantor's act while insolvent—to wit, the conveyance of his property to give a preference—upon instituting such proceedings in the state court they thereby became lienors and secured creditors, pursuant to said statute, under the deed of conveyance thus executed by the bankrupt, which conveyance the law declared upon the institution of the suit inured to the benefit alike of the secured creditor in the deed and his other creditors properly joining therein. The true intent, spirit, and meaning of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], after enumerating the debts for which preference is thereby specially given, such as the payment of costs, taxes, etc., and certain labor claims, is to adopt the order of priority for the payment of debts prescribed by the state law; and by section 64b, subsec. 5 (30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], debts of the character here under consideration are plainly covered, namely, "debts owing to any person who by the laws of the state is entitled to priority." The debt secured by the trust deed of the 13th of June, 1902, to Mrs. Porterfield, the estate of whose husband is now being administered by the bankrupt court, would clearly be entitled to priority under the laws of West Virginia, under the deed securing the same, either in the state court or in the bankruptcy court sitting in said state. The debt itself has not been assailed, and the deed was apparently made in good faith, and within the time specified by the laws of the state under which the deed was given a proceeding was regularly taken, the effect of which was not to destroy the deed, but to cause the same, by reason of the insolvency of the grantor in the deed, to inure to the benefit of other creditors, as well as the beneficiary named in the deed. This was the condition existing at the time of the bankruptcy proceeding, and hence as to the property covered by that deed to the extent of the debt therein secured the bankruptcy court took

and possessed itself of such property impressed with the lien, and liable not alone to that of the beneficiary named in the deed, but subject to the rights of all persons whose interest had attached thereto by reason of the law of the state at the time of the institution of the bankruptcy proceeding. The statute (section 2, c. 74, supra, Code W. Va. 1899) has frequently been under review by the Supreme Court of Appeals of the state, and as construed by that court its undoubted meaning is that transfers and charges given or created by an insolvent shall, as to existing creditors, inure to the benefit pro rata of such creditors, and those secured, if attacked within the period and in the manner contemplated by the statute; and we think it equally clear from such decisions that the statute applies to debts and liens of the class involved in this case. Wolf v. McGugin, 37 W. Va. 561, 562, 16 S. E. 797; Carr v. Summerfield, 47 W. Va. 155, 34 S. E. 804; Herold v. Barlow, 47 W. Va. 750, 754, 762, 36 S. E. 8; Feely v. Bryan, 55 W. Va. 586, 588, 589, 47 S. E. 307. The lien here claimed is analogous to that of mechanics, materialmen, subcontractors, etc., which class of liens have been respected and enforced under the present bankruptcy act. They are given a lien by statute, but to be effective the same must be preserved and secured within a prescribed period by filing such claims, duly perfected, etc., for recordation in the designated court of the state. Being thus entitled to this inchoate lien, taking the steps to secure the benefit thereof within four months of bankruptcy has in every instance, so far as we are advised, been held not to be the taking of legal proceedings in contravention of the act, but merely doing the necessary thing—taking the essential step—to secure the existing right under the statute. In this class of claims, by reason of the work done or supplies furnished under the agreement between the parties, the statute declares that there shall exist for the amount due a lien, upon the same being properly perfected. In this case the lien arises pursuant to the statute, and under and by virtue of the deed or transfer of the debtor's property, he being an insolvent, provided the creditors assail the same within the statutory period. To say that they should lose the right thus secured by taking the step necessary to secure or make the same effective would be an anomaly. This view of the law has been steadily maintained by the bankruptcy courts under the present bankruptcy act. In re Kerby-Dennis Co., 95 Fed. 116, 36 C. C. A. 677; In re Georgia Handle Co., 109 Fed. 632, 48 C. C. A. 571; In re Emslie, 102 Fed. 292, 42 C. C. A. 350; In re West Norfolk Lumber Co. (D. C.) 112 Fed. 767; Mott v. Wissler Min. Co., 135 Fed. 697, 68 C. C. A. 335. In the latter case this court held that the lien for supplies could be filed even after bankruptcy.

Second. As to whether the relief to which the petitioner herein is entitled should have been afforded him by proceedings in the bankruptcy court, or that court should have suspended its administration so far as the portion of the assets of the bankrupt is concerned, properly applicable to the lien of the deed of the 13th day of June, 1902, in favor of Mrs. Porterfield, is largely a matter of discretion in the view we take. Either course could have been adopted. No question

of jurisdiction was involved. The bankruptcy court clearly had jurisdiction to proceed, and, if needs be, to have stayed the prosecution of the suit in the state court for the time being; but the state court likewise, at the time of the institution of the suit therein and the commencement of the bankruptcy proceedings, had and still has jurisdiction, and we think, as a matter of convenience, aside from any question of comity, the better plan would have been and is to proceed with the litigation in the state court, to the end that all creditors who may desire to do so may appear therein, and assert their rights to such fund, and in the meantime the bankruptcy proceeding would as to that portion of the estate remain in abeyance; the bankruptcy court carrying out the judgment of the state court, when duly informed thereof, in said proceeding. No inconvenience would arise from this except as to this part of the fund. The bankrupt's discharge need not be withheld. Creditors have the right to assert their claim of lien irrespective of discharge; and but for the fact of its being optional with them to appear in said suit, it would really be better for the trustee in bankruptcy to interpose therein in their behalf.

Consideration of the following subjects is desirable in view of the foregoing conclusions: First. Whether or not the respondent Susan E. Porterfield, at the time of the execution of the trust deed in her behalf on the 13th day of June, 1902, and for some years prior thereto, was then entitled to an equitable mortgage which operated to give her a valid lien, irrespective of the trust deed given in her favor, which was not the subject of attack under section 2, c. 74, of the Code of West Virginia of 1899. Secondly. Whether or not, by reason of having relinquished her contingent right of dower upon the express agreement to that effect, she should not be entitled, as a purchaser for value of such contingent right of dower, to maintain the trust deed in her favor, instead of merely holding a security over other creditors, and which was the subject of attack by them. These two views have been earnestly and ably pressed upon the court, and as to the first question the learned judge of the lower court concurred in the view that a right of equitable lien existed in favor of Mrs. Porterfield, and that the same was unaffected by the statute above referred to, and that such equitable lien was as effective as if secured by trust deed duly recorded; and in support of his view special reliance was placed upon the case of James v. Gray, 131 Fed. 401, 65 C. C. A. 385. After careful consideration of both questions and review of the authorities cited, we are unable to concur in the position either that Mrs. Porterfield is entitled to an equitable lien for the amount of her debt, or that she, by reason of her relinquishment of dower, occupies any vantage ground as against the creditors of her husband, except as to her commuted dower in the property that she surrendered.

The case of James v. Gray, 131 Fed. 401, 65 C. C. A. 385, is a decision of the Circuit Court of Appeals for the First Circuit, and a critical review of it will, we think, show what the court decided was that, under the laws of the state of Massachusetts as administered by the federal courts sitting in that state, a married woman was entitled to assert an equitable claim against the estate of her husband, either in-

dividually or against a partnership of which he was a member, and that such claim was provable in bankruptcy as an unsecured debt. Of the correctness of this position we entertain no serious doubt; but it does not follow that a claim or debt such as is held by the wife here has any of the elements of an equitable claim, entitling it to special consideration over ordinary claims and liens, or that it constitutes an equitable lien upon the husband's property. Cases of resulting trust may be found in abundance, and some where, under a parol agreement accompanied by possession, the rights of judgment creditors have been held subordinate to that of the equitable holder of the title (Floyd's Trustee v. Harding, 28 Grat. [Va.] 401; Hicks v. Riddick, 28 Grat. [Va.] 419); or suits for specific performance, where the money was paid and the purchaser placed in possession of the property and made improvements (Snyder v. Martin, 17 W. Va. 305, 41 Am. Rep. 670; Gallagher v. Gallagher, 31 W. Va. 9, 5 S. E. 297). But these cases do not support the contention here made, where the wife merely from time to time during her husband's solvency loaned him money, with the understanding that he would secure her for the same on his real estate, which he subsequently did after he became insolvent. There was nothing in the wife's debt entitling it to special equitable consideration over other debts due by the husband; and when it is sought to secure the amount by trust deed, to the exclusion of other creditors, such deed is clearly subject to the provisions of the statute authorizing it to be assailed, as it is to the recordation acts of the state. This we think clearly the law, and that the doctrine of a verbal promise to give a lien by mortgage or trust deed, constituting in effect such a lien, will be found not to have the support of the authorities either of the state of West Virginia or of the federal courts. In Atkinson v. Miller, 34 W. Va. 118, 11 S. E. 1007, 9 L. R. A. 544, it was held that an equitable mortgage, in order to affect creditors and purchasers for value without notice, must be recorded. In Feely v. Bryan, 55 W. Va. 586, 588, 47 S. E. 307, it was decided that if one loaned money to an insolvent person under an agreement that a mortgage would be made on certain property to secure the loan, and later when insolvent the borrower makes a mortgage, it does not create a preference, under section 2, c. 74, of the Code of West Virginia of 1899, as to other debts existing at the date of the mortgage. This decision is a very recent one, and will be found to contain an interesting discussion of the subject under consideration, and is, we think, conclusive against the right to set up a claim to an equitable lien here, in contravention to the rights of other creditors, and regardless of the recordation act of West Virginia. The federal courts, including this court, in at least two decisions have taken this same position; holding that the four month period prior to bankruptcy within which transfers of the bankrupt's property may be avoided cannot be enlarged and extended beyond such period, so as to prevent the assailing and invalidating of such conveyance, by means of a parol agreement such as we have in this case. In a recent case decided at the present term of this court (In re Augusta Pottery Co., supra) the court, having under review the very section of the West Virginia statute here in-

volved, decided that an agreement in writing to make a mortgage would not operate to create a lien and extend the statutory period beyond the four months and that an agreement to have such effect must necessarily be recorded (Code W. Va. 1899, c. 74, § 5; Feely v. Bryan, 55 W. Va. 589, 47 S. E. 307); and that the mortgage, notwithstanding the agreement to give the same, having been executed within four months of the bankruptcy, was unaffected thereby (In re Ronk [D. C.] 111 Fed. 154; Pollock v. Jones, 124 Fed. 163, 166, 61 C. C. A. 555; In re Dismal Swamp Contracting Co. [D. C.] 135 Fed. 415).

Coming to the question of the effect of the relinquishment of dower by Mrs. Porterfield, in support of the trust deed in her behalf, we think it well settled that a postnuptial settlement made in behalf of the wife in consideration of her relinquishment of dower is only valid to the extent of the dower released, and that Mrs. Porterfield can only claim such value instead of the debt secured in her favor, and that in this case she should be entitled to a lien arising from the sale of her husband's real estate for such commuted value of dower as of the time of the relinquishment thereof. Glascock v. Brandon, 35 W. Va. 84, 12 S. E. 1102; Herold v. Barlow, 47 W. Va. 761, 36 S. E. 8. In the latter case it is expressly held that a transfer on account of the dower of the wife was only good to the extent of the dower relinquished, and that the excess would stand for the benefit of other creditors. Strayer v. Long, 86 Va. 557, 10 S. E. 574; Davis v. Davis, 25 Grat. (Va.) 590.

It follows from what has been said that the decision of the lower court should be revised, and the cause remanded thereto, to be proceeded in therein in accordance with the views here expressed; the petitioner to recover his costs in this court.

MOORE v. GREEN et al.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1906.)

No. 617.

BANKRUPTCY—CLAIMS—TAXES—PAYMENT.

A bankrupt while a deputy sheriff received tax bills for collection, including bills on his own property, amounting to $611.47. He made no final settlement with the sheriff, though he made large payments on account of tax collections, including the bills on his own property. After the expiration of the sheriff's term, the latter made an assignment to a trustee, who took possession of all the tax books, including tax bills found in the desk of the bankrupt in the sheriff's office, amounting to $2,390.71. These bills did not include the bankrupt's individual taxes, which had been taken from the tax books and were in the bankrupt's possession; he claiming them to have been paid. *Held* that, as it was the sheriff's duty to close his tax transactions with the county annually, and to have returned delinquent taxes unpaid, and the bills against his deputy could not be so returned, the latter's taxes should be regarded as paid, and did not constitute a valid claim against his estate in bankruptcy.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Martinsburg.

For opinion below, see 138 Fed. 192.

James M. Mason, Jr., for appellant.

Forest W. Brown and A. W. McDonald, for appellees.

Before PRITCHARD, Circuit Judge, and WADDILL and KELLER, District Judges.

WADDILL, District Judge. This is an appeal from the decision of the United States District Court for the Northern District of West Virginia, involving the question of the propriety of the rejection by that court of the claim of $611.47, asserted by the appellant against the bankrupt's estate for unpaid taxes alleged to be due, and for which it is claimed a lien existed against the property of the bankrupt being administered by the court. The facts out of which the complaint arises are briefly these: The appellant's intestate, Eugene Baker, was the sheriff of Jefferson county, W. Va., for the period from January, 1897, to January 1, 1901, and the bankrupt, George Porterfield, was a deputy sheriff under him, and as such was charged with the collection of the taxes for Charlestown district in said county. He resided in said district, and during the period of four years the taxes upon his real property amounted to $453.30, and his personal property to $55.64, which latter items, with interest, constitute the debt in question. Porterfield, it seems, during his term of office, had no final settlement with his principal, the sheriff, though he made on account of collections of taxes thus placed in his hands, including the tax bills on his own property, large payments either to the sheriff, from time to time, or in claims against the county, drawn on the sheriff, and turned in by him as money to the sheriff. He seems to have kept no separate account of the public money, but mingled it with his own. After the expiration of the term of the sheriff, and in this unsettled condition of accounts between the sheriff and his deputy, Porterfield, the sheriff made an assignment to the appellant trustee, who in September, 1902, took possession of all the tax books, which included the tax bills for Charlestown district, found in the desk of George Porterfield in the office of the sheriff, which was done without the knowledge or consent of said Porterfield. The tax bills thus taken possession of amounted to the sum of some $2,390.71, and the claim is that an indebtedness of $3,000 was due by Porterfield. The tax bills thus found in Porterfield's desk did not contain his individual taxes, they having been from time to time taken from the tax books, and were in the bankrupt's pocketbook in his own possession; the bankrupt's contention being that he was entitled to such bills, having settled with his principal for them, and while he did not know precisely what, if anything, he owed on account of his deputyship, he thought he had sufficient uncollected tax bills, when credited with commissions and erroneous and delinquent taxes, to square himself with the high sheriff.

The sole question in this appeal turns upon whether or not the taxes properly assessable against the individual property of the bankrupt

shall be treated as paid or as remaining unpaid, and to constitute a lien against the bankrupt's property. The referee and the lower court were both of the opinion that in the dealings between the bankrupt and his principal, the high sheriff, these taxes were paid; that in the manner of dealing between the parties the bankrupt properly had the receipts, and that no specific debt for which the lien existed on account of individual taxes due by the bankrupt existed in favor of the sheriff, whatever might be the true state of accounts between them on a general settlement of their transactions; and in this view we fully concur. It was the duty of the sheriff to close up his tax transactions with the county annually, and to have returned as delinquent such taxes as were unpaid and proved uncollectible. These were public duties, with which both he and his deputy were charged; and he, of course, did not return his deputy's property delinquent, because, manifestly it could not be truthfully so returned, and should not, if returned, have been allowed by the state officials charged with the approval of such accounts. In the dealings between the sheriff and his deputy and the public these taxes were paid, and so treated, and neither he nor his deputy should be allowed now to make a contrary contention; particularly when the result would fall upon innocent persons in no wise responsible either for their neglect of their official duty or unbusinesslike methods in discharging the same. The basis of the appellant's contention in this case rests upon the fact that the property, sold in these proceedings for over $19,000, itself owned by the tax collector, ought to have been or could have been returned delinquent, and thereby for the time being escape taxation. Such an occurrence ought not to have been possible with any taxpayer, and should not be countenanced for a moment by the tax collector in dealing with his own property.

The decision of the lower court is plainly right, and will be affirmed, with costs. Affirmed.

FARRAR v. WHEELER.

(Circuit Court of Appeals, First Circuit. March 8, 1906. On rehearing, May 24, 1906.)

No. 574.

1. INFANTS—INJURIES—EARNING CAPACITY.

Where, in an action by an infant, by his father as his next friend, for injuries, there was no proof that plaintiff had been emancipated by his father, nor that the father had in any way waived his right to plaintiff's services, until after the verdict, it was error for the court to permit a recovery for loss of plaintiff's services during minority.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Infants, § 181.]

2. PARENT AND CHILD—EMANCIPATION—EVIDENCE.

That a father brought suit for injuries to his minor son as his next friend, was present in court, prosecuted the case in his son's behalf, and testified concerning two interviews with defendant in which he told defendant that, if his son wanted to work for him during his vacation, he

had no objection, was insufficient to show an emancipation or a waiver of the father's right to his son's services during minority.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parent and Child, § 174.]

3. WRIT OF ERROR—REMISSION OF PART OF RECOVERY—CONDITIONAL RELEASE.
Where, in an action for injuries to a minor, defendant excepted to the court's instruction permitting a recovery for the loss of the minor's services during minority, the error was not affected by the father's offer after verdict to release all claims for damages for loss of time, services, or earning capacity during the minority of his son, provided the judgment was affirmed.

On Rehearing.

4. SAME—REVERSAL—NEW TRIAL—SCOPE—LIMITATION—JURISDICTION.
Rev. St. § 701, provides that the Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a Circuit Court lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered or such further proceedings to be had by the inferior court as the justice of the case may require. *Held*, that where, in an action for injuries to an infant, the only error in the judgment related to the assessment of damages, the Circuit Court of Appeals had jurisdiction on reversal to limit a retrial to the question of damages.

5. SAME.
Where, in an action for injuries to a minor, it was held on a writ of error that the only error in the judgment was in an instruction permitting a recovery for loss of services during minority, the Circuit Court of Appeals on reversal and ordering a new trial only as to the question of damages would not limit the trial to an estimate of such services, and direct the jury to find their value and deduct it from the amount of the verdict already rendered.

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

John S. H. Frink (Orville E. Cain and John E. Benton, on the brief), for plaintiff in error.

William A. Pew, Jr. (Harry G. Sargent, on the brief), for defendant in error.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

COLT, Circuit Judge. This was an action to recover for personal injuries, brought by a minor through his father as next friend, in which the jury returned a general verdict in favor of the plaintiff, assessing damages in the sum of $5,000. The assignments of error relate to the rulings of the court below on the assessment of damages. In the instructions to the jury upon this point the court said:

"You may, in determining the damages to be awarded the plaintiff in this case, provided you shall find that he is entitled to recover, consider the question of loss of services; that is, the plaintiff is entitled to recover, if you shall find from the evidence that the plaintiff is entitled to recover anything, for loss of his services, past and prospective, and, in determining this question, you may consider how his earning capacity has been affected by the injury complained of."

To this ruling of the court the defendant excepted in substantially the following language:

"The defendant excepts to that part of the charge which allows the jurors to assess damages for the loss of earning capacity of the minor during his minority."

Whereupon the court said:

"My attention has been called to the question of loss of services, and I wish to say to you, gentlemen, that it makes no difference to whom the money is to be paid. The plaintiff is entitled to recover, if you shall find that he is entitled to recover for loss of services, irrespective of the question as to who gets the money. The law will take care of that."

To this ruling of the court the defendant seasonably excepted.

From the foregoing statement it appears that the court below instructed the jury in effect that, if they found the defendant liable, they might assess damages for loss of the plaintiff's earning capacity during his minority, and that the jury rendered a verdict accordingly.

Until emancipation or waiver the father had an independent cause of action against the defendant for loss of his son's services during minority. Unless, therefore, such emancipation or waiver is shown to have taken place upon the record before us, the instructions of the court below were too broad, and the verdict must be set aside.

The record shows that, previous to the commencement of the present suit, the father had not emancipated his son nor in any way waived his right to his son's services. The only evidence having any bearing on this question was, in substance, that the father told the defendant on two occasions that his son might work for him during his vacation. The record also shows that there was no waiver by the father of his claim for loss of services until after verdict. In fact, there is nothing in the record which indicates that any question of waiver was raised during the trial of the case, or was in any manner brought to the attention of the court or counsel. The record also shows that there was no allegation in the declaration for damages arising from loss of earnings during minority, and, further, that no claim was made in behalf of the son for loss of such earnings before or during the trial of the case. So far as appears from the record, the first time any such claim on the part of the son was ever suggested was during the charge, when the court instructed the jury that they might assess damages for loss of the son's services "past and prospective." Nor does the record show that the case was tried on the theory that the son was entitled to recover for loss of earnings during his minority, and that this was done with the father's consent and assistance.

The only circumstances set forth in the record previous to the verdict which have any bearing on the question of the father's waiver are the following: The suit was brought by the father as next friend. He was present in court prosecuting the case in his son's behalf, and testified about two interviews with the defendant in which he told him that if his son wanted to work for him during his vacation he had no objection.

It is manifest that these circumstances, of themselves, are entirely immaterial on the question of the father's waiver or even consent, since they are perfectly consistent with the assumption that the father never intended to relinquish his claim. These circumstances must be

supplemented by something else in the record to entitle them to any weight in the determination of this question. If, for example, the declaration had contained an allegation of damages for loss of earnings during minority, or if the son before or during the trial had claimed the right to recover for loss of these earnings, or if it appeared in any way that the trial of the case had proceeded on this theory, then the circumstances that the suit was brought by the father as next friend, and that he appeared in court and actively assisted in maintaining the son's claim, might have a material bearing on this question.

It further appears from the record that, after the verdict and after the bill of exceptions was filed, but before it was allowed, the father, by leave of court, filed a formal waiver and release to the defendant of any claim for loss of his son's services during minority, to which the defendant objected and excepted; and that, two months after the bill of exceptions was allowed, the plaintiff filed the following paper, styled a "Remittitur":

"Now comes Frank W. Wheeler, who brings this action as the father and next friend of his son, Harry B. Wheeler, and for the purpose of avoiding a new trial, hereby offers to waive any claim for damages based upon loss of time, services, or earning capacity of his son, Harry B. Wheeler, and offers to release under seal to the defendant, Charles D. Farrar, any and all claims for damages for loss of time, services, or earning capacity, during the minority of said son, which I may have in my own right as father of the said Harry B. Wheeler, and a release for such claims, duly executed, under seal, by the said Frank W. Wheeler, is now in the possession of said plaintiff's counsel of record in this case as an escrow, to be delivered to said defendant, Charles D. Farrar, in case the judgment in this action in favor of the plaintiff is affirmed."

A reading of this paper shows that the question of release, as it is finally left in the record, is simply an offer by the father to release, provided the judgment below is affirmed. But after verdict neither the father's release nor offer of release can deprive the defendant of his substantial legal right under his exceptions. As the case stands upon the record, the father's claim or right of action for loss of the son's services during minority, never having been waived, is still outstanding, and with respect thereto the defendant is entitled to his day in court and the opportunity of defense. The defendant might or might not have insisted upon his legal rights under his exceptions. He might have chosen to waive them, and to accept the verdict with the release tendered, and so end the controversy; but since he has not done this, and has elected to have the controversy settled in two suits rather than in one, it is not within the province of the court to deprive him of this right nor to question his judgment.

In no adjudicated case which has been called to our attention has it been held that a minor was entitled to recover for loss of earnings during his minority upon the state of facts presented in the record before us.

In Judd v. Ballard, 66 Vt. 668, 30 Atl. 96, the father at the trial testified that he had given his son his time between the injury complained of and his coming of age, and it was held by a divided court that a parent might waive his claim for loss of his minor son's time after the commencement of the suit.

Again, in some states, where the complaint seeks to recover the entire damages for loss of the minor's time, and it is brought by the parent as next friend, and the parent prosecutes the case in the minor's behalf and testifies therein, it has been held that these acts amount to a relinquishment of the parent's cause of action. Abeles v. Bransfield, 19 Kan. 16; Chesapeake & Ohio Railway Company v. Davis (Ky.) 58 S. W. 698. These cases, however, as we have already pointed out, are clearly distinguished from the case at bar.

Since the exceptions in the present case are confined to the rulings of the court on the question of damages, the case should go back for a new trial on that question alone.

The judgment of the Circuit Court is reversed, the verdict is set aside, the case is remanded to that court for further proceedings not inconsistent with this opinion, and the plaintiff in error recovers his costs of appeal.

On Rehearing.

PUTNAM, Circuit Judge. This is an action of tort for personal injuries, in which the judgment below was in favor of the plaintiff on a verdict of a jury. The suit was brought by a minor for an injury to himself, and, in assessing damages, the jury were permitted to allow him for loss of time, services, and earning capacity during his minority, in addition to what might be assessed for his physical sufferings. The only error was in allowing damages for loss of time, services, and earning capacity during his minority. In all other respects the proceedings at the trial were found to be correct. We held that the case should go back for a new trial on the issue of damages alone, and judgment was entered accordingly. The plaintiff in error, who was the defendant below, has now filed a petition for rehearing, in which he claims that, although the error related only to the rule of damages, the entire verdict must, or should in justice, be set aside, and that a venire de novo must, or should in justice, be ordered covering all the questions submitted to the jury. This is undoubtedly the rule at common law. Of course, in criminal proceedings at common law the rule is even more rigid. This, however, is all changed, so far as we are concerned, by various acts of Congress, of which the last was that of June 1, 1872, c. 255, § 2, 17 Stat. 196. This is now found in section 701 of the Revised Statutes, as follows:

"The Supreme Court may affirm, modify, or reverse any judgment, decree or order of a Circuit Court, or District Court acting as a Circuit Court, or of a District Court in prize causes, lawfully brought before it for review, or may direct such judgment, decree or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require."

The series of statutes resulting in section 701 of the Revised Statutes was formally considered in Ballew v. United States, 160 U. S. 187, 198, 16 Sup. Ct. 263, 40 L. Ed. 388, and sequence, and the flexible powers of the Supreme Court, which powers we hold by the act establishing the Circuit Court of Appeals, was fully explained. At page 202 of 160 U. S., page 268 of 16 Sup. Ct. (40 L. Ed. 388) the conclusion is as follows:

"From this, and from a review of the legislation on the subject of the powers conferred upon this court as a reviewing court, it follows as a necessary conclusion that general authority was given to it on a writ of error to take such action as the ends of justice, not only in civil, but in criminal, cases might require."

There was a general verdict of guilty on two counts of the indictment, the judgment was reversed as to the first count, and the case remanded with instructions to enter judgment according to the verdict on the second count, "and for such proceedings with reference to the first count as may be in conformity to law." The question in the precise form we have here does not seem to have ever been specifically passed on, but definite rulings on kindred topics establish beyond question the propriety of the judgment which we entered, so far as our legal right to enter it is concerned. We have met with a large class of cases where this broad power was exercised with reference to proceedings in equity, and proceedings at common law where juries have been waived; but, in Insurance Company v. Piaggio, 16 Wall. 378, 390, 21 L. Ed. 358, the judgment was reversed, and a venire de novo refused, and directions entered to the Circuit Court to modify the judgment by disallowing a single item of $5,000, which was specifically distinguished by the verdict of the jury. So, in New York, etc., Railroad Company v. Estill, 147 U. S. 591, 596, 622, 13 Sup. Ct. 444, 37 L. Ed. 292, where the jury found the issues for the plaintiff, and allowed a large amount of interest as shown by the record, but assessed the total damages in lump, the Supreme Court directed a new judgment allowing the principal without interest. In Felton v. Spiro, 78 Fed. 576, 583, 24 C. C. A. 321, it appeared that the error occurred after verdict with reference to a motion for a new trial, and the Circuit Court of Appeals for the Sixth Circuit reversed the judgment of the court below, leaving the verdict to stand, but directing further proceedings with regard to what was subsequent thereto. In American National Bank v. Williams, 101 Fed. 943, 947, 42 C. C. A. 101, the Circuit Court of Appeals for the Eighth Circuit reversed the judgment entered on a verdict of the jury, and remitted the case with directions to rectify the allowance of interest, and to enter a judgment for the diminished amount after rectification, and annulling it for the residue. In Great Western Coal Co v. Chicago G. W. Ry. Co., 98 Fed. 274, 279, 39 C. C. A. 79, where the declaration contained two counts, and a verdict had been rendered for the plaintiff on the second count, and, by direction of the trial court, for the defendant on the first count, the judgment was reversed, with an order that the judgment on the second count should stand, but that there should be a new trial on the first. In Pennsylvania Railroad Company v. Jones, 155 U. S. 333, 353, 15 Sup. Ct. 136, 39 L. Ed. 176, the judgment below was reversed, with directions to permit the plaintiffs below to elect to become nonsuit as to one defendant, and to take judgment on the verdict against the other defendants, and with further directions that, if they did not so elect, the entire verdict was to be set aside and a new trial ordered. This last case was considered and approved in Washington Gas Light Company v. Lansden, 172 U. S. 534, 556, 19 Sup. Ct. 296, 43 L. Ed. 543.

A number of cases will be found, both in the Supreme Court and the Circuit Courts of Appeals, where the only error related to the assessment of damages, and where it has been ordered that, on a partial remittitur, the judgment be affirmed. In such cases it has sometimes been required that the remittitur should be made in the Circuit Court and sometimes in the appellate court; and sometimes the judgment has been reversed and remanded to the court below for all proceedings with reference thereto. Among these cases are Hansen v. Boyd, 161 U. S. 397, 411, 412, 16 Sup. Ct. 571, 40 L. Ed. 746; and Hazard Powder Co. v. Volger, 58 Fed. 152, 157, 158, 7 C. C. A. 130, decided by the Circuit Court of Appeals for the Eighth Circuit on September 13, 1893. The latter case is peculiarly like this at bar, because, in the damages assessed there, the husband was allowed to recover for the loss of services and expenses regarding his wife, who was injured, and the court sifted out the details, and pointed out the reduction to which he should submit, and ordered that the judgment might stand if a remittitur of that amount, $426, was entered.

It is true, as the petition before us represents, that there have been numerous cases where the error related peculiarly to damages, and yet, so far as the reports show, the entire verdict was set aside. In none of those cases, however, was the question which we are considering examined, and therefore we are not called on to determine whether the circumstances were peculiar, or whether the propriety of ordering a new trial on only the question of damages was brought to the attention of the court.

The petition also calls our attention to the fact that injustice may be done because of the well-known number of instances in which the jurors, who are opposed to each other on the question of any verdict whatever, compromise on a result far smaller than they would willingly assess if the liability was unquestioned. On the other hand, there can be no doubt that in many cases the damages are increased by the fact that the defendant who is sued insists on litigating the whole matter, and thus, perhaps, brings out at great length aggravating circumstances which otherwise would not appear, impressing the sympathies of the jury beyond what they otherwise would be impressed. Such considerations, however, are too fugitive to be taken into account by an appellate tribunal, which deals only with questions of law. If they have any consideration at all, it is with the trial court, which may weigh all such matters in determining whether to set aside the verdict if it appears improper.

The statute which we have referred to, and the application of it to which we have called attention, demonstrate the flexibility of our powers in reference to the question before us. As the element of damages as to which the error in the trial occurred was only an incidental one, easily distinguished from everything else in the record, and as no complaint was made that the trial on the main issue was otherwise than just and lawful, we are not called on to require the parties in this litigation to travel again, at what may be great expense and labor, a long path on account of a misdirection with reference to

a short one, which misdirection may prove to be, after all, of very little practical consequence.

The petitioner also claims, inasmuch as the error related only to allowing the plaintiff below to recover for his services, etc., during minority, that, if we are to order a new trial only in part, we should limit it to an estimate of those services, and direct that the jury should find their value, and deduct it from the amount of the verdict already rendered. This would be a refining of the proceedings beyond anything heretofore known or suggested; and it would probably be illegal, because it would be impossible to put a new jury in the place of the old one, and to obtain any correct determination of the amount by which the verdict now before us was enhanced by reason of the error which occurred.

The court having fully considered the petition for rehearing, filed on April 21, 1906, and none of the judges who concurred in the judgment desiring that a rehearing should be had, it is ordered that the petition be, and the same is hereby, denied, and the mandate may issue forthwith.

SWIFT & CO., Limited, v. JONES.

(Circuit Court of Appeals, Fourth Circuit. May 3, 1906.)

No. 634.

1. COURTS—FEDERAL COURTS—PRACTICE—CONFORMITY.

While an action at law in the federal courts may be instituted under the conformity act (Rev. St. § 914, Act June 1, 1872, c. 255, 17 Stat. 197 [U. S. Comp. St. 1901, p. 684]), by complaint, as distinguished from a formal declaration, the federal court will not in all respects be governed in the conduct of the case by the pleadings, forms, and mode of procedure prescribed by the state law, especially with reference to questions pertaining to the method of trial, when inconsistent with federal statutes.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 900, 914–938.]

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

2. REFERENCE—FEDERAL COURTS—ACTIONS AT LAW—TRIAL.

Rev. St. § 648 [U. S. Comp. St. 1901, p. 525], provides that the trial of issues of fact in the Circuit Courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy and by the next section, which authorizes trial of issues of fact in civil cases by the court on stipulation waiving a jury, and section 700 [U. S. Comp. St. 1901, p. 570] declares that when an issue of fact in a civil case in a circuit court is tried by the court without a jury, the rulings of the court, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed by the Supreme Court, and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment. *Held* that, where an action at law was brought in the Circuit Court, the trial judge under such sections had no power, even with the acquiescence of both parties, to order a trial before a special master authorized to hear and pass on the issues of fact, and report his findings to the court.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 931.]

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

For opinion below, see 135 Fed. 437.

T. W. Bickett (Arthur F. Evans, on the brief), for plaintiff in error.

F. S. Spruill and William H. Ruffin, for defendant in error.

Before PRITCHARD, Circuit Judge, and WADDILL and KELLER, District Judges.

WADDILL, District Judge. The plaintiffs in error filed their complaint in the court below against the defendant in error to recover from him an alleged indebtedness of $2,487.75, for which they claim defendant was liable as guarantor upon a contract entered into between the plaintiffs and E. C. Jones, a son of the defendant; the undertaking being that said E. C. Jones would faithfully perform all the terms and conditions of a certain contract of agency theretofore entered into between him and the plaintiffs, and pursuant to which the latter appointed said E. C. Jones as their agent for the sale of their products in the town of Louisburg, N. C., the amount sued for being an alleged balance due by said E. C. Jones to the plaintiffs on account of the agency. The agreement or contract of agency between the parties is not under seal, nor the defendant's guaranty thereof, which is as follows:

"In consideration that Swift & Co., Limited, execute the foregoing agreement with E. C. Jones, I hereby guaranty the performance thereof by E. C. Jones of all the terms and conditions therein by him agreed to be kept and performed. It is understood that this is a continuing guaranty. [Signed] J. F. Jones."

The defendant answered this complaint, setting up various defenses, but the one chiefly relied on, and on which the court below based its decision, was the following clause of the contract of agency:

"The party of the second part [E. C. Jones] was to give a fidelity bond in such sum, and with such company as surety, as the party of the first part [Swift & Co.] shall designate; the party of the first part [Swift & Co.] to pay the premium."

—The contention being, and which theory the court below adopted, that this clause in the contract constituted a condition precedent to the defendant's guaranty; and it appearing from the facts that E. C. Jones, the party of the second part to the contract, had signed a blank application for such guaranty bond, that that was all which was incumbent upon him to do, as the plaintiffs in error, parties of the first part to the contract, were to designate the surety company, and pay the premium, which it does not appear was ever done, and said bond was never executed. The proceeding, though instituted in the United States Circuit Court, was brought under the North Carolina Code Procedure by complaint, instead of the usual common-law suit in that court, setting up the plaintiffs' cause of action. It nevertheless was purely a common-law case, for which the ordinary action of assumpsit would lie and was the proper remedy. Without considering the assignments of error, a preliminary question is presented upon the face of the record, which the court feels called to pass

upon, and which, in its judgment, makes it necessary, without in any manner passing upon the merits of the case, to remand the same to the lower court for further action therein. Upon the joinder of issue between the parties, as contemplated by the North Carolina Code Procedure, an order was entered by the lower court, also in conformity therewith, referring the case to a special master, who was "authorized to hear the same, and pass upon the issues of fact arising out of the pleadings, and report his findings of fact to the court," to the entry of which order both parties by counsel assented; and it was upon the findings of fact by the special master, who heard the evidence, and duly made his report thereon, that the lower court rendered its judgment in favor of the defendant. It is as to the correctness of this method of ascertainment of facts in a common-law case, as distinguished from a jury trial or trial by the court without a jury, that we base our action herein.

Under section 914 Rev. St., being section 5 of the act of June 1, 1872, c. 255, 17 Stat. 197 [U. S. Comp. St. 1901, p. 684], it is provided that:

"The practice, pleadings and forms, and modes of procedure in civil causes, other than in equity and admiralty causes, of the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms, and modes of procedure existing at the time in like cases in the courts of record of the state in which such circuit and district courts are held, any rule of court to the contrary notwithstanding."

Under this section, it may be conceded that the method of instituting the suit under the state practice by complaint, as distinguished from a formal declaration, could be adopted (Nudd v. Burrows, 91 U. S. 426, 23 L. Ed. 286; Railroad Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898); care being observed, however, to see that there was no confounding or combining legal and equitable causes of action. (New Orleans v. Construction Co., 129 U. S. 45, 9 Sup. Ct. 223, 32 L. Ed. 607). But while this is true as to the form of the action, and as to many of the questions raised in the progress of the proceedings thereof, it by no means follows that the federal court will in all respects be governed in the conduct of the case by the "pleadings and forms and mode of procedure prescribed by the state laws"; and particularly is this true in regard to questions pertaining to the manner and method of the trial of the case in that court, which must necessarily be largely governed by the federal statutes and the modes of practice prescribed for the government of such courts. The Supreme Court of the United States has, therefore, in construing the act in question, invariably held that the practice acts of the states should not be followed when in the estimation of the judges of the federal courts such legislation would unwisely incumber the administration of the law, or tend to defeat the ends of justice in the federal tribunals; nor should such acts be followed when the same were found to be inconsistent with the terms, or would tend to defeat the purpose, or impair the effect, of any legislation of Congress. Indianapolis R. R. Co. v. Horst, 93 U. S. 391, 23 L. Ed. 898; Southern Pacific Co. v. Denton, 146 U. S. 202, 209, 13 Sup. Ct. 44, 36 L. Ed. 377;

Luxton v. North River Bridge Co., 147 U. S. 336, 338, 13 Sup. Ct. 356, 37 L. Ed. 194; Chappell v. United States, 160 U. S. 499, 513, 16 Sup. Ct. 397, 40 L. Ed. 510. The Congress of the United States has in terms prescribed how trials in actions at law in the federal courts, certainly so far as the ascertainment and determination of the facts are concerned, shall be had; namely, by jury trial, or by the court without the intervention of a jury, pursuant to and in the manner prescribed by the act waiving a jury.

"Sec. 648, Rev. St. [U. S. Comp. St. 1901, p. 525]. The trial of issues of fact in the circuit courts, shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, and by the next section.

"Sec. 649, Rev. St. [U. S. Comp. St. 1901, p. 525]. Issues of fact in civil cases in any circuit court, may be tried and determined by the court, without the intervention of a jury, whenever the parties or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

"Sec. 700, Rev. St. [U. S. Comp. St. 1901, p. 570]. When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

These three sections constitute the whole federal law upon the subject, so far as this case is concerned, where the facts were ascertained without the intervention of a jury, and by the last-named section, the method of the correction of errors upon writ of error is expressly confined to the rulings of the court in the progress of the trial in the cause, if excepted to at the time, and duly preserved by bill of exception; and upon such writ of error the facts can only be inquired into where the finding is special, as distinguished from a general finding by the trial judge. Such sections constitute within themselves a perfect and complete system for the guide and government of the federal courts, and ought not to be departed from. Nothing is better settled than that whenever Congress has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the state upon the same matter. Ex parte Fisk, 113 U. S. 713, 721, 5 Sup. Ct. 724, 28 L. Ed. 1117; Whitfield v. Clark Co., 119 U. S. 522, 7 Sup. Ct. 306, 30 L. Ed. 500; Southern Pacific Co. v. Denton, 146 U. S. 209, 13 Sup. Ct. 44, 36 L. Ed. 377. The state legislation of North Carolina, in so far as the same presents the method for the ascertainment of the facts of the case under consideration, contrary to and inconsistent with the legislation of Congress on the same subject, must and should give way to the plain provisions of the federal law. It is the duty of the trial courts to adhere rigidly to these enactments of Congress prescribed for their government, and the presumptions are all unfavorable to the waiver of the right of trial by jury (Hodges v. Easton, 106 U. S. 408, 1 Sup. Ct. 307, 27 L. Ed. 169); and whenever

cases are submitted to them for trial without a jury, it must plainly appear that the waiver was made as prescribed by the act of Congress (Hughes, Fed. Jur. 363). Moreover, the mode of proof prescribed for the trial of common-law cases by section 861 Rev. St. clearly indicates that such trials in the federal courts are only to be had before a jury or the court in open court. It is "that the mode of proof in the trial in an action at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided"; and the sections referred to in the other provisos (Act March 9, 1892, c. 14, 27 Stat. 7 [U. S. Comp. St. 1901, p. 664]) relate to the taking of depositions de bene esse and the issue of commissions. Hughes, 364, supra. The question of following the state practice in matters of reference to referees and auditors has quite frequently been under review by the federal courts, and it may be said that the general trend of the decisions is to the effect that such statutes will not be followed, and that in said courts trial by jury is the only prescribed method for the ascertainment of facts, unless the same be waived, as contemplated by the act, except in cases of equity, admiralty, and bankruptcy. Kearney v. Case, 12 Wall. 275, 20 L. Ed. 395; Boogher v. New York Life Ins. Co., 103 U. S. 90, 26 L. Ed. 310; Sulzer v. Watson (C. C.) 39 Fed. 414; Stroheim v. Deimel (C. C.) 73 Fed. 430, 431; United States v. Indian Grave Drainage Dist., 85 Fed. 928, 930, 29 C. C. A. 578; Howe Machine Co. v. Edwards, Fed. Cas. No. 6,784; Hughes, Fed. Jur, supra, 364. In the last-cited case (a decision of Mr. Justice Blatchford while circuit judge) he discusses the question of the effect of the consent to the reference, which, however, in that case, was signed by only one of the parties, and in the case of Boogher v. New York Life Ins. Co., 103 U. S. 90, 26 L. Ed. 310, the query is made whether in cases of waiver, under the state practice act of Missouri, a review would be authorized by the Supreme Court in such case, and the latter court makes it quite clear that, if such right of review could be had, it would only be such as existed prior to the passage of section 700, Rev. St. (being section 4, c. 86, of the act of March 3, 1865, 13 Stat. 501 [U. S. Comp. St. 1901, p. 570]), and that the review could only be entertained at all by treating the referee's findings as those of the court. We do not mean to imply by anything stated herein that cases cannot be disposed of by arbitration in the federal practice, as in other courts, certainly where the rules of the federal court provide therefor. Alexandria Canal Co. v. Swann, 5 How. 89, 12 L. Ed. 60; Rork R. R. v. Myers, 18 How. 246, 15 L. Ed. 380; Hecker v. Fowler, 2 Wall. 123, 128, 129, 130, 17 L. Ed. 759. In the latter case will be found a full discussion of this subject, and it is of special interest. Andes v. Slauson, 130 U. S. 435, 438, 9 Sup. Ct. 573, 32 L. Ed. 989, is a case in which the parties by consent submitted the case to the judge under an order that it should be tried, and that "if upon its appearing to the judge upon such trial that there were questions of fact arising upon the issues therein of such character that the judge would leave them to the jury, if one were present," they should be submitted to the jury at the next term; and that the only finding of the judge was a general finding for the

plaintiff. Justice Gray, speaking for the court, said a trial thus ordered, consented to, and had was neither a trial by jury nor a trial by the court, or in accordance with the acts of Congress, but was a trial by the judge as referee, the trial deriving its whole efficacy from the consent of the parties; and in the progress of the opinion Justice Gray further stated that upon the trial issues of fact could only be had by jury at a stated term of court, unless the parties either in writing waived the jury, and submitted the case to the court's decision, or else agreed that the case should be tried and determined by a referee. The trial and determination, however, of the case by a referee, referred to by Justice Gray in this decision, would be nothing more than was the trial of the case then under consideration by him, namely, that of the judge sitting as arbitrator or referee, and whose authority so to dispose of the case was derived by reason of the consent of the parties. Without, therefore, in any manner questioning the right, in a proper case, to arbitrate, either through the judge acting as arbitrator, or the selection of referees contemplated by state statute, or otherwise to be chosen, we hold that it is well recognized that neither by agreement of parties nor by the laws of the state can a federal court sitting in such state, depart from the prescribed modes of procedure and rules embodied in the act of Congress for its guidance (Graham v. Bayme, 18 How. 60, 15 L. Ed. 265; Kelsey v. Forsyth, 21 How. 85, 16 L. Ed. 32; Richmond v. Smith, 15 Wall. 429, 21 L. Ed. 200); and hence when it appears that the reference of the lower court was not in any sense intended as an arbitration, or a purpose to have the referee to whom it was referred try and determine the same as an arbitrator, but that plainly the purpose of the reference was to have him ascertain the facts, in lieu of the jury or the judge of the lower court, by written consent of the parties, thereby substituting his judgment as to the facts of the case for that of the jury or the lower court, and that the judgment of the lower court was the result merely of his findings, as distinguished from rendering judgment upon its own findings in a proper case, we think it clear that such practice should not be sanctioned or adopted as a rule applicable to the trial of cases in this circuit. To do so would be, in effect, to create a new and additional method of disposition of common-law cases, neither provided for nor contemplated by the acts of Congress on the subject.

Without, therefore, passing upon the merits of this case, the same will be remanded to the lower court, with directions to that court to award a new trial thereof, such new trial to be proceeded with and conducted in the manner herein prescribed; the costs in this court to be borne equally by the parties respectively. Remanded.

FOLWELL v. MILLER et al.

(Circuit Court of Appeals, Second Circuit. April 2, 1906.)

No. 109.

1. CORPORATIONS—LIABILITY OF OFFICERS—PARTICIPATION IN WRONGFUL ACT OF CORPORATION—LIBEL.
   Where a libel was published by a newspaper owned by a corporation, the president of such corporation was not individually liable therefor because of his official capacity either as president or stockholder, in the absence of his personal participation in such publication.
2. LIBEL—PUBLICATION BY CORPORATION—LIABILITY OF MANAGING EDITOR.
   The editor in chief of a newspaper owned and operated by a corporation of which such editor in chief was president was not civilly liable for the publication of a libel by his subordinate, of which the editor in chief had no knowledge, and which was published during his absence from the office.
   [Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 178.]
3. SAME—RATIFICATION.
   Where the editor in chief of a newspaper was not civilly liable for a libel published by his assistant at the time suit was brought therefor, no liability could be created by his alleged ratification of his assistant's act by pleading as a partial defense, the truth of certain statements in the libel.

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

Wm. L. Snyder, for plaintiff in error.

B. F. Einstein, for defendants in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. The trial judge in the court below directed a verdict for the defendant, upon the ground that it appeared by the evidence that the defendant had not participated in the publication of the libel which was the subject of the action. The principal assignment of error challenges the correctness of this ruling.

The facts proved upon the trial were these: The libel was published in the New York Times, a newspaper owned by a corporation in which the defendant was the principal stockholder, and of which he was the president. The defendant was also at the time editor in chief of the newspaper, having general supervision of the editorial and news departments; but the news department was under the immediate charge of a subordinate editor. The libel consisted of a news item, which was received by the news editor during the night of April 5th, and was published in the issue which went to press on the morning of April 6th. The defendant was absent during the period covered by the reception and the publication of the libel from the editorial nooms and the building in which the newspaper was printed, and had no knowledge of the publication until a subsequent day.

That the defendant was not liable merely because he was president of the corporation and a stockholder is a proposition which does not

require extended discussion. The president of the corporation is an agent of very extensive, but not unlimited, powers. He is not personally liable because of his official capacity, any more than are the directors or stockholders, for torts committed by the corporation, in the absence of personal participation in the tortious act. As an agent, he is not liable for the acts of misfeasance or nonfeasance of his subordinate agents or employés. Bath v. Caton, 37 Mich. 199; Paper Co. v. Dean, 123 Mass. 267; Brown v. Lent, 20 Vt. 529; Murray v. Usher, 117 N. Y. 542, 23 N. E. 564; Nat. Cash. Reg. Co. v. Leland, 94 Fed. 502, 37 C. C. A. 372; Arthur v. Griswold, 55 N. Y. 400.

Whether the defendant was liable because of his relation to the newspaper as editor in chief, notwithstanding the libel was published without his knowledge or complicity, is a more debatable question. If that relation is one in which the editor is merely an agent and the proprietor is the principal, and the liability of the editor is to be tested by the ordinary rules of the law of principal and agent, it is plain, as has been already stated, that he would not be liable for any tortious act committed without his privity by another agent of the principal, whether such other agent be one of higher or lower grade. On the other hand, if the liability of the editor is coextensive with that of the proprietor, it is not affected or qualified by the circumstance that the publication was made without any personal participation on his part. It has long been the settled rule that when a libel is published in a newspaper the fact alone is sufficient evidence to charge the proprietor with the guilt of its publication, and he is not permitted to show in exculpation that he was not privy nor assenting to, nor encouraging, the publication. Although it may have been published, contrary to his express orders, by a servant, if this was in the usual course of the servant's employment, the proprietor is liable. Rex v. Gutch, 1 Moody & Malkin, 433; Rex v. Walter, 3 Esp. 21; Bruce v. Reed, 104 Pa. 414, 49 Am. Rep. 586; Andres v. Wells, 7 Johns. 260, 5 Am. Dec. 267. It has never been distinctly decided that the liability of the editor is coextensive with that of the proprietor. Some of the text-writers indulge in general statements which imply that the liability is coextensive, but the authorities which they cite do not justify the implication. The only carefully considered adjudication upon the point which we have been able to find is Smith v. Utley, 92 Wis. 133, 65 N. W. 744, 35 L. R. A. 620. In that case the court declared:

"That the managing editor of a newspaper is equally liable with the proprietor and publisher for the consequences in a civil action for the publication of the libelous article; and this is so whether he knew of the publication or not; for it is his business to know, and mere want of knowledge constitutes no defense."

The opinion cites the statements of the text-writers and the authorities referred to by them, together with some later authorities. Some of these authorities are of trivial importance. One is Watts v. Fraser, 7 Adol. & E. 223, where both editor and printer were held liable for a libelous illustration, although it was published without their knowledge; but the editor was also the proprietor of the magazine in which it was published. Nevin v. Speickermann ((Pa.) 4 Atl. 497, is another.

But it did not appear in that case that the defendant was an editor, and the court merely approved an instruction to the jury:

"That his being an officer of the corporation merely would not make him liable for the libelous publication, but if he was engaged in the general management of the paper, he would be liable if the publication was unjustified."

All that Smith v. Utley really decides is that the fact that a libel is published without any authority from, and without the knowledge of, a managing editor will not relieve him from liability when it appears that he was actively engaged in his duties as such editor at the time the libel was published. The reasoning of the opinion, however, is to the effect that publisher and editor stand alike in responsibility for the publication. Another adjudication in which it was incidentally decided that the editor's liability is coextensive with that of the proprietor is Hunt v. Bennett, 19 N. Y. 173, 175. In that case the point was raised that the allegation in the complaint that the defendant was the proprietor of the newspaper in which the libelous article was published, without alleging that he published it, or was concerned in its publication, was insufficient to charge him with the consequences. The court said:

"It is enough to say in answer that it appeared upon the trial, without objection, that the defendant was the editor of the paper, and that the article complained of was written by his assistant. Instead, therefore, of allowing the objection to prevail, even if it was valid, it is our duty to conform the pleadings to the facts proved."

Notwithstanding these adjudications, we are not convinced that the editor's liability is commensurate with that of the proprietor. Of course, he is liable equally with the proprietor when he has personally assisted in any manner in the preparation, revision, or otherwise of the publication of the libel. There is doubtless a presumption of fact that the managing editor has supervised the contents of the newspaper, and performed the duties of his office in that behalf. So doubtless when it appears that he has actually done so, the fact that he has omitted to notice some of the contents will not relieve him from the consequences of his participation. But when it appears affirmatively that he was not on duty during any part of the time between the reception of the libelous matter by the newspaper and the publication, and could not have had any actual part in composing or publishing, we think he cannot be held liable without disregarding the settled rule of law by which no man is bound for the tortious act of another over whom he has not a master's power of control. The action of libel is not based upon neglect of duty, but is for a positive tort; and there is no reason upon which an editor, any more than any other individual, can be held responsible for such a tort when it appears that he was actually innocent of all complicity in it.

It may be true that the moral responsibility of the managing editor of a modern newspaper for the publication of a libel is as great as that of the proprietor. Except upon questions of large policy, the editor in chief is usually supreme in controlling what shall and shall not be published in the newspaper, and ordinarily the proprietor delegates to him

almost untrammeled power in that behalf. Indeed it is safe to say that generally the proprietor is the more innocent of the two for the publication of the libelous matter. The Penal Code of this state recognizes the liability of each as identical, and its provisions are that every editor or proprietor of a book, newspaper, or serial "is chargeable with the publication of any matter contained in such book, newspaper, or serial," and that in a prosecution for libel it is not a defense that the matter complained of was published without his knowledge or fault, and against his wishes by another who had no authority from him to make the publication, unless the "act was disavowed by him as soon as known." Section 246, Pen. Code. But in civil actions legal liability and moral responsibility are not always coincident. The owner of the newspaper is liable for whatever may be published in it, because all those who are engaged in preparing and publishing it are his servants, and the publication is an act within the scope of their employment. It is therefore deemed the act of the owner himself, and, although done without his knowledge, or contrary to his express instructions, he must bear the consequences. The same principle applies to every tort committed by a servant in the course of his employment, whether it is a mere neglect or a tort of a willful and malicious quality. The editor, however, exercises a delegated authority for the owner, and consequently is but an agent of the owner, even though he be the editor in chief. His subordinates are not his agents or servants, because the power to select them and discharge them belongs to the owner, and they are not under his control when that power resides in a higher agent, notwithstanding he is permitted to control them when the owner does not see fit to intervene. It is impossible to differentiate the relation of an editor and proprietor from that of an agent and principal. We conclude that the trial judge correctly ruled that the defendant was not liable for the act of his subordinate under the circumstances of this case.

It is urged for the plaintiff in error that some of the averments of the answer, setting up as a partial defense the truth of certain statements in the libel, amounts to a ratification by the defendant of the act of his assistant editor, and renders the defendant liable as though he had originally directed the publication. It is a sufficient answer to this contention to say that, unless there was a cause of action against the defendant at the time the action was commenced, none which would maintain it could be created by his subsequent conduct.

The court below properly directed a verdict for the defendant, and accordingly the judgment is affirmed.

HOLBROOK, CABOT & DALY CONTRACTING CO. v. MENARD.

(Circuit Court of Appeals, Second Circuit. April 17, 1906.)

No. 580.

WRIT OF ERROR—JOINT JUDGMENT—SEPARATE PROCEEDINGS—DISMISSAL.

Plaintiff alleged injury in a collision between one of the cars of a railway company and one of the trucks of a contracting company. She made both companies defendant, averring that her injuries were inflicted by

reason of the "carelessness and negligence of the defendants, their servants, agents, or employés," and demanded judgment "against the defendants." Defendants appeared separately, and judgment was entered in favor of plaintiff after trial against both, whereupon defendant contracting company sued out a writ of error, without reference to its codefendant, or any showing that the latter had been notified to appear and failed to do so, or had refused to join in the proceedings in error. *Held*, that the judgment was joint, and therefore the several writ of error could not be sustained.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1811.]

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

This cause comes here upon a writ of error to review a judgment of the Circuit Court, Southern District of New York, in favor of defendant in error, who was plaintiff below, against plaintiff in error and the Interurban Street Railway Company, who were defendants below.

Benjamin Patterson, for plaintiff in error.

J. M. Gardner, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Upon the cause being reached for argument, the defendant in error moved to dismiss the writ of error, upon the ground that, the judgment appealed from being a joint one and the codefendant not joined in the writ, this court is without jurisdiction to hear the appeal. The motion is made upon the record, and the record only can be considered. Inglehart v. Stansbury, 151 U. S. 72, 14 Sup. Ct. 237, 38 L. Ed. 76. It discloses the following facts: Plaintiff averred that she was injured by reason of a collision between one of the cars of the Interurban Street Railway Company and one of the trucks of the Holbrook, Cabot & Daly Contracting Company. She made both companies defendant, averred that her injuries were inflicted by reason of the "carelessness and negligence of the defendants, their servants, agents, or employés," and demanded judgment "against the defendants." The cause came on to trial at a jury session of the Circuit Court in April, 1905, the defendant Holbrook, Cabot & Daly Contracting Company appearing by its attorney, and the defendant Interurban Street Railway Company appearing by its attorney, and the plaintiff appearing by her attorney. The jury rendered a verdict against both defendants, and on April 19th judgment was entered in favor of plaintiff against both. The defendant Holbrook, Cabot & Daly Contracting Company secured the allowance of a writ of error (which in no way indicates upon its face the existence of a codefendant) on May 29, 1905, and its bill of exceptions was settled on September 11th.

It is a familiar doctrine that in cases at law where the judgment is joint all the parties against whom it is rendered must join in the writ of error. The reasons for this practice are that the successful party may be at liberty to proceed in the enforcement of his judgment against

the parties who do not desire to have it reviewed, and that the appellate tribunal shall not be required to decide a second or third time the same question on the same record. Hardee v. Wilson, 146 U. S. 181, 13 Sup. Ct. 39, 36 L. Ed. 933. Where one of the parties refuses to join in a writ of error, the other may have a remedy by summons and severance. Courts have grown more liberal, and the formal practice of summons and severance is no longer required; but the Supreme Court has uniformly insisted that the record shall disclose that the party had been notified to appear, and had failed to appear, or, if appearing, had refused to join, and that on that ground the court granted an appeal to the party who prayed for it as to his own interest. Mason v. U. S., 136 U. S. 581, 10 Sup. Ct. 1062, 34 L. Ed. 345; Hardee v. Wilson, supra; Inglehart v. Stansbury, supra; Davis v. Mercantile Trust Co., 152 U. S. 593, 14 Sup. Ct. 693, 38 L. Ed. 563; Beardsley v. Ark. & Louisiana Railway, 158 U. S. 127, 15 Sup. Ct. 786, 39 L. Ed. 919.

We are constrained by these decisions to grant this motion. It is apparent that through failure to conform to the established practice the very thing has happened which that practice was designed to avoid, viz., another appeal from the same judgment. The record does not disclose it, but we must take judicial notice that at this same session a writ of error to review the same judgment, sued out by the railway company, is presented for consideration, and a similar motion made with regard to it. The authorities cited are directly in point and controlling.

The motion is granted.

INTERURBAN ST. RY. CO. v. MENARD.

(Circuit Court of Appeals, Second Circuit. April 17, 1906.)

No. 204.

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, in favor of defendant in error, who was plaintiff below, against plaintiff in error and the Holbrook, Cabot & Daly Contracting Company, who were defendants below.

Joseph Daly, for plaintiff in error.

J. M. Gardner, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Motion is made to dismiss the writ of error which was sued out by the railway company to review the judgment considered in Holbrook, Cabot & Daly Contracting Company v. Menard, opinion in which is herewith handed down (145 Fed. 498). There is nothing in the record to show summons and severance or its equivalent, and for the reasons set forth in that opinion the motion must be granted.

THE JOHN McCULLOUGH.

(Circuit Court of Appeals, Second Circuit. April 2, 1906.)

No. 184.

COLLISION—SUIT FOR DAMAGES—FAILURE OF PROOF.

A decree dismissing a libel filed by the tug Richards against the ferryboat McCullough for a collision when the vessels were on converging courses affirmed, on the ground that the evidence either showed that the vessels approached each other on crossing courses, and the Richards, having the McCullough on her starboard hand, was in fault for not seeing her, and conforming to her signal by allowing her to pass ahead, as was her right, or that it failed to establish that the McCullough was an overtaking vessel.

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

This cause comes here upon appeal by libelants from a decree of the District Court, Eastern District of New York, dismissing the libel.

The following is the opinion of the District Court by Thomas, District Judge:

The ferryboat McCullough was approaching her slip at Chambers street on a course about southeast by south. The tug Richards was descending the river on a course about south by west. The port bow of the McCullough struck the starboard side of the Richards some 20 to 30 feet forward of her stern. Each claims that the other was the overtaking boat. The McCullough is 217 feet long, and of the propeller type. The Richards is probably about 80 feet long, and was light. It is evident that as the vessels approached the place of collision they should have seen each other on crossing courses for some distinct time before the collision occurred, and should have apprehended the collision. The McCullough gives evidence that she did see the Richards above her, as far up as pier 27, while the McCullough was off Franklin street, and that she blew three several single whistles, and in default of answer slowed, stopped, and backed her engines, but that the Richards came forging alongside and past her, starboarding, so as to throw her stern against the ferryboat. The Richards gives evidence that her captain, mate, and others of the crew did not see the McCullough until she came up from behind, and was 10 or 12 feet away. As already stated, two vessels could hardly, in the use of proper care, approach each other on the courses given without previously seeing each other, if there was a good lookout, whichever vessel was ahead. Let it be admitted that the Richards was some 50 or 60 feet ahead when the collision occurred. How did she get ahead? Was she at all times ahead, or did she at one time have the McCullough on her starboard bow, and pass in front of her? The question is not which boat was ahead at the time of the collision, but did the Richards pass the McCullough after having her on her starboard bow; that is, did the McCullough have the right to be ahead? It is not probable that the McCullough was the faster vessel, or was going faster. In any case the vessels were on crossing courses. There were numerous vessels and tows in the neighborhood. A New York Central tug and a float were maneuvering near the New York shore opposite Franklin street, and somewhat menacing navigation, at least, so that the tug Palmer and her tow had stopped for them. Two ferryboats were drawing away from the New York shore below Chambers street; a ship was passing up nearer the middle of the river. Behind the Palmer was the Erie tug Rogers and her tow, bound for Duane street. Other tows were passing farther out than the vessels immediately concerned. It may be that the Palmer and the detaining tug at Franklin street fixed the attention of the navigators of the Richards, and

that she thereby failed to hear the McCullough's signals and to see her. Farrell, master and owner of the Richards, states that he was ahead of the McCullough. His mate confirms this, and the engineer adds something in corroboration. The master, mate, and steward of the Palmer make the same statement. So as the Richards reached the place of collision he may have been ahead; but was he ever behind? That is the question. For if he was, he at some time had the McCullough on his starboard hand, and in that case had no right to be ahead. The master, quartermaster, and deckhand of the McCullough state that the Richards was above the McCullough at all times, until she passed just at the moment of collision, and that the McCullough signaled her in vain. The McCullough's engineer gives some corroboration. The pilot of the Susquehanna confirms the McCullough's contention. The master of the Rogers adds strength to the McCullough's case. Hoyt, the master of the Orange, adds nothing. His evidence, if anything, aids the Richards. The master and mate of the Palmer were attentive to the tug and float inside them, and so fearful of collision with them that they stopped, awaiting their departure. They were honest in intention, but it is thought not very watchful of the McCullough and the Richards. The steward of the Palmer was an intelligent person, but he was idling in the bow of the Palmer, and it is not believed that he noticed closely. The master and mate of the Richards did not know of the approach of the McCullough until she was almost upon them, which shows no high degree of observation, for upon the crossing courses they should have seen. The master of the McCullough did see the Richards, and undoubtedly signaled her. He was not an altogether satisfactory witness, but his signals, sufficiently proven to have been given, show that he saw the Richards, and claimed the right of way. The Rogers master was employed by the Erie Company. He was a fair witness. The master of the Susquehanna was an excellent witness. He had an opportunity to see and to hear. It was his business to know the conditions about him before he passed up the river. The McCullough's whistle attracted his attention to the event and the locality of the McCullough and the Richards. He placed the Richards up river. The burden of proof is upon the owners of the Richards in their action; it is upon the owners of the McCullough in its action. Considering the burden of proof, it seems quite as probable that the Richards at one time had the McCullough on her starboard hand, and drew ahead of her until she almost crossed her bow, as that the Richards was always ahead, and never owed the McCullough any duty. It may be that the Richards was going faster, and got ahead. But she could not get ahead without crossing the McCullough's bow, as their courses crossed. Therefore, it is decided that it is not proved whether the McCullough was or was not an overtaking vessel. When the evidence on one side goes so far as to neutralize the evidence on the other, the burden of proof should determine the decision. In the action against the Richards the same state of facts appears. But here the burden of proof is shifted. The libel in each action is dismissed for lack of sufficient controlling evidence to support it, without costs to either party.

La Roy S. Gove, for appellants.
Herbert Green, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Libelants contend that the ferryboat McCullough was solely in fault for a collision between her and libelants' tug the Leonard Richards. There is much conflict in the testimony upon several of the important points involved. The cause was tried in the presence of the district judge, who saw all the witnesses, and himself closely questioned several of the important ones. We do not feel

warranted in disturbing his findings as to the facts. Our own impression from reading the record is that when the vessels first drew towards each other they were on crossing courses, the Richards having the ferryboat on her starboard hand; that their respective obligations were fixed by that circumstance; that the ferryboat signaled and navigated in conformity to such obligations, while the Richards failed to heed the signals, and kept on across the bow of the ferryboat. For some reason the testimony as given appears not to have been so persuasive as it looks in print, and Judge Thomas found, not that the vessels were on crossing courses, but that the Richards, on whose owners was the burden of proof, had "not proved whether the McCullough was or was not an overtaking vessel." Certainly there is no such clear weight of testimony as would induce this court to disregard such finding, and to hold that she was an overtaking vessel. Whether we find, as the weight of the testimony seems to indicate, that the vessels were on crossing courses, or, as the district judge found, that libelants had not proved that the McCullough was an overtaking vessel, the result would be the same—a dismissal of the libel.

The decree is affirmed, with costs.

THE TRANSFER NO. 15.

(Circuit Court of Appeals, Second Circuit. April 17, 1906.)

No. 212.

1. COLLISION—INSPECTORS' RULES—CROSS-SIGNALS.
   Inspectors' rule No. 3, prohibiting the giving of cross-signals when vessels are approaching each other from opposite directions, does not apply to vessels on crossing courses, nor have inspectors power to make rules which would deprive a vessel of a right given her by the statutory navigation rules.
2. SAME—STEAM VESSELS CROSSING—VIOLATION OF RULES.
   A tug *held* solely in fault for a collision between her tow, a car float on her starboard side, and a steamship, where the two approached each other on crossing courses, and the tug, having the steamship on her starboard hand, persisted in crossing ahead without having obtained the consent of the other vessel.

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

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, holding the tug solely responsible for damages resulting from a collision between a car float which she had in tow and libelant's steamer City of Atlanta.

Henry G. Ward, for appellant.

Clarence S. Haight, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. We fully concur in the findings and conclusions of the district judge, and do not think it necessary to add anything to his comments upon disposing of the case except in a minor particular.

It is suggested that the tug had no business to give a cross-signal, such suggestion being apparently with reference to the inspectors' rule forbidding the use of such signals. That rule (rule III, as amended January 25, 1899) is by its terms restricted to "vessels approaching each other from opposite directions," and does not cover vessels on crossing courses, as these were, where under the steering and sailing rules one is burdened and the other privileged. There is nothing which forbids either of such vessels, while still at a safe distance from the other, to propose a modification of some indicated maneuver. Moreover, as we pointed out in The John King, 49 Fed. 469, 1 C. C. A. 319, when under the steering and sailing rules a vessel has the right to make a particular maneuver, she cannot be deprived of such right by any rule of the inspector forbidding her to sound a signal which would indicate her intention to make that particular maneuver. The power of the inspector to make rules is restricted to such as are "not inconsistent with the provisions of [the] Act of June 7, 1897, c. 4, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2875]," adopting regulations for preventing collisions upon harbors and inland waters. See section 2 of that act (30 Stat. 102 [U. S. Comp. St. 1901, p. 2884]).

Irrespective, however, of any questions as to what signals she blew and when, the tug had the steamer on her starboard hand, and there was nothing in the circumstances of the case which prevented the application of articles 19 and 22. She was clearly in fault for proceeding to cross the bows of the steamer without first having, while at a safe distance, obtained the latter's assent to such navigation. The persistent advance of the tug beyond the safety limit, sounding signals which indicated an intention to continue such advance, was a sufficient indication to the privileged vessel to warrant her in stopping and reversing. Our impression from an examination of the record is that if she had maintained her course and speed to the end she would have cut down the starboard car float.

The decree is affirmed, with interest and costs.

TACOMA RY. & POWER CO. v. GEIGER.

(Circuit Court of Appeals, Ninth Circuit. May 14, 1906.)

No. 1,289.

1. APPEAL—ASSIGNMENT OF ERROR—NEW TRIAL—REFUSAL TO GRANT.
   The refusal of the trial court to grant a new trial cannot be made the subject of an assignment of error in the Circuit Court of Appeals.
   [Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3864.]

2. COURTS—FEDERAL COURTS—JUDICIAL DISTRICT—DIVISION OF STATE.
   The division of the state of Washington into two judicial districts left the then existing Circuit and District Courts restricted only as to territory and intact as to all other respects.

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

B. S. Grosscup, Charles O. Bates, and Walter M. Harvey, for plaintiff in error.

Edward E. Cushman, for defendant in error.

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

ROSS, Circuit Judge. That the refusal of the trial court to grant a new trial is not the subject of an assignment for error here has been decided too often to require a citation of the decisions. If the assignment to the effect that the court below erred in overruling the defendant's "challenge to the jurisdiction of the above-entitled court at the time of the hearing" of the motion for a new trial can be considered, it is disposed of by the decision of this court at the last term in the case of the Seattle Electric Company v. Hartless et al., 144 Fed. 379, where we held that the division of the state of Washington into two judicial districts left the then existing Circuit and District Courts restricted only as to territory, and intact in all other respects.

The remaining assignments of error relate only to the proceedings upon the trial of the case in the court below, concerning which there is no bill of exceptions.

Motion to dismiss denied, and the judgment affirmed.

UTAH-NEVADA CO. v. DE LAMAR.

(Circuit Court of Appeals, Ninth Circuit. May 14, 1906.)

No. 1,267.

REMOVAL OF CAUSES—RECASTING PLEADINGS—DIVISION OF CAUSE—EFFECT.

On the removal of a cause to obtain both equitable and legal relief, complainant filed amended pleadings, as required by Circuit Court rule 19, splitting the cause into two, one an action at law, and the other a suit in equity, after which it was held in the law action that the cause was improperly removed. *Held*, that the bill in equity so filed did not constitute the commencement of a separate and distinct suit, and hence on the reversal of a decree therein the suit should be remanded to the state court.

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

Houx & Barrett, James G. Maguire, W. H. Metson, and J. T. Houx, for appellant.

Alfred Sutro, for appellee.

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

ROSS, Circuit Judge. The decree appealed from dismissed the cause "for failure on complainant's part to comply with the sixty-ninth equity rule in the matter of taking testimony," and awarded the defendant to the suit costs against the complainant, taxed at $59.90.

Counsel for the respective parties are agreed that the judgment must be reversed, but disagree as to what the provisions of the judg-

ment of reversal should be; the appellant claiming that the judgment appealed from should be reversed with directions to the court below to remand the cause to the state court, and the appellee contending that it should be reversed with directions "to permit the parties to amend the pleadings, if so advised, so as to show the requisite diversity of citizenship between the assignor of the appellant and the appellee." The legal side of the cause was before this court at the October Term, 1904, when we held that the Circuit Court was without jurisdiction, for the reason that the action was based on an assigned contract, and it did not appear that the assignor of the chose in action and the defendant thereto, the appellee in that case, as in this, had the requisite diverse citizenship. Utah-Nevada Company v. De Lamar, 133 Fed. 113, 66 C. C. A. 179.

Objection is taken by the appellee to those portions of the printed record which embrace: (1) The original complaint filed by the Utah-Nevada Company against De Lamar in the superior court of the city and county of San Francisco, state of California, on the 12th day of February, 1903; (2) petition of the defendant thereto for the removal of that cause from that court to the court below; (3) the order of the state court transferring the cause to the court below; (4) the notice of a motion made by the plaintiff in the case to remand the cause to the state court; (5) the order of the court below denying the motion to remand; and (6) the notice of a motion made by the defendant to the suit that the plaintiff replead in the Circuit Court.

The appellee also requested the insertion into the printed record herein of: (1) The answer of the defendant to the bill of complaint filed by the plaintiff in the court below; (2) the enrollment; (3) præcipe for transcript on appeal; and (4) certificate of the clerk to the record on appeal herein.

We think the objections made by the appellee to the record are not well taken. The suit was commenced in one of the superior courts of the state of California, in which state legal and equitable grounds of action may be and are joined in one complaint. The defendant to the suit moved the state court for an order removing the cause to the United States Circuit Court, which order was made, and, upon the transfer of the cause to the court below, the plaintiff therein moved the Circuit Court to remand the cause to the state court, which motion the court below denied, and, in view of the rule prevailing in the federal courts requiring legal and equitable grounds of action to be separately proceeded upon, ordered that the plaintiff recast its pleadings therein, which was done; the complaint on the law side of the court being numbered in the court files 13,220, and being that branch of the cause disposed of by this court in its opinion and judgment rendered October 3, 1904, and reported in 133 Fed. 113, 66 C. C. A. 179, and the bill presenting the plaintiff's alleged equities being numbered in the files of the court 13,220A, and being that disposed of by the judgment from which the present appeal is brought.

It is manifest that neither the enrollment, præcipe for transcript on appeal, nor the certificate of the clerk to the record on appeal, could, if they had undertaken to do so, make of the filing of such a bill, under

such circumstances, the original commencement of the suit; but an inspection of those papers fails to show that either of them undertook to do anything of the sort.

It is, we think, also perfectly clear that the recasting of the pleadings in the court below by reason of the rule prevailing in the federal courts, to the effect that legal and equitable remedies must be separately sought, was but a continuation in the federal court of the case originally brought in the state court, and by it transferred to the federal court, and constituted parts and parcels of the same cause of action; and such are the provisions of rule 19 of the rules of practice in the Circuit Court, that rule being as follows:

"Rule 19. Amendment on Removal Proceedings. If the complaint in a cause removed from a state court combine causes of action for both legal and equitable relief, the plaintiff may, without any order of court, within ten days from the filing of the transcript, if filed by him, or if filed by any other party, within ten days after notice of such filing, or within ten days after the decision upon a motion to remand, if a motion to remand be made and denied, serve upon the opposite party and file with the clerk separate amended complaints, one on the law side of the court for the legal relief, and the other on the equity side of the court for the equitable relief, or may, at his option, without any order of court, serve upon the opposite party and file with the clerk; an amended complaint eliminating from the cause either the legal or the equitable part thereof as he may elect. It shall be the duty of the plaintiff in the cases above mentioned to take one or the other of the courses above pointed out, within the times above provided; and the time of the opposite party to appear or plead or take any other step in the cause shall not commence to run until the amendment is made as above specified; and if such amendment be not so made the cause may on motion of any adverse party, on due notice, be dismissed for want of prosecution.

"The plaintiff in any cause removed from a state court may in all cases amend his complaint, as of course, and without any order therefor, in any other respect, within the times above specified. Any amended complaint served and filed as above provided shall be deemed and treated as a continuation of the suit removed from the state court."

The circumstance that the bill filed by the plaintiff on the equity side of the court is not in terms declared to be an amended complaint is unimportant, for a pleading is not what it is called, but what it really is. Its character is to be determined by the court. Mills v. Fletcher, 100 Cal. 148, 34 Pac. 637. This bill, however, does expressly state upon its face that the cause is one "removed from the superior court in and for the city and county of San Francisco, state of California, on petition of defendant," and in its introductory part expressly states that the complainant is "continuing to object to the jurisdiction of said Circuit Court." In other words, it was not there as an original complainant, but under compulsion, continuing its objections to the jurisdiction of the federal court, and filing the bill only in accordance with the rule prevailing in that court.

None of the cases cited by the appellee sustains his contention that such repleading in the federal court is a commencement of a separate and distinct suit from the cause removed from the state court.

It results from what has been said that the judgment must be reversed, and cause remanded to the court below, with directions to remand the cause to the state court from whence it came.

PENDLETON et al. v. UNITED STATES & VENEZUELA CO. et al.

(Circuit Court of Appeals, Second Circuit. April 17, 1906.)

No. 194.

SHIPPING—DEAD FREIGHT AND DEMURRAGE—LIABILITY OF CHARTERER.

Evidence *held* to support findings by the trial court that libelants had not established their claim for dead freight under a charter based on the ground that the water on a bar was not of sufficient depth to enable the vessel to load a full cargo, nor that there was a failure to exercise customary dispatch in discharging which entitled them to demurrage.

[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.]

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

This cause comes here upon appeal from a decree of the district court, Southern District of New York, dismissing a libel by the owners of the brig Jennie Hurlbut to recover freight, dead freight, average, and demurrage under a charter of that vessel for a voyage from Maracaibo to New York to carry a full cargo of asphalt in boxes and/or barrels. The freight and average were paid into court after libel was filed. The cargo carried was 448 tons while the capacity of the brig was 720 tons. The contention of libelants is that so short a cargo was taken because there was not water enough on a bar which had to be crossed in getting out of the Gulf of Maracaibo to admit of the vessel carrying more. The respondents insisted that they had asphalt ready to ship sufficient to give a full cargo, but that the master refused to load it, although there was sufficient water for the brig to carry it out of the gulf in safety.

H. W. Goodrich, for appellants.
Mark Ash, for appellees.

Argued before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. The master, whose testimony was taken on deposition, nowhere states that there was not sufficient water, but only that the pilots told him there was not enough. There is some evidence contradictory of the master's narrative as to his conversation with the pilots; but, conceding that such conversation was exactly as he gives it, it does not prove that the water was in fact insufficient. As to what the depth really was, it is hearsay merely and not competent. None of the pilots were examined, as apparently they might have been by deposition. The only witness who testifies to a lack of sufficient water on the bar is the mate. His testimony was taken in open court in the presence of the District Judge, who also heard the manager of the asphalt company, Critchfield. The last-named witness contradicted much of the collateral testimony given by the mate, and positively asserted that the depth of water was considerably greater than the mate asserted, having himself sounded the location repeatedly to determine whether there was sufficient water to insure convenient access to the asphalt plant. Other witnesses, who testified to a greater depth than the mate asserted that there was,

were also examined in the presence of the District Judge. Manifestly he credited some witnesses and discredited others, and his conclusion on this disputed question of fact will not be disturbed on appeal.

As to the claim for demurrage, the evidence as to what would be "customary despatch" in unloading such a cargo is not satisfactory, the delay in obtaining hoisting apparatus, occasioned by the crowded condition of the port, is excusable and we concur with the District Judge in the conclusion that the libelants have not made out a case upon this claim. Nor do we feel inclined to interfere with the discretion of the District Judge as to the allowance of costs to respondents. It is true that the claims for freight and average were not settled until suit was brought, but thereafter they were promptly paid into court, and the only expense incurred was in litigating the claims in which the libelants were eventually beaten.

The decree is affirmed, with costs.

NATIONAL BANK OF BOYERTOWN v. SCHUFELT.

(Circuit Court of Appeals, Eighth Circuit. April 24, 1906.)

No. 2,190.

1. JURY—JURORS—DISQUALIFICATION—PRIOR SERVICE—FEDERAL STATUTES.
   Under the express provisions of Act Cong. June 30, 1879, c. 52, § 2, 21 Stat. 43 [Ind. T. Ann. St. 1899, § 4193], prior service is no ground for disqualification of a juror, unless such service was in the capacity of a petit juror.
   [Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 423–430.]
2. SAME—INDIAN TERRITORY.
   Under Mansf. Dig. § 3995 [Ind. T. Ann. St. 1899, § 2675], declaring that no person shall be compelled to serve as a grand or petit juror more than one term in any one year, prior service as a juror is not a disqualification, but a personal exemption, which the person called to serve may urge or waive at his election.
3. WRIT OF ERROR—EVIDENCE—EXCEPTIONS.
   The admission of evidence cannot be reviewed where no exception was reserved to the ruling.
4. REPLEVIN—INSTRUCTIONS—EVIDENCE.
   Where in replevin to recover certain mortgaged cattle there was no claim that the marshal had not taken the cattle claimed by plaintiff, or that he had taken any that were not so claimed, an instruction making plaintiff's right to recover depend on whether its mortgage covered the cattle taken by the marshal under the writ was not erroneous; the record making it certain that the jury could not have understood the reference to the cattle taken under the writ as meaning anything other than the cattle claimed by the plaintiff.
5. SAME.
   Where plaintiff sued to recover certain mortgaged cattle described as 326 head of three year old steers, located in a certain feed lot, which cattle subsequently became intermingled with cattle mortgaged to another, all of which were in defendant's possession, it was immaterial whether the cattle covered by plaintiff's mortgage were designated in an instruction by reference to their age or to their location at the date of the mortgage.

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

William H. Kornegay and Luther Perkins, for plaintiff in error.

Charles W. German, Edwin C. Meservey, and Cameron L. Orr, for defendant in error.

Before VAN DEVANTER, HOOK, and ADAMS, Circuit Judges.

VAN DEVANTER, Circuit Judge. This was an action in replevin instituted by the plaintiff in error to recover the possession of cattle to which he asserted a right of possession under a chattel mortgage. A trial before a jury resulted in a verdict for the defendant, and the judgment entered thereon was subsequently affirmed by the Court of Appeals of the Indian Territory. 82 S. W. 927. In the course of impaneling the jury it appeared that one Tiger, who was on the regular panel of petit jurors for that term, and who was offered as a juror in the case, had served as a juror in that court at a prior term and within a year, but whether his service had been as a grand juror or as a petit juror was not disclosed. The plaintiff challenged him for cause on the ground of his prior service, and the challenge was overruled. The plaintiff reserved an exception to the ruling, and afterward excluded him from the jury on a peremptory challenge. The other peremptory challenges accorded to the plaintiff were also used, but whether he was thus enabled to exclude from the jury all objectionable persons does not appear. Complaint is made of the overruling of the challenge for cause, and the matter is presented in the briefs as if its solution depended largely upon whether the statute of the United States declaring "no person shall serve as a petit juror more than one term in any one year" (Act June 30, 1879, c. 52, § 2, 21 Stat. 43; Ind. T. Ann. St. § 4193), or the statute of Arkansas (Mansfield's Dig. § 3995, Ind. T. Ann. St. 1899, § 2675), declaring "no person shall be compelled to serve as a grand or petit juryman more than one term in any one year," is controlling in the Indian Territory under the existing legislation of Congress. Act March 1, 1889, c. 333, § 8, 25 Stat. 784; Act June 30, 1879, c. 52, § 2, 21 Stat. 43; Act May 2, 1890, c. 182, §§ 29–31, 26 Stat. 93, 94; Act March 1, 1895, c. 145, §§ 6, 13, 28 Stat. 697, 698; Ind. T. Ann. St. 1899, §§ 8, 4193, 29, 30, 31, 50, 57. We do not, however, deem it necessary to consider which of the two statutes is controlling, because in neither event was the ruling erroneous. Under the federal statute, to operate as a disqualification the prior service must have been in the capacity of a petit juror, but, as before stated, it was not shown to have been of that character. Under the Arkansas statute, the prior service, whether as a grand or petit juryman, did not operate as a disqualification, but only as a personal exemption, which the person called as a juror could assert or waive as he chose.

Complaint is made of the admission of certain evidence on behalf of the defendant, but as no exception was reserved to the ruling, the plaintiff must be held to have acquiesced in it, and to have waived the objection made to the evidence. Hutchins v. King, 1 Wall. 53, 60, 17 L. Ed. 544; Railway Co. v. Heck, 102 U. S. 120, 26 L. Ed. 58; Rodriguez v. United States, 198 U. S. 156, 165, 25 Sup. Ct. 617, 49 L. Ed. 994.

These facts were disclosed at the trial: One Harrelson was the owner of two bunches of cattle, all of which were branded "Circle D" on the left hip. One bunch, containing approximately 326 head of three year old steers, was located in the feed lot on the Schufelt ranch three miles west of Lenapah, and the other, containing approximately 342 head of two year old steers, was located in Harrelson's Hog Shooter ranch, 10 miles southwest of Lenapah. In this situation Harrelson, on October 28, 1898, gave two chattel mortgages, one on each bunch of cattle. Each mortgage described the cattle covered by it in substantially the terms just mentioned, and stated that they constituted all the property of that description then owned or controlled by the mortgagor at the location named. The mortgage on the three year old cattle located in the feed lot on the Schufelt ranch came to be held by the plaintiff and the other by one Franklin. The number of cattle in each bunch was reduced by shipments and sales, which are not questioned, and the remaining cattle in the two bunches became intermingled. When the action in replevin was begun, the defendant, as agent of Franklin, was in possession of certain cattle which he insisted belonged to the bunch of two year olds which had been on the Hog Shooter ranch, but which the plaintiff insisted were part of the three year olds which had been located in the feed lot on the Schufelt ranch. The holder of each mortgage was conceded to be entitled to the possession of the cattle covered by it, and the chief question to be determined from the evidence was, were the cattle in dispute covered by the plaintiff's mortgage or by that of the defendant's principal, Franklin? In this state of the evidence the court instructed the jury:

"The question for you to decide in this case is whether the mortgage of the plaintiff, which is on the cattle above described as 326, covered the cattle levied upon by the marshal under the writ of replevin in this action, or any part of the same; that is, whether they, or any part of them, were located in the feed lot as described in the mortgage of October 28, 1898, now owned by plaintiff."

The plaintiff seeks to sustain an exception taken to this instruction, and, while the ground of the exception does not appear to have been stated at the time, it is urged that the instruction was erroneous in two respects: One that it made the plaintiff's right to recover depend upon whether its mortgage covered the cattle taken by the marshal under the writ of replevin, when there was no evidence as to what cattle had been taken under the writ; and the other that it made the plaintiff's right to recover depend upon the location of the cattle on October 28, 1898, the date when the two mortgages were given. Of the first point it is sufficient to say that, while it is true there was no specific evidence as to what cattle had been taken by the marshal under the writ of replevin, the record makes it altogether certain that the jury could not have understood the reference to the cattle taken under the writ to mean anything other than the cattle in dispute, or those sought to be recovered by the plaintiff. There was no suggestion that the marshal had not taken the cattle claimed by the plaintiff, or that he had taken any not so claimed. And in respect of the second point we think that, in view of the evidence re-

lating to the location of the cattle when the two mortgages were given, it was immaterial whether those covered by the plaintiff's mortgage were designated in the instruction by reference to their age or to their location at the date of the mortgage. In the light of the evidence and the terms of the mortgages, either means of designation would have been readily and correctly understood by the jury. This disposes of such of the assignments of error as are open to consideration by us, and, as they are not in our opinion well taken, the judgment is affirmed.

LEE WON JEONG v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 14, 1906.)

No. 1,265.

1. ALIENS—CHINESE—DEPORTATION—JUDGMENT—RECITAL OF FACTS.

Where a judgment for the deportation of a Chinese person recited that it appeared to the court that accused was a Chinese laborer and a subject of the Emperor of China; that he was not registered as required by Acts Cong. approved May 5, 1892, c. 60, § 6, 27 Stat. 25, and Act Cong. Nov. 3, 1893 (chapter 14, § 1, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1320]), and that he did not belong to one of the classes of Chinese excepted by said acts from such registration, and was unlawfully within the United States, it was not objectionable for failure to state sufficient facts to sustain it.

[Ed. Notes.—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.]

2. APPEAL—RECORD—BILL OF EXCEPTIONS—EVIDENCE—REVIEW.

Where the evidence printed in the record was not embodied in a bill of exceptions or otherwise authenticated as having been used before the trial court, assignments of error based on the evidence could not be reviewed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2433–2440.]

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

For opinion below, see 136 Fed. 701.

Edwin Mays, for appellant.

W. C. Bristol, U. S. Atty.; and Edward E. Cushman, Special Asst. to Atty. Gen., for the United States.

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

ROSS, Circuit Judge. This is an appeal from the judgment of the court below directing the deportation of the appellant to China, affirming a like order of the United States commissioner at Portland, Or., based upon a verified complaint of one of the government's Chinese inspectors charging that the appellant was unlawfully within the United States and within the jurisdiction of the court below, in that he was a subject of the Emperor of China, and without the certificate of registration, or other document or lawful authority entitling him to be or remain within the United States, that he was a laborer, and

did not belong to any of the excepted classes of Chinese persons provided for by law. From the opinion of the court below found in the record it appears that seven other Chinese persons were proceeded against in like manner and at the same time, in respect to five of which the court, after reviewing the testimony given on behalf of the respective parties, reversed the action of the commissioner directing their deportation, and discharged them; but in respect to the present appellant and one Lee Jo Yen, the court affirmed the commissioner's order of deportation, saying in the opinion:

"Whatever consideration I might otherwise be disposed to give to the testimony in behalf of these defendants, the unexplained fact admitted by them that they came from Seattle to Portland via Pasco, and, upon their arrival at The Dalles, got off the cars and came to Portland by boat, convinces me that they are unlawfully in the country, and that the consciousness of such fact prompted them to adopt this devious route and course to escape detection and arrest on their arrival in Portland."

The judgment of the court below that is appealed from is as follows:

"This cause was tried by the court upon appeal from the order of E. D. McKee, United States commissioner, ordering said defendant deported from the United States to China, and upon the testimony offered before this court on behalf of the plaintiff and defendant; and was argued by Mr. William W. Banks, assistant United States attorney, and by Mr. Edwin Mays, of counsel for said defendant; and it appearing to the court that said defendant, Lee Wong Jeong, is a Chinese laborer and a subject of the Emperor of China, that he has not registered as required by Acts Cong. approved May 5, 1892, (chapter 60, § 6, 27 Stat. 25), and Act Cong. Nov. 3, 1893, c. 14, § 1, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1320], and that he does not belong to one of the classes of Chinese excepted by said acts from such registration; and is now unlawfully in the United States: It is therefore ordered and adjudged that said defendant, Lee Won Jeong, be deported from the United States to China forthwith."

The first assignment of error is to the effect that the court erred in affirming the decision of the commissioner "without finding the facts upon which said order could be based."

The second assignment is to the effect that the court below erred "in not making and filing findings of fact and conclusions of law, as without these there are no grounds for the order affirming the commissioner's order of deportation." It is sufficient to say in response to these assignments that the facts upon which the court below proceeded are sufficiently stated in the judgment.

The remaining assignments of error are based upon the evidence printed in the record, which, however, is not embodied in a bill of exceptions, or otherwise authenticated as having been used before the court below. It cannot therefore be considered here.

Motion to dismiss and to strike out denied, and the judgment affirmed.

IMPERIAL MFG. CO. v. MUNSON SUPPLY CO. et al.

(Circuit Court of Appeals, Second Circuit. April 23, 1906.)

No. 275.

PATENTS—INFRINGEMENT—TYPEWRITER KEYS.

The Graham & Savell patent, No. 504,065, for a cushioned cap for typewriter keys, *held* valid, on appeal from an order granting a preliminary injunction, and infringed by one form of defendant's construction, but not by another form.

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

The following is the opinion of the Circuit Court, by Townsend, Circuit Judge:

On motion for preliminary injunction against infringement of claim 1, of patent No. 504,065, granted August 29, 1893; claim 7 of patent No. 563,163, granted June 30, 1896; and claims 1, 2, and 3 of patent No. 563,164, granted June 30, 1896—all to Graham & Savell. These patents have never been adjudicated, but the evidence of universal public acquiescence for a period of 12 years, and of the relations of defendant Munson to complainant as its agent, are sufficient to sustain the motion.

The patents relate to certain alleged inventions in india-rubber cushions for typewriter keys. Patent No. 563,163 need not be considered, as, if construed broadly enough to cover defendants' construction, it would be void, in view of the prior state of the art. Patent No. 563,164 covers a process of inlaying letters by vulcanization and the resulting product, both of which appear to be old, in view of similar processes and products in the general field of art relating to the manufacture of articles of india rubber.

Claim one, of patent No. 504,065, the one as to which infringement is here claimed, is as follows: "(1) A hollow cushioned cap for the keys of typewriting machines, having a letter or character on its surface, said cap provided with means for engaging the key for maintaining the cap elevated to form an air space or cushion between the inner top wall of the cap and top of the key." The cap, as described in the specifications, comprises a metallic sleeve arranged to fit over the rim of a typewriter key, having above it a rim or flange with a neck of smaller diameter, and above this an outwardly expanding flange. The "hollow elastic cap is stretched over the flange, a, until the lower edge of it fits into the space or neck between the body, A, and the flange, a, where it is firmly held in place. * * * When this cap is in place there is a hollow space between the thin surface of the cap and inner portion of the cup-shaped flange, a, and in addition to this when the rim, A, has been fitted upon the key, a certain amount of air is retained within the space between the key and the elastic cap which serves as a cushion, making the pressure with the fingers very soft and agreeable, and preventing any soreness or injury to the fingers by constant striking of the keys."

There is no prior art which shows such a construction. The only patent relied on to limit the invention is No. 455,319, to Green, in which an ordinary rubber thimble is pushed down directly on the key without any interposed structure, and is held in place simply by the elasticity of its rubber rim. The objection to this construction is that it lacks the cushioning qualities provided for by the construction of the patent in suit, and that, as appears from the affidavits, it is impracticable because, by reason of the dependence upon the elasticity of the rim as the means of attachment, it is only capable of use for a short time. It is true, as found by the Patent Office when the application for the patent in suit was pending, that Green shows an air space between the top of the key and the solid rubber cap, but this is not in construction or operation the air cushion of the patent

in suit, which, by means of the flange construction, maintains the cap elevated to form an air space or cushion as claimed. The defendants' cap differs from that of Green, in that it introduces into its construction means for engaging the keys and for maintaining the cap elevated, consisting of an external band supporting the key and cushion, provided with punching points to hold the rubber in place. The effect of this arrangement is to form an interposed air space or cushion like that of the patent in suit. The defendants contend, however, that this construction does not infringe because said air space is crossed by two bands or bridges of rubber extending at right angles to the exterior band across the air space, and because in the latter construction the air space has been further obstructed or filled up with sponge rubber, thus reducing the elasticity of the cushion and thereby introducing a novel improvement.

Defendants appear to have appropriated the essential element, the elevated air space or cushion of the first claim of patent No. 504,065. The fact that they have introduced rubber bridges or pieces of sponge rubber merely so as to reduce the amount of resiliency secured by the patented construction is not sufficient to relieve them of the charge of infringement.

The motion for a preliminary injunction as to claim 1 of patent No. 504,065 is granted, and is denied as to the other two patents.

J. Q. Rice, for appellants.

Livingston Gifford, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. The court is of the opinion that the complainant's patent is valid; that the defendants' cap, when made without the sponge rubber filling, is an infringement of the first claim of complainant's patent, but when made with the filling is not an infringement; and that a sufficient case was shown for an injunction.

The order granting preliminary injunction is affirmed, without costs of appeal to either party.

CORTIS v. AMERICAN STREET LAMP & SUPPLY CO. et al.

(Circuit Court, S. D. New York. March 2, 1906.)

1. PATENTS—INFRINGEMENT—LAMP.
The Cortis patent, No. 613,648, for a lamp, the essential element of the combination shown being a spring support or cushion for carrying the chimney-gallery and mantle-support in lamps using an incandescing mantle, to prevent injury to the mantle from jars or shocks, is not infringed by the mantle supporting device of the Momand patent, No. 781,613.

2. SAME—LAMP CHIMNEY.
The Marsh patent, No. 652,730, for a lamp chimney, claims 1, 2, and 3, the essential element of which is an adjustable support for the upper portion of a sectional chimney for use on lamps having an incandescing mantle, must be limited to the precise construction shown in view of the prior art, and, as so limited, are not infringed by the chimneys shown in the Momand patent, No. 791,355.

In Equity. On final hearing.

Seabury C. Mastick (Charles S. Jones, of counsel), for complainant.
W. P. Preble, Jr., for defendants.

HAZEL, District Judge. The patents in suit, No. 613,648 dated November 1, 1898, granted to Frank A. Cortis as inventor, and No. 652,730, dated June 26, 1900 to Riverius Marsh, assignor to Dwight T. Cortis, relate to new and useful improvements in lamps and lamp chimneys. The structures described in the specifications are subject to conjoint use in an illuminating gas lamp which has an incandescing mantle of the Welsbach type. The object of the earlier patent, which will be considered first, was to prevent disintegration or destruction of the mantle (which is composed of a delicately woven fabric) from jars or shocks. The specification says:

"The object of my invention is to provide means whereby the mantle-supporting portion of the lamp may be insulated from shocks and jars; and to this end it consists in the combination, with the lamp-support, of a yielding cushion interposed between the lamp-support and the mantle-support, and in details of the several parts making up the device as a whole, and in the combination of such parts, as more particularly hereinafter described, and pointed out in the claims."

The claims 1, 7, and 8, which the defendants are charged with infringing, read as follows:

"(1) The combination of an incandescent gas-burner, of a spring-support constructed to carry the mantle and prevent undue vibration and shaking thereof, with a telescopic tubular connection for supplying gas without interfering with the action of the spring-support."

"(7) In combination with a bracket or like support for a lamp having a fragile mantle over the flame, a tubular connection between the support and the burner of said lamp, a mantle-support, and a yielding cushion interposed between the lamp-support and the mantle-support.

"(8) In combination in an incandescent burner, of a spring-support constructed to support a mantle and prevent undue vibration or shaking thereof, with a tubular connection for supplying fluid without interfering with the action of the spring-support."

The essential element of the combination, evidently, is the spring-support or yielding cushion. In the first claim, the spring-support is

mentioned as carrying the mantle so as to prevent destruction by undue vibration and shaking; in claim 7 the spring-support is described as a yielding cushion interposed between the lamp-support and the mantle-support, while claim 8 defines a spring-support constructed to support a mantle, and to thereby prevent undue vibration and shaking thereof. That portion of the lamp which rests upon the gallery or ledge gently reciprocates by force of the elasticity of the spring or yielding cushion when the lamp is shaken and thereby the incandescent mantle is prevented from breaking or disintegrating. If the mantle and that portion of the lamp which supports it rested rigidly upon the gallery or ledge, it would not be difficult to understand that any oscillating or vibratory motion might destroy the mantle and perhaps the globe. The principal defense is noninfringement. The defendant contends that the patentee brought into the art a device which affords protection from jars and shocks to the chimney gallery and chimney together with the mantle-support and the mantle, and that the essential element of the above claims is the coiled spring, which is illustrated in the drawings attached to the specifications. This claim is supported by the proofs; for to accomplish the object of the inventor, it was necessary to provide means "whereby the mantle supporting portion of the lamp may be insulated from shocks and jars." The specification says:

"Prior to my invention the chimney-gallery, f [which supports the chimney, g, a mantle, h, and, in most instances, a shade], has been supported directly on top of the air-shutter, the mixing or central tube, c, extending through a central opening in the chimney-gallery, as shown in dotted line in Fig. 1, which gallery is thus supported firmly in an upright position. When the parts are so supported, any jar given to the gas-bracket or other support for the lamp or the lamp itself is communicated directly to the chimney-gallery and mantle-support and causes the mantle to break short off at the neck or upper portion, and thus become destroyed. In order to avoid this, a spring-cushion or like elastic device, e, is interposed between the mantle-support [in this instance the chimney-gallery] and the bracket or part fast to the bracket."

Continuing, the specification says:

"The mantle, h, is supported usually from a loop formed on the upper end of a rod, h^1, which rod is secured in a socket, h^2, in the chimney-gallery as by means of a clamp-screw, the head of which is shown at h^3."

It will be observed that the entire weight of the gallery and chimney is borne by the elastic cushion. From a careful reading of the specification in connection with the drawings it is clear that the patentee does not claim a spring-support that carries the mantle, as the mantle is supported from a loop formed on the upper end of a slender bar or rod which is secured to the chimney-gallery. Claims 1 and 8 do not limit the location of the spring-support, but I think that to include a yielding support for the mantle alone would be an expansion of such claims. Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 274, 24 L. Ed. 344. The feature of threading the loop to suspend the mantle over the flame was a known arrangement at the date of the patent in suit. In the patent to Bell, No. 409,554 of August 20, 1889, is shown a method of suspending the mantle by a platinum wire from the hori-

zontal ring at the top end of a rod vertically adjusted to the side of the burner. The prior art as evidenced by prior patents, does not disclose the spring or cushion arrangement of the Cortis patent. The Svenson patent, No. 321,657, for an oil lamp, has a coiled spring located in the base of the lamp to press down the front to enable convenient and expeditious filling. This device has little bearing upon the patent in suit. The Nichol patent, No. 555,732, issued March 3, 1896, is perhaps suggestive of the Cortis structure. The patent related to a gas-burner using an incandescent gas-mantle, and the object was to overcome vibration or jars. The mantle was supported by two spiral springs which were suspended from a fixture which was independent of the gas bracket. It is thought that the Nichol device would be close enough to suggest the Cortis coiled spring or yielding cushion, but the proofs show that the invention in suit was conceived and completed in the latter part of the year 1889, before the Nichol application was filed. That the Cortis device in question was in prior public use within the purview of the statute, or that it was abandoned, is not claimed. The validity of the patent in suit and the time when the invention was made is not seriously questioned. The scope of the claims in controversy, however, is not thought to encompass the structure of the defendants. The defendants' gas-mantle is hung upon a platinum wire attached to the upper portion of a curved or bended steel wire. Such curved wire is a so-called double wire support for the incandescent mantle and was designed, according to patent, No. 781,613, dated January 31, 1905, issued to Momand, to prevent any part of the mantle-support from "lying within the central zone of heat from the burner." In short, the peculiar curvature of the wire enables keeping the suspended mantle directly above the burner. Complainant contends that the upper portion of the wire is curved in such a manner as to impart to it a resiliency which results in securing the advantages of the patent in suit. I am not convinced of the soundness of this proposition. There is no such spring action in the curvature of the rod used by the defendants as was designed to prevent destruction of the mantle by vibratory shocks or jars. Concededly, a slender metal rod even without the double wire support is yielding to a slight extent. The steel rods of the defendants' device, together with a slight degree of resiliency due to the manner in which the platinum wire is fastened thereto, in connection with Welsbach burners from which the mantle is suspended, concededly were old at the date of the Cortis invention. Defendants claim that their rods are curved or doubled to preserve the ring at the upper part and particularly to remove the necessity of soldering one of the vertical bars to the ring. The defendants have simply altered the form of a supporting rod and have not thereby primarily afforded elasticity to the lamp-support or other devices of the patent in suit. It is quite true that infringement cannot be avoided by omitting one element of a combination of the claims and substituting therefor equivalent means to perform the same function, but as already intimated, the principle of defendants' steel wire device performs its function in a different manner and in such a way as not to include the essential element of the Cortis patent in

suit. In Eames v. Godfrey, 1 Wall. 78, 17 L. Ed. 547, the Supreme Court substantially held that even if a defendant should use the other elements of the combination, though not the identical mechanism, and his structure performed the same function, the patent would not be infringed. The court says:

"The patent in controversy was for a combination of mechanical powers to effect a useful result, and such a patent differs essentially in its principles from one where the subject-matter is new. The law is well settled by repeated adjudications in this court and the circuit courts of the United States, that there is no infringement of a patent which claims mechanical powers in combination unless all the parts have been substantially used. The use of a part less than the whole is no infringement."

See, also, Case v. Brown, 2 Wall. 320, 17 L. Ed. 817; Burr v. Duryee, 1 Wall. 531, 17 L. Ed. 650, 660, 661.

I do not wish to be understood as holding that a complainant because his patent is for a combination cannot invoke the doctrine of equivalents, as the rule of equivalents is applicable to combination claims as well as to cases where a patentee is the inventor of an entire structure; but the scope of combination claims is subject to a narrower view. Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33. In my judgment, the defendants' structure is not within the scope of the claims under consideration. As to patent No. 652,730. The essential element of the involved claims is the upper section of a chimney or flue which is adjustably supported in relation to an incandescent mantle. In complainant's brief, the construction of the Marsh chimney is correctly explained as follows:

"The upper section is supported on a rod, a^2, capable of vertical adjustment so as to maintain the chimney above the mantle or to lower it so as to completely inclose the mantle. The lower section, D, is in the form of a frustrum of a cone and rests upon the perforated shell or gallery, b^2. By this construction the patentee explains that separate currents of air are induced, one within and the other outside of the cone, D. The inner current of air passes around the mantle and with the products of combustion escapes through the upper section A, of the chimney. The outer current of air prevents 'the intense heat of the mantle from unduly heating and breaking the glass globe.'"

The device is exclusively adapted to the Welsbach incandescent mantle, and the advantage to be derived from the patent is explained in complainant's brief as follows:

"The feature of adjustability of the upper section of the chimney permits it to be raised or lowered relatively to the mantle so as to regulate the draft, or so as to rest upon the cone, D, to completely enclose the mantle thus protecting the mantle from draughts liable to disintegrate it when not in use, or when the inside of the globe is to be cleaned."

The defenses interposed by the answer are anticipation and noninfringement. The claims in controversy read:

"(1) In a gas-lamp, the combination of a gas-burner, an incandescing mantle of refractory material above the burner, an outer removable glass globe, a vertically-adjustable tubular chimney adapted to be raised above or moved down over the mantle to inclose it, means for adjusting the said tubular chimney from the outside of the globe, whereby the chimney may be adjusted without removing the globe.

"(2) In a gas-burner, the combination of the main burner, a refractory mantle supported above the burner, an adjustable chimney adapted to be vertically adjustable to expose or completely inclose the refactory mantle, a glass globe inclosing the chimney, mantle and burner and means to support the chimney in its adjusted position.

"(3) In a gas-burner, the combination of the main burner, a refactory mantle supported above the burner, an adjustable chimney adapted to be vertically adjustable to expose or completely inclose the refractory mantle, means to support the chimney in its adjusted position, and a conical shield encircling the base of the refractory mantle or burner and over which the vertically-adjustable chimney fits."

Complainant claims that Marsh was the first to provide a chimney which could be lowered to fit over mantles of various sizes to the end that a desired draught might be created. The claims, though the language is broad, must be restricted, however, on account of the prior state of the art, to the precise construction shown. In the patent of Fischer, No. 308,762, dated December 2, 1884, is shown a combination of elements, one of which is a vertically-adjustable lamp chimney. The chimney which may be raised or lowered is arranged in telescopic fashion; that is, the construction consists of two tubes, the outer tube having a slanting slot and a set screw which is used to fasten the inner tube. The fact that the patent relates to an oil lamp is not thought material. It certainly was old at the date of the invention to provide lamps with tubular flues which were adjustable substantially in the same manner as in the Marsh structure. See patents to Fish, No. 127,685, issued June 11, 1872, for street lamps; Hagerty, No. 142,693, issued September 9, 1873; Miller, No. 307,406, of October 28, 1884; Pfingst, No. 347,375, of August 17, 1886. It is true that the chimney arrangement of the Fischer patent was to provide means to fit the lamp to cars and to enable convenient removal of the globe. Such arrangement of the chimney, however, is not far removed from the alteration made in the structure in suit. That the Marsh conception by which the tubular chimney is lowered over the mantle, and down upon the cone of the chimney gallery was a patentable improvement is not seriously controverted. The principal question is whether or not the scope of the involved claims in view of the prior art entitles the patentee to a construction of such breadth as will include a telescopic arrangement for sliding the chimney. Probably, some credit is due the inventor for having slightly improved the art, but his conception was not that of a pioneer, and accordingly he is entitled only to protection for the means by which he achieved the result. Complainant's structure has a three-part chimney—an upper and lower section, the inner part and the outer part being in concentric position, the lower section resting upon a so-called perforated shell at the lower end of the mantle. To lower the upper portion of the chimney the rod is operated in the manner as stated in the patent. The defendants' chimney and the manner of its operation is described in the specification of patent No. 791,355, issued to Momand, as follows:

"A flue, as J, is slidably fitted within the member, H, and is provided with a radial stud or pin, j, adapted to enter the slot, h, an do lie within any one of the sockets, h^4, to support the flue thereby at a predetermined height above

the mantle, I. The vertical position of said flue is to be determined according to the air-draft conditions of the lamp, and, as is obvious, will be regulated by adjusting the flue so that its stud or pin, j, rests in a suitable socket, h^4. When desired to remove the flue from its sheath, the pin or stud, j, is disengaged from the slot, h^3, and is moved downwardly through a channel, h^5."

The defendants' chimney is adjusted similarly to the method described in the Fischer patent. The tubes are telescopic in form, and are adjusted at variable heights by a pin and rack arrangement. According to the proofs, the patentee did not design his invention to lower the inner tube so as to enclose the mantle and protect it from draughts. It has been held that when a defendant makes and uses a device according to the specification of a patent held by him, the presumption of patentability between him and a prior patentee is balanced. Hence, the Momand patent, describing the structure of the defendants, granted subsequently to the Marsh patent in suit, is some evidence tending to show that in the estimation of the Patent Office there was a patentable difference between the two lamp chimneys and the features by which they were lowered over the mantle. Boyden Power-Brake Co. v. Westinghouse Air-Brake Co., 70 Fed. 816, 17 C. C. A. 430; Bates v. Keith (C. C.) 82 Fed. 100. I have not considered the patent to Prendergast & Slinack, which defendants claim anticipates the patent in suit. The question, therefore, of whether the interference proceedings and the decision of the Patent Office declaring that Marsh was the prior inventor were binding upon the defendants who were not parties to the interference proceeding, need not be decided. Enough has been said to indicate that the combination claims 1, 2, and 3 are only entitled to a narrow construction. Such being the fact, the defendants' chimney is thought not within their scope.

The bill charging the defendants with infringement of patents No. 613,648 and No. 652,730, is not sustained, and, accordingly, is dismissed with costs.

WELSBACH LIGHT CO. v. CREMO INCANDESCENT LIGHT CO.

(Circuit Court, S. D. New York. March 9, 1906.)

1. PATENTS—CONSTRUCTION OF CLAIMS—CHANGES IN PATENT OFFICE.

The claims of a patent as allowed must be construed with reference to the action of the Patent Office thereon as the prior art; they are not affected by a mere change in the wording at the instance of the Patent Office which leaves the substance unchanged, but, if narrowed in scope, and so accepted by the applicant, he is bound thereby.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 243½, 244.]

2. SAME—INFRINGEMENT—LAMP APPLIANCE.

The Heald patent, No. 423, 317, for an appliance for use with incandescent gas lamps, cannot be construed to cover, as a part of the invention, the removable tubular support for the lower end of the mantle and the supporting rod, which was old, and a claim therefor rejected by the Patent Office, but is limited to the feature of the refractory ring support at the top of the mantle. As so limited, *held* not infringed.

In Equity. On final hearing.

Thomas W. Bakewell, Thomas B. Kerr, and Hillary C. Messimer, for complainant.

Louis Hicks, for defendant.

HAZEL, District Judge. The bill in this action was filed to restrain the alleged infringement of letters patent No. 423,317, dated March 11, 1890, to Arthur Heald, and to recover profits and damages for past infringement. The patent now owned by complainant relates to improvements in appliances for use with incandescent gas lamps. The answer denies infringement, and alleges anticipation by various prior patents granted in this country and in England. The object of the inventor was to remove certain deficiencies existing in incandescent gas mantles which particularly relate to what is commonly known as the Welsbach type. This type of gas mantle is tapered or conical in form and is a product of oxides of refractory earths. It is manufactured by saturating a textile fabric with a solution of chemical salts of rare earths and then incinerating the mantle. The resultant of the process is a netlike structure which on account of its fragility requires further fluidal treatment to harden the material. Upon this being done, and when properly protected from shocks or jars, the mantle can be handled or transported safely. When a mantle comes in contact with the flame of a lamp the hardening fluid is burned off, leaving the refractory brittle material intact and capable of emitting a brilliant light. It is necessary to sew to the mantle at the upper end a piece of Brussels netting, which being turned backward over the edge leaves a varying thickness extending downward from the apex about 1⅜ inches. In this situation the mantle is saturated with lighting fluid and a platinum wire is threaded through the hem and upon being drawn taut leaves a small opening. The ends of the platinum wire are thereupon fastened to the steel ring portion of a perpendicular rod, which is attached by a set screw to the shell or ledge of the burner or lamp. Such, briefly, was the state of the art in relation to the mantle at the date of the invention in suit. It will be noted that the incandescent mantle after it was in condition to suspend over the gas burner was adjusted by means of a rigid vertical steel rod, which was firmly attached to the gallery or ledge of the lamp. At its lower end the rod was kept in place by a set screw connecting it with the gallery through a hole in the boss, while at the top end it was suspended over the burner by fastening the platinum wire to the ring in the rod. According to the patentee, the method just described involved disadvantages which he designed to overcome. The patent has three claims; the first and second alleged to be involved read as follows:

"(1) In an appliance for use with gas lamps to produce light by incandescence, the combination, with a tubular mantle of the kind herein referred to, of a lower support constructed to be removably attached to a part of a lamp and to carry the lower end of said mantle, a rod carried by said lower support and external to said mantle, and a ring of refractory material carried by said rod, and to which the upper end of said mantle is secured, substantially as herein described.

"(2) In an appliance for use with gas lamps to produce light by incandescence, the combination of a tubular support capable of being applied to and removed from a burner, a holding device carried by said tube or equivalent, a rod firmly held by said holding device, a support carried by said rod, and a mantle having its lower end fitted to said tube, and its upper end directly attached to said support, substantially as herein described."

The patentee claims that he has made a step forward in the art by altering the form of the mantle support and tubular support and thus enabling an accurate adjustment of the mantle over the flame or burner and also obviating the necessity of reinforcing and threading. He asserts that by simply lifting the tube or slip with the attached portions, i.e., the rod and mantle, styled the "cap and carrier," he can readily remove the mantle from its position over the burner and replace it by another. Stress is laid upon the assertions that great care was necessarily exercised to properly adjust and align the mantle of the Bunson burner, that a customer frequently could not attach the mantle to the lamp, and that an employé of the vendor usually was sent to the house of the consumer to make the installation. Such claimed difficulties of handling and adjusting the mantle are denied by the defendant. That the mantle is mounted at the factory so as to secure accurate adjustment over the gas burner is undeniable. Indeed, there is evidence by defendant's witness Berlinecke to the effect that the sale of mantles that were unaccompanied by a tube was abandoned "because the other could be made better, and was easier to put on." Certainly, it was necessary properly to center the mantle at a certain height to obtain the best results. Evidence was given to show that before the patent in suit the mantle was removed from the burner by loosing the set screw and pulling out the rod from the boss, and to replace another required inserting the lower end of the rod in the boss; but this is an immaterial point in view of what is plainly stated in anterior patents. There was earnest disputation at the hearing in relation to the scope of the claims, as to whether or not they included the tubular support for the mantle at its lower end. Complainant contends that the invention is not only for the manner of supporting or suspending the mantle from a refractory ring at the top, but also for a removable support attached to the burner of the lamp and to the rod. As heretofore explained, the lower support consists of the tubular ring which fits the burner and, together with the rod and mantle, comprises the so-called cap and carrier. The claims are for a combination of old and separately well-known elements, together with new elements. In view of the action of the Patent Office limiting the claims, as hereinafter stated, the new elements are not at first reading of the patent apparent with reasonable certainty. It is a rule of patent law that a claim as allowed in order to ascertain the real invention must be interpreted with reference to the action of the Patent Office and the antecedent art. If the simple wording of the claims was changed by the patentee at the request of the commissioner of patents, leaving the substance of the claims unchanged; that is, allowing the language employed to cover the invention as originally asserted by the inventor, a meritorious patent, one that has progressed the art, should not be destroyed. Hubbell v. United States, 179 U. S. 80,

21 Sup. Ct. 24, 45 L. Ed. 95; Leggett v. Avery, 101 U. S. 256, 25 L. Ed. 865; Campbell Printing P. Co. v. Duplex Co., 101 Fed. 282–295, 41 C. C. A. 351; Walker on Patents, § 187. In Shepard v. Carrigan, 116 U. S. 593, 6 Sup. Ct. 493, 29 L. Ed. 723, the Supreme Court says:

"If an applicant, in order to get his patent, accepts one with a narrower claim than that contained in his original application, he is bound by it. If dissatisfied with the decision rejecting his application, he should pursue his remedy by appeal."

It is important to know whether this principle is applicable to the facts here. The file wrapper and contents show that when the application was filed it contained seven claims, evidently, in the judgment of the examiner, describing old elements, for such claims were twice rejected on the ground that they lacked novelty. The examiner cited as to claim 1, the patents to Requa, No. 266,889; Lungren, No. 336,576; and Lungren, No. 365,832. Claim 2 was also rejected on the patent to Lungren, No. 336,576. Claims 3, 4, and 5 were rejected on the patent to Fahnehjelm, No. 332,650, and on the British patent, No. 5,354 of 1887. Later, the application was amended by substituting narrower claims. The amended claim which was for a tubular support for the mantle, "constructed to be removably attached to a part of the lamp," was again rejected on British patent, No. 7,990 of 1887, to Imray. There was an allowance of the patent when the inventor added to the first claim the limiting feature of the refractory ring support at the top of the mantle. The second claim in suit is not thought to cover more than the first, excepting that it more clearly indicates that the clay ring described in the specification shall be attached directly to the mantle. Upon reference to the specification in relation to the manner of attaching the mantle to the ring, it would seem reasonably certain that by the words, "directly attached," the patentee meant to be understood as claiming a method without sewing the Brussels net, and threading the hem with platinum wire. In the beginning, the inventor claimed the tubular support, but he acquiesced in the rejection of this feature on reference by the patent office to the Imray structure. The Patent Office manifestly did not intend to cover any other mantle support than a ring of clay or other suitable material, sufficiently large to allow the mantle to be drawn through it so that it might be turned over at the top edge, and thus avoid the necessity of sewing on the netting and threading with platinum wire the reinforced portion. That being done, the specification says, "the cotton mantle is then incinerated and the finished mantle remains fixed on the ring." Concededly, this element was a departure from the prior art. The essence of neither of the involved claims considering the limitations of the Patent Office can be construed to include the removable tubular support at the lower end. The principle of the adjudications referred to are thought applicable to this case. This conclusion finds support in the evidence. It is shown that the gas mantle, a vertical rod with a ring or hook at the upper end, and a cover for the burner were old at the date of the invention in suit. But such fact, standing alone, is immaterial, as that can be said of other com-

bination claims. The question of infringement depends upon the breadth of the claims in suit, and what was included by them. In the patents to Bell, Nos. 390,056, 390,057, and 408,072, and to Mactear, No. 378,699, combinations of the elements just mentioned are unquestionably shown. True, the details of the structures are different from the Heald invention; for instance, the vertical rod is attached to the gallery of the lamp by a set screw, and the tubular supports are not removed with the mantle. As already stated, the mantle in prior structures was turned over at the upper end and threaded with a platinum wire or asbestos. In the British patent of Von Buch, No. 1,235 of 1886, is shown a supporting ring or loop at the top of the mantle and an asbestos ring. Aside from what is shown by prior patents, the Imray English patent involved the feature of the removable support attached to the rod at the lower end of the mantle as in the Heald patent. In Figs. 3 and 4 of the drawings of the Imray patent is shown a support functionally like that of complainant's. The general character of the structure considered in connection with the drawings indicates with reasonable clearness that the lower tubular support is easily removed from the burner. Furthermore, the mantle is suspended or supported at the top from the center of a curved rod and extends downwards within the upper edge of the tube, not on the outside thereof as in the Heald patent. In relation to the flame the mantle is adjustable in practically the same manner as the Heald device and can easily be put over the burner by the consumer. There was, therefore, no invention, in my opinion, in constructing a tubular support for the mantle attached at the lower end to a perpendicular rod so as to enable removing the cap and carrier, no new result being accomplished. The feature of extending the mantle below the tube is also old, it being shown in defendant's exhibits gas burners Nos. 1, 2, and 5, and also in the patents of Bell, to which attention has been directed. Reference was made, on the oral argument of this case and in the brief submitted by complainant, that the patent to Imray does not sufficiently describe the invention and being a foreign patent, upon the authority of Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33, cannot anticipate the invention in suit. The rule there announced, however, does not apply. The drawings accompanying the specification show the tubular support in combination with the rod and mantle with sufficient clearness. Does the method by which the mantle support of the defendant is suspended infringe the claims in suit? The defendant's mantle in appearance is much like that of Heald. In the process of manufacture, however, the top of the mantle is threaded with asbestos similarly as it was with the platinum wire of the prior art. The elicited facts show that the mantle of the defendant is immersed in the lighting fluid and then in the "fixing" bath, and when dry, it is turned over at the upper end; the asbestos being threaded through the hem. The ends of the asbestos are then fastened to a ring portion of the rod, or are fastened in a loop to a double wire support from which the incandescent mantle is hung. It will be observed that defendant's structure has no clay ring attached directly to the vertical rod and the mantle. The asbestos thread cannot be

regarded as the equivalent of the refractory ring arrangement described in the Heald patent, inasmuch as such feature was old. Upon this point, as already intimated, the Von Buch patent says that "rings of wire, of platinum, irridium, asbestos, or other refractory material, are useful to sew or thread incandescent mantles. The practicability of such use cannot safely be disputed. The foregoing reasons constrain me to hold that the claims in suit are entitled to a narrow construction and that infringement by the defendant is not established by the proofs.

The bill is dismissed, with costs.

BATES MACH. CO. v. WM. A. FORCE & CO.

(Circuit Court, S. D. New York. April 17, 1906.)

PATENTS—INFRINGEMENT—NUMBERING MACHINES.

The Bates patent, No. 721,276, for a typographic numbering machine, claims 13, 14, and 15, which relate to a drop-cipher device, were not anticipated, and disclose invention, but are for mere improvements on machines in the prior art, and come within the rule that one who selects and combines elements from the inventions of others into a new structure, adapted to accomplish the old result, is entitled to a patent only for his own particular form of adaptation, and hence are not entitled to the benefit of the doctrine of equivalents. As so limited, *held* not infringed.

In Equity. On final hearing.

Alfred B. Carhart, for complainant.

William E. Warland, for defendant.

HAZEL, District Judge. The patent in suit, No. 721,276, granted February 24, 1903, to Edwin G. Bates, assignor to complainant, relates to typographic numbering machines designed for inclosure in the ordinary printer's chase or frame. The machines are automatic, and are provided with devices known as "drop-cipher blocks," arranged to avoid printing nonsignificant ciphers to the left of a given number. Complainant alleges infringement of claims 13, 14, and 15, which refer to this drop-cipher device, and involve a movable block or wheel section, engraved on its printing face with the cipher character, and forming part of the periphery of the printing wheel, but being loosely seated in a recess of the wheel, so that it can be readily depressed within the wheel and held below the printing plane when desired. Machines for automatic number printing were old, and the drop-cipher feature was first disclosed in 1875 in patent No. 166,681, to Bowman. This patent shows a printing wheel having an opening extending from the shaft to the periphery of the wheel, with a sliding cipher block therein, which, according to the drawing, was constructed to move radially from the center to the periphery of the wheel. In patent No. 521,000, of June 5, 1894, to Reinhardt, is described a drop-cipher having projections at the side to enable movement inward and outward. This construction was subsequently improved by Reinhardt in patent No. 561,946, dated June 6, 1896. This patent shows a cipher block in a recess of the numbering wheel, which

may be depressed from the rim of the wheel, and having undercut guiding bevels, the recess having the corresponding co-operating bevels at its outer end, much like the bevels mentioned in claim 13 of the patent in suit. It is thought this patent would anticipate the claims in suit were it not that the cipher block is pivoted, and therefore unable to move laterally, but being confined to radial movements from the shaft to the plane of the wheel. The patent to Reinhardt, No. 692,072, granted January 28, 1902, shows a loose movable drop-cipher, although it lacks the lateral movements of complainant's cipher block. In the patent to F. W. Wicht, No. 391,289, dated October 16, 1888, a movable drop-cipher is described, moving in a recess from the periphery of the wheel to the shaft hole thereof. The drawings and specifications show a cam groove extending lengthwise, with which the drop-cipher, provided with a rim at its inner end, co-operates, and is intermittently enabled to move to the printing plane and to recede therefrom. This patent also discloses projections and a notch, which operate as a shoulder, and arrest the cipher block in accurate printing position. A more particular consideration of the Bates improvement is now necessary. The novelty of the involved claims is not controverted. They read as follows:

"(13) A printing-wheel having a recess, and a non-pivoted drop-cipher block therein disconnected from the body of the wheel, and being loose in the recess, adapted to move toward and from the periphery of the wheel, and also to move slightly sidewise in the plane of the wheel in the recess, said wheel having undercut guiding-bevels, and said block having corresponding co-operating bevels at its outer side, whereby, as the block is moved outwardly in the recess, it is accurately guided forward or backward into position as necessary, and arrested by said bevels.

"(14) A printing-wheel having a recess, and a non-pivoted drop-cipher block therein disconnected from the body of the wheel, and held in the recess loosely, whereby it can move to and from the periphery of the wheel in the recess, and can move slightly sidewise in the plane of the wheel, and shoulders for arresting the block in exact printing position.

"(15) A printing-wheel having a recess, a floating drop-cipher block in the recess, and shoulders for guiding the block into position and arresting it."

Complainant claims that by the Bates improvement a radical departure from the known constructions was made, in that sliding or pivotal connections were avoided, thus allowing the cipher block to work with entire freedom in the opening of the wheel, without bearings or guides, and that it has overcome the difficulties experienced with machines having close-fitting drop-cipher blocks arising from the blocks becoming clogged with printer's ink and dirt, and inability to clean the same without removal of many small parts, which would entail loss of time and labor. True, the prior art discloses movable drop-ciphers closely fitted in a recess, but the pivoted drop-cipher of Reinhardt is open in construction, and suggests a freedom of play of the drop block by an abandonment of the pivoting arrangement.

Now, what was the achievement of Bates? The field is limited, and by reason thereof the claims must be confined to the specific construction described. The patentee's departure from the prior art is unquestionably confined to nonpivoted drop-cipher block loosely

seated in the recess of the wheel, which recess extends from the periphery of the wheel. By his arrangement the drop-cipher is enabled to move in the recess laterally and toward and from the printing plane of the wheel; the movements apparently being controlled by beveled shoulders or points of support. The open construction of the device facilitates cleaning of the parts, and obviates some delay in cleaning the machine from accumulated dirt and ink. The improvement, however, was in an existing and commonly known art, and, the claims being entitled to a narrow construction only, the doctrine of equivalents has no application. The cipher block of the alleged infringing device has on the left-hand side a lug or projection fitting in a small recess or opening on the left-hand side of the cipher opening of the wheel, to prevent the block from falling out of the wheel. Defendant's structure is apparently an alteration or an improvement of the Wicht patent of 1888. In the latter structure the opening is on the right-hand side of the cipher block, and the lug or projection is on the wheel, while in defendant's device the lug or projection is on the left-hand side of the block, and the recess in the wheel. On the other hand, in complainant's structure the drop-cipher is retained in the wheel by the bevels or shoulders specifically mentioned in the claims set out. The right-hand side of defendant's cipher block has a straight side fitting against a corresponding straight side in the opening of the wheel. The principle of the Wicht patent and that of defendant is similar, the chief difference being that in defendant's the cipher block is cut away more at its lower end, thus giving increased space for the play of the cipher block. Complainant contends that the straight right-hand side of defendant's block and the lug on the left-hand edge of the cipher block co-operating with the notch at the opening in the wheel in defendant's device form the mechanical equivalent of the bevels or shoulders called for by the claims in question. The complainant, however, as before indicated, was not a pioneer, and therefore, giving consideration to the patents of the prior art, must be restricted to the precise form described. An inspection of the file wrapper and contents of the Bates patent, together with the subsequent patent granted to Wicht & Spielmann, No. 739,369, dated September 22, 1903, the device claimed to be used by defendant, confirms this impression. It is a general rule that "one who selects and combines elements from the inventions of others into a new structure, adapted to accomplish the old result, is entitled to a patent only for his own particular form of adaptation." Loew Supply Co. v. Fred Miller Brewing Co. (C. C. A.) 138 Fed. 886. The departure of complainant, though an improvement, did not achieve new patentable results, and accordingly the principle applies that:

"When two inventors have each adapted the substantial features or elements of an earlier invention, making, respectively, but slight changes in or improvements upon the earlier device, each will be limited to his own specific form of device; and, if there are differences therein, neither device will be held to be an infringement of the other."

Sander v. Rose et al., 121 Fed. 835, 58 C. C. A. 171; Boyd v. Janesville Hay Tool Co., 158 U. S. 260, 15 Sup. Ct. 837, 39 L. Ed. 973;

Cons. Store Service Co. v. Siegel-Cooper Co., 107 Fed. 716, 46 C. C. A. 599.

The defense that the device in question was invented by one Wicht, a former employé of the complainant, and not by the patentee, is not sustained by the evidence. On the contrary, the proofs indicate that the patentee was the original inventor, as claimed in the bill. The other defenses advanced need not be given consideration.

In accordance herewith, the drop-cipher device described in the claims in controversy is held valid and not anticipated, and, as construed, is not infringed by the device of defendant. The bill is dismissed with costs.

BATES MACH. CO. v. WM. A. FORCE & CO.

(Circuit Court, S. D. New York. April 17, 1906.)

PATENTS—INFRINGEMENT—NUMBERING MACHINE.

The Bates patent, No. 676,084, for a numbering machine, while not for a pioneer invention, covers patentable improvements which overcame objections to the machines of the prior art, and entitle its claims to a reasonably broad construction and range of equivalents. As so construed, claims 2 and 22 *held* infringed.

In Equity.

Alfred B. Carhart, for complainant.
William E. Warland, for defendant.

HAZEL, District Judge. The bill seeks to restrain the alleged infringement of letters patent No. 676,084, dated June 11, 1901, issued to Edwin G. Bates, complainant's assignor. The invention relates to automatic type high numbering machines, which ordinarily comprise a rectangular metal box, containing a horizontal shaft, number-printing wheels, and a swinging pawl frame, to operate the numbering wheels, and a so-styled "plunger" device. The latter is located at one end of the frame, and constitutes means for actuating the wheel operating pawls. The combined elements are designed to be locked in a printer's chase or form. The principal defenses interposed are want of invention, noninfringement, and that the patentee was not the real inventor. Claims 2 and 22, the bases of the action, read as follows:

"(2) The combination, in a numbering machine, of a frame, an axis, number-wheels, ratchets, a stepped pawl, a pawl-carrying plate having arms with bearings on said axis, one of the arms having gear-teeth, a plate, a spring normally holding the plate out of the printing-plane, and adapted to be compressed by the act of printing, pins for guiding said plate, and a projecting arm on said plate, with teeth engaging said gear-teeth, as set forth."

"(22) The combination of a numbering-machine frame, a plate, 11, extending across the machine at right angles to its axis, said plate having an extending arm with rack-teeth, an arm with gear-teeth meshing with the rack, a plurality of guide-pins for plate 11, near opposite ends thereof, and a single spring, serving to raise said plate."

The plate of the plunger device, as shown in the drawings, has a rigid overhanging arm, which connects directly with the actuating

pawl swing. The chief improvement of the claims is shown to be this overhanging arm, which permits direct connection with the actuating pawl swing, and enables instant removal and reassembling of the plunger without displacing any screws or end plate of the machine. The early numbering machines necessitated the removal of a screw or screws, and in some instances an end plate of the machine, before the plunger could be removed. This operation required a certain amount of mechanical skill, entailed loss of time in cleansing, and was apt to result in rendering the machine inoperative. Bates undertook to overcome these objections, and to provide a simple and efficient device, capable of instant removal, constructed of few parts, and one which reduced delay in cleansing to a minimum. To this end he devised a vertically moving plunger with a rigid projecting arm, having geared teeth at the end thereof, which meshed with geared teeth of the swinging pawl frame when the plunger plate was depressed by the movements of the printing machine, and imparted to the pawl frame a forward and rearward motion, causing the pawls to co-act with the teeth of the ratchet wheels, and thus rotate the printing machine. The patent is not for a pioneer invention, as numbering machines in form much like that in suit were known to the art. Defendant contends that the structures of the prior art, if they do not wholly negative novelty in the Bates device, limit it to the identical form described. In considering the prior art, it is not deemed necessary to discuss at length the numerous patents in evidence. It is sufficient to note that the indicated elements are found in other known combinations, of which the several patents to Reinhardt and the patents to Sanders are a fair type. Bates, however, simplified the art, as has been indicated, by suitably arranging direct connection between his plunger and the swinging pawl frame in such manner as to easily operate the actuating means, and make the plunger instantly removable for cleansing, and easy to restore for a continuance of the printing operation. To accomplish his object he departed from the constructions of the prior art, which disclosed and utilized, among other forms, a pin projecting into the pawl frame through a mortise in the side wall between the plunger and pawl swing. Complainant claims, and the elicited facts support such claim, that the new conception and combination of the claims in suit includes the following elements:

"A transverse plate held above the plane of printing over the end of the frame, guided and prevented from turning by vertical pins projecting downwardly into vertical sockets, together with a strong nonbreaking spring, located centrally under the point of printing contact, the plate having a rigid overhanging arm bridging the intervening wall of the frame to rock the pawl-swing by the direct meshing of the face of the pawl-swing with the vertically moving rigid plunger-arm, without the intervention of levers, and without passing through the wall of the frame."

The prior art does not show a device having a plate with guide-pins, a central spring underneath, and a rigid overhanging arm, with meshing teeth at the end thereof. This feature of the Bates construction was new, and in connection with the elements above quoted from complainant's brief apparently performs a new and beneficial

result. The earlier machine discloses a plunger, consisting of a solid piece of metal, held in vertical position by an end plate screwed to the metal box or frame. Although a spring or springs was contained in the plunger of some of the earlier devices, yet they lack the central spring, guide-pins, and guide sockets of complainant's invention, and accordingly were unable to achieve the result of the patent in controversy.

The serious issue presented is whether or not defendant's structure may be properly included within the scope of the claims. In view of the prior art, the Bates invention is not strictly in the class of patents calling for a wide range of equivalents, but the original changes and alterations in the plunger device, which resulted in a meritorious apparatus, entitles the patentee to a reasonable construction of his claims; especially as the important objections to complete success in prior machines were overcome by the improvement. The evidence shows that the invention was generally recognized as useful and beneficial, and the business of the inventor was enhanced thereby. Does the structure of the defendant embody the essential elements of complainant's invention? After carefully examining the Reinhardt and such other machines as are claimed by defendant to narrow the scope of the claims, the testimony and structure of defendant, I have concluded that the patent should not be as strictly construed as defendant contends. Defendant achieves the result of the Bates invention by the employment of a combination of substantially similar elements, although an apparent attempt is made to differentiate the same. The exhibit Force machine, model 13, No. 1,541, in addition to the elements that were admittedly familiar to the art, shows a rigid projecting arm on the plunger, with a pin engaging a slot in one of the arms of the pawl-carrying plate, and accordingly comes within the language of claim 2. Complainant's expert claims that defendant's slot in one of the arms of the pawl-carrying plate and pin on the plunger which engages such arm are the equivalents of the gear-teeth in complainant's swinging frame and projecting arm. This interpretation I conceive to be a correct comparison of the involved structures. The essential elements of claim 22 are the "plate, 11, extending across the machine at right angles to its axis, * * * a plurality of guide-pins for plate 11, near opposite ends thereof, and a single spring, serving to raise said plate." In the Force machine the plate is shorter than that of the Bates construction, although it extends across the machine, and is guided by a pin and an arm which fits into a vertical slot near the plunger, and which is claimed by complainant to functionally operate an additional guide-pin. Whether such device has a single guide-pin or a plurality of guide-pins is not thought important in view of the result attained. Defendant's plunger is readily detached from the machine by means of a bolt in the top end of the frame, which enters a slot in the stem of the plunger, and enables instant removal of the plunger without displacement of screws or end plate of the machine.

The next defense is that one Speilman, a former employé of complainant, was the original inventor of the device in question. The

proofs upon this point are not persuasive of the correctness of the asserted claim. The testimony of the patentee that he prepared the original sketches and drawings and directed and supervised the construction is clear and convincing.

A liberal view of this invention is not taken without some hesitation, but, in view of the strength and simplicity of the device, which evidently has overcome prior difficulties in the art, and the success accorded it by the trade, a construction of sufficient breadth as to include defendant's structure is warranted. The claims being valid and infringement shown, a decree may be entered in the usual form for an injunction and accounting.

SEEBERGER v. RENO INCLINED ELEVATOR CO.

(Circuit Court, S. D. New York. December 1, 1905.)

PATENTS—INFRINGEMENT—STAIRWAY.

The Wheeler patent, No. 479,864 for a stairway, construed, and *held* not anticipated, valid, and infringed as to claims 6 and 10, and not infringed as to claims 7, 11, and 12.

In Equity. Suit for infringement of letters patent, No. 479,864, for a stairway granted to George A. Wheeler, August 2, 1872. On final hearing.

Harold Binney, for complainant.

Redding, Kiddle & Greeley, for defendant.

WALLACE, Circuit Judge. Upon the argument of this cause it was decided that claims 7 and 12 of the complainant's patent had not been infringed by the defendant, and decision was reserved upon the questions of the validity and infringement of claims 6, 10, and 11. The 11th claim is limited by its terms to the hand-rail described in the patent (which is an endless band, preferably made hollow and cylindrical) "in combination with guards overlapping the same." These guards are flexible flaps which rest loosely upon the belt to protect the fingers from a squeezing contact at the posts, r. The defendant's hand-rail is made in short sections or joints which together form an endless band, but it does not require guards, and does not have them, or any equivalent for them. For this reason, if for no others, the claim is not infringed.

The two claims which remain to be considered are expressed in very broad terms, but require limitations to be read into them by implication, besides those required by their terms. The "elevator" of the claims is not necessarily any kind of an elevator, or passenger elevator, but the term may and should be read as enumerating a stairway passenger elevator. It is only in this type of elevator that there is any occasion for the use of a hand-rail; and the improvements which are generally the subject of the patent are in passenger elevators "which will afford a stairway for travel" as well as a continuously movable elevator. Treating the claims as specifying such an elevator, they are to be further limited so as to embrace such an elevator

only when equipped with a hand-rail having the peculiar characteristics mentioned in the claims.

None of the prior patents anticipate either of the claims as thus limited. The Ames patent shows a traveling stairway having a stationary balustrade, but, as it does not suggest a traveling balustrade, necessarily does not suggest a traveling hand-rail. The Souder patent does not show or suggest any balustrade or hand-rail, and is merely for a traveling stairway. The Wilding English patent does not show a traveling stairway in the ordinary acceptation of the term, but shows a stationary staircase having a supplementary elevator for passengers consisting of a traveling step or platform. This platform is secured to a traveling carriage which moves upon a rail extending along the side of the stairway. Upon this carriage is mounted a baluster, which carries a cylindrical slide, which incloses and runs upon an upper rail extending along the side of the stairway parallel with the lower rail. The platform, when moved by the actuating mechanism connected with it, carries with it the carriage on the lower rail, the baluster, and the slide on the upper rail, as parts integral with itself. By this construction, while the passenger is being conveyed upon the platform, he can grasp the slide, or, if he chooses to do so, can grasp any part of the upper rail. The upper slide is thus in a sense a traveling hand-support. There is no suggestion in the patent that it is for any other use than to insure greater steadiness to the platform. Treating it as a hand-rail, it is not separate from the elevator, but an integral part of it. It is not a continuous hand-rail, because it does not extend from one terminal of the elevator to the other.

That it involved invention to adapt the hand-rest of the Wilding patent to elevators of the traveling staircase type is a conclusion which does not seem open to reasonable doubt. The Wood patent for a dirt machine, showing a dirt conveyor, and the other patents for conveyors or elevators not intended to carry passengers, are much more remote than the Wilding patent in their bearing upon the patentable novelty of the claims. The conclusion is also fully warranted that there was not in the prior art any elevator adapted to carry passengers to and from different levels, and to permit them to move from place to place thereon, equipped with a hand-rail also traveling and serving to enable the passengers to preserve their upright positions, notwithstanding the movement of the elevator, and assist in supporting them, whether the elevator is moving or at rest. The claims of the patent should therefore receive a sufficiently liberal construction to secure this invention to the patentee, so far as this is consistent with their language. The term "separate," as used in the claims, was inserted in compliance with the requirements of the patent office, and to distinguish the hand-rail from that which it was assumed was shown in the Wilding patent. Although this limitation would not seem to have been required by the prior state of the art, effect must be given to it. Effect is given to it by treating the word "separate" as referring to a hand-rail which is not integrally a part of the traveling support. The "continuous hand-rail" of the tenth claim is

one that affords a support for the whole distance between the terminals of the stairway. As thus construed the defendant's elevators embody the invention expressed in the terms of both claims.

A decree is ordered for the complainant enjoining the infringement of claims 6 and 10, and for an accounting. As the defendant has been compelled needlessly to litigate the question of the infringement of claims 7, 11, and 12, the decree is without costs.

WESTON ELECTRICAL INSTRUMENT CO. v. VALLEE BROS. ELECTRICAL CO.

(Circuit Court, D. New Jersey. May 12, 1906.)

PATENTS—SUIT FOR INFRINGEMENT—EQUITY JURISDICTION.

A bill for infringement of a patent which charges past infringement only and contains no allegation of present or threatened infringement, does not state a case within the jurisdiction of a court of equity, when taken in connection with a plea denying any infringement since more than a year prior to the filing of the bill, and with the fact that the patent expired before the hearing.

In Equity. On bill and plea.

Alan D. Kenyon, for complainant.
Joseph C. Fraley, for defendant.

LANNING, District Judge. The bill of complaint in this case was filed August 16, 1905. It alleges infringement by the defendant of two patents, Nos. 392,387 and 497,482, capable of conjoint use, and actually so used by the complainant; that both of the patents have been sustained by the United States Circuit Court for the Southern District of New York; and that the defendant, in violation of the complainant's rights, has made, used, and sold electrical measuring instruments and shunts for electric light and power stations similar in some or all of the material parts thereof to the improvements set forth in the patents. The prayer of the bill is for an accounting and for a preliminary and also a permanent injunction.

The plea was filed within the time required by the rules of practice, and on the very day that one of the patents expired. It denies that the defendant has made any instruments or shunts of the kind described in the bill, and declares that the only electrical measuring instruments and the only shunts for electric light and power stations which it has procured, used, sold, or offered for sale, were purchased by it from the Cutter Electrical & Manufacturing Company, which was the selling agent of the Keystone Electrical Instrument Company, the manufacturer of the instruments; that injunctions were issued, in suits instituted by the complainant, against the Keystone Electrical Instrument Company and the Cutter Electrical & Manufacturing Company in April, 1904, on one of the patents, and against the Keystone Electrical Instrument Company on the other of the patents in August, 1904; and that it has not made, procured, used, sold, or offered for sale, any electrical measuring instruments or shunts in

any way relating to either of the patents or alleged to infringe thereon since June 22, 1904, on or about which day the complainant released the Cutter Electrical & Manufacturing Company from all claims for profits and damages, and on or about which day the complainant was informed by the Cutter Electrical & Manufacturing Company that the defendant had been a purchaser from it of electrical measuring instruments and shunts.

The question raised by the plea is whether the case is a proper one for equity jurisdiction. If the record of the case as it now stands shows that the complainant is entitled to injunctive relief, the bill should be retained and the defendant be required to account for profits and damages in order that complete relief may be administered. But the bill contains no allegation whatever that the defendant at the time of the filing of the bill was infringing or threatened to infringe either of the patents except in the eleventh clause where it is declared that "the said defendant has made, used, and sold, and is making, using, and selling, the said inventions in conjoint use in one and the same apparatus in the manner hereinafter described." Every subsequent allegation of the bill concerning alleged infringement however relates to the past. There is not even an allegation that the defendant had in its possession at the time the bill was filed any instruments of the kind therein described. These facts, and the fact that the plea denies that the defendant ever made any such instruments, or that it sold or dealt in such instruments for more than a year before the bill was filed, show that the case is not one for a preliminary injunction. And, inasmuch as one of the patents expired before the complainant could secure a final hearing, no ground for relief by permanent injunction now exists. The result is that the plea must be sustained. This conclusion, I think, is in harmony with the doctrine of the following cases: Edison Phonograph Company v. Hawthorne & Sheble Manufacturing Company (C. C.) 108 Fed. 630; McDonald v. Miller (C. C.) 84 Fed. 344; American Cable Railway Company v. Chicago City Railway Company (C. C.) 41 Fed. 522.

I have not overlooked the fact that a similar plea was recently overruled in the case of Western Electrical Instrument Company v. W. R. Garton Company by the Circuit Court for the Northern District of Illinois. A copy of the record of that case has been furnished to this court, but no opinion seems to have been filed in it and this court is uninformed as to the facts which influenced that court in making its order.

The plea will be sustained, and the bill dismissed for want of jurisdiction.

UNITED STATES FASTENER CO. v. MEYERS et al.

(Circuit Court, S. D. New York. April 25, 1906.)

PATENTS—INFRINGEMENT—SEPARABLE BUTTONS.

The Pringle patent, No. 580,001, for a separable button, claims 1 and 2, relating to the socket member, disclose a patentable invention, but cover a new combination of old elements, and must be limited to the precise combination shown. As so limited, they are not infringed by the device of the Kerngood patent, No. 645,624.

In Equity.

Roberts & Mitchell, and Hillary C. Messimer, for complainant.

George Cook and Livingston Gifford (John R. Bennett, Odin Roberts, Donald Campbell, of counsel), for defendants.

HAZEL, District Judge. This suit relates to the alleged infringement of patent No. 580,001, dated April 6, 1897, granted to Eugene Pringle, and now owned by complainant. The patent is for an improvement in separable buttons, wherein is shown a socket and stud adapted for attachment to gloves or other garment, either the socket or the stud being resilient, thereby enabling them to be snapped together or parted. The many prior patents introduced by defendants show unceasing endeavor to improve so-called separable buttons or snap fasteners. The inventor herein seeks—

"To provide means by which a hollow rivet will operate with the button-head member to hold both it and the stud-catching device secured with the fabric, and further, to provide specific means by which my improvements can be embodied in the button-head and stud member of a separable button."

The first and second claims are involved:

"(1) A button-head for a separable button, consisting of a cap, having a rivet-engaging piece, extending inward from its outer edge, and provided with a central aperture and a hollow rivet, having a closed head, inserted from the opposite side of the material from the cap, and spread or upset by pressure against the inner surface of the cap and upon the rivet-engaging piece therein, and flanged below the material, substantially as described. (2) A button-head, comprising a cap-plate, a rivet-engaging piece connected thereto, a hollow rivet spread or burred within the cap against the rivet-engaging piece and a stud-catch secured to the base-flange of the rivet, substantially as described."

The claims relate only to the socket member of the fastener, the stud member not being included therein. The chief defense is noninfringement, although lack of invention is also asserted. The complainant contends that its patent is clearly an advance in the art, because of simplicity in construction, ease and convenience in assembling, and in variance and permanence in operation. The claims are for a combination which, considered independently, are old, but which are united in an original patentable way, and achieve an improved result. The principal element of the claims is the hollow rivet, closed at its upper end, which after insertion in the material is depressed or upset by contact with the inner surface of the cap. This element, in cooperation with the cap and rivet-engaging piece, it is claimed by complainant, distinguishes its structure from the prior art, in that the

latter shows a socket open at the clinching end. Preparatory to the clinching arrangement of the patent in suit, the closed end of the hollow rivet is inserted in a slit or aperture of the material, the cap and the rivet-engaging piece being attached and placed in position on the upper side of the material, and is thrust through the opening against the under side of the cap piece. The latter is depressed, causing the upper end of the rivet to be upset or spread, forming an enlarged chamber. In this manner the operating parts and the glove or fabric are securely fastened, and the stud member may then be sprung or snapped into the socket. The results of the invention are not entirely new, yet the advantages arising from the employment and unison of familiar elements, producing a more efficient and economical device, entitles it to protection. National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 C. C. A. 544; Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33; Thomson v. Citizens' Nat. Bank, 53 Fed. 250, 3 C. C. A. 518. Hence the combination in a socket member for a button fastener of a cap or plate, rivet-engaging piece, and a hollow closed end rivet is thought not to have been obvious nor previously practiced in the precise manner described in the patent in controversy.

The defendants suggest the point that the fastener described in the patent in suit has never been manufactured or sold, but, the patent being valid, this does not justify or excuse infringement. Bement v. National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058. The claims of the patentee, in view of the prior art, must be strictly construed, and, being so construed, the defendants are not thought to infringe.

Defendants manufacture their fasteners under a patent granted to Kerngood, No. 645,624, dated March 20, 1900. The issuance of this patent naturally raises the presumption of dissimilarity between the Kerngood device and that of complainant. Bates v. Keith (C. C.) 82 Fed. 102; Boyden Power-Brake Co. v. Westinghouse Air Brake Co., 70 Fed. 816, 17 C. C. A. 430; American Pneumatic Tool Co. v. Phila. Pneumatic Tool Co. (C. C.) 123 Fed. 894. The prior patents and the testimony of the expert witnesses would seem to warrant the conclusion that defendants' device is sufficiently differentiated from complainant's specific form to escape the charge of infringement. True, defendants use with other small parts a cap, a rivet-engaging piece, and a closed socket. The socket piece has an outwardly projecting flange at the bottom, and at its top a small hollow projection, cupola shaped, which projection, after insertion through the fabric, is upset against the under side of the cap or an anvil plate in the same. Such, however, was substantially the method employed in the patents to Shipman, No. 388,255, Kraetzer, No. 359,615, and McMillan British patent, No. 2,592. Indeed, the drawings and specifications of the Kraetzer patent disclose a marked similarity to defendants' device in relation to the elements in controversy. The closed hollow rivet and engaging piece which complainant contends contributes largely to the easy manipulation of the socket member are disclosed in the patents mentioned. The features relating to the cap-plate and stud-catch

need not be discussed, for in the view taken by the court, as already referred to, the claims must be limited to the exact structure described. In complainant's device the shape of the body of the hollow rivet is radically changed by the spreading operation, while in defendants' device the hollow rivet is not changed in shape, the projection at the upper end of the rivet being depressed and spread to unite the socket and cap members. As said by defendants' expert:

"It retains its straight walls, and only the small projection on the top of the socket or rivet is pressed down and spread and practically solidified, and that is the only part of the device that is changed by the act of securing this part of the separable button to the fabric. In the device of the patent in suit, the plate, G, which is secured to the flange of the hollow rivet must have a central opening smaller in diameter than the opening of the hollow rivet, in order to form the nonresilient stud-catch: whereas in the defendants' button the plate clamped on the base of the rivet has a larger opening than the opening of the hollow rivet or socket."

Whether the required resiliency is in the socket or stud is perhaps not material, but the difference in construction of defendants' cup-shaped socket is helpful to determine the question of infringement. Defendants' socket has no yielding means for holding the stud of the fastener, and is provided near its lower end with two side slits, through which two fine spring wires are passed, and they are held in position by projections formed in the rim of the flange of the socket, which are turned down and pressed upon the ends of the wires. Complainant's stud-catch is formed by the flange or plate secured to the hollow rivet, which has a smaller opening than the rivet, the resiliency being in the stud member.

The conclusion being reached that claims 1 and 2 are valid, but not infringed by defendants, the bill is dismissed, with costs.

UNITED SHOE MACHINERY CO. v. GREENMAN.

(Circuit Court, D. Massachusetts. April 13, 1906.)

No. 141.

1. PATENTS—ANTICIPATION—ABANDONMENT OF MACHINE.
   A machine fully embodying a device subsequently patented by another does not lose its effect as an anticipation because its use was abandoned solely for the reason that the product in making which it was employed was not successful where it is shown that the machine worked successfully and the maker did not abandon the invention embodied therein.
   [Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 73.]

2. SAME.
   Notwithstanding that A., having embodied his invention in a machine whose use was soon abandoned, later failed to describe it in the patent granted him, so that the latter was inoperative, yet the attempt to obtain the patent is evidence that A.'s invention was not an abandoned experiment.

3. SAME—CLUTCH.
   The Davey & Ladd patent, No. 672,056, for a clutch, is void for anticipation.

In Equity.

William K. Richardson and J. Lewis Stackpole, for complainant.
L. Hart Anderson, for defendant.

LOWELL, Circuit Judge. This was a bill in equity to restrain the infringement of letters patent No. 672,056, issued to Davey and Ladd, for an improvement in clutches. The following claims are in suit:

"(2) The combination of the driving clutch member of the machine provided with a friction surface; with the main shaft, and a driven clutch member connected to rotate therewith but capable of independent longitudinal movement thereon and provided with friction-surfaces at its opposite ends; and a stationary friction-surface or brake, and means for impelling said driven clutch member into engagement with the friction-surface of the driving member, and connecting mechanism between the main driven shaft and driven clutch member for moving said driven clutch member out of engagement with the driving member and into engagement with the brake, substantially as described."

"(6) The combination of the main shaft to be driven, with a clutch governing the operation of said shaft, comprising a driven clutch member connected with said shaft and provided with friction-surfaces at its opposite ends; a stationary friction-surface constituting a brake adjacent to one of the friction-surfaces of said driven clutch member; and a driving clutch member having a friction-surface adjacent to the other of the friction-surfaces of the said driven clutch member; and means actuated by the main shaft for automatically disengaging the said driven clutch member from the driving clutch member and engaging it with the brake at a predetermined point in the rotation of said main shaft whereby said main shaft is stopped in a predetermined angular position, substantially as described."

The purpose of the invention is thus described in the specifications:

"This invention relates to a clutch and is shown as embodied in a clutch adapted to be used on sewing-machines, nailing-machines, and in machines in which it is desirable to stop the machine at a definite point in its cycle of movements—as, for example, in the case of the sewing-machine when the needle is at its highest position, or in the case of a nailing-machine, after the nail is driven and when the parts are in the position to receive the material or at a position to receive the nail to be driven at the next operation of the machine. The said clutch comprises a friction member connected with the driving-shaft to rotate in unison therewith, but having independent longitudinal movement thereon. Said friction member has friction-surfaces at opposite sides, one adapted to co-operate with a socket in the main frame to act as a brake to stop its rotation and the other adapted to co-operate with a corresponding surface or socket in the driving-pulley. The main shaft, that is driven by the clutch when its movable friction member is engaged with the driving-pulley and disengaged from the brake, is provided with a cam co-operating with shifting mechanism by which said friction member of the clutch is shifted from engagement with the driving-pulley to engagement with the stationary brake at a definite point in the rotary movement of the main shaft, thus causing said main shaft to be stopped at a definite point in its movement, its arrest, however, being the result of frictional action rather than impact, and thus taking place without severe shock to the working parts of the machine."

The defendant denied the validity of the patent and the infringement.

On the issue of anticipation, the evidence shows an unusual state of affairs. The patent was applied for in 1897. In 1893 one Stiles built a machine, which is in evidence, and which is admitted to em-

body fully the patented device. Stiles built this machine for a machine shop, the Thomson Manufacturing Company. It was intended for use in setting a bifurcated stud. When the machine was finished it was operated, and set the stud successfully, but the bifurcated stud did not hold well in the fabric. The attempt to introduce this stud into use was therefore abandoned, and the machine was stored away in the pattern-room of the company, where it remained unused until introduced in evidence in this suit. The working drawings from which it was constructed are also in evidence. Stiles died in 1895. In 1894 he applied for a patent, intending to patent the invention embodied in his machine. In 1896 a patent was issued, No. 565,811. A comparison of some of the drawings of the Stiles patent with the Stiles machine, and with its working drawings, suggests irresistibly that the former were based upon one or both of the latter. In the drawings of the patent, which, in this respect, are like the working drawings of the Stiles machine, the brake of the machine is lettered "K," which letter in the specifications is said to designate a "friction clutch." Neither the specifications nor the claims refer to a brake. The defendant contends that the designation is a manifest error, and that the Stiles patent therefore discloses the invention of the patent in suit. The complainant contends that the patent discloses only that which it expresses, and not something which the patentee omitted by mistake. If the mistake were obvious upon inspection, the defendant might well be right; but the error in the patent is not merely in the lettering, but chiefly in the failure of the scrivener to understand the machine he was describing. Evidently he was not informed of the brake, perhaps through the omission of the patentee himself. The complainant has constructed a machine which resembles the drawings of the Stiles patent, and in which the member K is a clutch. To accomplish this result, the construction has necessarily been extraordinary, and it contains some elements which are mechanically superfluous and are not mentioned in the Stiles patent; but the complainant's evidence is to the effect that the machine thus constructed to illustrate the drawings of the patent does not contradict them, and is operative. It is doubtful, at least, if the Stiles patent, without reference to the machine in evidence, discloses a brake. Either "K" is a clutch, or the patent is unintelligible. As will hereafter appear, however, the issue thus stated need not be decided.

The defendant urges that, even if the brake be absent from the Stiles patent, yet there is no invention in adding a brake to the device there described, inasmuch as a brake is shown in other patents. There is force in the contention, but a strong and quickly-acting brake is absolutely necessary to accomplish the purpose of the patent, and the addition of a brake, as shown in the patent, may well involve invention.

The defendant further contends that the Stiles machine itself, even though it was never patented, anticipates the patent in suit. The complainant contends that the machine was an abandoned experiment.

The machine in question was used to set studs, and used successfully. Its use was abandoned because the studs set were unsatisfactory, a matter which had nothing to do with the machine in question, and was

especially unconnected with that part of the machine which embodies the claims in suit. Moreover, while ceasing to use the machine, Stiles did not abandon the idea which it embodied, but sought to patent his invention. Through his carelessness or another's, he may have failed in his attempt and his patent may be worthless as an anticipation; but it is conclusive proof that he had a positive intention not to abandon the invention, and there is no rule laid down in the decided cases which compels me to disregard this manifest intention. Brush v. Condit, 132 U. S. 39, 10 Sup. Ct. 1, 33 L. Ed. 251; Dalby v. Lynes (C. C.) 64 Fed. 376; Coffin v. Ogden, 18 Wall. 120, 21 L. Ed. 821; Bromley Bros. Carpet Co. v. Stewart (C .C .) 51 Fed. 189. I find, therefore, that the patent is anticipated by the Stiles machine, and the bill will be dismissed with costs.

Bill to be dismissed, with costs.

NASH et al. v. McNAMARA et al.

(Circuit Court, D. Nevada. May 7, 1906.)

No. 835.

1. REMOVAL OF CAUSES—MOTION TO REMAND—DOUBTFUL JURISDICTION.
   Where the jurisdiction of the federal court of a cause removed from a state court is doubtful, while the jurisdiction of the state court is unquestionable, the proper course is to remand the case.
   [Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 220.]

2. SAME—PARTIES ENTITLED TO REMOVE—PLAINTIFFS IN INTEREST.
   Parties brought into an action in a state court by a cross-complaint alleging that they claim an interest in the property involved, and who appear and file a complaint setting up that they have succeeded to the interest of the plaintiffs, and alleging substantially the same cause of action against defendants upon which the original complaint was based, must be treated as plaintiffs, taking the place and rights of the original plaintiffs, and have no standing as defendants to remove the cause.

On Motion to Remand to State Court.

Campbell, Metson & Brown, James A. MacKenzie, Key Pittman, and George A. Bartlett, for plaintiffs.

William Forman, B. G. Wilson, A. R. Needles, and L. A. Gibbons, for defendants.

HAWLEY, District Judge (orally). The petition for removal in this case is on behalf of the Manhattan-Dexter Mining Company of Nevada, a corporation, and the Manhattan-Union Mining Company, a corporation. Both of said corporations were organized and existing under the laws of the state of South Dakota, and are therefore citizens and residents of said state. Many of the questions discussed by counsel are complicated in their nature and character; and it is questionable, to say the least, whether the views expressed by counsel for the plaintiffs in the court below, who petitioned the state court for a removal of the case—even if it could be held that they should

be treated as defendants—can be sustained. The petition for removal is in many respects admitted to be defective. Taking the lengthy statement of facts prepared by the defendants, which is admitted to be substantially correct, the court would perhaps be justified in disposing of the motion by simply stating that after a very thorough and careful examination of the entire record from the state court, it has grave doubts whether this court has jurisdiction to hear and determine this case.

In Kessinger v. Vannatta (C. C.) 27 Fed. 890, the court said:

"It is the constant practice of this court to remand causes brought here from the state courts in cases of doubtful jurisdiction. The reason of this practice is obvious and conclusive. In the first place the jurisdiction of the state court is unquestionable. It is, at least, concurrent with this court. But the jurisdiction of this court depends upon special facts, and it is in the present case, to say the least, doubtful. It is the safer and wiser course to send a cause for trial to a court of unquestionable jurisdiction, rather than retain it here, and go through all the forms of trial, when the jurisdiction is doubtful." Fitzgerald v. Missouri P. Ry. Co. (C. C.) 45 Fed. 812, 820; Hutcheson v. Bigbee (C. C.) 56 Fed. 329; Concord Coal Co. v. Haley (C. C.) 76 Fed. 882; Johnson v. Wells Fargo & Co. (C. C.) 98 Fed. 3, 8; Plant v. Harrison (C. C.) 101 Fed. 307; McKown v. Kansas & T. Coal Co. (C. C.) 105 Fed. 657; Groel v. United Electric Co. (C. C.) 132 Fed. 253, 265; Dodd v. Louisville B. Co. (C. C.) 130 Fed. 186, 198.

In Ernst v. American S. M. Co. (C. C.) 114 Fed. 981, the court said:

"It is a doubtful question whether or not there is a separable controversy. That being so, the proper course is to remand the case."

But I shall not dispose of the case on this ground alone. The petition is sui generis. No case like it has ever before been presented to this court. The original suit brought by the individual plaintiffs against the defendants could not have been brought in this court because, for all that appears in the petition and record from the state court, all of the parties plaintiffs and defendants were citizens and residents of the state of Nevada. The rule is well settled that a suit cannot be removed on the ground of diverse citizenship unless the requisite citizenship existed both when the suit was begun and when the petition for removal was filed. The defendants in their amended answer and cross-complaint to the original complaint alleged that the corporations—who are petitioners for removal—were "and each of them is a party necessary and proper to be joined as either plaintiffs or defendants in this suit." After proceedings had in the state court they were brought in and claimed that they had bought the interests of the original plaintiffs, stood in their shoes, and were the sole owners of the mining ground in controversy. They filed a regular complaint against the defendants, based substantially upon the same grounds as were set forth by the original plaintiffs; and after filing their complaint and submitting themselves to the jurisdiction of the state court, they petitioned for a removal of the case to this court upon the ground of diverse citizenship, alleging that they were citizens and residents of South Dakota, and that the defendants were residents and citizens

of the state of Nevada, and further averred in their petition for removal—

"That this suit is one in which there can be a final determination of the controversy between them and said defendants, without the presence of any other parties in the cause, the plaintiffs A. D. Nash, A. G. Raycraft, T. L. Oddie, and E. Sutro being now mere nominal parties whose interest, if they have any, is identical with that of your petitioners, between whom and said defendants there is now involved in this suit one sole and separable controversy."

The right of removal exists only on behalf of a defendant. No question can be made that the interest of the petitioners is adverse to the defendants, and that by their complaint they assigned themselves (where this court would have to assign them) on the side of the original plaintiffs. They must be treated as plaintiffs. I am unwilling to say, under all the facts and circumstances of this case, that they had a right as plaintiffs to remove the cause to this court. They were brought into the suit because they claimed some interest in the property. This proceeding was merely ancillary to the suit then pending. By claiming the property they connected themselves with the suit, subject to the disabilities of the other parties plaintiff in respect to a removal at the time they came in. This is true whether they voluntarily appeared and asked to be substituted or were brought in by the averments of the defendants' answer. Their status as to the right of removal is not changed. Cable v. Ellis, 110 U. S. 389, 398, 4 Sup. Ct. 85, 28 L. Ed. 186; Houston & Texas Ry. Co. v. Shirley, 111 U. S. 358, 360, 4 Sup. Ct. 472, 28, L. Ed. 455; Jefferson v. Driver, 117 U. S. 272, 274, 6 Sup. Ct. 729; 29 L. Ed. 897; Farmers' & Merchants' Nat. Bank v. Schuster, 86 Fed. 161, 165; 156, 29 C. C. A. 649; Speckert v. German Nat. Bank, 98 Fed. 151, 154, 38 C. C. A. 682.

In Cable v. Ellis, supra, the court, discussing the right of Cable to remove the suit, said:

"He took his place by intervention in the suit subject to all the disabilities that rested at the time on the party in whose stead he is to act. If his application to have his rights in respect to the improvements he has put on the property settled in this suit can be entertained at all, it will be only as an incident to the original controversy, and whatever would bar a removal of suit before he intervened will bar him afterwards, even though by his intervention he may have raised a separate controversy."

In Houston & Texas Ry. Co. v. Shirley, supra, the court said:

"We think the Circuit Court was clearly right in sending the case back to the state court. * * * The proceeding to bring in the trustees of the sold-out company was not the commencement of a new suit; but the continuation of the old one. The trustees were nothing more than the legal representatives of the company that had been sold out, and took its place on the record as a party. The suit remained the same, but with the name of one of the parties changed."

In Jefferson v. Driver, supra, the court, with reference to the right of Jefferson to remove the case, said:

"He was brought into the suit as a purchaser pendente lite, and the relief asked against him is only an incident to the original controversy. The proceeding is merely ancillary to the suit pending when he bought the property in dispute, and under which he got possession. It is, in short, only a part of

the machinery in the administration of the cause. By purchasing pendente lite he connected himself with the suit, subject to the disabilities of the other parties in respect to a removal at the time he came in."

Let an order be entered remanding the cause to the state court from which it came.

FORDYCE et al. v. OMAHA, KANSAS CITY & E. R. R. et al. MISSOURI RY. CONST. CO. v. SAME. OAKMAN et al. v. SAME.

(Circuit Court, W. D. Missouri, W. D. April 11, 1906.)

Nos. 2,401, 2,404, 2,423.

1. RECEIVERS—PREFERENTIAL CLAIMS—RAILROADS—FORECLOSURE OF MORTGAGE.
To entitle a general creditor of an insolvent railroad company to preference over a mortgage which covered not only the corpus of the railroad property of every kind and description, but also the net income after deducting current operating expenses, the debt must have been contracted upon the faith of being paid from such current income, and not created for construction or ordinary equipment; and even when so contracted, as a general rule, there is no equity which entitles the creditor to preferential payment over the mortgagee from the proceeds of the property at foreclosure sale, where it brings less than the mortgage debt, or to subject the corpus of the property in the hands of the purchaser to its payment, unless it is shown that there was a diversion of net income to the benefit of the mortgagee, and the burden of proving such fact rests upon the claimant.

2. SAME—RIGHT OF PURCHASER TO CONTEST.
The fact that the court, in a suit for foreclosure of a railroad mortgage, may in its orders have directed that preferential claims for supplies and materials be paid out of the proceeds of the sale or the corpus of the property in the hands of the purchaser, does not deprive the purchaser of the right to contest such claims, on the ground that they are subordinate in right to that of the prior mortgagee.

3. SAME—DIVERSION OF INCOME.
Diversion by a railroad company of net income properly applicable to the payment of current claims for supplies, etc., to the benefit of a mortgagee, in order to entitle the holder of such a claim to priority of payment over the mortgagee from the corpus of the property, must have been made after the creation of the debt sought to be so enforced as an equitable lien.

4. SAME—IMPROVEMENTS BY RECEIVER.
The fact that an indebtedness for permanent improvements incurred by railroad receivers in a creditor's suit to which a mortgagee was not at the time a party was authorized by the court does not effect a displacement of the mortgage lien in favor of such indebtedness, nor does the fact that at the time such indebtedness was authorized there was default on the mortgage, and the mortgagee might have become a party, amount to an acquiescence in the expenditure, which estops him to assert the priority of his lien, except as to income which may have been diverted to such purpose prior to the filing of his cross-bill.

5. EQUITY—EXCEPTIONS TO MASTER'S FINDINGS.
Exceptions to findings of fact by a master should not be the general result, but must be specific, and point out the particular errors relied on, and where they are based on particular evidence should refer to the place in the record where the same may be found.

6. RECEIVERS—PREFERENTIAL CLAIMS—RAILROADS—FORECLOSURE OF MORTGAGE.
Where a number of railroads owned by different companies were operated together as a single system, charges made by one against another for

rental of locomotives and expenses advanced in maintaining the joint officers and offices are not preferential, and entitled to priority over a prior mortgage given by the company charged, where there was no diversion of net income to the benefit of the mortgagee.

7. SAME—CLAIM FOR BALLAST CARS.

An indebtedness of a railroad company for ballast cars for use in improving its roadbed is not necessarily entitled to preference over a mortgage upon the corpus of the railroad property, and is not allowable as a preferred lien, where it appears that there was no net income from the operation of the road after it was contracted, either before or after the receivership.

8. SAME—DIVERSION OF INCOME—PAYMENT OF RENT.

Rent paid by railroad receivers on a lease of another road, made prior to the receivership, and adopted by them, does not constitute a diversion of income which entitles a creditor whose claim originated after the lease was made to preference over a mortgage out of the corpus of the property, but is an operating expense.

9. SAME.

A diversion of earnings by railroad receivers in making new constructions, even if it inures to the benefit of bondholders, will not avail to entitle an unsecured creditor to priority of payment over the mortgagee from the corpus of the property, unless it is further shown that but for such diversion there would have been net earnings subject to the equitable lien.

10. SAME.

A claim against a railroad company for breach of contract is not one on which a claim to preference over a mortgage can arise.

In Equity. On exceptions to master's report.

The following is the portion of the master's report referred to in opinion:

A claim, to be preferential, must be one contracted upon the faith of being paid from the current income (Lackawana, etc., Co. v, Farmers', etc., Co., 176 U. S. 298, 20 Sup. Ct. 363, 44 L. Ed. 475), and must not be one created for construction or ordinarily for equipment (Rhode Island Locomotive Works v. Continental Trust Co., 108 Fed. 5, 47 C. C. A. 147; Illinois Trust & Savings Bank v. Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481; Atlantic Trust Company v. Dana, 128 Fed. 209, 225–230, 62 C. C. A. 657). Where there is no net income of the receivership, the question arises whether claims of a preferential nature can be charged against the property foreclosed, in the absence of proof of a diversion of income for the benefit of the mortgagees. The order appointing the receivers does not aid in the solution of the question, because by its terms it is limited to the net income of the receivership, of which, as hereinafter seen, there was none. Besides this, the claims presented not having been paid, the purchaser at the foreclosure sale can question their right to a preference. This has been clearly decided. In Louisville, etc., R. Co. v. Wilson, 138 U. S. 501, 506, 11 Sup. Ct. 405, 407, 34 L. Ed. 1023, 1025, Mr. Justice Brewer said: "We would not be understood as asserting, even by implication, that the terms of an order of appointment of a receiver vest in all claimants an absolute right as against the security holders. Such terms may be, and doubtless are, a protection to the receiver; and what he does and pays within those terms may be, thereafter, beyond the challenge of any party interested in the property. But when he has not acted, and the question is presented to the court as to the liability of the property for any claim, the court is not foreclosed by the order of appointment, but may consider and determine equitably the extent of liability of the property to such claim and what its rights of priority may be. Hence, as the receiver did not pay this claim, the parties in interest may rightfully challenge its priority, even if it were within the very letter of the order of appointment of the receiver." In Gregg v. Mercantile Trust Co., 109 Fed. 220, 226, 48 C. C. A. 318, 324,

Judge Lurton said: "If the order made when the receiver in this case was appointed be construed as including claims for services of the kind rendered by these appellants, the order did not vest in the claimants described any absolute right to be paid out of the corpus of the mortgaged property in preference to the mortgagees. If the receiver had acted under that order, and paid these claimants out of income, it would doubtless protect him. But he did not. He had no surplus to so apply. When the claimants sought to have their claims paid out of the corpus of the mortgaged property, and thereby displace fixed liens, the court was free to hear the objections to such a decree, and to decide the matter upon settled principles of equity. Railroad Co. v. Wilson, 138 U. S. 501, 506, 11 Sup. Ct. 405, 34 L. Ed. 1023." In Monsarrat v. Mercantile Trust Co., 109 Fed. 230, 231–232, 48 C. C. A. 328, 329, 330. Judge Lurton said: "The contention that the balance due on this mileage account when a receiver was appointed for the defendant railroad company, became a liability of the receiver by virtue of the order made when the receiver was appointed is unsound. That order was the usual order made in such cases, directing the receiver to pay labor, supply, and material claims, and 'traffic or mileage balances,' which had accrued within six months. Conceding that the order included the balance due on this mileage account, still it does not follow that the claim became thereby a receiver's debt. In the case of Gregg v. Trust Co. (a case against the same receiver, and decided at this term) 109 Fed. 220, 48 C. C. A. 318, we had occasion to pass upon the legal effect of that order, it being there contended that every claim within the terms of that order was thereby preferred over the mortgagees in the corpus of the mortgaged estate. We then held that, while the receiver would have been protected if he had paid out of the earnings of the receivership the claims embraced within the order, yet the order did not vest in any of the claimants an absolute right of payment out of the corpus of the mortgaged estate in preference to the mortgagees, and that if, in default of income out of which the receiver might comply with the order, creditors should seek to displace mortgages resting upon the corpus of the railroad, the mortgagees were entitled to be heard. The case of Railroad Co. v. Wilson, 138 U. S. 501, 506, 11 Sup. Ct. 405, 34 L. Ed. 1023, was cited as an express authority. If this was a right conclusion, it clearly follows that such an order did not have the effect of converting debts of the railroad company into debts of the receiver."

In this case, the order for the receiver to pay from the earnings was made at a time when the bondholders were not represented nor in court. Atlantic Trust Co. v. Dana, 128 Fed. 209, 225–230, 62 C. C. A. 657. This fact would not be material unless there were net earnings of the receivership. In this court the view prevails that proof of diversion is necessary. In Illinois Trust & Savings Bank v. Doud, 105 Fed. 123, 131, 132, 148, 44 C. C. A. 389, 397, 398, 414, 52 L. R. A. 481, Judge Sanborn said: "It is the diversion of the income of the mortgaged property from these claims, which have a superior equity to the claim of the bondholders, that forms one of the grounds of the preferential lien which is vouchsafed to them. But it is only when the income is diverted from the payment of these claims which have a higher equity to the payment of those which stand upon a lower plane that any equity arises in favor of any one on account of diversion. In Fosdick v. Schell, 90 U. S. 235, 253, 254, 25 L. Ed. 339, Chief Justice Waite said that, if the officers of the company 'give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. * * * Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably detained. It follows that, if there has been in reality no diversion, there can be no restoration, and that the amount of restoration should be made to depend upon the amount of the diversion.' Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596; Union Trust Co. v. Illinois M. R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963; Wood v. Safe Deposit Co., 128 U. S. 416, 420, 421, 9 Sup. Ct. 131, 32 L. Ed. 472. * * * When a careful examination and analysis of the facts and opinions in all the cases in the Supreme Court upon the subject of

preferential claims in suits to foreclose mortgages of quasi public corporations is made, and dicta are distinguished from adjudications, the decisions of that court will be found to sustain these propositions: A mortgagee of the property, acquired and to be acquired, and of the income of a quasi public corporation, such as a railroad company, obtains a lien upon the net income of the company after the current expenses of operation incurred in the ordinary course of business are paid, and impliedly agrees that the gross income shall be first applied to the payment of these current expenses, before the net income to which he is entitled arises. A court of equity, engaged in administering mortgaged railroad property under a receivership in a foreclosure suit, may prefer unpaid claims for current expenses of the ordinary operation of the railroad, incurred within a limited time before the receivership, to a prior mortgage lien, in the distribution of the income or of the proceeds of the mortgaged property. If such a mortgagor diverts the current income from the payment of current expenses to the payment of interest on the mortgage debt, or the improvement of the mortgaged property, so that current expenses remain unpaid when a receiver is appointed, the court may, out of the income accruing during the receivership, restore to the unpaid claims for current expenses the amount so diverted. But if there has been no diversion there can be no restoration, and the amount of the restoration cannot exceed the amount of the diversion." In Kansas Loan & Trust Co. v. Electric Ry. & Light Co. (C. C.) 108 Fed. 702, it was, as stated in the syllabus, decided: "The right of one furnishing supplies to an insolvent railroad company to a preference over the mortgagee is dependent on the fact that there has been a diversion of the net earnings of the mortgaged property over and above the necessary expenditures for operation, and that such diversion has inured to the benefit of the mortgagee, and the burden rests upon the claimant of such preference to establish such facts." Judge Philips, among other things, said: "This cause has been submitted to the court on exceptions filed to the special master's report allowing the claim of the intervener as a preferred claim, to be paid out of the proceeds of the sale of the mortgaged premises prior to the claim of the mortgagee thereon. The master's report, as submitted to the court, with the other papers in the case, presents the matters in controversy in such shape that it is impossible for the court to intelligently understand and pass upon the matters in dispute. As the intervener's right to a preferential claim is dependent upon the fact that there has been a diversion of the net earnings of the mortgaged property over and above the necessary expenitures for operation and that such diversion has inured to the benefit of the mortgagees (Bank v. Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481), the burden of proof rests upon the intervener to establish this fact. If the net earnings of the operation of the railroad over and above the expenses of operating were in fact diverted into improvements of the mortgaged property, and for its betterment, thereby enhancing the value of the mortgagee's security, to enable the court to determine such fact the master's report should contain a summary of the evidence, showing not only the fact of diversion, but approximately the amount thereof; and if it is claimed that such diversion inured to the benefit of the mortgagee in the way of improvements of the property, or in paying interest on the mortgage debt, or dividends and the like, the master should report and show by the evidence before him into what property the money diverted went, so that the court can see from the facts found whether it went into improvements of the property or its betterment. In other words, the facts found should show what money went in a particular direction, and in what it was invested, so that the court can see from the facts found whether or not the mortgagee received a benefit from the diversion, so as to postpone its lien to that of the claim of the intervener."

These cases establish the rule in this circuit, which is binding upon the master, even if he entertained any doubt upon the subject. However, as an original question, it may be said that, while it has been held that the corpus can be charged with the claim for operating expenses in the absence of a diversion, yet the well-considered cases are to the contrary. Probably the most satisfactory and thorough reviews in the books are Judge Lurton's opinions in a series of cases in the Circuit Court of Appeals for the Sixth Circuit.

In International Trust Co. v. T. B. Townsend Co., 95 Fed. 850, 860, 37 C. C. A. 396, 406, the syllabus thus clearly states the decision: "The doctrine announced in Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339, and the cases following it, is that the current income of a railroad is primarily applicable to the payment of its operating expenses, including proper equipment and necessary repairs, and that such expenses are an equitable charge on the income earned during the receivership, though incurred previously by the company, within such reasonable time as shall be fixed by the court, and without regard to whether or not income has been diverted; but the right to such preference extends to income only, and the rule does not authorize a court to displace liens on the corpus of the property in favor of supply creditors, except where, and to the extent that, income which should in equity have been applied to the payment of their claims has been diverted for the benefit of the bondholders, either by the payment of interest therefrom, the purchase of property, or in making permanent improvements on the property; and where there has been no such diversion, either before or during the receivership, and there are no surplus earnings of the receivership, a supply creditor of the company is not entitled to payment from the proceeds of the road, when sold, in preference to the mortgagees." Judge Lurton made a thorough review of the cases, and among other things said: "But if there has been no diversion of the current income, either before or after the appointment of a receiver, and no 'surplus income' during the receivership, out of which unpaid debts of the income can be paid, upon what theory can the proceeds of a mortgage foreclosure sale be applied to the payment of such debts against the objection of mortgage creditors? If nothing has been diverted from the 'current debt fund,' if there has been no augmentation of the fund applicable primarily to the satisfaction of the mortgage creditors, is there any just or equitable reason for requiring a restoration where nothing has been improperly received? We think in such cases the court has no power to displace contract rights, and neither Fosdick v. Schall nor any of the cases which have followed it afford any sufficient authority, when rightly understood, in opposition to this view. These 'debts of the income' are an 'equitable charge' only upon the 'current income' of the mortgaged railroad. If such debts remain unpaid when the railroad passes into the possession of a court of equity, this 'equitable charge' is continued, and attaches to the 'surplus income' arising under the receivership. If this surplus income is not applied to the payment of the debts to which it is primarily devoted, but is expended for the benefit of the mortgagee, as in payment of interest, or in the purchase of property which passes under the mortgage, or in betterments of the railroad itself, an equity arises, as a consequence of such diversion, which will justify a court of equity in requiring the mortgagees to restore to the income that which has been taken away. The power of the court to displace mortgage liens in favor of such unsecured debts of the mortgagor depends upon the fact that the current income, either before or after the receivership, has been diverted to the benefit of the displaced mortgage, and the extent to which the corpus of the mortgaged property can be called upon to pay such debts of the income is limited by the amount of the diversion."

In Rhode Island Locomotive Works v. Continental Trust Company, 108 Fed. 5, 7–9, 47 C. C. A. 147, 149–151, there was another thorough review of the question by Judge Lurton, and among other things he said: "If the appellant is to obtain any relief, it must show, first, that the demand here presented is not a debt created upon the personal credit of the company, but a current operating expense incurred to maintain the property as a going concern, and its railroad in condition to be used with reasonable safety for the transportation of persons and property, and with the expectation of the parties that it was to be met out of the current receipts of the company; and, second, that there are net or current earnings now applicable to the payment of such debts of the income, or that there has been a diversion of the current earnings, either before or since the receivership, which the mortgagees should equitably restore. International Trust Co. v. T. B. Townsend Brick & Contracting Co., 37 C. C. A. 396, 95 Fed. 850; Central Trust Co. v. East Tennessee, V. & G. R. Co., 26 C. C. A. 30, 80 Fed. 624; Virginia & A. Coal Co. v. Central R. & Banking Co., 170 U. S. 365, 18 Sup. Ct. 657, 42 L. Ed. 1068; Southern

Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 285, 20 Sup. Ct. 347, 44 L. Ed. 458. * * * If the demand of the appellant is to be paid at all, it must be paid out of the proceeds of the sale of the mortgaged property of the railroad company at the expense of the mortgagees. But before this can be done it must be made to appear that there has been a diversion of current earnings, by which this complainant has been deprived of his equitable rights, and that the mortgagees should equitably restore to the fund liable to the payment of debts of the income the fund thus diverted. * * * There is nothing in Southern Ry. Co. v. Carnegie Steel Co., cited heretofore, which casts any doubt upon this restoration doctrine as declared in Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339, Burnham v. Bowen, 111 U. S. 776, 783, 4 Sup. Ct. 675, 28 L. Ed. 596, and in St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. R. Co., 125 U. S. 658, 673, 8 Sup. Ct. 1011, 31 L. Ed. 832. Upon the contrary, the decree in that case was predicated upon the fact that there had been a diversion of income 'in paying interest, sinking fund, and contract debts, and for construction and equipment, which were all for the benefit of mortgage creditors, and which, to the extent necessary, should have been applied in payment of preferential claims, including those of the Carnegie Company. 176 U. S. 294, 295, 20 Sup. Ct. 362, 44 L. Ed. 474."

In Gregg v. Mercantile Trust Co., 109 Fed. 220, 227-229, 48 C. C. A. 318, 325-327, it was said: "This court in International Trust Co. v. T. B. Townsend Brick & Contracting Co., 37 C. C. A. 396, 95 Fed. 850, and in Rhode Island Locomotive Works v. Continental Trust Co. (decided November, 1900) 108 Fed. 5, 47 C. C. A. 147, after a full review of all the decisions of the Supreme Court in respect to the power and authority of a court of equity to provide for the payment of labor and supply claims in preference to mortgagees, reached the conculsion that preference could be given to such claims only out of the income of the mortgaged railroad, and that mortgages upon the corpus could only be displaced by such creditors when it was shown that there had been a diversion of the income, either before or after the receivership, by which the mortgagees had profited. In Rhode Island Locomotive Works v. Continental Trust Co. we endeavored to formulate from the decisions of the Supreme Court the principle upon which unsecured creditors might be preferred. Speaking of the claim seeking a preference in that case, we said: 'If the appellant is to obtain any relief, it must show, first, that the demand here presented is not a debt created upon the personal credit of the company, but a current operating expense, incurred to maintain the property as a going concern, and its railroad in condition to be used with reasonable safety for the transportation of persons and property, and with the expectation of the parties that it was to be met out of the current receipts of the company; and, second, that there are net or current earnings now applicable to the payment of such debts of the income, or that there has been a diversion of the current earnings, either before or since the receivership, which the mortgagees should equitably restore. International Trust Co. v. T. B. Townsend Brick & Contracting Co., 37 C. C. A. 396, 95 Fed. 850; Central Trust Co. v. East Tennessee, V. & G. R. Co., 26 C. C. A. 30, 80 Fed. 624; Virginia & A. Coal Co. v. Central Railroad & Banking Co., 170 U. S. 365, 18 Sup. Ct. 657, 42 L. Ed. 1068; Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 285, 20 Sup. Ct. 347, 44 L. Ed. 458.' The ground upon which this doctrine of the primary appropriation of income to the payment of current operating expenses rests is that the mortgagee impliedly consents. This implication of consent arises from the fact that a railroad mortgage is a very peculiar kind of property. Looking to the long time of such mortgages, the fact that the mortgagor is expected to remain in possession until default, that the value of the property is largely dependent upon its continued operation, and that the preservation of the franchises of such companies depends upon their continual exercise, it is not unreasonable assumption that 'every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income.' Fosdick v. Schall, supra. The displacement of mortgage liens cannot be justified upon any line of reasoning which assumes that one class of creditors may be deprived of the benefits of their contract liens for the benefit of another upon the ground that the public interests are

thereby subserved by the maintenance of a railway for the public convenience. Such a position antagonizes the constitutional principle that private property shall not be taken for the public benefit without compensation. The public character of such companies is only considered as one of the factors in arriving at the conclusion that the mortgagee in the income contracts only in respect to net income. But, if income alone is applicable to the payment of such operating expenses, how has it come about that in many instances such creditors have been paid out of the corpus of mortgaged property? The ground upon which a mortgage upon the corpus may be displaced is most logically stated by Chief Justice Waite in Fosdick v. Schall in these words: 'The power rests upon the fact that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to the whole or part of the general creditors. Whatever is done, therefore, must be with a view to the restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that, if there has been in reality no diversion, there can be no restoration, and that the amount of restoration should be made to depend upon the amount of diversion.' The fact that such claims seem to have been paid in Miltenberger v. Railroad Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117, and that Justice Blatchford does not refer to or discuss the doctrine of diversion of income, has been regarded by some of the Circuit Courts and by some of the Circuit Court of Appeal as justifying the displacement of mortgage liens independently of any diversion of income; and counsel in the cases at bar have urged that evidence of a diversion of income is no longer necessary. We cannot give that consequence to that case in view of the restatement of the diversion doctrine in the later cases of Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596; and St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. R. Co., 125 U. S. 658, 673, 8 Sup. Ct. 1011, 31 L. Ed. 832. In St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. R. Co., last cited, the claimant was denied payment out of the proceeds of sale of the mortgaged property because no diversion of income had been shown. Touching the necessity of proof of such diversion, the court said: 'There are cases, it is true, where, owing to special circumstances, an equity arises in favor of certain classes of creditors of an insolvent railroad corporation otherwise unsecured, by which they are entitled to outrank in priority of payment, even upon the distribution of the proceeds of a sale of the body of the property, those who are secured by prior mortgage liens. Illustrations and instances of these cases are to be found in Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339; Miltenberger v. Railroad Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117; Trust Co. v. Souther, 107 U. S. 591, 2 Sup. Ct. 295, 27 L. Ed. 488; Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596; Union Trust Co. v. Illinois M. R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963; Dow v. Railroad Co., 124 U. S. 652, 8 Sup. Ct. 673, 31 L. Ed. 565; Sage v. Railroad Co., 125 U. S. 361, 8 Sup. Ct. 887, 31 L. Ed. 694; and Trust Co. v. Morrison, 125 U. S. 591, 8 Sup. Ct. 1004, 31 L. Ed. 825. The rule governing in all these cases was stated by Chief Justice Waite in Burnham v. Bowen, 111 U. S. 776, 783, 4 Sup. Ct. 675, 679, 28 L. Ed. 596, 599, as follows: "That, if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use." There has been no departure from this rule in any of the cases cited. It has been adhered to and reaffirmed in them all. Admitting, therefore, that the reasonable rent of the leased line accruing to the petitioner was a proper charge upon the gross income of the Indianapolis & St. Louis Railroad Company, as a part of its current operating expenses, before any net income could arise applicable to the payment of the interest on the mortgage bonds, it must still be shown, to entitle the petitioner to the relief prayed for, that the arrearage due on account thereof has arisen by the diversion and misappropriation of the fund that ought to have been applied to its payment to the use and benefit of the mortgage bondholders. Counsel for the petitioner undertake to do this, and insist that upon the proofs in this case it satisfactorily appears that such a diversion and misappropriation have taken place, to its injury, and to the advantage and benefit of the bondholders claiming the fund in court for dis-

tribution.' In Virginia & A. Coal Co. v. Central Railroad & Banking Co., 170 U. S. 355, 365, 18 Sup. Ct. 657, 42 L. Ed. 1068, and in Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 293, 20 Sup. Ct. 347, 44 L. Ed. 458, the conclusions were founded upon evidence of diversion of income, the opinions being full and elaborate upon this point. We are aware of the fact that in maintaining the necessity for evidence of diversion of income before allowing solemn mortgage securities to be displaced, we are in disagreement with other courts of appeal for whose judgment we entertain very great respect. Believing, as we do, that we have correctly interpreted the opinions of the Supreme Court, and that the limitations which have been placed upon the preferential character of unsecured operating debts are in accord with settled principles of justice, we shall adhere to the views we entertain until the Supreme Court shall otherwise adjudicate."

In Gregg v. Metropolitan Trust Co., 124 Fed. 721, 722, 59 C. C. A. 637, 638, Judge Lurton again said: "There is no surplus income arising from the operation of the receiver applicable to the payment of this or any other debt, nor is it claimed that there was any diversion of income by the receiver, by which the mortgage creditor profited, upon which to found an equity against the bondholders. Burnham v. Bowen, 111 U. S. 776, 782, 4 Sup. Ct. 675, 28 L. Ed. 596; International Trust Co. v. Townsend Brick Co., 95 Fed. 850, 37 C. C. A. 396, 405. The proceeds of the sale of the mortgaged property are insufficient to pay the mortgage debts, and, if the appellant is to be paid at all, he must be paid at the expense of the mortgage creditors out of the proceeds of the sale of the mortgaged property. Before the mortgage creditors can be displaced in respect of the corpus of the property, it must appear that the current earnings which accrued during the period shortly before the receivership were not applied to the payment of current operating expenses, incurred within the same period, but were used in the permanent improvement of the property mortgaged, or for the payment of the mortgage debt, and that, as a consequence of this misapplication, current expense creditors have been disappointed. This is the well-settled rule in respect of the payment of these so-called preferential debts of the income. Central Trust Co. v. East Tenn., V. & G. Ry. Co., 80 Fed. 624, 26 C. C. A. 30; International Trust Co. v. Townsend Brick Co., 95 Fed. 850, 37 C. C. A. 396; Rhode Island Locomotive Works v. Continental Trust Co., 108 Fed. 5, 47 C. C. A. 147. This was the law as declared in the opinion upon the former appeal and as such is the law of the case. Gregg v. Mercantile Co., 109 Fed. 220, 227, 48 C. C. A. 318."

The Circuit Court of Appeals for the Seventh Circuit took the same view in Niles Tool Works v. Louisville, etc., R. Co., 112 Fed. 561, 563, 50 C. C. A. 390, 392, where Judge Seaman said: "On the facts thus appearing we are of opinion that no foundation exists for priority of the appellant's claim to make it chargeable against the purchasers under the foreclosure decree, and that the order of the circuit court thereupon is sustained by the entire line of authorities. Reversal is sought on the authority of expressions in the early case of Fosdick v. Schall, 99 U. S. 235, 252, 25 L. Ed. 339, upon which, as remarked in the brief on its behalf, the 'appellant anchors its faith;' but the contention ignores the distinctions which are there pointed out as grounds for the preference, and is untenable as well under that decision as it clearly is under the uniform line of later authorities. In Fosdick v. Schall the doctrine is recognized, as fully exemplified in the later cases, that the mortgagee of a railroad company is entitled to the net income only to be applied in payment of interest or principal of the mortgage indebtedness; that there is an implied agreement that the current income shall be first applied to the payment of the necessary operating expenses of the road, and an equitable lien thus arises in favor of debts for current expenses, which will be enforced to displace mortgage liens within reasonable limitations; and as remarked in International Trust Co. v. T. B. Townsend Brick & Contracting Co., 37 C. C. A. 396, 405, 95 Fed. 850, 859, 'the doctrine thus stated is the foundation of the "diversion" or "restoration" doctrine applied in the later cases.' So the rule which was actually applied in Fosdick v. Schall, was in conformity with such doctrine, and, while it is true that remarks in the opinion indicate that 'proper equipment and useful improvements' may be chargeable against the gross earnings, the ground for such possible exception is thus stated: 'If,

for convenience of the moment, something is taken from what may not improperly be called the "current debt fund," and put into that which belongs to the mortgage creditors, it certainly is not equitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees.' 99 U. S. 252, 25 L. Ed. 342. This suggestion of contingencies which may enlarge the exception in favor of preference, if consistent with the later decisions, does not support the appellant's claim, for the reason that neither of the conditions so indicated appears in the present record."

In Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339, 343, Mr. Chief Justice Waite said: "No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must, to a greater or less extent influence the chancellor when he comes to act. The power rests upon the fact, that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that, if there has been in reality no diversion, there can be no restoration, and that the amount of restoration should be made to depend upon the amount of diversion." In Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 679, 28 L. Ed. 596, 599, Mr. Chief Justice Waite said: "We do not now hold, any more than we did in Fosdick v. Schall or Huidekoper v. Locomotive Works, 99 U. S. 260, 25 L. Ed. 345, that the income of a railroad in the hands of a receiver, for the benefit of mortgage creditors who have a lien upon it under their mortgage, can be taken away from them and used to pay the general creditors of the road. All we then decided, and all we now decide, is—that, if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use."

In Wood v. Guarantee, etc., Co., 128 U. S. 416, 9 Sup. Ct. 131, 32 L. Ed. 472, 473, Mr. Justice Lamar said: "The argument is unsound. There are several answers to it: First, it overlooks the vital distinction between a debt for construction, and one for operating expenses. The doctrine of Fosdick v. Schall is applicable wholly to the latter class of liabilities. In the case of Cowdrey v. Galveston, H. & H. R. Co., 93 U. S. 352, 23 L. Ed. 950, it was settled that the doctrine does not apply where it is a question of original construction. Secondly, it overlooks the important fact that the doctrine only applies where there is a diversion of the income of a 'going concern' from the purpose to which that income is equitably primarily devoted, viz., the payment of the operating expenses of the concern. In other words, the income must be first devoted to the expenses of producing the income."

In Central Trust Co. v. Chattanooga, etc., R. Co. (C. C.) 69 Fed. 295, 296, Judge Newman said: "The only question discussed on this demurrer has been the right of intervener to priority over the lien of the mortgage debt. So far as that question is concerned, I am clear that the intervener does not make a case by his petition such as makes his claim one to be preferred over the mortgage indebtedness. The case of Cutting v. Railroad Co., 9 C. C. A. 401, 61 Fed. 150, decided by the Circuit Court of Appeals for this circuit, following Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339, decides that, in order to make such a claim preferential, it must appear that there was an order of court, at the time the receivers were appointed, providing for its payment, and evidence that the current earnings before or after the appointment of the receiver were diverted to paying interest on the bonded debt."

In Cutting v. Railroad Co., 61 Fed. 150, 156, 9 C. C. A. 401, 408, Judge Pardee said: "The Florida Central & Peninsular Railroad Company further assigns as error that numerous small claims allowed to be due by the defendant, the Tavares, Orlando & Atlantic Railroad Company, for supplies furnished prior to the appointment of the receiver under the bill of foreclosure, were allowed by the court, and ordered to be paid out of the proceeds of th

corpus of the property. As the court in appointing a receiver made no provision for the payment of such claims, and as there is no evidence in the record tending to show that current earnings, either before or after the receiver was appointed, were diverted to paying unearned interest, or in fact, any interest, upon the bonded debt, we are unable to sanction the order authorizing the payment of said claims from the proceeds of the sale of the property. See Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339."

In Hunt v. Memphis Gaslight Co., 95 Tenn. 143, 144, 31 S. W. 1006, 1008, it was said: "Again, the doctrine invoked by the complainants only applies where there is a diversion of the income of a 'going concern' from the purpose of which the income is equitably and primarily devoted, viz., the payment of the operating expenses of the concern." In Coe v. Midland Ry. Co., 31 N. J. Eq. 130, 131, the same view was taken.

In Mersick v. Hartford, etc., R. Co. (Conn.) 55 Atl. 664, 668, 669, 100 Am. St. Rep. 977, after freely quoting from the decisions of the Supreme Court of the United States, Judge Hall said: "From the language quoted from the cases above cited, it would appear that the foundation principle of Fosdick v. Schall, and the other cases referred to, by which a certain preference is given a particular class of unsecured creditors over the mortgagees of a railroad, is an agreement upon the part of such mortgagees, in accepting such security for the payment of the bonds, that current debts, contracted in the ordinary course of the business of the railroad company shall be paid from the current earnings of the railroad before such mortgagees shall have any claim upon such income. It is by virtue of this implied agreement that the current debts, as between the supply creditors and the mortgagees, become a charge in equity upon the continuing income both before and after the appointment of a receiver, and whether or not there has been a previous diversion of the income for the benefit of the mortgagee. But the superior equity springing from such implied agreement, in favor of the current-debt creditors, is in the current income derived from the mortgaged property, and not in the body of the mortgaged property itself. None of the cases above referred to go so far as to imply an agreement upon the part of the mortgagees, in accepting their security, that the body of the mortgaged property may be used to pay the current expenses of operating the railroad. The power of a court of equity to apply the corpus of mortgaged property to the payment of such unsecured claims against the railroad company is always made to rest upon the fact that in some manner the mortgagees have received the benefit of those earnings, which, by their implied agreement, should have been applied to the payment of current expenses. We are not prepared to accept as law the rule which seems to have been adopted in some of the cases cited by counsel—that those who have rendered services, or furnished supplies to keep a railroad in operation, even after the mortgage interest is in arrear, and the bondholders have the right to take possession under their mortgage, are entitled to priority of payment over the mortgagees from the corpus of the mortgaged property, or the proceeds of the sale thereof, when there has been no diversion of the earnings of the railroad to the benefit of the bondholders. Assuming, without deciding, that the doctrine of Fosdick v. Schall is applicable to a street railroad like that of the defendants, how does that effect the rights of these intervening creditors? They are not asking that income in the hands of the receiver be used to pay their claims. There are no earnings of the railroad in his hands. The expense of operating the road during the receivership has exceeded the receipts. To entitle the interveners to payment from the proceeds of the sale of the mortgaged property, it must therefore be shown that there has in some manner been a diversion of the current income for the benefit of the mortgagees. But it does not appear that the mortgagees have received any part of the income of the road which should have been diverted to the payment of these claims, or that the action of the bondholders in taking possession of the road has prevented the payment of these claims from the earnings of the railroad. On the contrary, it appears that no interest has been paid on the bonds from the earnings of the railroad since August 1, 1896, and that since that time the receipts from the road have been inadequate for the payment of the ordinary operating expenses, and that large sums have been borrowed by the company to enable it to meet

its current obligations. There has been no diversion, and there can be no restoration. The claims of the supply creditors and the principal part of the Patterson claim are not debts of the bondholders, but of the railroad company, contracted either upon the credit of the company itself, or upon the credit of its earnings. As there has been no diversion of such earnings for the benefit of the bondholders, there can be no payment of such claims, under the doctrine of Fosdick v. Schall, from the mortgaged property, or the money derived from its sale, until the mortgage debt is satisfied."

Frank Hagerman, for the purchasers.

S. W. Moore and F. H. Wood, for Texarkana & Southern Co., Knott & Swinney, receivers, and Continuous Rail Joint Co.

Austin & Austin, for E. A. Kinsey Co.

H. C. Solomon, for C. & D. Stern and Platte Overton.

A. S. Van Valkenburgh and Frank P. Blair, for Rodger Ballast Car Co.

PHILIPS, District Judge. After the foreclosure sale and the confirmation thereof to the purchaser, various creditors of the mortgagor companies filed intervening petitions to have their respective claims declared preferential in character, to be paid out of the proceeds of the sale under the foreclosure proceedings, or as a lien upon the corpus of the property in the hands of the purchaser. These matters were referred to Shannon C. Douglass, as special master, to take the proofs and report his findings on the facts and the law. To his reports in the cases several of the interveners have filed exceptions, which have been heard by the court. The master's reports are most comprehensive and thorough, exhibiting great care and an intelligent understanding of the issues and the law of the case. His collection and review of the decisions bearing upon the question of preferential claims is a valuable contribution to that branch of judicial literature.

His conclusions on the law are based upon the following propositions, as applied to the character of these claims: (1) To constitute them preferential over the mortgage, which covered not only the corpus of the railroad property of every kind and description, but also the net income after deducting current operating expenses, the debts must have been contracted upon the faith of being paid from such current income, and not created for construction or ordinary equipment. (2) Where there is no proof showing a diversion of such current income to the use or benefit of the mortgagee, and there is a deficit of the net income arising from the operation of the road in the usual business-like way, and the property under foreclosure sale brings less than the mortgage debts, no equity exists in favor of such general creditors over the mortgagee, entitling them to be recompensed out of the purchase money, or to subject the corpus of the property in the hands of the purchaser to the payment of such debts. The master further held that, to entitle the interveners to the enforcement of their alleged preferential claims, it devolved upon them to show by evidence that there had been a diversion to the benefit of the mortgagee of net earnings after deducting such current expenses.

As a general proposition, I understand this to be a correct exposition of the law as applied in this jurisdiction. Illinois Trust & Savings

Bank v. Doud et al., 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481; Atlantic Trust Co. et al. v. Dana et al., 128 Fed. 209, 62 C. C. A. 657; Kansas Loan & Trust Co. v. Electric Railway Co. (C. C.) 108 Fed. 702. This ruling is supported by both the weight of authority and reason. Rhode Island Locomotive Works v. Continental Trust Co., 108 Fed. 5, 47 C. C. A. 147; Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co., 176 U. S. 298, 20 Sup. Ct. 363, 44 L. Ed. 475; International Trust Co. v. Townsend Brick & C. Co., 95 Fed. 850, 57 C. C. A. 396; Gregg v. Mercantile Trust Co., 109 Fed. 220, 48 C. C. A. 318; Gregg v. Metropolitan Trust Co., 124 Fed. 721, 59 C. C. A. 637, affirmed in 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717; Niles Tool Works Co. v. Louisville, N. A. & C. Ry. Co., 112 Fed. 561, 50 C. C. A. 390; Wood v. Guaranty Trust Co., 128 U. S. 416, 9 Sup. Ct. 131, 32 L. Ed. 472; Cutting v. Tavares, O. & A. R. Co., 61 Fed. 150, 156, 9 C. C. A. 401; Hunt v. Memphis Gaslight Co., 95 Tenn. 143, 144, 31 S. W. 1006; Mersick v. Hartford, etc., Ry. Co. (Conn.) 55 Atl. 664, 668, 669, 100 Am. St. Rep. 977.

It may be conceded that there are expressions in opinions of the Justices of the Supreme Court that certain exceptions should be made, under special circumstances, to the general rule requiring proof of such diversion. It may also be conceded that exceptions at times have been, and doubtless should have been, made, ex necessitate, in cases of imperious business necessities, such, for instance, as the payment of balances on traffic arrangements between the bankrupt and another road, to prevent disruption of the traffic, to the serious detriment of operating the business under the receivership; also, in case of seizure under prior attachment or execution against the bankrupt road, where good judgment would authorize the court to direct the payment of the lien, or where the necessity of continuing a supply contract is supreme, and its continuance should be conditioned upon paying antecedent claims under the contract, and the like. But no such contingency or administrative policy is presented in the instance of any claim in this record.

There are some other settled rules of law applicable to nearly all of the intervening claims which may here be stated:

(1) The fact that the court, in the order appointing the receiver, may have directed that preferential claims for supplies and materials be paid out of the proceeds of the sale or the corpus of the property in the hands of the purchaser does not control the right of the purchaser to contest such claims on the grounds that they are subordinate in right to that of the prior mortgagee. Louisville Railroad Co. v. Wilson, 138 U. S. 501, 11 Sup. Ct. 405, 34 L. Ed. 1023; Gregg v. Mercantile Trust Co., supra; Monsarrat v. Mercantile Trust Co., 109 Fed. 230, 48 C. C. A. 328.

(2) In some of the claims counsel for interveners have attempted to show diversions prior to the creation of the debts sought to be enforced as an equitable lien. This court in Kansas Loan & Trust Co. v. Electric Railway, etc., Co. 108 Fed. 703, said:

"This intervener has nothing to do with the earnings of the road or their diversion by the road prior to the creation of its debt. The creditor can only

concern himself about diversions of the current earnings after the creation of his debt."

In Central Trust Co. v. East Tennessee Ry. Co., 80 Fed. 624, 626, 26 C. C. A. 30, Judge Lurton said:

"Prior to the period covered by the maturity of appellants' claims, there was a surplus of gross earnings over all operating expenses; but it cannot be contended that the company was under any obligation to future creditors to accumulate a surplus to meet possible deficiencies in the income to meet future income debts, or that it was improper to apply such surplus in payment of interest."

(3) Stress is placed in argument in respect of expenditures for machinery, repairs, and improvements made on what is known as the "Quincy Division," operated by the Eastern road under a contract of lease; that the leased line had become so out of repair by reason of original imperfect construction and wear and tear that in the year preceding the appointment of the receivers in the original suit the railroad commissioners of the state had pronounced it unsafe for public use, and directed that the roadbed and some of its bridges be placed in necessary repair within a given time. Further stress is laid upon recitals contained in a petition by the receivers to the court, asking permission to issue receiver's certificates to raise money for making such repairs, etc.; the argument based thereon being that such material and work were essential to keep the road a going concern, and therefore the debts created for the machinery, etc., furnished to aid in thus improving the condition of the road should be held preferential, irrespective of whether there was any diversion of net income. In the first place, it is to be kept in mind that when all this occurred the mortgagee was not in court. It did not become a party to the proceedings in which the receivers were appointed until December 1, 1901, when it appeared and filed its cross-bill. Any statements made by the receivers in said petition, and any adoption of the expressions of the receivers in the order of court, were, as to the mortgagee not a party to the proceeding, entirely ex parte, and could not be, as against it, evidence of the facts recited. Aside from this, the law is, as declared by the Court of Appeals of this circuit in Atlantic Trust Co. v. Dana, 128 Fed. 209, 62 C. C. A. 657, that the right of the intervener as against the mortgage lienor to have such claims declared preferential, to be enforced upon the corpus of the property in the hands of the purchaser under the foreclosure sale, is to be regarded as a debt not authorized or sanctioned by the mortgagee.

(4) Nor can the fact that the mortgagee, after its right accrued to enter as for condition broken, failed to exercise it, be construed into an equitable estoppel on the ground of its acquiescence in the expenditures made as equitable liens created by the mortgagor, or the receivers appointed by the court when the first mortgagee was not a party thereto. The only effect of the nonaction of such prior lienor is to preclude it from laying any claim to the current income accruing prior to its cross-complaint, which may have been used or diverted, to which such lienor might have asserted claim. Atlantic Trust Co. et al. v. Dana, supra; Mersick v. Hartford, etc., Ry. Co., supra.

(5) Further, the law is that, although the equipments and repairs augmented the mortgage security, it does not affect the question of the right of the interveners to the asserted preferential lien. Rhode Island Locomotive Works v. Continental Trust Co., supra; International Trust Co. v. Townsend Brick & C. Co., 95 Fed. 850, 37 C. C. A. 396; Illinois Trust Co. v. Doud, 105 Fed. 148, 44 C. C. A. 389, 52 L. R. A. 481.

The master has found as a fact from the evidence before him that there was no diversion of the net income derived by the receivers from the operation of the road to the use of the mortgagee, for the palpable reason that after the most liberal allowances for all claimed diversions for improvements to which an equitable lien could attach there was no surplus income. The law is that the master's report upon matters of fact is deemed to be true where no exceptions are properly taken thereto. And even where an exception is taken, the conclusions of the master on questions of fact, on conflicting evidence, if any, are presumptively correct, and will be adhered to by the court on review unless it appears to be palpably wrong by the most persuasive weight of evidence. Growing out of these rules in such procedure, exceptions, when taken, must not be to the general result, as such would be but in the nature of a general demurrer. The exceptions must be specific, pointing out the particular errors relied upon, and where they are based upon particular evidence contradicting conclusions of the master they should refer to the evidence in the record where the same may be found, and not leave the court to grope through voluminous records of testimony, as in this case, running into thousands of pages, to find, as best it may, where the evidence relied on may be found. Chief Justice Marshall, in the early case of Harding v. Handy, 11 Wheat. (U. S.) 103-127, 6 L. Ed. 429, said:

"It may be observed, generally, that it is not the province of a court to investigate items of an account. The report of the master is received as true when no exception is taken, and the exceptions are to be regarded so far only as they are supported by the special statements of the master, or by evidence, which ought to be brought before the court by a reference to the particular testimony on which the exceptor relies. Were it otherwise, were the court to look into the immense mass of testimony laid before the commissioner, the reference to him would be of little avail. Such testimony, indeed, need not be reported further than it is relied on to support, explain, or oppose a particular exception."

Mr. Justice Clifford in Greene v. Bishop, 1 Cliff. 186, Fed. Cas. No. 5,763, after adverting to the above statement of Chief Justice Marshall, said:

"But the evidence ought to be brought before the court by reference to the particular testimony on which the excepting party relies."

Speaking of the exception he said:

"It merely alleges that the finding of the master is erroneous and unsatisfactory, without attempting or pretending to specify any particulars in which the error consists, * * * and omits altogether to refer to any portion of the testimony to support the allegation."

In Jaffrey v. Brown (C. C.) 29 Fed. 476, 479, the court said:

"The exceptions are to be regarded so far only as they are supported by the special statements of the master, or by evidence which ought to be brought before the court by a reference to the particular testimony."

In Jones v. Lamar (C. C.) 39 Fed. 585-587, the court said:

"Solicitors for the complainants say that they are unwilling to rely solely upon the evidence referred to by the master as the basis of his findings, and since they have specified nothing else, and since the court, under the rule in Harding v. Handy, supra, will not consider testimony in support of the exceptions not referred to in the report of the master, or brought to its attention by appropriate reference in the exceptions, exceptors are unable to proceed."

See, also, Farrar v. Bernheim, 74 Fed. 435-438, 20 C. C. A. 496.

In fact the exceptions in these cases do not even directly charge that the master has improperly reported the facts. But again and again, with unusual reiteration, it is simply charged that the master erred in finding that there was no net income, or that there was no diversion, or that the claim was not preferential, and the like, and that he should have found otherwise, without claiming that his finding is not supported by evidence, and by pointing out where the court will find the particular fact or facts relied on. In such condition of the record the court would be justified in accepting the master's findings of the facts as correct. Nevertheless, the court, in certain instances, has had recourse to the record, and read the evidence, although it has occasioned great inconvenience and labor, bearing upon particular questions of fact, to determine whether they justified a different finding from that of the master.

Claim of Receivers of the Gulf Company against the Eastern Company.

The receivers of the Gulf Company, on December 30, 1899, recovered a judgment against the Eastern Company for $24,738.78, including interest, upon an account against the Eastern Company accruing prior to the receivership. As found by the master, the greater portion of this claim consisted of the proportionate part of joint expenses paid by the Gulf Company. The Eastern, Northern, Omaha, and Gulf Companies were operated as one system. The expenses of their general offices and other departments were, in the first instance, paid by the Gulf Company, and by a system of bookkeeping a charge was made upon some basis against each company which was a part of the system. Other items were for repairs to cars and locomotives and car supplies, the principal items being for rental of locomotives. There was also a claim, not included in the judgment, for $118.89 for stationery and telegraph bills due from the Eastern Company to the Gulf Company. The court is strongly inclined to the opinion that, under the facts found by the master touching the relations between the Gulf Company and the Eastern Company, the method of their management and operation, under the master mind of Mr. Stilwell, making them one system in fact, in connection with the manner of the bookkeeping and the adjustment of accounts at stated periods, the carrying of balances and charging the same to a general account,

the Gulf Company was and is in no position to claim that the credits were extended upon the faith of the application to their payment of the current earnings of the Eastern Company, and therefore they are wanting in the first quality of a preferential claim. The following authorities bear upon the law of the case: Thomas v. Western Car Co., 149 U. S. 95–112, 13 Sup. Ct. 824, 37 L. Ed. 663; Penn v. Calhoun, 121 U. S. 251, 7 Sup. Ct. 906, 30 L. Ed. 915; United States Trust Co. v. Western Contract Co., 81 Fed. 454, 26 C. C. A. 472; Morgan's Louisiana & Texas Railroad, etc., Co. v. Texas Cent. R. Co., 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 625.

The court approves the findings of the master that the items of the judgment for the rental of the locomotives and expenses advanced in maintaining a joint system of officers and offices are not preferential, as shown by the following authorities: Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339; Kneeland v. American Loan & Trust Co., 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379; Thomas v. Western Car Co., supra; Rhode Island Locomotive Works v. Continental Trust Co., supra; Morgan's Louisiana & Texas R., etc., Co. v. Texas Cent. R. Co., supra; Contracting & Building Co. v. Continental Trust Co., 108 Fed. 1, 4, 47 C. C. A. 143.

The court also approves the findings of the master that the claim of intervener touching the matter of the payment of interest prior to the appointment of the receivers did not constitute a diversion, and was not preferential in its character.

The matter of purchase of ballast cars and ballasting and work done on the Quincy Division will be more particularly discussed when we come to the consideration of the claim of the Rodger Ballast Car Company. It is sufficient here to say that the contention of counsel for the Gulf Company that this purchase and work should be regarded as of the nature of original capital, or a construction which should be accounted for, although not paid for by the Eastern Company, should not be recognized. The analysis made by the master of the whole evidence touching the issue of any actual surplus of net earnings clearly demonstrates that, considering all outlays which might have been characterized as diversions, there was a large deficit of net income after deducting the operating expenses. The evidence furthermore shows that in order to keep the road a going concern the bondholders made large advances to its operators. It results that the exceptions are overruled.

The Claim of the Texarkana & Southern Company; also Claim of Knott & Swinney, Receivers of the Kansas City Suburban Belt Railway Company.

The court perceives nothing worthy of review arising on the exceptions in this case, and the findings of the master are approved, and the exceptions are overruled.

Claim of the Rodger Ballast Car Company.

This claim is predicated of the purchase price of 32 ballast cars, one plow car, and for freight charges thereon, shipped to the Eastern

Company, and accepted in November, 1899. This claim was urged before the master in the first instance upon the theory that they were preferential in their character, and should be allowed regardless of the question of fact as to whether or not there was any diversion of net income under the receivers. The intervener, concluding ultimately to attempt to show a diversion, introduced in evidence books of account of the Eastern Company, and examined its auditor and chief engineer. The result of the book account showed that the expenses of operation of the road under the receivership from January 2, 1900, and including June 23, 1903, amounted to $1,313,538.31, and that the total earnings were $1,122,281.63, leaving a deficit of $191,256.68. The only oral testimony introduced by the intervener on this branch of the case was that of Collins, the chief engineer, and Kendrick, the auditor of the receivers. In the first place, the intervener's debt having been contracted prior to the intervention of the mortgagee by cross-bill, and the work on the Quincy Division, where the supplies were used, having been furnished under contract of purchase prior to said intervention, how stands this claim? The ballast cars purchased were merely for facilitating the work of hauling and distributing the ballast along the railroad for improving the track. The cars were not the ballast itself, essential to placing the track in proper and suitable condition for successful operation. They were mere vehicles—cars conveniently constructed—for hauling ballast from one point to another, whereby it may be conceded that the work of such ballasting was facilitated or expedited. In this respect how does it differ, as affecting the right of preference over the mortgage, from an engine or other car bought to assist in the better operation of the railroad work, whereby its business could be better done and its income augmented? Debts contracted for such adjuncts and equipments to railroads do not necessarily constitute a claim preferential to that of the mortgage upon the corpus of the property or the current income covered by the mortgage. Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co., 176 U. S. 298, 20 Sup. Ct. 363, 44 L. Ed. 475; Southern Railway Co. v. Carnegie Steel Co., 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458; Rhode Island Locomotive Works v. Continental Trust Co., supra; Illinois Trust & Savings Bank v. Doud, supra. As already shown, the fact that the equipments augmented the security does not alter the case. Rhode Island Locomotive Works v. Trust Co., supra; International Trust Co. v. Townsend Brick & C. Co., supra.

It being conceded that prior to appointment of receivers there was no net income, to give the intervener the relief sought it devolved upon it to show that after the creation of its debt, and during the operation of the road under the receivership, they diverted to the use or benefit of the mortgagee a part of the net income of their earnings in the operation of the road, which in equity should have been applied to the payment of its claim. To meet the result, as shown by the books of the company above stated, objection is made to the item of $51,000 on the credit side of the account of expenditures, which represents the amount of receiver's certificates issued under the authority

of the court. The contention is that the receivers should have charged themselves with the amount realized on such certificates, which is not shown by the debit side of the account. It is suggested by counsel for the purchasing company that from all that appears from the evidence this $51,000 might have been included in the item under the head of earnings "All Other Sources," $83,816.74. As there was no evidence showing the constitutent elements of the "all other sources," the presumption might be indulged that the receivers kept an honest account, and charged themselves with the proceeds of the receiver's certificates, and that without more it ought to be assumed that this is embraced within "all other sources." But, waiving this, deducting the $51,000, there would still remain $141,256.68 of expenditures over earnings.

The next contention of intervener is that the item of credit of $101,483.52 of expenditures for rentals paid on the lease contract of the Quincy road should be deducted as a diversion. The court can perceive no reason why this contention should obtain. Long prior to the extension of the credit of the Eastern road, the lease contract between it and the Quincy road was made. The rentals paid were in fulfillment of that contract. The lease having been taken over and recognized by the receivers, the contract became obligatory upon them until repudiated. Central Trust Co. v. Continental Trust Co., 86 Fed. 517, 528, 30 C. C. A. 235. In that case the court said: "When a lease of part of a line of railroad has been adopted by the receiver and the court, the rent should be paid as an operating expense." And in Mercantile Trust Co. v. Farmers' Loan & Trust Co., 81 Fed. 254–258, 26 C. C. A. 387, the court said:

"If the court below properly accepted and adopted the leases, the rentals reserved under them became an integral part of the operating expenses of the trust estate in the hands of the receivers, as much as the wages of the hired men, the rent of leased engines or cars, the traffic balances due connecting railroads, or any other ordinary expense of operation."

In no proper legal sense was such rental payment a diversion in favor of the mortgagee.

The master properly found that the repairs of bridges for the maintenance of the Quincy road constituted a part of the rental provided for by the lease, and, as such, they were necessary operating expenses. The credit side of the account shows an item of "equipment notes" $39,362.93. The settled law of this jurisdiction is that such items are classed as operating expenses, and do not constitute diversion in favor of the mortgagee. The oral evidence introduced shows that the ballasting was 33 miles upon the Eastern road and 60 miles on the Quincy Division; one-tenth of which was full ballast, at $1,650 per mile, and nine-tenths was one-half ballast, at $1,000 per mile. It does not appear from the evidence on what particular road this one-tenth of full ballast was applied. In any event, not over one-tenth can be regarded as new construction, and the nine-tenths was merely repair work. The item of charges for work on bridges was on the Quincy Division, and was of the nature of repair work. There were some water tanks destroyed by fire which were rebuilt, and perhaps one

new one built, and there was $1,050 expended on the construction of a spur road, and other claimed new constructions, amounting in the aggregate to $8,300. These were expended on and in connection with the Quincy branch of the railroad. It is in the first place very questionable as matter of law whether these expenditures, which inured to the benefit of the Quincy Division and not to that of the Eastern Company, covered by the mortgage, could be said to have inured to the benefit of the mortgagee; or, in other words, whether or not the diversion, if any, could be charged to the Eastern Company. In St. Louis, Alton, etc., Railroad Co. v. Cleveland, etc., Railway Co., 125 U. S. 658, 8 Sup. Ct. 1011, 31 L. Ed. 832, where the question was between claims of a preferential character and the bondholders under a second mortgage, the court said:

"It cannot be said that the application of earnings to the payment of the interest on the first mortgage bonds is chargeable to the holders of the second and third mortgage bonds; the latter alone are interested in the fund for distribution. That fund, in the sense of the rule sought to be applied, cannot be said to have been benefited by the payment to other bondholders from the gross earnings applicable to the payment of the rent. The equity of the petitioner, if in fact it exists, is against the holders of the first mortgage bonds, who have actually received the money to which it claims to be equitably entitled. * * * As we have already stated, no equity can arise upon the alleged breach of trust unless the second and third mortgage bondholders participated in it, or have been benefited by it."

The only answer to this is the suggestion that, inasmuch as the Eastern road had an option under the lease contract to purchase the Quincy line, it had an indirect interest in making the betterments on the leased line. This, however, would only be, at the most, prospective and contingent, which was never realized, and in no wise conferred a present benefit on the mortgagee. The bare expectation in no degree augmented the mortgage security.

Independent of these considerations, conceding that certain items of expenditures on the Quincy road should be deducted from the credit side of the account, there would still remain a large deficit in the current earnings under the receivership, arising from operating expenses. Before the intervener can charge the corpus of the property in the hands of the purchaser with the payment of its claim, the burden is upon it to show that but for such diversion there would have been a net surplus of earnings subject to the equitable lien. The law only exacts that the amount of the diversion shall be restored by the mortgagee receiving it for the benefit of those entitled thereto. So that if its restoration still left a large deficit in the net earnings in the operation of the road, there would be no subject-matter upon which the equitable lien could attach. Furthermore, the proof is that the contract of lease, under direction of the court, was surrendered by the receivers, and the property was surrendered to the Quincy Company prior to the decree of foreclosure, and therefore no possible benefit inured to the mortgagee from any improvements made thereon.

It results that the exceptions must be overruled.

Claim of Continuous Rail Joint Company.

This claim amounts to $2,799.46 for rail joints purchased in November, 1899, by the Eastern Company and used upon its road. Conceding that this was an operating expense contracted upon the faith of the earnings of the company, proof of diversion for the benefit of the mortgagee is essential to the relief. The only evidence thereof, in the first instance, was under the stipulation that the testimony taken in the case of the Rodger Ballast Car Company should be used. Afterwards it was stipulated between counsel as follows:

"That all evidence tending to prove or disprove a diversion, if any, offered by or against any of the intervening petitioners in this case who have filed claims against the Eastern Company, shall be considered as offered in evidence in the matter of this intervening petition, and made a part of the record, subject to such orders as may be made as to costs."

On this state of the record counsel for intervener bases a claim of diversion upon the fact of payment prior to the receivership of rentals on the lease of the Quincy Company, in the form of interest on certain bonds of that company. The master found and held that the theory of liability where there has been no diversion of earnings is that the mortgagee received a benefit in the way of the payment of interest or for the betterment of his property; that the fact that some other road or some other bondholders received such benefit is no reason why the property of the Eastern Company should be charged with the amount of the diversion as against the mortgagees, who received no benefit therefrom. In addition to this, the payment of such interest was a part of the consideration of the rental contract, and, as stated under the foregoing ruling, would be a part of the operating expenses. The master has found that there were at no time any net earnings that were or could have been paid on the interest upon the bonded debt of the Quincy Company, as there were no such net earnings. The master also further found that prior to the receivership no payments on account of lease rentals were made either from the gross or net earnings of the Eastern Company or from its funds; that the same were made by the construction company, and by it charged to the Eastern Company in its unpaid open accounts, heretofore referred to. The total amount actually paid as rentals in the form of interest upon bonds of the Quincy Company was $124,000, although the total indebtedness incurred for the lease rentals was $210,344.68. The loss in operating expenses over earnings prior to the receivership was in excess of $351,000, making $140,191 in excess of all liabilities incurred for lease rentals, and over $227,000 in excess of the amount of interest paid upon the bonds of the Quincy Company. Superadded to this, the master finds the fact to be that prior to the receivership $228,480.11 was advanced in loans of money to the Eastern Company by those interested in marketing its bonds. The analysis of these accounts and the deductions made therefrom by the master demonstrate beyond any question that there were no net earnings applicable to the payment of this claim. This claim originated November 7, 1899. Between that date and the appointment of the receivers there were no payments by the Eastern Company for interest upon

its own or the bonds of the Quincy road, or for lease rentals, or for the benefit of the mortgage bondholders. As already shown in the foregoing part of this opinion, it is a matter of no concern to this intervener what payments were made prior to the origin of its account.

The master has found that the $15,000 claimed by the intervener to have been paid for lease rentals in November, 1899, was not paid by the Eastern Company, but was paid by the construction company, and charged in the open account. Further claim is made by intervener that $15,943.65 was paid for new locomotives in October, November, and December, 1899. The master has found that of this amount $5,990 was paid October 31, 1899, prior to the origin of the intervener's account, $6,500 in notes, and the balance, amounting to $3,643.65, consists of items, $3,000 of which went into equipments, and the $3,643.65 was more than reimbursed by advances in borrowed money, and was far less than the loss in earnings. The sum of $14,054.68, claimed to have been paid in October and November, 1899, to the Pullman Company, was for equipments, and the master has found that this was not paid out of the current earnings, but upon drafts on the construction company. The other items claimed to have been diverted were for equipments, for maintenance, and repairs on the Quincy line. I can find no reason in fact or law for setting aside the findings and conclusions of the master respecting this claim, and the exceptions are therefore overruled.

Claim of E. A. Kinsey Company.

This claim is for $990. The master has found that this sale was made to the Omaha Company, and credit extended to it, and that in the accounts between the Omaha and the Eastern Companies one-half of this amount was afterwards charged to the Eastern Company, because material to that extent was used by the Eastern Company in 1899 in reconstructing its track. While these roads were run under practically one management, it was a matter of arrangement between the companies after the contract and sale was made. As such, the case falls within the decision in Southern Railway Co. v. Ensign Mfg. Co., 117 Fed. 423, 54 C. C. A. 591. And whether or not this is to be regarded as a contract completed between the claimant and the Omaha Company, there was no evidence introduced on the part of this claimant showing a diversion of any net income in favor of the mortgagee. The claim was therefore rightly rejected by the master, and the exceptions must be overruled.

Claim of C. & D. Stern.

This claim is for $805 for rent of a building at Quincy, Ill., for November and December, 1899, and January, February, March, April, and May, 1900, and also for 32 wooden boxes sold in November, 1899, for $4.90, and for damages to a broken window 75 cents. The master has found that no proof as to the last two items was offered. The lease was made June 1, 1899, to the Eastern and Omaha Companies for one year, at a rental of $115 per month. During the occu-

pancy of the building the rent was paid upon the basis of 46 per cent. by the Omaha Company and 54 per cent. by the Eastern Company. The rent was all paid up to November 1, 1899, and they vacated the building November 7, 1899, offered the keys to the intervener, who refused to accept them. As there was no actual occupancy of the building after November 7, 1899, the only claim of intervener arises on breach of contract, for which no preferential right could arise. This was expressly so held in the case of Central Trust Co. v. Wabash Railroad Co. (C. C.) 32 Fed. 566, 567. The only basis for preferential claim could be predicated of the seven days of rent in the month of November, amounting to $26.84, which was properly rejected, in the absence of any proof of diversion. This exception is therefore overruled.

Claim of Platte Overton.

This claim is for $497.60 for ties, lumber, and fence posts furnished the Eastern Company in November, 1899. The other items of the account were paid. The unpaid account in favor of J. C. Duval & Co. the intervener claims was assigned to him. But the master held that the proof of such assignment was not satisfactory. It would be a sufficient answer to this claim to say that it was not filed until the 28th day of August, 1903, long subsequent to the time fixed in the order and decree of court for filing such claims. While the claimant has presented affidavit in explanation of the delay in presenting the claim, it furnishes no excuse in law. Equity favors the diligent. It is of great importance, where parties are undertaking to fix such liens upon the property purchased at foreclosure sale, that such claims should be promptly presented, so that the purchaser may have early knowledge of what claimed burdens there are upon his purchase. Even if this objection were removed, there is an utter failure of any proof of diversion, and the claim was properly rejected. The exception is overruled.

Claim of Handlan-Buck Manufacturing Company.

This claim is for supplies furnished prior to the appointment of receivers, sold to the Omaha Company upon its order, amounting to $377.75. The master finds that they were necessary for keeping the Omaha Company in good condition, and when used it was as an operating expense. It appears that the claimant filed an intervention in the foreclosure suit against the Omaha Company in the Circuit Court for the Southern District of Iowa for the full amount of this sum, of which $168.51 was allowed as a preferential claim and paid. The balance of the account was disallowed. The court in that cause undertook by its decree to declare that the intervener was entitled to be subrogated to all the rights of the Omaha Company or the receiver thereof against the Eastern Company. So the claim is presented here. $209.28 of these supplies were in fact used by the Eastern Company in the operation of its road. The said decree of the Iowa court, if not extrajudicial, was clearly res inter alios acta, and cannot be recognized as binding in this proceeding. The claim was clearly inad-

missible as preferential, for the reason that credit was not given upon the faith of the earnings of the Eastern Company, and there is no proof of any diversion. This exception, therefore, is overruled.

Claim of Simmons Hardware Company.

The claim of Simmons Hardware Company is for $442.36 for hardware supplies sold to the Eastern Company in December, 1899, and used on the road. The claim was rejected for lack of any proof of diversion made by it, and therefore the exception is overruled.

Claim of Railway Supply Company.

The facts in this case and the law applicable thereto are little different in principle from those presented in the foregoing case of Handlan-Buck Mfg. Co., and for the reasons assigned in the latter case the exceptions herein are overruled.

FORDYCE et al. v. KANSAS CITY & N. CONNECTING R. CO. et al.

(Circuit Court, W. D. Missouri, W. D. April 16, 1906.)

No. 2,402.

1. RECEIVERS—ALLOWANCE OF CLAIMS—PRIORITIES—DIVERSION OF INCOME.
   To entitle a creditor of an insolvent railroad company for supplies furnished to preference of payment over a prior mortgagee from the corpus of the property it must be shown that credit was given upon the faith of payment out of the net earnings of the company, and also that there was a diversion of such income to the benefit of the mortgagee.
2. RAILROADS—LIEN FOR DAMAGES TO ABUTTING PROPERTY—PRIORITY TO MORTGAGE.
   Under Const. Mo. art. 2, § 21, which provides that private property shall not be taken or damaged for public use without just compensation, and that the fee of lands taken for railroad tracks without consent of the owner shall remain in such owner, claims for damages to abutting property resulting from the construction of a railroad stand on the same footing as those for a taking of property, and constitutes an equitable lien, which has priority over a mortgage of the road, and is entitled to preference in payment from the proceeds of the property when sold in foreclosure proceedings.

   [Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 570.]

In Equity. On exceptions to master's report.

Frank Hagerman, for purchasers.
S. W. Moore and F. H. Wood, for Kansas City S. Ry. Co.
Knott & Swinney and Brown & Dolman, for Baker and others.

PHILIPS, District Judge. In the memorandum opinion just handed down in Nos. 2401–2404 the court has discussed certain principles and rules of law which are applicable to some of the cases here to be reviewed on exceptions to the master's report, to which reference is made without here restating them.

Claim of the Kansas City Southern Railway Company.

These claims are predicated of judgments of the receivers of the Gulf Company against the Northern Company. On the facts found by the

master, these claims must be rejected for two reasons: (1) It is not perceived as matter of fact that the credits were extended upon the faith of payments to be made out of the net earnings of the Northern Company; and (2) because there was no diversion of net income from the operation of the road applicable to the payment of the claims. Looking to substance rather than mere form, the judicial mind cannot be closed to the fact that in the scheme of the Gulf Railroad, what is known as the "Northern Connecting Roads" were secured for the mere purpose of exploitation of a system intended to extend from Port Arthur to Kansas City, and reach northwest to Omaha, and north and northeast in the direction of the Lakes and Chicago. The various short lines constituting the so-called "Northern Connection" or extension were well known to be independently nonsupporting. They were but the evidence of things not yet seen; the mere shadow of substance hoped for. From the inception of their acquisition they were but parasites, drawing their subsistence from the main trunk. The supplies for equipments, repairs, and operation furnished by the Gulf Company were essential, no doubt, to keep the branches of this northern adjunct going concerns, but they were the mere dependencies of the main line, never yielding income sufficient for their own maintenance. These facts were well known to the managers dominating and directing the affairs of the system in a scheme of promotion. As shown by the master, the charging of these supplies was not only largely a matter of mere bookkeeping, but they were done under the selection of the president of the Gulf Company. The charging of balances in transactions between the several branches and the main trunk, as ordered and directed by one dominating mind, were quite arbitrary, and were charged ad libitum; so that it is hardly possible, on the evidence submitted for the master, to have found what specific amount of supplies was actually chargeable to the Northern Company. Aside from this, however, the actual physical facts contradict any amount of asseveration, however vigorous, that it could have been in the contemplation of the manipulators of this enterprise in furnishing said supplies that the Gulf Company as such did so upon the faith or expectation of their being paid for out of the net earnings of the Northern Connecting lines. The underlying purpose and expectation unquestionably were that, upon the faith and credit of the main line, supplies of material and money could be furnished and raised to keep the Northern lines going concerns until at some time in the distant future the whole system might become self-supporting. The Northern Company never had any surplus income applicable to the payment of these supplies; and the master has found, and so the record warrants, the fact to be that there was no diversion of net income for the benefit of the mortgagee, which equity demands should be restored by it for the benefit of this creditor. Even conceding some betterments placed upon the Northern road, the deficit in net earnings was still great. These exceptions are therefore overruled.

Claim of Knott & Swinney, Receivers of Suburban Belt.

The court perceives nothing respecting the claims against the receivers of the Northern Company by the receivers of the Suburban

Belt Company to justify any discussion of the exceptions, and they are therefore overruled.

Claims of Henry Baker, Middie Van Camp, Administratrix, George Briggs, Administrator, Elizabeth Nierman, and F. W. Moore.

As these claims arise practically out of the same state of facts, and depend upon the same questions of law, they will be considered together. In the construction of the Northern road through the town of Osborn, De Kalb county, Mo., it so changed the surface and grade of a street on which the claimants' real property abutted as to damage the same. It does not appear that the company ever took steps for the condemnation of this right of way. The master, after hearing the proofs and viewing the property, fixed the amount of damages sustained by each of these claimants. He disallowed the claims as not preferential, on the ground that they were for unliquidated damages, and further that there was no proof of diversion. In this ruling I am of opinion that the master fell into an error of law. The Constitution of this state (article 2, § 21) declares that:

"Private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner therein devested. The fee of lands taken for railroad tracks without consent of the owner thereof shall remain in such owner, subject to the use for which it is taken."

Under this fundamental law, damage to property in making such public improvement is placed on the same footing as taking private property for public use. The law seems to be pretty well settled that such claims for damages are of the nature of a continuing equitable lien, from which the corporation can never escape until the claim be satisfied. Lewis on Eminent Domain (2d Ed.) § 621, vol. 2, says:

"No rights can be acquired in private property under the power of eminent domain except subject to the duty of making just compensation therefor. Consequently, the party originally taking or occupying the property cannot transfer to another, by mortgage, lease, or otherwise, any right in the property except subject to the same duty. In other words, the owner's claim for just compensation is paramount to any right which can be derived by or through the party making or seeking the condemnation. Different courts work out this result in different ways, but we believe all concur in reaching it in one way or another. * * * The forcelosure of a mortgage upon the property and franchises of the condemnor, to which the claimants for damages are not parties, cannot affect the rights of the latter. Sometimes such claimants are made parties, and their rights adjusted in the foreclosure proceedings, and the property sold clear of such claims. In such case the claims for land damages should be given preference to the mortgage debt in the distribution of the proceeds, and a decree to the contrary is error."

This view of the law was recognized in Central Trust Co. v. Bridges, 57 Fed. 753, 6 C. C. A. 539; Hobbs v. State Trust Co., 68 Fed. 618, 15 C. C. A. 604, and this view is evidently entertained by the Court of Appeals of this circuit from expressions in the recent case of Zimmerman, Administrator, v. K. C. N. W. Railroad Co., 144 Fed. 622. It has been expressly decided that a claim for damages like this to abut-

ting property falls within the same principle of protection. Lewis on Eminent Domain (section 622) says:

"It has been held that a claim for damages to abutting property by a railroad in a street has priority over a mortgage of the road and its franchises, and the owner may enjoin the operation of the road until such damages are paid. There would seem to be no reason why the abutter should not have the same remedies against those claiming under the first company as against the first company itself, even to the matter of a personal action."

This view is ably supported by the opinion of Judge Acheson in Mercantile Trust Co. v. Pittsburgh & W. R. Co. (C. C.) 29 Fed. 732.

It must result that the exceptions in these cases to the master's report should be allowed, and the respective amounts of damages found by the master are allowed as preferential claims, but without interest. Thomas v. Western Car Co., 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663.

BRADLEY v. LEHIGH VALLEY R. CO.

(District Court, S. D. New York. March 8, 1906.)

1. SHIPPING—DAMAGE TO CARGO—NEGLIGENCE OF TUG AND TOW.
   Damage to a cargo of wheat, through the sinking of a canal boat in a dock, *held* not to have resulted from unseaworthiness, but to have been due to the pushing of the boat by her towing tug into the slip, while it was filled with ice, which was done at the request of the master of the boat, and for which both tug and tow were chargeable with negligence.
2. TOWAGE—LIABILITY OF TOWING TUG—HARTER ACT.
   The Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]) has no application to the question of the liability of a tug for damage to the cargo of her tow, which arises upon a contract of towage and not of affreightment.
3. INSURANCE—ASSIGNMENT BY INSURED OF CLAIM AGAINST CARRIER—RECOVERY BY INSURER.
   A cargo insurer, under a policy which provides that the insurance shall not inure to the benefit of any carrier, and shall be null and void to the extent of any amount recoverable by the insured from any carrier, who has advanced to the insured the amount of a loss as a loan and taken an assignment of a claim for the loss against the carrier, may recover thereon, notwithstanding a provision of the bill of lading that the carrier shall have the benefit of any insurance effected by the owner.

In Admiralty. Action for loss of cargo.

Black & Kneeland, for libellant.

Robinson, Biddle & Ward, for respondent.

ADAMS, District Judge. This was an action brought by Herbert Bradley, the assignee of C. E. Nourse & Company of Toronto, Canada, to recover from the Lehigh Valley Railroad Company, for the benefit of the Sea Insurance Company, Limited, the damages incident to the sinking of a part of 7,890 bushels of wheat, the cargo of the canal boat A. J. Dean, at the foot of 42nd Street, Brooklyn, on the 23rd day of January, 1903. The libellant's allegation was that the boat was old and weak and injured by being brought in contact with ice while

being towed to 42nd street; that the damage to the wheat was due to negligence on the part of the respondent in loading it upon an unseaworthy boat and in towing her in the night time when the river and harbor were full of floating ice. The respondent denied that the Dean was a weak boat or old in the sense of being infirm or used up or that it was guilty of any negligence; further that C. E. Nourse & Company effected insurance on the grain and has been paid for the loss by the underwriter and has no cause of action against the respondent.

The following stipulation was entered into by the parties and constitutes libellant's evidence, viz.:

"The following facts are agreed upon and admitted by the parties to this action.

The 4500 bushels of wheat laden on the canal boat 'A. J. Dean' on January 23, 1903, were received by the respondent from its connecting railways and were transported over respondent's lines to New York.

Said wheat was carried and transported under certain through bills of lading issued to the shippers by the respondent's connecting carriers, by which the carriers agreed to deliver said wheat at New York to steamers of the Prince Line. Each of said bills of lading contained the following proviso:

'In case of any loss or damage to goods for which this Company or connecting lines or other carriers may be liable, it is agreed that the Company or line or carrier so liable shall be given the benefit of any insurance by or for account of the owner of said goods and shall be subrogated in such rights before any demand shall be made on them in respect of such loss or damage, and in case of any liability whatsoever the Company shall only be liable for the invoice value at the point of the shipment.'

Prior to the 23rd day of January, 1903, C. E. Nourse & Co. of Toronto, Canada, became the owners of said 4500 bushels of wheat by due indorsement of said bills of lading, and were the owners thereof at the time said wheat was damaged by the sinking of the canal boat 'A. J. Dean.'

C. E. Nourse & Co., had entered into a contract for insurance with the Sea Insurance Company, Limited, of which contract, Policy No. 5681 hereto annexed marked Exhibit A. is a true copy.

Said contract or policy of insurance was in full force and effect on January 23, 1903. A certificate of insurance, the original of which is hereto annexed marked Exhibit B., was issued on January 21, 1903, covering a shipment of which the 4500 bushels of wheat in question formed part.

The statement of the policy number as 5645 in the certificate Exhibit B. is an error, the true policy number being 5681, and Exhibit A. is the policy under which said certificate was issued.

On January 29, 1903, C. E. Nourse & Co. presented to the agents of the Sea Insurance Company, Limited, a statement of claim, which is annexed marked Exhibit C.

On February 6, 1903, C. E. Nourse & Co., received from the Sea Insurance Company, Limited, the sum of $3992.85 and gave the receipt marked Exhibit D. annexed hereto.

On November 19, 1903, C. E. Nourse & Co. duly executed and delivered to the libellant Herbert Bradley, the assignment marked Exhibit E. and annexed hereto.

The libellant brings this action for the benefit and at the expense of the Sea Insurance Company, Limited."

Exhibit A. was the ordinary form of a marine policy. It was numbered 5681 and, inter alia, contained this provision:

"It is also agreed, * * * that it is warranted by the assured that this insurance shall not inure directly or indirectly to the benefit of any carrier or other bailee by stipulation in bill of lading or otherwise; and that this Policy shall be null and void to the extent of any amount paid by or recoverable from any carrier or bailee."

Exhibit B. was a certificate of the Sea Insurance Company, Limited, as follows:

"This is to Certify, that on the 21st day of Jany., 1903, this Company insured under policy No. 5645. for C. A. Nourse & Co. the sum of Seven Thousand Dollars in gold, on 7890 Bushels of mixed Wheat Valued at sum insured shipped on board of the Prince Line (Trojan Prince) at and from New York, N. Y. to Leghorn, Italy, and it is hereby understood and agreed, that in the case of loss, such loss is payable to the Order of C. E. Nourse & Co., on surrender of this Certificate."

Exhibit C. showed the loss to amount to $3992.85.

Exhibit D. was a receipt in the following form:

"February 6th, 1903.

"Received from the Sea Insurance Company Ltd. Three thousand nine hundred and ninety-two and 85/100 Dollars as a loan without interest and repayable only to the extent of any net recovery we may make from the carriers, responsible for the loss on our grain damaged while on board the Lighter 'A. J. Dean' intended for the Steamer 'Tartar Prince' on or about January 23rd, 1903.

"$3992.85 C. E. Nourse & Co."

Exhibit E. was the assignment to the libellant mentioned above.

Testimony was taken, on behalf of the respondent, of several witnesses.

The master of the tug Mercedes, which towed the Dean from the terminus of the line of the respondent about 3 o'clock in the morning, testified that, in company with the boat Henry Igo, he towed the Dean to her destination at 42nd Street, where they arrived about 4:30 o'clock. The boats were towed alongside and projected some 12 or 15 feet ahead of the tug. The master also testified that it was then slack flood tide and ice was not moving, but there was some kept in the slip by a northwest wind. He pushed the boats a short distance in but the master of the Dean was not satisfied and the tug, at his instance, pushed the boat further in and she was made fast about half way up the slip. The master measured the water in her and told the tug's master that she was all right and the tug left.

The agent of the Providence & Washington Insurance Company, which had some insurance on the cargo, testified that the Dean had passed inspection to carry grain, although she was built, according to the records, in 1874 and rebuilt in 1888; that she had several hundred dollars spent in repairs upon her in 1893. She was not classed as 1st, 2nd, or 3rd, but as fit to carry this cargo.

The master of the boat could not be found and his protest was offered in evidence and received without objection. It was as follows:

"My Boat is a bin boat, I took on my cargo during the months of December and January, boat was in good condition when loaded. On the 23rd of January the tug 'Mercedes' of the Lehigh Valley R. R. Co. came to tow my boat to 42nd Street, South Brooklyn. There was considerable ice in the River; the tug had another boat called the 'Henry Igo.' Proceeded on our way and arrived at 42nd Street at five o'clock A. M. After our arrival the tug left me. I tried my pumps and found about 5 inches of water. I pumped her dry. I went down into the cabin and got my breakfast. After a short time I came on deck and found the boat had settled at the bow, and found about three to four feet of water. I called for assistance and the tug 'Mutual and Municipal' came and pumped my boat for about two hours,

but could not hold her, water came in so fast, and my boat sank at the dock. My boat did not leak prior to this, and held her cargo in good condition. This disaster was caused by ice making a hole in my boat."

A shipwright testified that he gave a small overhauling, as ordered by the owner, in 1892, to the extent of about $30.

The Inspector for the Providence & Washington Insurance Company testified that he had inspected the boat at different times and put her on the company's list as allowed to carry grain. That in his experience he had known new and sound boats to be sunk in going through the ice.

The master of the accompanying boat, the Henry Igo, testified that two hours after their arrival at 42nd Street, the Dean began to show signs of distress; that the slip was so full of ice, they retained their places without putting out lines; that he then notified the master of the Dean who had gone below to lie down, that she had about 4 inches of water in her, who replied that it was all right; that he then went to his breakfast and when he came out the Dean was still lower in the water and he again notified the master, who hustled around and secured the services of a tug to put a siphon in his boat but it did no good and she sank almost immediately.

The testimony seems to warrant the inference that the boat was seaworthy and sank through injury from the ice. The master said in his protest: "This disaster was caused by ice making a hole in my boat." There is nothing to overcome this statement and although it would have been more satisfactory if the master had been subjected to cross-examination, yet, as this was waived, it must be assumed, in connection with the other testimony of the respondent, to establish that the ice was the cause of the loss.

The libellant urges that any doubt in the case should be resolved against the boat (The Aggi [D. C.] 93 Fed. 484, 491), but I do not think there is any doubt upon the proof as it stands. At the least, there was general proof of seaworthiness and an adequate cause of loss being shown, it sufficiently meets any burden that there may be upon the carrier. The Sandfield (D. C.) 79 Fed. 371.

It is also urged that the respondent was negligent in causing the boat to be towed through the ice in the night time, citing The Rambler (D. C.) 66 Fed. 355, and the J. B. King Transportation Company v. Steamtug Phœnix, 143 Fed. 350. In the latter, several cases were referred to, tending to show that simply towing in ice is regarded as negligent, viz.: The Tugboat James A. Wright, 3 Ben. 248, Fed. Cas. No. 7,190; the Steamtug U. S. Grant, 7 Ben. 337, Fed. Cas. No. 16,804, cited by Coxe, J., in The M. J. Cummings (D. C.) 18 Fed. 178, 184. But it was held in the Transportation Company v. Phœnix, that half damages only were recoverable, because the towed boat participated in the risk. Here the boat was pushed into the ice in the slip at the express request of the master, so that if the tug were negligent, half damages could probably only be recovered in a case against her. The request of the master of the boat to be towed would not entirely relieve the tug from the effects of her own negligence. I feel constrained to

hold that pushing the boat into the ice in the slip, where there was probability of danger therefrom, constituted negligence on the tug's part.

The loss here apparently occurred through the negligence of the tug, notwithstanding the seaworthiness of the Dean, and there does not seem to be anything in the Harter Act which tends to exonerate her owner from liability therefor. The question as to the application of that statute to a case where both the tug and tow were owned or controlled by one person has not apparently been decided. It was raised in The Cygent, 126 Fed. 742, 61 C. C. A. 348, before the circuit court of appeals for the first circuit but it was there found unnecessary to decide the question. In The Nettie Quill (D. C.) 124 Fed. 667, a locomotive carried on a barge towed by that steamer was dumped overboard. There a bill of lading was issued by the steamboat and the court, Toulmin, J., decided that the contract was one of affreightment, rather than of towage, and the Harter Act applied, but there can be no question of the kind here as the relation of the tug was one of towage. Here there was no such connection between the tug and the wheat, as would bring the Act into operation. The relief afforded by the Act should not be unduly extended and in the absence of authority making it applicable to a case of this kind, I think that the owner of the tug should be held, unless some defense exists by reason of the insurance of the wheat.

The respondent relies upon the provision in the bill of lading, quoted in the agreement of facts (Libellant's Exhibit 1, supra), to the effect that in case of any loss or damage to goods for which the carrier may be able, it is agreed that the carrier shall be given the benefit of any insurance by or for account of the owner, but the policy of insurance provided (Exhibit A, supra), that such provision should be null and void so far as the carrier was concerned.

In any event, the provision relied upon does not amount to an agreement that the shipper shall insure for the carrier's benefit and any contract of that nature would not be enforceable if made (Inman v. South Carolina Railway Company, 129 U. S. 128, 139, 9 Sup. Ct. 249, 32 L. Ed. 612), and it has been decided that under a policy in this form, the assured cannot recover from his insurers when he has accepted a bill of lading by which he agrees to give the carrier the benefit of his insurance, if the loss is one for which the carrier would otherwise have been responsible (Inman v. Railway Co., 129 U. S. 140, 9 Sup. Ct. 249, 32 L. Ed. 612; Fayerweather v. Phenix Ins. Co., 118 N. Y. 324, 23 N. E. 192, 6 L. R. A. 805). It is contended, however, that the transactions between the cargo owners and their insurers subsequent to the loss, amount to a payment thereof and the insurers are thereby estopped from claiming the benefit of the warranty in the policy. It appears that the assured presented a claim to the underwriter and advanced such amount "as a loan," taking a receipt showing such fact. (See Exhibit D., supra.) This method of dealing has been authoritatively held not to constitute a payment. The Guiding Star (D. C.) 53 Fed. 936, 940; The Inman Case, supra;

Judd v. N. Y. & Texas S. S. Co., 117 Fed. 206, 213, 54 C. C. A. 238; Pennsylvania R. R. Co. v. Burr, 130 Fed. 847, 65 C. C. A. 331.

It seems that by reason of the tug's negligence, the libellant is entitled to recover.

Decree for the libellant, with an order of reference.

FALK v. UNITED STATES.

AMERICAN CIGAR COMPANY v. UNITED STATES.

(Circuit Court, S. D. New York. December 22, 1904.)

Nos. 3,577, 3,606.

1. CUSTOMS DUTIES—GOODS IN WAREHOUSE—WITHDRAWAL.
   The provisos in Tariff Act July 24, 1897, c. 11, § 33, 30 Stat. 213 [U. S. Comp. St. 1901, p. 1701], and Tariff Act Oct. 1, 1890, c. 1244, § 50, 26 Stat. 624, relating to withdrawal of merchandise from bonded warehouse, are not repugnant, because neither section is general in its application, but is restricted to merchandise previously imported for which no entry has been made.
2. SAME.
   Section 2983, Rev. St. [U. S. Comp. St. 1901, p. 1958], forbidding allowance for injury, loss, etc., sustained by merchandise in warehouse, was not repealed by Customs Administrative Act June 10, 1890, c. 407, § 20, 26 Stat. 140 [U. S. Comp. St. 1901, p. 1950] as amended by Act Dec. 15, 1902, c. 1, 32 Stat. 753 [U. S. Comp. St. Supp. 1905, p. 419], providing that merchandise withdrawn from warehouse shall be subjected to the duties applicable at the time of withdrawal.
3. SAME.
   Section 20, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 140 [U. S. Comp. St. 1901, p. 1950], as amended by Act Dec. 15, 1902, c. 1, 32 Stat. 753 [U. S. Comp. St. Supp. 1905, p. 419], authorizing the withdrawal of merchandise from warehouse upon payment of the duties to which it is subject at the time of such withdrawal, refers exclusively to rate of duty rather than weight of the merchandise.
4. SAME—INJURY IN WAREHOUSE—LOSS OF WEIGHT.
   Under section 2983, Rev. St. [U. S. Comp. St. 1901, p. 1958], forbidding abatement of duties for injury, loss, etc., sustained by merchandise in bonded warehouse, merchandise dutiable by weight should be assessed with duty without allowance for weight lost while in warehouse.

On Application for Review of Decisions of the Board of United States General Appraisers.

The decisions in question affirmed the assessment of duty by the collector of customs at the port of New York on importations by G. Falk & Bro. and American Cigar Company. Note G. A. 5,695, T. D. 25,353. The following provisions of law are involved in the cases:

That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed by this act and to no other duty, upon the entry or the withdrawal thereof: Provided, that when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise

at the time of its entry. Tariff Act July 27, 1897, c 11, § 33, 30 Stat. 213 [U. S. Comp. St. 1901, p. 1701].

That any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal; Provided, that the same rate of duty shall be collected thereon as may be imposed by law upon like articles of merchandise imported at the time of withdrawal.—Extract from Act Dec. 15, 1902, c. 1, 32 Stat. 753 [U. S. Comp. St. Supp. 1905, p. 419], amending section 20, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 140 [U. S. Comp. St. 1901, p. 1950].

That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares and merchandise previously entered without payment of duty, and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to no other duty upon the entry or withdrawal thereof than if the same were imported respectively after that day; * * * Provided, further, that when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its withdrawal. Extract from Tariff Act Oct. 1, 1890, c. 1244, § 50, 26 Stat. 624.

Hatch Keener & Clute (J. Stuart Tompkins, of counsel), for the importers.

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

PLATT, District Judge. The merchandise in question consists of certain tobacco entered in bonded warehouse and subsequently withdrawn. At the time of withdrawal the importer claimed that such tobacco had lost in weight and that duties should be assessed thereon according to the weight at the time of withdrawal, the collector having liquidated the duties upon the entered weight of such merchandise. The position taken by the Board of General Appraisers, namely, that section 33 of the act of 1897 is repugnant to section 50 of the act of 1890, is untenable, because neither of said sections is general in its application, but is restricted to merchandise previously imported for which no entry has been made. Upon another ground, however, it would seem that the general position taken by the Board ought to be sustained. The importers contend that section 20 of the act of June 10, 1890, as amended by the act of December 15, 1902, authorizes them to withdraw the merchandise from the warehouse upon payment of duties and charges based upon its weight at the time of withdrawal. To reach this conclusion they are obliged to contend that the section just quoted repeals section 2983 of the Revised Statutes [U. S. Comp. St. 1901, p. 1958], which reads:

"In no case shall there be any abatement of the duties or allowance made for any injury, damage, deterioration, loss or leakage sustained by any merchandise while deposited in any public or private bonded warehouse."

That is, they are forced to make that contention if the plain reading of section 2983 covers such a loss of weight as occurred in the case of the merchandise in question. It seems too plain for discussion that the word "loss," coupled as it is in the disjunctive with "leakage," applies precisely to such a case as the one before us. I cannot find any sound reason for believing that the Congress did not have section

2983 in mind when it enacted said section 20, as amended. It is obvious that section 20, especially as amended, refers exclusively to rate rather than weight. For these reasons the decision of the Board of Appraisers ought to be sustained.

Decision affirmed.

ADAMS TOP-CUTTING MACH. CO. v. WILDMAN MFG. CO.

(Circuit Court, E. D. Pennsylvania. June 9, 1906.)

No. 35.

NEW TRIAL—GROUNDS—WAIVER.

Where evidence as to loss of profits was introduced by both parties in an action for breach of contract, and fully argued and submitted to the jury without objection and under instructions to which no exception was taken, the question of the right to recover such profits as an element of damages cannot be raised by defendant on a motion for new trial.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 62–66.]

On Motions by Defendant for a New Trial, and for Judgment on Reserved Point, Notwithstanding the Verdict.

Boyd Lee Spahr and Ellis Ames Ballard, for plaintiff.

Jere B. Larzelere, Jr., and Dimner Beeber, for defendant.

J. B. McPHERSON, District Judge. The reserved question must certainly be determined, I think, in favor of the plaintiff, for there was a considerable body of evidence, contradicted, no doubt, by evidence on the other side, to the effect that the defendant had broken its contract with the plaintiff, and should therefore be called upon to respond in damages. How much these damages should be was a matter to which both parties directed much attention. A great deal of evidence was taken upon this subject, it was elaborately argued to the jury as a question of fact, and no objection was made concerning their competency to decide it. This being so, I see no reason for interfering with their settlement of the controversy. The loss of profits was the principal item of damage claimed by the plaintiff, and, as the defendant interposed no objection at the trial to the instructions given by the court nor to the submission of the question to the jury, it is too late, in my opinion, to raise the question now whether it was proper either to hear evidence upon this subject or to permit the jury to pass upon it.

The motion for a new trial is overruled. The defendant's motion for judgment notwithstanding the verdict is also refused, and to the refusal of the latter motion an exception is sealed.

WOODWARD et al. v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. April 25, 1906.)

No. 2,307.

1. TRIAL—VERDICT SHOULD BE DIRECTED WHEN ONLY ONE SUSTAINABLE.
It is the duty of the trial court to direct a verdict at the close of a trial before a jury in two classes of cases: (1) That class in which there is no conflict in the evidence; and (2) that class in which the evidence is conflicting, but is of so conclusive a character that the court in the exercise of a sound judicial discretion would set aside a verdict in opposition to it.
[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 376–395.]

2. RAILROADS—FIRES—STATUTORY PRESUMPTION FROM SETTING BY RAILROADS IN MINNESOTA REBUTTABLE.
The presumption of negligence or of defects in machinery from scattering fire, raised by section 2700, Gen. St. Minn. 1894, was created to change the burden of proof. When this has been done, and the evidence has been adduced, it is functus officio, and it cannot be used to raise an issue which the evidence does not present.
[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1710–1712.
Presumption of negligence from railroad fires, see note to McCullen v. Chicago & N. W. Ry. Co., 41 C. C. A. 370.]

3. SAME—COURT SHOULD DIRECT VERDICT AS IN OTHER CASES.
If the proper employés of the railway company have testified to the effect that there were no defects in the locomotive, or that reasonable care had been used to avoid them, and that the locomotive was operated with ordinary care and skill, and the evidence at the close of the trial is so conclusive that an opposite finding is not sustainable, the statutory presumption of negligence is overcome as a matter of law, and it is the duty of the trial court to instruct the jury in a fire case from Minnesota, as in other cases, to return a verdict for the defendant.
[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1711.]

4. SAME—NEGLIGENCE—CUSTOMARY SPEED OF PASSENGER TRAIN ON DRY AND WINDY DAYS IS NOT.
A railway company owes to the owners of isolated buildings near its tracks no duty to stop or to diminish the customary speed of its regular passenger trains as they pass them on dry and windy days, in the absence of fires previously set or other evidence of the danger of setting a fire.
[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1672.]

5. EVIDENCE—TESTIMONY THAT ACT WAS NOT DONE BASED ON ABSENCE OF RECORD AND THE RECORD ITSELF ADMISSIBLE.
In the absence of memory, one who knows that, if an act had been done by him or by his department, it would have been recorded upon a book or paper which he had at the time and which he identifies, may testify that he knows it was not done, from the absence from the record of any note of it, although this fact does not refresh his memory, and the record and this testimony are competent evidence of the fact that the act was not performed.

6. RAILROADS—FIRES—CONDITION OF LOCOMOTIVE DURING PRECEDING MONTH NOT TOO REMOTE.
Testimony of the condition of the devices upon a locomotive for arresting sparks and preventing the escape of fire at various times within a month preceding the setting of the fire in controversy is not too remote.

7. SAME—EVIDENCE OF REQUIREMENT AND CUSTOM OF INSPECTION COMPETENT.
Testimony that for a number of years the railway company had required the firemen of its passenger trains, and that it had been their custom, to

Inspect the dampers, ashpans and dump grates of their locomotives before they started on their trips to see that they were clean and in good order, and that the company had required both firemen and engineers to report what, if anything, was needed, is competent upon the issue of the negligence of the company.

(Syllabus by the Court.)

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

See 122 Fed. 66.

P. J. McLaughlin (F. W. Gail and William D. Mitchell, on the brief), for plaintiffs in error.

F. W. Root, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. This is an action against the railway company for damages for alleged negligence in the operation of one of its locomotives whereby the farm buildings of the plaintiff Woodward were burned. The main line of the defendant's railroad between Minneapolis and Chicago ran within 150 feet of Woodward's buildings. Between the railroad and the buildings there was a traveled highway. On the afternoon of May 1, 1900, after an engine of the defendant drawing a regular passenger train of eight cars had passed southeasterly along the railroad, a fire, which subsequently consumed the buildings, was discovered in some combustible material 106 feet northeasterly from the railroad. It was a dry time, and a strong wind was blowing across the track from the southwest. As the engine passed at the usual speed of about 35 miles an hour, sparks and cinders flew from its smokestack, and some of them were blown into an open window of one of the cars and were probably of the size of a navy bean. When the plaintiffs had established these facts they rested their case, and the defendant introduced evidence to the effect that there were no defects in its locomotive, and that there was no negligence in its operation which could have caused the fire. The court then charged the jury to return a verdict for the defendant, and this instruction is the first alleged error, which is specified.

It is the duty of the trial court to direct a verdict at the close of the evidence in two classes of cases: (1) That class in which the evidence is undisputed; and (2) that class in which the evidence is conflicting but is of so conclusive a character that the court in the exercise of a sound judicial discretion would set aside a verdict in opposition to it. And, where the trial court has directed a verdict upon the latter ground, the appellate court may not lawfully reverse the judgment founded upon it, unless upon a consideration of the evidence it is convinced that it was not of such a conclusive character that the court below in the exercise of a sound judicial discretion should not have sustained a verdict in the opposite direction. Patton v. Tex. & Pac. Ry. Co., 179 U. S. 658, 660, 21 Sup. Ct. 275, 45 L. Ed. 361; Randall v. Baltimore & Ohio R. Co., 109 U. S. 478, 481, 482, 3 Sup. Ct. 322, 27 L. Ed. 1003; Marshall v. Hubbard, 117 U. S. 415, 417, 419, 6 Sup. Ct. 806, 29 L. Ed. 919; Treat Mfg. Co. v. Standard Steel

& Iron Co., 157 U. S. 674, 15 Sup. Ct. 718, 39 L. Ed. 853; Riley v. Louisville & N. R. Co., 66 C. C. A. 598, 133 Fed. 904; Haggerty v. Chicago, Milwaukee & St. Paul Ry. Co. (C. C. A.; decided at the September, 1905, term), 141 Fed. 966; Waters-Pierce Oil Company v. Van Elderen (C. C. A.) 137 Fed. 557, 569, 571; Chapman v. Yellow Poplar Lumber Co., 32 C. C. A. 402, 404, 89 Fed. 903, 905; New York Central, etc., R. Co. v. Difendaffer, 62 C. C. A. 1, 3, 125 Fed. 893, 895; Shoup v. Marks, 62 C. C. A. 540, 545, 128 Fed. 32, 37.

The court below directed the verdict on this ground, and the question is: Should that court in the exercise of a sound judicial discretion have sustained a verdict upon the evidence in this case to the effect that the defendant failed to exercise ordinary care to avoid setting a fire to Woodward's property by the operation of its railroad? For the gravamen of this action is not the setting of the fire, but the negligence of the defendant whereby the fire was kindled. The railroad company had the same right to operate its railroad by the use of engines, cars, fire, and steam near the premises of Woodward that the latter had to carry on his farm by the use of horses, men, machinery, steam, and electric power in proximity to the railroad. The limit of the duty of each was to exercise ordinary care to prevent injury to the property of the other by the use of his own. Neither was liable to the other for injuries which resulted from the use of his own property, notwithstanding his exercise of reasonable care to prevent them.

There was undisputed evidence that the use of the most approved devices and machinery and the reasonably careful operation of locomotives will retain only about 75 per cent. of the sparks necessarily manufactured in their operation, while about 25 per cent. thereof will be unavoidedly thrown forth from the smokestack upon the air. If the property of Woodward was injured by one of these sparks whose escape ordinary care could not have prevented, the company was not liable for the damage caused thereby, because that damage was not the result of any negligence on its part, and it owed him no duty to avoid damages which reasonable care could not prevent.

There was evidence in this case from which a jury might have inferred that the fire was set by a spark thrown from the smokestack of the defendant's locomotive. The specific question, therefore, which the court was called upon to determine, was whether or not the evidence was so conclusive that this spark was not one of the 75 per cent. whose escape might have been prevented by ordinary care that a verdict to the contrary could not have been lawfully sustained. The statute of Minnesota did not relieve the court from the determination of this question. It provides that:

"All railroad companies or corporations operating or running cars or steam engines over roads in this state shall be liable to any party aggrieved for all damage caused by fire being scattered or thrown from said cars or engines, without the owner or owners of the property so damaged being required to show defect in their engines or negligence on the part of their employés; but the fact of such fire being so scattered or thrown shall be construed by all courts having jurisdiction as prima facie evidence of such negligence or defect." Gen. St. Minn. 1894, § 2700.

Statutes of the same nature have been adopted in the adjoining states of North Dakota and South Dakota. These statutes were passed

because it was so difficult for claimants of damages caused by fires set by railroad companies to establish in the first instance the facts that their locomotives were defective, or that they were negligent in their operation. The purpose of the legislators in enacting these laws was simply to change the burden of proof so that the defendants might be required to produce the witnesses at their command who were familiar with the facts on which the evidence of negligence depends. The practical and legal effect of these statutes corresponds with the reason for their existence. It is to raise a presumption from the scattering of coals or sparks of fire or the setting of a fire by a locomotive that there was either a defect therein, which might have been avoided by the exercise of reasonable care, or negligence in its operation. This presumption, however, is not a conclusion of law. It is nothing but an artificial, rebuttable presumption of fact whose sole office is to change the burden of proof. When that result has been attained, the presumption becomes functus officio. It may not be used after the evidence of the facts has been adduced to raise an issue for the jury which the evidence itself does not present. Hence, in the first instance, it is always a question of fact for the court at the close of the evidence whether or not the presumption of negligence arising from these statutes has been overcome by the evidence of the care exercised by the defendant. If the proper employés of the railway company have testified to the effect that there were no defects in the locomotive, or that reasonable care had been used to avoid them, and that the engine was operated with ordinary care and skill, and the evidence at the close of the trial is so conclusive that an opposite finding is not sustainable, the statutory presumption has been overcome as a matter of law, and it is the duty of the court to instruct the jury in a fire case from these states, as in other cases, to return a verdict for the railway company. Rosen v. Chicago G. W. Ry. Co., 27 C. C. A. 534, 536, 83 Fed. 300, 302; Karsen v. Railroad Co., 29 Minn. 12, 14, 15, 11 N. W. 122; Daly v. Railway Co., 43 Minn. 319, 45 N. W. 611; Smith v. Railroad Co., 3 N. D. 17, 23, 53 N. W. 173; McTavish v. Great Northern Ry. Co. (N. D.) 79 N. W. 443, 446; Spaulding v. Railroad Co., 30 Wis. 110, 123, 11 Am. Rep. 550; Id., 33 Wis. 582; Huber v. Railway Co., 6 Dak. 392, 43 N. W. 819; Koontz v. Navigation Co. (Or.) 23 Pac. 820; Railroad Co. v. Talbot, 78 Ky. 621; Railroad Co. v. Packwood, 7 Am. & Eng. Ry. Cas. 584; Louisville & N. R. Co. v. Reese, 85 Ala. 497, 5 South. 283, 7 Am. St. Rep. 66.

The engineer and fireman who operated the locomotive, and other witnesses who dealt with it before and after the fire, testified in detail to facts which tended to show that it was equipped with suitable appliances in perfect condition for arresting sparks, and that it was carefully and skillfully operated on the day of the fire. Counsel for the plaintiffs in error contend, for various reasons which will now be considered, that the evidence of the exercise of ordinary care by the railway company was not conclusive. There was evidence that the country and the weather were dry, that there was a strong wind blowing across the track toward Woodward's buildings from the

southwest, that there was great danger of setting them on fire on account of their proximity to the railroad and on account of the combustible materials of which they were composed and with which they were surrounded. It is insisted that this situation demanded of the defendant a diminution of the speed of its train as it passed the buildings, while the fact was that it passed on schedule time at the ordinary speed of that train at that place, about 35 miles per hour. It is hardly probable that less speed, which would have detained the locomotive opposite the buildings a longer time, would have decreased the danger. Moreover, the primary duty of the railway company was to the state and to the passengers. It was to operate its railroad with reasonable speed at regular times to accommodate passengers and shippers. It owed this duty to the state, and its obligation to discharge it was the consideration of its charter. There is no evidence that the locomotive had previously set any fires, or that there was any reason to suppose that its ordinary operation would fire the buildings of Woodward. The stoppage or material diminution of the speed of its train by a railroad company on dry and windy days at isolated buildings near its track, under such circumstances, is incompatible with the proper discharge of its duty as a common carrier, and this company cannot be held to have been negligent in the discharge of its duty to Woodward in this case, because it drove its engine past his property at its usual speed.

The southern end of the trip of this locomotive on the day of the accident was at La Crosse in the state of Wisconsin. At that place were two dispatchers whose business it was to receive the engine when it arrived and to take it to the roundhouse. There was less danger of the escape of sparks during the operation of the railroad immediately after coals had been spread upon the fire in the box and when the firebox was closed. It is said that the fireman testified at the first trial that he had no recollection of seeing the dispatchers at La Crosse on the day of the fire, that he testified at the second trial that he distinctly remembered seeing them, and upon cross-examination that he had no recollection of seeing them, but that they were there every night as he remembered, that as he approached Woodward's place on the day of the fire he opened the firebox four times and spread four shovels full of coal evenly over the fire in the grate of the locomotive during 26 seconds while he was traveling 80 rods; and it is further said that his testimony is shifty and evasive and shows that he opened the firebox while passing the buildings that were burned. Whether or not this fireman saw the dispatchers on the night of the fire is not material, because without his testimony the evidence is conclusive that one of them received the engine and delivered it to the roundhouse. The only basis for the claim that the fireman opened the firebox while he was passing the buildings is the argument that 26 seconds is too short a time in which to open and close the door of the box four times and to put four shovels full of coal on the grate. But it is not impossible to do so. The fireman testified that it was his customary practice to do so just before he arrived at the burned buildings, that he did so on this occasion, and that the firebox

was closed while the locomotive was passing the improvements. His evidence upon this subject was not shaken on cross-examination, and it was not contradicted by any witness, fact, or circumstance. A finding by a jury to the contrary would have been without support in the evidence, and the court would have been obliged to avoid it.

Attention is called to the testimony that sparks about the size of navy beans escaped from the smokestack. But there is no evidence that sparks of this size could not have passed through the most modern and approved spark arrester, and undisputed evidence that this engine was equipped with such a device and that it was in perfect condition.

It is said that the netting provided to arrest sparks was not produced in evidence at the trial. But, as the testimony regarding it was undisputed and presented no issue, its absence was immaterial.

The contention is made that there is no trace of the engine and of the netting from the time they were delivered at the coal dock at La Crosse by the engineer on the evening of the fire. But Hiscox, one of the dispatchers at La Crosse, testified that either he or Cole took the locomotive from the dock to the roundhouse, and that he inspected it and found it in perfect condition. Green, the night foreman of the roundhouse, testifies that Hiscox made a written report that the engine was in good condition, and that no repairs or changes were required or made upon it that night. The engine returned to Minneapolis the next day where it was again inspected and found to be in perfect condition.

There was evidence that at the time of the fire there were no screens and no netting over the dampers to the ashpan, and that some railroad companies had equipped their ashpans with such devices. But the ashpan of this locomotive was carried along beneath the engine between the rails. It was 8 to 10 inches deep, 32 inches wide, and 6½ feet long. As it passed the burned buildings it was moving at the rate of 35 miles per hour with the rear damper open and the front damper closed. Two witnesses said that it was possible for coals to escape from it, but no witness testified that he had known of fire being blown or carried more than 8 feet beyond the rails in case of its escape. It is incredible that coals from this ashpan could have traveled over the rail and over the highway and have first set fire 106 feet distant from the railroad. The result is that the evidence was conclusive that if the fire was set by the engine it was kindled not by fire or coals from the ashpan, but by sparks from the smokestack, that the locomotive was equipped with approved appliances in perfect condition to prevent as far as possible the escape of such sparks, and that the engine was carefully and skillfully operated. This action has been twice tried. At the first trial the jury considered the evidence and found that the defendant was guilty of no negligence. At the second trial the court decided that the exercise of reasonable care by the railroad company was so conclusively proved that it could not sustain a verdict for the plaintiffs. It had the same opportunity as the jury to observe the appearance and demeanor, and to judge of the credibility, of the witnesses and its considered opinion

should receive consideration and respect. Patton v. Tex. & Pac. Ry. Co., 179 U. S. 660, 21 Sup. Ct. 275, 45 L. Ed. 361. A deliberate review and careful digest of the printed evidence has convinced that there was no mistake in the conclusion of the court below, and that no court could in the exercise of a sound judicial discretion sustain a verdict for the plaintiffs upon this evidence. There was therefore no error in the instruction for the defendant.

When the engine arrived at La Crosse the engineer made a record in his own handwriting, which was delivered to Green, the foreman of the roundhouse. The latter testified on his direct examination that he knew there were no changes or repairs made on the engine that night. On cross-examination he said that he had no personal recollection of the matter, but that he had a record. On redirect examination he was shown the record. He testified that he recognized it as the handwriting of the engineer, that he received it about 8:30 in the evening of the day of the fire for the purpose of learning whether any repairs would be needed upon the engine, and that he turned it over to some other person the next morning. He said that he knew that the record was accurately kept, that if any repairs had been made the back of this record would have shown this fact, and that he could state from an inspection of the record whether any repairs or changes had been made that night. It is specified as error in this state of the record that the court permitted the witness to testify, over the objection that no foundation had been laid which permitted the witness to use this memorandum to refresh his memory, as follows:

"Q. Then referring to defendant's Exhibit A (the record), I will ask you whether there were any repairs or changes made upon that engine that night at North La Crosse?

"A. No, sir; no changes were made at all."

But there was no error in this ruling. It is perfectly competent for one to examine a deed, mortgage, or other instrument and to testify from the absence of his own handwriting thereon that he never wrote or signed it, and, where one knows that a certain record contains a note of every act done by him or by his department, he may lawfully testify to this knowledge, and from the absence of any record of the act he may depose that the act was not done by him or by those under his control. Such a use of a record may not be competent to refresh the memory because it may not have that effect, but the record and the testimony in the absence of memory constitute the best evidence of the fact that the act was not done, and for that reason they are admissible to prove it.

The fire was set on May 1, 1900. Counsel for the plaintiffs objected to the testimony of witnesses that on April 5th, 11th, 18th, and 24th, respectively, preceding, they examined the netting and all the parts of the engine which in any way affected the arresting of sparks and found them in perfect condition, upon the grounds that the witnesses testified from records and their knowledge, and not from memory, and that the evidence was too remote, and they specify its ad-

mission over these objections as error. The first ground of these objections is untenable for the reasons which have been stated. Was the evidence too remote? The last examination was only seven days before the fire. The evidence was that the machinery had continued in the same good condition for 20 days preceding that examination, and it was all admissible in connection with the rule of law that a condition once shown is presumed to continue for a reasonable time, unless the contrary is shown, because it had a strong tendency to prove that the device for arresting sparks continued in good condition until the time of the fire.

Finally, counsel for plaintiffs contend that the court erroneously permitted the traveling engineer of the defendant to testify that for a number of years the defendant had required its firemen on passenger trains, and that it had been their custom, to inspect dampers, ashpans and dump grates before they started on their trips in order to see that they were clean and in good order, and that the railroad company had required both firemen and engineers to report what, if anything, was needed. But the question at issue here was whether or not the defendant had exercised ordinary care in the operation of its railroad, and this evidence was clearly competent and material upon this issue, because it had a direct tendency to prove the degree of care which it used. It may be that the requirement and the custom tended to show extraordinary care, but the evidence is not inadmissible upon that ground, because the greater care includes the less and is competent evidence of it.

There was no error in the trial of this case, and the judgment below must be affirmed. It is so ordered.

ROSE et al. v. McKIE.

(Circuit Court of Appeals, First Circuit. May 24, 1906.)

No. 620.

1. MANDAMUS—ENFORCEMENT OF JUDGMENT AGAINST TOWN—COMPELLING ACTION BY OFFICERS.

   It is no defense, to an application for a writ of mandamus to compel officers of a town to perform duties imposed on them by statute toward providing for the payment of a judgment against the town, that such duties do not include all the acts requisite to a full satisfaction of the judgment.

   [Ed. Note—Enforcement of judgment against municipality by mandamus, see note to Holt County v. National Life Ins. Co., 25 C. C. A. 475.]

2. MUNICIPAL CORPORATIONS—PAYMENT OF DEBT—AUTHORITY TO TAX.

   Authority given to a town by statute to contract a debt carries with it authority to tax for the payment of such debt, unless expressly withheld.

   [Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 2043.]

3. SAME—MANDAMUS TO COMPEL LEVY OF TAX—DEFENSES.

   It is no defense, to an application for a writ of mandamus to compel the levy of a tax by a town to pay a judgment against it, that the authority of the town to tax is limited, unless it is also shown that such limited authority has been exhausted. The authority is not exhausted by an issue of bonds.

4. SAME—AUTHORITY TO PAY DEBT.
Authority given a town by statute to contract a debt necessarily carries with it authority to appropriate money for the payment of such debt.

5. MUNICIPAL CORPORATIONS—DUTIES OF OFFICERS—TOWN WARDEN IN RHODE ISLAND.
By the statutes of Rhode Island, a warden, in towns authorized by their charters to elect such officers, is vested with the powers and duties of a justice of the peace.

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

For opinion below, see 140 Fed. 145.

Walter H. Barney (Barney & Lee, on the brief), for plaintiffs in error.

Stephen R. Jones (Richard E. Lyman and Carver & Blodgett, on the brief), for defendant in error.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

LOWELL, Circuit Judge. This was a petition for a writ of mandamus to Rose, the treasurer, Champlin, the first warden, and Mott, the town sergeant, of the town of New Shoreham in Rhode Island. The petition alleged that McKie had recovered judgment in the Circuit Court against the town of New Shoreham, and had demanded payment thereof from Rose; that Rose refused to pay, stating to the officer charged with the service of the execution that there was not money enough in the town treasury to pay it; that Rose had not sufficient money of the town of New Shoreham to pay the judgment; that it thus became the duty of Rose to apply to a warden of the town for a warrant to the sergeant to summon a town meeting which should levy a tax to pay the execution. The petition sought a writ of mandamus to Rose, commanding him to apply to Champlin, as warden, to grant a warrant to the town sergeant, for a town meeting "for the speedy ordering and making a tax to be collected to reimburse, pay or satisfy said town treasurer the money, costs and charges recovered against him, and to pay and satisfy the said judgment and execution of your petitioner." The petition further sought corresponding writs to Champlin and Mott.

Rose made answer, admitting the judgment, his refusal to pay the execution, his lack of funds, and the official character of the respondents.

The answer proceeded as follows:

"That under said chapters 770 and 893 of the Public Laws, hereinabove referred to, in and by which said town of New Shoreham was authorized to aid in the purchase of or construct a steamboat or steamboats for the transportation of passengers and freight to and from said town, and to hold and operate the same as in and by said acts is set forth, the right of said town to make appropriations for said purposes is expressly limited by said chapter 770 to a sum not exceeding fifty thousand dollars ($50,000), and by said chapter 893 to a sum not exceeding thirty thousand dollars ($30,000) in addition to the sum of fifty thousand dollars ($50,000) authorized and appropriated by said town under section 1 of said chapter 770; and in and by said acts, said town was authorized to hire said money for the purposes set forth in said acts, and to issue the notes or bonds of said town for said sums respectively, in such form and upon such terms as the town council of said town might determine.

"And this defendant avers that at a special town meeting of the electors of the town of New Shoreham, qualified to vote for the expenditure of money therein, held in said town on the twenty-seventh day of April, A. D. 1900, said electors, by a majority vote, appropriated the sum of fifty thousand dollars ($50,000) for the purposes mentioned in said chapter 770 of the Public Laws, and authorized and directed the town treasurer to hire said sum for said purposes, and to sign, execute and deliver the negotiable notes or bonds of said town therefor for such a term of years (not exceeding thirty) and in such form and upon such terms (not exceeding four per cent [4 %] per annum, semiannually) as the town council might determine was for the best interests of said town.

"That thereafterwards, to wit, on the twenty-fourth day of July, A. D. 1900, the town council of said town of New Shoreham, acting under the provisions of said chapter 770 and of said vote of said special town meeting, authorized and directed this defendant, as town treasurer, to hire the sum of five thousand dollars ($5,000) for said purposes, and to execute and deliver the negotiable note of the town therefor, as in said resolution was more specifically provided.

"That thereafterwards, to wit, on the seventeenth day of November, A. D. 1900, said town council, acting under the provisions of said chapter 770 and of said vote of said town council, authorized and directed this defendant, as town treasurer, to hire the additional sum of forty-five thousand dollars ($45,000) for the purposes aforesaid, and to execute and deliver the negotiable note or notes of said town therefor, as in said resolution was more specifically provided.

"That thereafterwards, at a special town meeting of the electors of the town of New Shoreham, qualified to vote for the expenditure of money therein, held in said New Shoreham on, to wit, the ninth day of April, A. D. 1901, said electors, by a majority vote, appropriated the further sum of thirty thousand dollars ($30,000) in addition to said previous sum of fifty thousand dollars ($50,000), in accordance with the provisions of said chapter 893 of the Public Laws, and for the purposes therein set forth, and authorized and directed the town treasurer of said town of New Shoreham to hire said sum of thirty thousand dollars ($30,000) and to sign, execute and deliver the negotiable note or notes of said town therefor, payable at such time and at such rates of interest as the town council of said town might determine.

"That thereafterwards said town council, on, to wit, the seventh day of October, A. D. 1901, authorized and directed this defendant, as town treasurer, to hire said sum of thirty thousand dollars ($30,000), in accordance with said vote of said last-mentioned town meeting, and to execute and deliver the negotiable note or notes of said town therefor, as in said resolution was more specifically provided.

"That this defendant, acting under the authority of said acts and said votes of said town meetings and of said town council, above recited, proceeded as therein directed and hired on the negotiable notes of said town of New Shoreham said sums of five thousand dollars ($5,000), forty-five thousand dollars ($45,000), and thirty thousand dollars ($30,000), respectively, in all, the sum of eighty thousand dollars ($80,000) for the purposes aforesaid.

"And this defendant is advised that in making said appropriations and hiring said sums, above recited, said town has exhausted its authority to raise money for the purposes set forth in chapters 770 and 893 of the Public Laws, and that it has now no authority to appropriate or raise, either by a tax or by loan, any further sum for any of said purposes, including the payment of the judgment and execution referred to in said petition, unless further special legislative authority therefor shall be granted by act of the General Assembly of the state of Rhode Island.

"And this defendant is further advised that since said town, without such further legislative authority, would have no right or power to raise, appropriate or apply any additional sum for any of the purposes mentioned in said act, it would have no authority, without such additional legislation, to levy a special tax for the purpose of meeting said judgment and execution,

and that any such tax would be illegal and uncollectible; that, if any such tax would be levied and collected, the town would have no lawful power or authority to appropriate the proceeds thereof to the payment of said judgment and execution; and that therefore it is not the duty of this defendant to make application for a warrant to call a special town meeting to levy such a tax."

The material parts of the statutes referred to are as follows:

"Chapter 770 of the Public Laws of the State of Rhode Island, Passed April 26, 1900.

"An Act to Authorize the Town of New Shoreham to Facilitate Transportation to and from Said Town.

"It is enacted by the General Assembly as follows:

"Section 1. The town of New Shoreham is hereby authorized to aid in the purchase of or to construct a steamboat for the transportation of passengers and freight to and from said town, and may hold and dispose of said property like other property of said town: Provided, That a majority of the voters of said town, qualified to vote upon any proposition to impose a tax or for the expenditure of money therein, present and voting at any legal town meeting called for that purpose, shall vote in favor of such purchase or construction; and said town is hereby authorized and empowered to appropriate and use for the purposes above mentioned a sum not exceeding fifty thousand dollars, and to hire said money for said purposes and to issue the notes or bonds of said town for said sum in such form and upon such terms as the town council of said town may determine.

"Sec. 2. The control and management of said steamboat property shall be vested in a board of commissioners * * *.

"Sec. 3. Said board of commissioners shall have power to run said steamboat line to and from said town and the cities of Newport and Providence, and to establish rates of fare and charges for freight on said line and to sue for and collect the same. Said commissioners shall annually report in writing to the town treasurer of said town, and file a sworn statement of their account with said treasurer, showing the several sums received and paid by them as said commissioners during the previous year, and showing in detail the persons to whom and the purposes for which the payments were made.

* * * * * * * * * * *

"Sec. 6. This act shall take effect from and after its passage."

"Chapter 893 of the Public Laws of the State of Rhode Island, Passed March 22, 1901.

"An Act in Amendment of and in Addition to Chapter 770 of the Public Laws, Passed at the January Session, A. D. 1900.

"It is enacted by the General Assembly as follows:

"Section 1. The town of New Shoreham, in addition to the powers granted by chapter 770 of the Public Laws passed at the January session, A. D. 1900, is hereby authorized and empowered to purchase, aid in the purchase of, or to construct a steamboat or steamboats for the transportation of passengers and freight to and from said town, and may hold the same as provided in section one of said act * * * ; and said town is hereby authorized and empowered to appropriate and use for the purposes above mentioned, and for operating said boats, a sum not exceeding thirty thousand dollars in addition to the sum of fifty thousand dollars authorized and appropriated by said town under section one of said act, and to hire said money for said purposes and to issue the notes or bonds of said town for said sum in such form and upon said terms as the town council of said town may determine.

"Sec. 2. Section 3 of chapter 770 of the Public Laws, passed January, A. D. 1900, is hereby amended so as to read as follows:

" 'Sec. 3. Said board of commissioners shall have power to run and operate said steamboats to and from said town and the cities of Newport and Providence, or wherever said commissioners may determine, and to establish rates

of fare and charges for freight on said steamboats, and to sue for and collect the same in the name of said town, and to make such contracts for and in behalf of said town, in connection with the operation of said steamboats and said business, as in their judgment they may deem necessary and proper. Said commissioners shall annually report in writing to the town treasurer of said town, and file a sworn statement of their account with said treasurer, showing the several sums received and paid by them as said commissioners during the previous year, and showing in detail the persons to whom and the purposes for which the payments were made.'

"Sec. 3. This act shall take effect on and after its passage, and all acts and parts of acts inconsistent herewith are hereby repealed."

Other statutes of Rhode Island relied upon by the petitioner are as follows:

From chapter 36 of the General Laws of 1896:

"Sec. 12. Every person who shall have any money due him from any town or city, or any claim or demand, against any town or city, for any matter, cause or thing whatsoever, shall take the following method to obtain the same, to wit: Such person shall present to the town council of the town, or to the city council of the city, a particular account of his claim, debt, damages or demand, and how incurred or contracted; which being done, in case just and due satisfaction is not made him by the town or city treasurer of such town or city within forty days after the presentment of such claim, debt, damages or demand aforesaid, such person may commence his action against such treasurer for the recovery of the same.

"Sec. 13. On judgment being obtained for such debt, damages or demand, in case said treasurer shall not have sufficient of the money of such town or city in his hands to satisfy and pay the judgment obtained and the charges expended in defending such suit, the said treasurer shall make application to any justice of the peace in such town or city, and thereupon the justice shall grant a warrant to the town sergeant of such town, requiring him to warn the electors of the town to hold a town meeting, at such time and place as shall be appointed, or to the mayor of such city requiring him to call a special meeting of the city council of such city, for the speedy ordering and making a tax, to be collected for the reimbursement of said treasurer.

"Sec. 14. In case said electors, or said city council, as the case may be, upon due warning given them, shall not take due and effectual care to reimburse, pay or satisfy said treasurer the money, costs and charges by him expended, or recovered against him, upon petition, in the nature of a petition in equity, by him or by the person recovering the judgment named in section thirteen of this chapter, made to the [appellate division of the supreme] *superior* court at any time thereafter, setting forth facts [said division], *the court* may order the assessors of said town or city to assess upon the ratable property thereof, and the collector to collect, a tax sufficient for the payment of said judgment, with all incidental costs and charges, and the expenses of assessing and collecting such tax."[1]

The answer of Champlin admitted that he was first warden, but alleged that he was not the only warden or justice of the peace in New Shoreham. It alleged that Rose had made no application to Champlin to grant a warrant for town meeting; that Champlin had never declined or refused to issue a warrant; that he was ever ready and willing to issue a warrant, if lawful application was made for the purpose. The answer of Mott admitted that he was town sergeant, and set up that no warrant had ever been issued by a justice of the peace

[1] NOTE. The words in brackets in section 14 are stricken out, and the words in italics inserted by the provisions of the "Court and Practice Act," which went into effect July 17, 1905.

or by a warden directing him to summon a town meeting; that he had ever been ready and willing to make service of a warrant lawfully issued. The Circuit Court ordered the writ to issue commanding Rose to apply to Champlin for a warrant, commanding Champlin to grant the warrant to Mott, and commanding Mott to summon a town meeting.

Thereupon the respondents, Rose, Champlin, and Mott, sued out a writ of error to this court.

The plaintiffs in error, hereinafter called the respondents, contend that the relief sought is not within the jurisdiction of the Circuit Court. "A proceeding by mandamus to compel the levy of a tax to pay a judgment is in the nature of an execution." Chanute City v. Trader, 132 U. S. 210, 10 Sup. Ct. 67, 33 L. Ed. 345. The writ issues only as ancillary to other proceedings, and to fulfill the purpose of an execution where that remedy is not available or is ineffective. If the writ here ordered to issue required the town officers to levy a tax and satisfy the petitioner's judgment, argue the respondents, it might accord with precedent, but here it only compels the calling of a town meeting, a preliminary proceeding which does not necessarily provide payment of the petitioner's judgment, but may do no more than prepare for proceedings which are beyond the scope of this petition. If the town meeting summoned in accordance with the writ should not provide payment of the judgment, the petitioner could obtain its satisfaction only by supplemental proceedings under section 14 above quoted, either in this court or in some court of the state. The respondents' argument amounts to this: As the writ issues only to discharge the functions of an execution, it must discharge those functions completely or must be denied.

But it is not for the respondents to object that the remedy sought by the petitioner is incomplete. If the writ here prayed for be treated as a necessary part, but only a part, of the execution to which the petitioner is entitled, the writ should not be denied because all the remedy is not given at once. Mandamus to a town officer does not issue as of course wherever an execution against the town remains unsatisfied. It issues only to compel a town officer to do those acts which the law requires of him toward the payment of the judgment. If the law imposes upon him no duty in the matter, the writ will not issue against him. Conversely, the writ will not be denied, because his statutory duty does not extend to the full satisfaction of the execution. The writ will issue to compel him to do his duty to that end, be his part in the operation large or small. "Assuming that the return is true in fact, does it excuse the board of county commissioners from the performance of so much of the command of the writ as ordered them to collect and pay over, as well as to levy, the taxes to pay relator's judgment? The excuse offered is, in brief, that, although commanded to levy, collect, and pay over, the respondents are powerless to do more than levy, since the law devolves the duty of collecting and paying over upon another officer of the county, the treasurer, who can only act upon tax rolls to be prepared by the county clerk. The office, and the only office, of the writ of mandamus, when addressed to a

public officer, is to compel him to exercise such functions as the law confers upon him. When the law enjoins upon such an officer the performance of a specific act or duty, obedience to the law may, in the absence of other adequate remedy, be enforced by this writ." U. S. v. Labette County (C. C.) 7 Fed. 318, 320. In Labette County v. Moulton, 112 U. S. 217, 5 Sup. Ct. 108, 28 L. Ed. 698, it was contended by the respondents that they should not all be joined in one petition; that is, that the several steps making the "equivalent of the execution and levy" should be taken separately, and not combined in one proceeding. While the Supreme Court there held that all the steps of an assessment and levy might properly be directed by one writ, yet the court did not suggest that, for some particular reason, these steps might not be directed by separate proceedings. In Hawley v. Fairbanks, 108 U. S. 543, 548, 2 Sup. Ct. 846, 27 L. Ed. 820, the writ directed the county clerk to extend upon the tax collector's books a sum sufficient to pay the judgments in question. In U. S. v. Clark County, 96 U. S. 211, 24 L. Ed. 628, the writ directed the county clerk, and in Knox County v. U. S., 109 U. S. 229, 3 Sup. Ct. 131, 27 L. Ed. 915, it directed the justices of the county court, to draw a warrant on the county treasurer. In City of Little Rock v. U. S., 103 Fed. 418, 43 C. C. A. 261, the writ directed the issuance of warrants. In a later part of their brief, some of the respondents in this case raise the contention settled by the Supreme Court in Labette County v. Moulton, and they urge that they should not be joined in one petition. Thus they object in one breath that the petition asks too much and too little. Neither contention can be allowed.

We come next to the principal question raised in this case: Has the petitioner a right to the levy of a tax by the town in order to pay his judgment? That is the purpose of the writ and of the town meeting. He has recovered a judgment against the town. His debt is thus determined to be due and payable, founded upon a just contract. From the existence of the debt arises the presumption of the right to payment. "When authority is granted by the legislative branch of the government to a municipality, or a subdivision of a state, to contract an extraordinary debt by the issue of negotiable securities, the power to levy taxes sufficient to meet, at maturity, the obligation to be incurred, is conclusively implied, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention. The power to tax is necessarily an ingredient of such a power to contract, as, ordinarily, political bodies can only meet their pecuniary obligations through the instrumentality of taxation." Ralls County Court v. U. S., 105 U. S. 733, 735, 736, 26 L. Ed. 1220. The Supreme Court has held, however, that a municipality may owe a debt, that judgment may be recovered thereupon, and yet that the municipality may be forbidden to raise money for its payment by the ordinary means of raising money, viz., taxation. U. S. v. Macon County, 99 U. S. 582, 25 L. Ed. 331. Liability in theory may thus be established by the judgment; the right to take out execution may follow thereupon; the execution may be ineffective, and yet the writ of mandamus may be denied, although the writ is held to dis-

charge the function of an execution in suits against municipalities. Thus it has been said: "There is no necessary connection between the power to contract debts and the power to levy taxes to pay them." Board of Commissioners v. King, 67 Fed. 202, 205, 14 C. C. A. 421.

While this anomalous condition is well recognized, two things are to be observed concerning it: First, where there is a debt, authority to tax is presumed in the absence of some express provision to the contrary. Authority to contract a debt carries with it authority to tax, unless authority to tax is expressly denied. Ralls County Court v. U. S., 105 U. S. 733, 26 L. Ed. 1220; Citizens' Association v. Topeka, 20 Wall. 662, 22 L. Ed. 455; U. S. v. New Orleans, 98 U. S. 381, 393, 25 L. Ed. 225; U. S. v. Saunders, 124 Fed. 124, 128, 59 C. C. A. 394. Second, as the only effective limitation is upon the right to tax, the respondents' return or answer must show not only that this limitation exists, but that the limited authority to tax has been exhausted. City of Cleveland v. U. S., 111 Fed. 341, 348, 49 C. C. A. 383; Beaulieu v. Pleasant Hill (C. C.) 14 Fed. 222.

Applying these considerations to the case at bar, we find that the judgment has established a valid contract and debt. Harshman v. Knox County, 122 U. S. 306, 316, 7 Sup. Ct. 1171, 30 L. Ed. 1152. The only legislation referred to contains no express limitation of the town's authority to tax. The respondents offer two arguments:

A. That the statute has limited the town's authority to appropriate money for the purposes mentioned, and that the town has appropriated money up to the limit thus fixed. But that the town was authorized by the Legislature to contract with the petitioner, and thus to incur the debt upon which the judgment is based, has been settled by the judgment. And, as the respondents admit, the books contain no case in which authority to appropriate money for the payment of a debt is limited more narrowly than the authority given to incur the debt. Such a provision would be almost a contradiction in terms. Authority to contract a debt and authority to pay it cannot be separated. The courts have gone a long way when they have held a town may owe a debt, to pay which it may not levy a tax; but to hold that a town may owe a debt which it cannot pay by a mere appropriation of money in its treasury is to juggle with words. It is to say that a body corporate may owe money which it is forbidden by any means to pay; that an obligation to pay is compatible with an obligation not to pay. This construction of the statute cannot be admitted.

B. The respondents further contend that the limitation expressed in the statute is equivalent to a limitation of the town's authority to tax, and hence that only $80,000 can be raised by taxation. Even if this interpretation of the statute be sound, which we by no means decide, yet these respondents are not helped by it. Construed most strongly in their favor, their answer alleges no tax, but only that the town owes debts incurred under the statutes and not provided for, amounting in all to more than $80,000. In order to prevent the issue of the writ, under the construction of the statute just mentioned,

they must show not only a limitation of the town's authority to tax, but also that the town has exhausted the authority thus limited.

The respondents further contend that the statutes of Rhode Island make the granting of a warrant to the town sergeant the duty of a justice of the peace, while Champlin's office is that of first warden. By the charter incorporating the town of New Shoreham, granted November 6, 1672, it is provided that the freemen, inhabitants of Block Island, "shall choose two of the said freemen able and well qualified for the preservation of his Majesty's peace." "And that the said elected and engaged persons shall be called Wardens." These wardens were given authority to issue writs for town meetings, to hold pleas of actions of account, debt, etc., and to have the conservation of the peace. Records of the Colony of Rhode Island, vol. 2, p. 467 et seq. See volume 4, p. 25. The office of warden in the town of New Shoreham is continued by the Constitution of Rhode Island, art. 10, § 7. By the Public Laws of Rhode Island of 1798, in section 12, p. 330, of "an act declaring towns to be bodies corporate, establishing town councils, regulating town meetings, and prescribing the manner of recovering debts due from towns," it was provided that, in case the town treasurer had not sufficient of the town's money in his hands to satisfy a judgment recovered against the town, "then, upon application made by such town treasurer to any justice of the peace or warden of such town, such justice or warden shall grant forth a warrant to the town sergeant of such town." In other respects this section follows substantially Gen. Laws 1896, p. 155, c. 36, § 14, above quoted. This provision was substantially re-enacted in the Public Laws of 1822, (page 257, § 12). In the Public Laws of 1844 (page 299, § 13), all mention of the warden was omitted from the corresponding section; but in another part of the Revision it was provided that "the powers and duties hereby, or by any special act conferred and imposed on justices of the peace, may, and shall be enjoyed and performed by wardens in those towns that are authorized by their original charters to elect wardens." Page 108, § 23. The provisions above referred to for the collection of debts may be traced through the successive revisions to section 14 of chapter 36, p. 155, of the General Laws of 1896. Gen. St. 1857, c. 30, § 13; Gen. St. 1872, c. 31, § 12; Pub. St. 1882, c. 34, § 13. The provision assimilating the duties of warden to those of justice of the peace may be traced in like manner. Gen. St. 1857, c. 168, § 24; Gen. St. 1872, c. 185, § 41; Pub. St. 1882, c. 196, § 40. In the General Laws of Rhode Island of 1896 (chapter 288, § 24), it appears as follows:

"The duties and powers hereby or by any special act conferred on District Courts and on justices of the peace may and shall be performed and enjoyed concurrently with the District Courts by wardens in those towns that are authorized by their original charters to elect such officers."

And in many other places throughout the statutes of Rhode Island it appears incidentally that the duties of a warden are ordinarily those of a justice of the peace.

From these considerations it appears that the Circuit Court committed no error in issuing the writ.

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

PENN MUT. LIFE INS. CO. v. ASHE.

(Circuit Court of Appeals, Sixth Circuit. May 5, 1906.)

No. 1,445.

NEW TRIAL—DEATH OF JUDGE PENDING MOTION—AUTHORITY OF SUCCESSOR. Rev. St. § 953, as amended by Act June 5, 1900, c. 717, 31 Stat. 270, [U. S. Comp. St. 1901, p. 696], provides that, where the trial judge, by reason of death, sickness, or other disability, is unable to pass on a motion for a new trial and allow and sign a bill of exceptions, his successor, or any other judge holding the court, shall do so if the evidence has been taken in stenographic notes, or if he is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions, but that, if he is satisfied that he cannot, he may in his discretion grant a new trial to the party moving therefor. *Held* that, where the judge of a Circuit Court died leaving a pending motion for a new trial undecided, and there was no record from which his successor could fairly pass upon the motion and allow and sign a bill of exceptions, his only authority under the statute was to grant a new trial.

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

McFarland & Canada, for plaintiff in error.

Malone, Dubose & Riddick, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit upon two policies for $5,000 each, issued May 2, 1892, by the Penn Mutual Life Insurance Company on the life of S. A. Rogers. Rogers paid the first and second premiums due May 2, 1892, and May 2, 1893, borrowed on the policies the money to pay the third premium due May 2, 1894, and failed to pay any further premiums. According to the computation of the company, the reserve resulting from the payment of the first and second premiums, after deducting the loan which paid the third premium, was sufficient to carry each policy for 1 year and 121 days; that is to say, until August 30, 1896. Rogers died on January 6, 1898, after the policies, as construed by the company, had expired. On the 8th of June, 1898, suit was brought on the policies. The case was heard before Judge Hammond and a jury. After the jury had heard the testimony, the trial was terminated on December 18, 1899, by the making of the following agreed entry, under which, as it will be observed, the court directed a verdict in favor of the plaintiff, but reserved the questions of law involved for determination on a motion for a new trial, when, if such motion should be decided in favor of the defendant, the verdict was to be turned into one for the defendant by direction of the court:

"This day come again the said plaintiff accompanied by her attorney and the said defendant by its attorneys and come again also the jury heretofore impaneled and sworn herein, when the trial of this case was again resumed and the jury having heard the testimony and listened to the arguments of counsel, the parties agree by this record entry that the court may take the verdict of the jury for the amount due the plaintiff as if upon a verdict directed by the court in favor of the plaintiff, but on motion for a new trial, if the court should find the law for the defendant, the verdict

shall be turned into one for the defendant company by direction of the court, neither party to be prejudiced hereby in any right to a writ of error. Whereupon the said jury upon their oaths do say they find the issues herein joined to be in favor of the said plaintiff and against the said defendant to the sum of nine thousand, seven hundred and twenty dollars. It is therefore considered by the court that the said plaintiff, Maggie L. Ashe, as such executrix, do have and recover of and from the said defendant, the Penn Mutual Life Insurance Company, said sum of nine thousand, seven hundred and twenty dollars and the costs of this suit, for the collection of which execution is hereby awarded. Whereupon the said defendant by its attorneys moves the court for a new trial of this case, which motion is hereby continued for consideration to a subsequent day of the present term."

In accordance with this entry, Judge Hammond took the case under advisement upon the questions of law involved, but never decided them. The motion for a new trial was continued from term to term, until December 17, 1904, when Judge Hammond died. Upon his death, Judge McCall was appointed to fill the vacancy, and on March 1, 1905, the plaintiff moved for execution upon the judgment entered December 18, 1899, and the defendant for a new trial. In support of this motion, the defendant offered the affidavit of counsel showing what had occurred between Judge Hammond and the attorneys for the parties at the time the entry of December 18, 1899, was agreed upon, and the depositions of the officers of the company used on the trial. Judge McCall, sitting as the court below, declined to consider the affidavit and depositions, and on May 4, 1905, overruled the motion of the defendant, sustained that of the plaintiff, and ordered execution to issue upon the judgment. The view taken by the judge below of his authority and duty under the circumstances is sufficiently indicated in the following extracts from his opinion:

"This motion [that made before Judge Hammond] is now pending, and I am asked to grant a new trial of the case. A most perplexing and difficult question is presented. A presiding judge, the successor in office of the trial judge, now deceased, is asked to pass upon a motion for a new trial in a case about the facts of which, as they were permitted to go to the jury, he knows nothing, and just as little about the rulings of the court on objections to testimony offered before the jury. As remarkable as it may at first appear, this want of information as to these things on the part of the presiding judge is strongly urged, and not without some merit, as the reason why this motion should be granted and a new trial awarded. On the contrary, why should not the same thing be urged with equal force as the reason why the presiding judge should do nothing of the kind, but allow the verdict and judgment to stand as rendered?"

After commenting on the character of the motion that it raised a question of law and must be regarded as still pending, the court continued:

"However this may be, I am satisfied that, when the verdict and judgment was spread upon the minutes of the court, Judge Hammond was of the opinion that it was correct, both upon the facts and the law of the case; and, since he did not see proper to change it under the motion for more than six years, it is persuasive, if not conclusive, that he was content to let it stand. I cannot bring myself to conclude that I have any authority under the law and facts now presented to set the verdict and judgment aside at this late day, when I know nothing, and can know nothing, of the trial of the case."

Without considering the affidavit offered by counsel for the defendant company, and confining ourselves to the agreed entry of December 18, 1899, it is obvious that the verdict and judgment then entered was a provisional one; it recognized there were certain questions of law raised during the trial which should receive the careful consideration of the court, and a verdict for the plaintiff was directed upon the express agreement that the court, upon a motion for a new trial, would consider and decide these questions, preserving to each party its right of review. If it should find the law for the defendant, the verdict was to be turned into one for the defendant. Neither party was to be prejudiced by the entry in its right to a writ of error. From such an entry, no inference could be drawn that the court, after consideration, had decided the questions of law in favor of the plaintiff. The plain statement was that it had not decided them, and the agreement was that it should decide them before the judgment was to be deemed conclusive, so that the defendant, if the court overruled its motion for a new trial, might take his exceptions, and not be prejudiced in his right to a writ of error. If this entry had not been made, and the court had been compelled to charge the jury, the defendant by proper exceptions might have reserved the legal questions it deemed important, and thus have preserved its right of review. To hold that, by the delay of the judge in passing upon the motion for a new trial, the defendant has been deprived of its right of review, is to say that without any fault on its part it lost its day in court, and must be deprived of its property without due process of law.

Before the passage of the act of June 5, 1900, amending section 953, it was the settled rule in the courts of the United States that the signing of a bill of exceptions is a judicial act, which can only be performed by the judge who sat at the trial, or by the presiding judge, if more than one sat. Malony v. Adsit, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. Ed. 163; Western Dredge & Imp. Co. v. Heldmaier, 111 Fed. 123, 49 C. C. A. 264. By the amendment referred to, section 953 (1 Comp. St. U. S. 1901, p. 696), was supplemented so as to read as follows:

"Section 953. That a bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof if more than one judge sat at the trial of the cause, without any seal of the court or judge annexed thereto. And in case the judge before whom the cause has heretofore been or may hereafter be tried is, by reason of death, sickness, or other disability, unable to hear and pass upon the motion for a new trial and allow and sign said bill of exceptions, then the judge who succeeds such trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been or is taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions, shall pass upon said motion and allow and sign such bill of exceptions; and his ruling upon such motion and allowance and signing of such bill of exceptions shall be as valid if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case said judge is satisfied that owing to the fact that he did not preside at the trial, or for any other cause, that he cannot fairly pass upon said motion, and allow and sign said bill of exceptions, then he may in his discretion grant a new trial to the party moving therefor."

The judge below seemed to be of the opinion that, although, as he stated in his opinion, he knew nothing about the facts of the case as they were permitted to go to the jury, and just as little about the rulings of the court on objections to the testimony offered to the jury, in short, knew nothing, and could know nothing, of the trial of the case, nevertheless he had authority, under section 953, to pass upon the motion for a new trial, and, as a consequence, allow and sign a bill of exceptions. In this we think he erred. The general rule, enforced by the weight of authority in this country and England, is that where a party, without laches on his part, loses the benefit of his exceptions through the death or illness of the judge, a new trial will be granted. Hume v. Bowie, 148 U. S. 245, 253, 13 Sup. Ct. 582, 37 L. Ed. 438, and cases cited. Section 953, as amended, enforces this just doctrine by providing that where the trial judge, by reason of death, sickness, or other disability, is unable to hear or pass upon a motion for a new trial, and allow and sign a bill of exceptions, his successor shall do so if the evidence has been or is taken in stenographic notes, or if he is satisfied by any other means that he can pass upon such motion, and allow a true bill of exceptions; but in case such successor is satisfied that owing to the fact that he did not preside at the trial, or for any other cause, he cannot fairly pass upon said motion and allow and sign said bill of exceptions, he may in his discretion grant a new trial to the party moving therefor. This, we take it, is authority to the successor, although he did not preside at the trial, to pass upon the motion for a new trial, and allow and sign the bill of exceptions, only in case he is furnished with the information, either by stenographic notes of the evidence, or otherwise, which will enable him to do so fairly and intelligently; and, if he cannot pass fairly and intelligently upon the questions of fact and law presented by the motion for a new trial, he is given authority, according to the general rule, to grant a new trial.

Since the judge below conceded he could not pass fairly upon the motion for a new trial, and allow and sign a bill of exceptions, the only authority he could exercise, under the section, was to grant a new trial.

The judgment is reversed, and the case remanded, with instructions to grant a new trial.

L. J. MUELLER FURNACE CO. v. CASCADE FOUNDRY CO.

(Circuit Court of Appeals, Third Circuit. May 15, 1906.)

No. 8.

1. FRAUD—ACTION FOR DECEIT—QUESTIONS FOR JURY.

In an action in the nature of one for deceit to recover damages for false representations, by which plaintiff was induced to enter into a contract, where the evidence is conflicting as to the exact language used, the question whether defendant intended to state an existing fact, or merely to express an opinion, is one of fact for the jury.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, § 67.]

2. SAME—FALSE REPRESENTATIONS—KNOWLEDGE OF FALSITY.
An action of deceit may be supported by proof of false representations made by defendant to influence the action of plaintiff, if defendant either knew them to be false, or was consciously ignorant or recklessly indifferent as to whether they were true or false.
[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, §§ 3–5.]

3. SAME—DAMAGES—SUFFICIENCY OF PROOF.
A plaintiff suing to recover damages for false representations, by which it was induced to enter into a contract to manufacture a large quantity of castings, which contract it afterward rescinded, cannot recover damages because of depreciation in the market value of a quantity of iron bought for use in carrying out the contract, where it is not shown how much was used before rescission of the contract, nor what was done with the remainder.

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

For opinion of the Circuit Court, see 140 Fed. 791.

Frank Gunnison, for plaintiff in error.

J. W. Sproul, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and J. B. McPHERSON, District Judge.

GRAY, Circuit Judge. The plaintiff in error and defendant below (hereinafter called the defendant) is a corporation of the state of Wisconsin, located in Milwaukee, engaged in the manufacture and sale of heating furnaces. Having no foundry connected with its factory, it purchased such castings as it required in the manufacture of the furnaces, from outside foundry companies. For a number of years prior to the contract out of which this suit arose, it purchased its castings from the Walworth Run Foundry Company, of Cleveland, Ohio. On January 20, 1903, it entered into a written contract with the Cascade Foundry Company, a corporation of the state of Pennsylvania, defendant in error and plaintiff below (hereinafter called the plaintiff) for the manufacture of a certain number of furnaces,—that is, for the castings to be used in their construction. The contract covered a period of five years, and provided for the different styles of furnaces that were to be constructed under it, and for the regulation of price. This price was so much per pound, depending upon the fluctuation of the cost of iron up or down, but the weight of the parts that were to be manufactured was to be determined by taking the weights of the patterns of the different parts manufactured (these patterns being themselves castings) and adding 6 per cent. to one class of pattern weights and 8 per cent. to another class. Upon the weights thus determined, the price of the castings to be furnished by the plaintiff was to be calculated.

After some delay, the plaintiff company entered upon the active performance of its contract in May, 1903, and having manufactured a number of these castings, some time in the latter part of June, 1903, claimed the right to rescind the contract, on the ground that the method for ascertaining the weight of the castings, by adding 6 and 8 per cent. to the pattern weights, as provided for in the contract, re-

sulted in plaintiff's furnishing to the defendant much greater weight than was paid for under the terms of the contract, the excess of the weight of the castings over the pattern weight being alleged as 15 to 25 per cent. instead of 6.to 8 per cent., and that plaintiff was induced to enter into the contract, providing for this method of settling the weight, by the false representations knowingly made by the defendant company, that this mode of ascertaining weights was a just one, and would fully protect the plaintiff company, and amount to as much as the actual weights, the defendant company "being then and there in the exclusive possession of the facts from which the truth or falsity of the statement in relation to weights could be ascertained."

With this statement of the ground of liability, the plaintiff sets forth in its declaration the damages suffered by it, by reason of its attempt to perform said contract, and of its preparation for the same in the purchase of material, flasks and other appliances necessary for the execution of its contract.

The representations complained of in the declaration, which the testimony adduced by plaintiff tended to show had been made by the agent of the defendant to the plaintiff, substantially as stated, were:

"That an equitable, just and true method of ascertaining the weights of the castings required to be made under the contract aforesaid, was, by computing the same from the pattern weights, to wit, al least double radiator furnaces to be figured at eight per cent. above pattern weights, and all other furnaces at six per cent. above pattern weights; that such means of ascertaining weights was a just means, would fully protect the Cascade Foundry Company and amount to as much as actual weights; that eight and six per cent. above the pattern weights respectively, would be equal to the actual weight of the castings made, which they then and there knew to be false, the actual weight over and above the pattern weights being not less than twenty-five per cent."

At the close of the testimony, the case was submitted to the jury by the learned trial judge, and resulted in a verdict for the plaintiff. The writ of error sued out by the defendant, brings before us, as assignments of error, the refusal of the trial judge to give binding instructions in favor of the defendant, and the refusal to give certain specific instructions to the jury. The principal question raised by these assignments is founded upon the proposition, that no sufficient evidence had been offered to justify the jury in finding that the defendant company, or its officers or agents, made any false representations, inducing the plaintiff to enter into the contract made between the plaintiff and defendant, which warranted plaintiff in rescinding the said contract.

The contention of the defendant is, that the representations alleged and proved were merely expressions of opinion by the agent of defendant, that the addition of 6 and 8 per cent. to the pattern weights would be a fair method of arriving at the actual weight of the castings, and that the actual weight would not exceed the result thus arrived at, and were not representations of existing facts.

An action grounded upon alleged injury, occasioned to plaintiff by false representations of defendant, is an action in the nature of an action for deceit. Nothing is better settled then, that to be actionable,

such representations must be as to past or existing facts, and not merely promises or expressions of opinion as to future events; although the state of mind or intent of the defendant may, under certain circumstances, be regarded as a fact existing at the time the representation is made in regard to it. But the general rule is, that false representations, inducing conduct on the part of the plaintiff to his injury, to be actionable, must relate to past or existing facts, and not be mere promises or expressions of judgment or opinion.

The plaintiff in error and defendant below complains here, that the court below did not undertake to decide for itself as to the character of these representations, instead of submitting to the jury the question, whether they were mere expressions of opinion, or assertions as to an existing fact. In submitting the case to the jury, the court below correctly stated to them the distinction to be observed between representations as to past or existing facts, and mere promises or expressions of opinion, or judgment, charging them that if the representations complained of were of the latter character, the plaintiff could not recover. There was some conflict of testimony between the witnesses for plaintiff and defendant, as to the precise character of the statements made and language used by the agent of the defendant, in regard to the method suggested by him, and finally incorporated in the contract for determining the weight of the castings as a basis for payment of the same, and the true question in the case may, as a whole, be viewed as one of intent. Was it the intent of the defendant to be understood as expressing an opinion on the one hand, or as stating an existing fact upon the other, in order to influence the conduct of the plaintiff, provided always that it has been shown that plaintiff acted upon such representation in the sense intended by the defendant. As a question of intent, it was peculiarly a question for the jury. This was practically, if not expressly, the question submitted, and we think properly submitted, to the jury; and we cannot say, after a careful reading of the record, that there was nothing in the facts or circumstances proved in the case, to warrant the jury in determining it as they did.

The defendant, as plaintiff in error, has objected in his argument here, that plaintiff was permitted to give in evidence an alleged representation by defendant's agent, when urging that 6 and 8 per cent., when added to the pattern weights, would represent the actual weight, that this had been so under a similar contract with the Walworth Run people, during a period of five years. Such a representation, if made, was clearly as to the existence of a past fact. The objection urged is, that this particular representation is not set forth in the declaration, and its admission contravenes the rule, that the probata must agree with the allegata. It may be doubted whether, in an action of deceit, a plaintiff should be permitted to set up a false representation, of which, by his declaration, he has given the defendant no notice. No objection, however, was made at the trial to the admission of this evidence, and there is, in consequence, no assignment of error in that regard. If, however, we are at liberty to disregard it, when considering whether, on all the evidence, binding instructions

should have been given in favor of the defendant, we are clearly of opinion that it should not be so excluded. The Walworth Run experience was not a distinctive matter, but a part of the general statement as to false representations outlined, but not given in totidem verbis, in the declaration.

Further objection is made by plaintiff in error, that there was no evidence to show that the alleged false statements of material facts were made with knowledge of their falsity. From what has been already said, it is manifest that the representations alleged and proved to have been made by defendant's agent, related to facts peculiarly within the knowledge of the defendant. A five-years' experience as to similar contracts with the Walworth Run people, was a fact which warranted an inference by the jury of such knowledge. An action of deceit may be supported by proof of representations made by the defendant, to influence the action or conduct of the plaintiff, if defendant was consciously ignorant, or recklessly indifferent, as to whether they were true or false. While the court below failed to adequately charge the jury in regard to this point, in the view here taken, no injury could have been done the defendant on that account.

Finding no error in the refusal of the court below to give binding instructions to the jury in favor of the defendant, or in the charge of the court as to the general law applicable to the case, we are nevertheless compelled to the conclusion that the judgment below must be reversed upon the first specification of error, which is:

"The learned court erred in refusing to affirm defendant's third point or request for charge to the jury, which was as follows: (3) The item for loss in the amount of loss sustained by the plaintiff in the depreciation of iron cannot be considered by the jury, for the reason that the plaintiff failed to show how much of the iron purchased by it was used in performing the contract before the rescission by the plaintiff, or how much was used before (or after) the rescission for any other purpose, and at what price any definite portion of it was used."

As an item of damage, the declaration set forth a purchase (presumably between January and April, 1903) of 350 tons of iron, for the purpose of performing the contract at prices varying from $26 to $22.90 per ton, the whole purchase money aggregating $8,385; that later, the value of the iron was $15 and $16 per ton, or $5,500 in all. This sum was subtracted from the former, and the difference of $2,885 is claimed as the loss on this item. At the trial, it was proved that the iron was purchased after the making of the contract in January, and before April, at the prices stated in the declaration, and that the price of iron went down gradually from that time until December, when it reached $15 or $16 per ton, or even lower. The only figures submitted to the jury to show a loss on this item, were those stated in the declaration,—that is, the difference between the price at which the iron was purchased previous to the rescission and what the same iron could be purchased for at the low price it had reached in December, 1903, a difference of about $10 a ton. It was shown on cross-examination of plaintiff's witnesses, that this depreciation in price of iron from April, 1903, to December, 1903, was a gradual one; that in July, 1903, it had gone down $2.90 per ton, and that in

August it had gone down $3 a ton, and so on. The work of producing the castings was undertaken by the plaintiff in May, 1903, and the letter of rescission was written on the 22d of the following June. Forty-one furnaces had been completed, and some iron had been wasted in defective castings, which was in consequence scrapped. No testimony was given or offered by the plaintiff, to show how much of the iron purchased had been actually used before the rescission, in making the said completed furnaces, or how much had been used in the defective castings, afterwards scrapped, nor was it shown definitely, how much of the iron so purchased was used after the rescission, or whether any or how much had been used, when the price had only fallen $3 per ton, or in what way or at what times any of the said iron was manufactured or used by the plaintiff.

As this item of loss, as stated by the plaintiff on the basis of the difference between the purchase price and the market price, in December, 1903, constituted two-thirds of the damages claimed, it was incumbent upon plaintiff to show, by competent testimony, to the jury the particulars above mentioned. There is no direct evidence of the quantity of iron on hand and unused after the rescission, and no evidence at what dates such iron was afterwards used, or what the market price thereof was at the dates of using. The plaintiff cannot be permitted in such a case to submit so important a matter to the mere conjecture and speculation of a jury, with no adequate data for ascertaining the real loss suffered.

We think, therefore, the court was in error in refusing the third request for charge to the jury, made by the defendant, as above quoted, and in permitting the misleading and insufficient testimony, upon which we have just commented, to go to the jury, without any word of explanation or caution.

The fifth assignment of error is as follows:

"The learned court erred in not sustaining the objection of the defendant to the question asked the witness, James D. Hay, by counsel for the plaintiff, at the end of the following quotation of the notes of his testimony: 'Q. Are you a competent foundryman, Mr. Hay? A. I am not the best. Q. Are you competent to testify as to whether this can be done, whether these castings can be made within the works that was specified or not, yourself? A. That I couldn't do it I don't believe. Q. But are you competent to say whether it could be done? A. I just could give my opinion, that is all. Q. What class of moulders did you have working at this work? A. I had the best moulders I could find in the city of Erie or anywhere. Q. How was your foreman? A. My foreman is a good moulder. He has worked at it for over twenty years, and I got the best moulders, men that were experienced in this business. If there was a good moulder, I said get him, it don't make any difference what you pay. I immediately raised the price on those fellows, and said pay them $3.00 a day; we are going to make these furnaces for Mr. Mueller if we can do it, and I stood faithfully by it, too. Q. Now, then, after this work and your experience, what do you say to the jury about those furnaces being made at 6 per cent. and 8 per cent. above the pattern weights? A. It can't be done.'"

Mr. Hay, when first called as a witness, had testified that he was president of the Cascade Foundry Company, but that prior to that, he had been register and recorder of Erie county, and that he had not had any experience in castings.

The qualifications of a witness to testify as to his opinion, must be

passed upon by the court, and the discretion of the trial judge is necessarily a wide one, and not reviewable, except in case of manifest mistake. If it were not that the judgment below must be reversed on other grounds, we would hesitate to deal with a question resting so largely within the discretion of the trial judge, but in view of a possible new trial, we should perhaps not pass this assignment, without expressing our opinion, that the learned judge of the court below was in error, in permitting this witness to testify as to his opinion upon such evidence as to his qualifications to do so as is disclosed by the record.

For these reasons, the judgment below is reversed, and the case is remanded to the Circuit Court, with instructions to grant a venire de novo.

CITY OF MEMPHIS v. POSTAL TELEGRAPH CABLE CO.

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

No. 1,503.

1. REMOVAL OF CAUSES—JURISDICTION—AMOUNT IN CONTROVERSY.
Where a suit was brought by a city against a telegraph company to recover $1,772 for street rentals for the maintainance of defendant's poles and wires and the bill prayed for the payment of the rentals or forfeiture of defendant's rights in the streets, and that its occupation thereof should cease, the matter in controversy was not necessarily limited to the amount of the money sought to be recovered, and hence a verified removal petition stating that the value of the matter in controversy was more than $2,000 sufficiently showed that the amount in controversy was sufficient to confer federal jurisdiction.

[Ed. Note.—Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennant-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.]

2. MUNICIPAL CORPORATIONS—CONTROL OF STREETS—USE BY TELEGRAPH COMPANIES—RENTALS—STATUTES.
Acts Tenn. 1879, p. 14, c. 10, § 4, provided that public streets and other property used by a municipal corporation for municipal purposes were thereby transferred to the custody and control of the state to remain public property for the uses to which it had previously been applied. Chapter 11, § 3 (p. 16), then declared that the city of Memphis was given power to repair all streets and other public grounds and places within the taxing district, to open, close, and widen and have entire control over all streets of the taxing district. *Held*, that such act conferred full power on the city to demand and receive compensation for the use of its streets by a telegraph company for the erection of the poles and wires.

3. SAME.
Such power was not nullified by Acts Tenn. 1885, p. 120, c. 66, § 1, authorizing any telegraph company to maintain its line along and over the public highways and streets of the cities and towns of the state and over any lands or public works belonging to the state.

4. EQUITY—LIMITATIONS—DEMURRER.
That a portion of the relief demanded by complainant in a suit in equity is barred by limitations may be raised by demurrer.

5. TELEGRAPHS—FRANCHISE—STATUTES—CONTRACT WITH STATE.
Acts Tenn. 1885, p. 120, c. 66, providing that any telegraph company may construct, operate, and maintain its line over and along the public highways and streets of the cities and towns of the state or across and

over any lands or public works belonging to the state, did not operate as a contractual franchise between the state and a telegraph company seeking to maintain its poles and wires along the streets of a city without paying a rental therefor if demanded by the city.

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

For opinion below, see 139 Fed. 707.

Jas. L. McRee, for appellant.

Metcalf, Minor & Metcalf (J. W. Buchanan and Felder & Rountree, of counsel), for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges, and McCALL, District Judge.

SEVERENS, Circuit Judge. The bill in this case was filed in the chancery court of Shelby county, Tennessee. The cause was removed on the ground of diverse citizenship of the parties by the Postal Telegraph Cable Company from that court into the United States Circuit Court for the Western District of Tennessee, where the defendants demurred to the bill. The latter court sustained the demurrer and dismissed the bill. The object of the suit was to enforce certain ordinances of the city of Memphis, passed December 20, 1894, and January 28, 1902, respectively, requiring the payment of rentals by telegraph companies operating in, and occupying the streets and other public places in the city with its poles and wires, and declaring that a failure to make payment of the rentals within a specified time should operate as a revocation of the license to use and occupy the streets. The rental required by the first of the ordinances was fixed at $2 per annum for each pole erected by the company, and that required by the ordinance of 1902 was fixed at $3. The bill alleges that the defendant had used and occupied with its poles and wires the streets of the city, and that payment of the rentals for the years from 1894 to 1902, inclusive of those years, amounting to $1,772, had been demanded of the company and refused, and the bill prayed for a decree for the payment of the rentals, or that the rights of the defendant in the streets be decreed forfeited, and that its occupation thereof should cease and determine, and for such other general and special relief as to the court might seem fit and proper. A statute of Tennessee authorizes the filing of a bill in equity to recover such charges as those here involved, and the question occurred to us upon the argument whether on the removal of the cause into the Circuit Court of the United States it should not have been assigned to its law docket on the theory that the suit was for a money demand. As respects the amount involved, the petition, which is sworn to, states that the value of the matter in controversy is more than $2,000, which may well be. The bill involves more than a money demand and asks, in a certain contingency, a decree ousting the telegraph company from the streets, a species of relief which could not be had at law. Moreover, no question as to the propriety of the exercise of the jurisdiction of a court of equity in the case has at any time been raised in the court below or in this court and the substantial question involved in the controversy

so far as the recovery of the rentals is concerned would be determined on the same principles whether presented in a court of law or in a court of equity. Upon a consideration of all these facts we have concluded that we ought not on our own motion to turn the parties back without decision here to a trial on the law side of the court. The question is one, not of the power of the court, but of fitness and expediency, and stands upon a different footing from what it would have done if it had been presented and considered at an earlier stage of the case. The grounds of the demurrer interposed by the defendant were, as assigned, these:

"(1) It appears from the said bill that the pole rental sought to be recovered is demanded by the city of Memphis, the plaintiff, by virtue of an ordinance of said city without any authority therefor from the state of Tennessee. (2) The control of streets and highways in the state of Tennessee rests in the said state and the bill fails to show any authority from the state to the plaintiff for exacting the rental sought to be recovered. (3) The city of Memphis, plaintiff, had no authority to enact the ordinance under which said pole rentals are demanded. (4) The said defendant further demurs to so much of said bill as seeks to recover for the period between December 20, 1894, and June 4, 1896, for that portion of said demand is barred by the statute of limitations. (5) The charge sought to be collected is a tax and unconstitutional as in violation of the Constitution of Tennessee, and of the United States."

The first three of these are all involved in the general question whether the city had lawful authority to impose this charge upon the defendant. The Legislature of Tennessee at its session in 1869–70 passed an act entitled "An act to reduce the charter of Memphis and the several acts amendatory thereof into one act, and to revise the same." Chapter 26, p. 225, Acts Tenn. 1869–70. Section 1 of this act granted to the city the right "to own and hold property, real, personal and mixed;" and declared that "all right, title, and interest in, and to use, all real estate within the limits of the said city which may hereafter be dedicated, donated or granted to any public use shall be vested in the corporation of the city of Memphis for the said use" and "that the city council may do all other things as a natural person." In 1879 the Legislature passed other acts relating to the power of the city. Section 4, c. 10, p. 14, of the acts of that year. "The public buildings, squares, promenades, wharfs, streets, alleys, parks, and fire engines—and all other property real and personal hitherto used by said corporation for municipal purposes are hereby transferred to the custody and control of the state, to remain public property as it has always been, for the uses to which said property has hitherto been applied." Then by section 3 of the following chapter (chapter 11, page 16), the city of Memphis is given power "to repair and keep in repair, streets, sidewalks, and other public grounds and places in the taxing district; to open and widen streets, to change the location or close the same and to lay off new streets and alleys when necessary; and to have and exercise entire control over all streets and other public property of the taxing district." And by section 14 (page 25) of the same chapter it is declared "that the fire engines (and equipment), engine houses, public buildings, public grounds, parks, promenades, wharves, streets, alleys * * * and all other property, real and personal, hitherto used by such corporations for purposes of govern-

ment, are hereby transferred to the custody and control of said board of commissioners," meaning the board of fire and police commissioners of the city.

It is seen that by the act of 1879 "the entire control" of the streets was granted by the Legislature to the city of Memphis. And we think that for reasons hereafter noted this grant of power included the power to demand and receive compensation for facilities afforded for a use and occupation not enjoyed by the general public. But it is claimed by the defendant that this grant of authority was superseded and rendered null so far as telegraph and telephone companies are concerned by the act of 1885, p. 120, c. 66, the first section of which provides that any such company "may construct, operate and maintain such telegraph, telephone or other lines necessary for the speedy transmission of intelligence along and over the public highways and streets of the cities and towns of this state, or across and under the waters and over any lands or public works belonging to this state." Our attention is called to the fact that in the prior statute (Milliken & V. Code, § 1535), relating to the same subject, such companies were granted this privilege "free of charge" as expressed therein, while in the act of 1885 these words were omitted. It is contended by the city that the Legislature by the act of 1885, which is a general statute, did not intend to resume the power of control of its streets which it had given to the city of Memphis by the act of 1869–70, and that the general law operates only as a permission, to exercise in the streets of Memphis the franchises granted to telegraph companies subject to the control which it had already granted to the city. We think that this contention should be sustained, first, upon the ground of the familiar rule of construction that a statute general in its terms will not repeal by implication a particular statute relating to some particular matter or locality unless the intention of the Legislature to repeal the special act shall plainly appear. We had occasion to consider this subject with special attention in Guthrie v. Sparks, 131 Fed. 443, 65 C. C. A. 427, where we said:

"The general rule is that an act which relates to a particular subject is not repealed by a later one which is general in its terms, but would include the particular case if that were not already provided for. The exception to this rule is that, if it plainly appears that the later general statute was intended to cover the particular case, and hold sway in place of the former act, the latter must be regarded as repealed by implication. But as repeals by implication are not favored the intent to repeal must plainly appear."

And we referred to several cases in the Supreme Court in support of this statement. In Sutherland on Statutory Construction (2d Ed.) § 275, it is said that:

"Unless there is a plain indication of an intent that the general Act shall repeal the other, it will continue to have effect, and the general words with which it conflicts will be restrained and modified accordingly."

This statement has a peculiar adaptation to the case before us. Again, there are certain special reasons for thinking that the Legislature could not have intended to displace the "entire control" of the streets which it had committed to the city. No one doubts, we sup-

pose, that the power to charge a telegraph company with a proportion of the cost of making and keeping in repair and policing a street of the city was lodged somewhere. And if so, no place was so appropriate for lodging it as in the city itself. It alone was obliged to bear the whole cost of maintenance. The share of the cost of maintenance for public use belonged to the city. The share due from the telegraph company for its special use was also due to the city, for the latter was carrying it, and its treasury should be reimbursed. It was a local matter and could be most conveniently attended to by the officials of the municipality who would be best informed of the circumstances and by all analogies the proper persons to assess and collect the charge. It would belong to no other public fund. It was therefore perfectly reasonable that the city should possess the authority to make and collect such a charge, and rather unreasonable that it should be committed to any other depositary of governmental authority. And there is no machinery provided by statute for the levy and collection of such charges by the state, and there was none when the Legislature passed the act of 1885. These seem to us strong reasons for believing that the Legislature had no intention of reserving to the state the power to charge the telegraph company for its proportion of the cost of maintaining the streets of the city of Memphis, but rather that it intended to leave that matter with the authority to which it had granted the power of control possessed by the state. The grant of "entire control" seems even a more absolute delegation of power than the power "to regulate," which was held in St. Louis v. Western Union Tel. Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380, and 149 U. S. 465, 13 Sup. Ct. 990, 37 L. Ed. 810, to authorize the city of St. Louis to assess and collect a like charge for the use of the streets for the maintenance of the structures of a telegraph company. Indeed that case, if we are right in thinking that the Tennessee Act of 1885 did not deprive the city of the control of its streets in this regard, is ample authority for holding that it had power to levy and collect the charges in question, the reasonableness of them not being now disputed; and the case of Postal Telegraph Co. v. Baltimore, 79 Md. 502, 29 Atl. 819, 24 L. R. A. 161, affirmed by the Supreme Court of the United States in 156 U. S. 210, 15 Sup. Ct. 356, 39 L. Ed. 399, is directly in point. See also further discussion of the subject in Western Union Tel. Co. v. Borough of New Hope, 187 U. S. 419, 23 Sup. Ct. 204, 47 L. Ed. 240, and Atlantic & Pacific Tel. Co. v. Philadelphia, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995, and in Western Union Tel. Co. v. Pennsylvania R. R. Co., 195 U S. 566, 25 Sup. Ct. 133, 49 L. Ed. 312.

It is argued that this charge is a tax, and that the city of Memphis is not empowered to levy a tax not specified in its charter. But although such charges as these are sometimes called "taxes," they are not such as are generally meant in constitutions and statutes by that term. But by whatever name called, the power to impose them was given to the city by the grant of "entire control" over its streets. If there is a burden imposed upon abutting owners by the structures of the telegraph company, that is a matter between those parties, and is irrelevant to the subject of the present controversy.

The fourth ground assigned for demurrer was this: "The said defendant further demurs to so much of said bill as seeks to recover for the period between December 20, 1894, and January 4, 1896, for that period of said demand is barred by the statute of limitations." The Tennessee statute of limitations bars the recovery for such a demand after six years, and the yearly rental falling due December 20, 1895, would be affected by this limitation. The general rule is that in actions at law, the defendant must raise the defense by plea, and that it cannot be presented by a demurrer, for the reason that the plaintiff would then be cut off from his right to reply and prove matter in avoidance. Allen v. Word, 6 Humph. (Tenn.) 284. But the rule is different in equity, where the pleadings end in the formal replication, which denies the matters or the sufficiency of the matters set up in the answer; and the defense may be made by demurrer. Wyatt v. Luton, 10 Heisk. (Tenn.) 458; Dunlap v. Gibbs, 4 Yerg. (Tenn.) 94.

The fifth ground of demurrer is that the charge sought to be collected is "in violation of the Constitution of Tennessee and of the United States." But what provision of either of those instruments this charge infringed is not pointed out, and we are unable to apprehend what it may be, unless it is that a supposed contract was created between the state and the telegraph company by the act of 1885 and the action of the telegraph company thereunder, which is impaired by the city of Memphis in imposing this charge. But for the reasons stated we think that upon the proper construction of the act of 1885 the state did not propose to contract for an immunity to the telegraph company for charges of this character. As this appeal brings here only the questions raised by the demurrer we deal with nothing else.

The decree of the court below is reversed, with costs, except as to that part of the bill which seeks to recover the annual rental charge falling due December 20, 1895, as to which it is affirmed.

MAYOR, ETC., OF CITY OF NASHVILLE, TENN., v. CUMBERLAND TELEPHONE & TELEGRAPH CO.

(Circuit Court of Appeals, Sixth Circuit. June 5, 1906.)

No. 1,507.

MUNICIPAL CORPORATIONS—TAXATION—TELEPHONE COMPANY—CONTRACT WITH CITY CONSTRUED.

An ordinance granting a franchise to a telephone company to construct and operate its plant and the right to maintain its poles and wires in the streets contained a provision that the company should pay to the city annually a stated sum for each box in use by it, "in lieu of all other taxes except water tax." Under the Constitution and statutes of the state, the city had no power to exempt property from ad valorem taxation, but was expressly prohibited from doing so. *Held* that, in view of such limitation and of the rule that, where a statute or an ordinance is capable of two constructions, one of which would make it valid and the other void, the former is to be adopted, such provision must be construed as providing the box tax as the measure of the municipal taxes or charges which might be imposed by the city on account of the use and occupation of its streets

and public places; that, as so construed, it was valid, and the payment of the tax therein provided for did not affect the right and duty of the city to tax the property of the company as assessed by the state for general purposes.

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

Hill McAlister and Edward J. Smith, for appellant.
William L. Granbery, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. For some time prior to October 16, 1888, the Cumberland Telephone & Telegraph Company had maintained and operated in the city of Nashville a telephone exchange under a revocable license. On that day the mayor and city council of the city passed an ordinance granting to the company the right to erect and maintain in the city a telephone plant. The ordinance was accepted by the company October 25, 1888. The first and sixth sections of the ordinance are the sections most involved in the present controversy. They are as follows:

"Section 1. That the Cumberland Telephone & Telegraph Company be and is hereby granted the right to erect and maintain in operation telegraph poles, cables, and wires over the various streets, alleys, and squares of the city, and cables and wires over the Cumberland river bridge, for the purpose of transmitting messages by telephone."

"Sec. 6. That said Telephone & Telegraph Company shall pay directly to the city comptroller each year, in lieu of all other taxes except water tax, one dollar on each and every box actually in use, said tax to be paid quarterly."

By another section the city was given the right to string the wires for the maintenance of the city's fire alarm system on the poles of the company. Since that time the company has paid the one dollar per box tax or charge, as stipulated in the sixth section, and also the general taxes assessed upon its real estate and office furniture in the city. For the years 1897, 1898, 1899, and 1900, the state board of assessors, in pursuance of a general law of the state, assessed the distributable property, the poles, wires, and accessories, according to its value, and certified its assessment to the tax assessor for the city of Nashville for the levy and collection of taxes for the purposes of the city. These taxes amount in the aggregate to the sum of $4,970.78, together with interest and penalties prescribed by law. The company has declined to pay these taxes or any part of them. The city brought this suit in the state chancery court to enforce the payment thereof, and the company, being a Kentucky corporation, removed the cause into the Circuit Court of the United States, where, the pleadings being reformed, it filed an answer denying its liability to pay the taxes sued for, and also filed a cross-petition, praying that it be allowed to set-off the sums which it had paid as one dollar per box charges specified in the sixth section of the ordinance above mentioned. The court below held and adjudged that the company was liable to pay the ad valorem taxes sued for, but that it was entitled to recover the sums paid on account of the one dollar per box charge, and to set the same off against the ad valorem taxes sued for by the city. The amount of the set-off somewhat exceeded the amount due the city, but, the defendant having waived a judgment for the ex-

cess, the suit of the city was dismissed. The costs were divided equally between the parties. The city appeals from the allowance of the set-off. The company does not appeal.

No question is raised as to the regularity of the proceedings for the assessment of the ad valorem taxes or the liability of the company to pay them, if the city is not precluded from claiming them by its stipulation to accept the one dollar per box tax in lieu of all other taxes except water taxes. The contention of the company is that the city stipulated to waive all other taxes than the one dollar per box tax and water taxes, and that it is estopped from claiming to recover this ad valorem tax; or, that if it is not so estopped, the stipulation of the company to pay the one dollar per box tax is void, and that it is entitled to recover what it has paid upon the understanding that that was to be in lieu of all other taxes except water taxes, about which no controversy has arisen. The contention of the city is that, upon the proper construction of the sixth section of the ordinance, it cannot be held to have intended, or the company be supposed to have expected, that it was thereby obtaining immunity from general taxation, but only such as the city itself had rightful authority to impose. We think, for reasons presently to be stated, that the position of the city should be sustained.

1. The city had no power to grant immunity from general taxes levied and collected by the direct authority of the state. The Constitution of the state (section 28, art. 2) requires that "All property, real, personal, or mixed, shall be taxed." And section 20 of the charter of the city provides that "no municipality controlled by this act shall exempt any property from taxation not exempt from state taxation." The purpose is that there shall be equality in the burden of taxation of all property in the state and this applies to municipalities as well as to the state. Counsel for the company frankly says in his brief: "The telephone company also concedes that the city has no right, by contract or otherwise, to exempt property from ad valorem taxes." But he contends that under its agreement the city cannot do both; that is, collect the one dollar per box tax and the ad valorem tax also. The city was bound to regard the limitations upon its power imposed by its charter, and the company was bound to know the charter limitation of the city, for it was a public law, and that the city had not the power to grant an immunity from ad valorem taxes imposed under the general law of the state. In the face of this presumed knowledge of the parties, what did they mean by the provision that the company should pay one dollar per box annually, and that this should be in lieu of all other taxes except water taxes? To construe this language as importing an agreement that the city would violate an express provision of its charter is altogether unreasonable, and cannot be admitted. To construe the language as intending to include those taxes or charges which the parties had power to contract about, and not those things which were wholly beyond their control, is not only a reasonable, but we think a natural, construction of their language. Among the "taxes" which they had in mind were "water taxes," and these were ejusdem generis with those from which they were excepted.

2. There were various local "taxes" or charges to which the company was at the instance of the city liable to be subjected. Such as, for in-

stance, for inspection of the plant and policing the streets, a privilege tax, which at that time, and until 1895, the city had power to impose (see subsection 2 of section 14 of chapter 114 of its charter); and a tax for its use and occupation of the streets and public places of the city, which by virtue of the control given to it by subsections 9 and 28 of said chapter 114, and its obligation to repair and keep in order, the city might require of the company, as we held in City of Memphis v. Postal Telegraph Cable Co. (recently decided [C. C.] 139 Fed. 707), upon the authority of St. Louis v. Western Union Tel. Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380, and later cases decided by the Supreme Court. Thus the language, "all other taxes except water taxes," had a number of objects to which it was referable, and no word of the ordinance would fail to be operative. It is a familiar canon in the construction of statutes that if the language be susceptible of two constructions, one of which would make it valid and the other void, the former will be adopted. 1 Sutherland, Stat. Constr., § 83; Dugger v. Insurance Co., 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796; State v. Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941. The same rule is applicable to ordinances. Merriam v. New Orleans, 14 La. Ann. 318. "An ordinance is frequently capable of two constructions, one of which will bring it within the limits of the power conferred upon a corporation, another of which would invalidate it. That one should be adopted which gives effect to the ordinance." Horr & Bemis, Municipal Police Ordinances, § 193.

3. It is also to be observed in this connection that the parties used the word "taxes" in section 6 of the ordinance in the wide sense of a tribute exacted by public authority in compensation for a benefit or advantage enjoyed by a party under a grant of or permission to exercise some privilege extended to him. This ordinance was adopted in 1888. Four or five years later Mr. Justice Brewer, in delivering the opinion of the Supreme Court in St. Louis v. Western Union Tel. Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380, for the first time distinguished clearly such "charges" as are permissible for the use of public property, as streets, for private purposes, as for telephone and telegraph services, and "taxes" in the proper sense of that word. It is noteworthy that in that case the telegraph company was objecting to the charges because they were "taxes," and in the Circuit Court they were characterized as, and held to be, such; and in this sixth section the language employed denotes that the one dollar per box to be paid by the company was contemplated as a tax, for this payment is to be in lieu of "all other taxes" except water taxes. It was competent for the city to measure the compensation to be made to it for the privilege of occupying its streets with the structures of the company by the number of boxes used, instead of the number of poles, as has been practiced in some other cities. There is no complaint that the method of measuring the compensation to the city is not reasonable and fair, nor could there be, for the company assented to it. The controversy is upon the larger grounds which have been herein stated. The construction which we think should properly be given to the sixth section of the ordinance of October 16, 1888, disposes of the appeal. It seems clear to us, first, that the city did not

undertake to grant to the company an immunity against the payment of general and ad valorem taxes, and, second, that it was competent for the city to agree with the company upon the amount to be paid by the latter for or in lieu of all taxes or charges which the city had lawful authority to impose upon it on account of its use and occupation of the streets and other public places of the city.

It results from these conclusions that the judgment of the Circuit Court should be reversed, and that the Circuit Court should be directed to enter a judgment in favor of the plaintiff for the amount of said several ad valorem taxes for the years 1897, 1898, 1899, and 1900, as assessed, with interest on the amount of such taxes for each several year from the time when they should have been paid to the entry of the judgment, including all penalties prescribed by law for failure to pay such taxes when due.

It is so ordered.

LYLE v. ALABAMA GREAT SOUTHERN RY. CO.

(Circuit Court of Appeals, Sixth Circuit. May 5, 1906.)

No. 1,480.

MASTER AND SERVANT—ACTION FOR KILLING OF BRAKEMAN—QUESTIONS FOR JURY.

Plaintiff's intestate, a brakeman, when attending to the coupling of two freight cars, on one of which he was riding, stepped upon the bumper of such car which was loose and turned, throwing him to the track where he was run over and fatally injured. In an action to recover for his death on the ground of defendant's negligence in failing to inspect the bumper and keep it in repair, there was evidence tending to show, not only a custom of brakemen in performing the duty in which deceased was engaged to step upon the bumpers, but also that in the particular case it was necessary for him to do so in order to get off the car and make the coupling. *Held*, that such evidence presented questions for the jury, and that it was error to direct a verdict for defendant on the ground that the bumper was not intended to be used as a step and defendant therefore owed no duty of inspection to deceased, but his death was due to his own negligence in using it for an illegitimate purpose.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1020.]

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

Samuel Bosworth Smith, for plaintiff in error.

Lewis Shepherd, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit to recover damages for the wrongful death of the plaintiff's intestate, one Milton Lyle, a brakeman killed while in the employ of the defendant company. The court directed a verdict for the defendant. The question is whether the case should have gone to the jury. The defendant was charged with negligence in permitting a bumper on a gondola car to become loose and out of repair, so that when Lyle stepped upon it, it turned,

and he was thrown to the ground and run over; also in not making a proper inspection which would have disclosed the defect. In giving the peremptory instruction, the court sustained the position of the defense, that the bumper was intended solely to receive and lessen the shock of meeting cars, and not, under any circumstances, as a foothold or part of the platform; therefore, the company was not obliged to inspect the bumper with a view of ascertaining whether it was firm, and Lyle, in stepping upon it as he did, was attempting to put it to an illegitimate use, for the result of which the company could not be held responsible. In other words, it was the negligence of Lyle, and not that of the company, which caused the accident.

The accident occurred while a number of freight cars were being made up for delivery on the belt line at Chattanooga. A switch engine had thrown one car on the track and then "kicked" another car, gondola No. 4,515, down the track toward the standing car, for the purpose of coupling the two together. Lyle was standing on the forward end of the moving car for the purpose of controlling its approach and attending to the coupling. The car was equipped with an automatic drawhead or coupler. On each side of the drawhead was a bumper (or buffer or deadwood), placed there to receive the shock of the meeting cars and protect the drawhead. Each bumper was made of cast iron and was fastened to the car by a rod which passed through its center, and was held in place by a nut underneath the car. With the nut tight, the buffer was stationary and firm, being held in place by lugs which were set into the sill, but if the nut became loose, the lugs would cease to hold and the buffer turn on the rod. The sill or platform of the car was about 12 inches deep, and at the right of the bumper, attached to the outside of the sill, was a brake, the staff of which originally stood up straight, with a brake wheel at the upper end, 15 inches in diameter. A rod from the automatic coupler ran past the brake to the corner of the car. This rod, which acted as a lever, could be manipulated by a brakeman standing on the ground, for the purpose of putting the drawhead in position to couple. On that side of the car near the corner was a stirrup or step used to get on and off the car. As we have stated, Lyle rode down on the forward end of this gondola. While it was still moving slowly, he stepped on the loose bumper, which turned with him, and he was thrown on the track and run over, receiving fatal injuries.

The question is whether he had a right, under the circumstances, to use this bumper as a foothold, relying upon its being in repair and firm and stationary. If he did, the company should have inspected it and kept it firm and stationary, or so marked it as to indicate that it was not firm and stationary. If he did not, there was no duty of inspection for the purpose indicated, and Lyle was guilty of contributory negligence in using the bumper for an illegitimate purpose. In determining this question, or rather in determining whether the court below was correct in deciding it in favor of the company, it has been necessary to examine carefully the testimony in the case. Upon three material points the testimony is conflicting: First, as to what Lyle actually did, whether he stepped upon the bumper for the purpose of go-

ing around the brake, or of jumping off the car; second, as to the necessity of his getting off the car before it struck the other one; and, third, as to the possibility of his passing behind the brake wheel, and between it and the end of the car.

Upon the first point, a witness for the plaintiff testified that Lyle, immediately after he was injured, in answer to the question, "How did it happen?" said "he went to go around the brake wheel and stepped on the bumper and it turned with him." One witness for the defendant testified that Lyle said after the accident, that "he attempted to jump down and the bumper turned with him." Another, that he said "he stepped on the buffer to get off the car and it turned with him." In view of this conflicting testimony, it was within the province of the jury to accept the statement of the witness for the plaintiff as to what Lyle said he was doing.

As to the second point, the necessity of his getting off the car while it was still in motion, it appears from the testimony that this would depend upon whether he knew at the time that the automatic coupler on both cars were properly set to couple. The knuckles or jaws might be open or they might not, and a brakeman might know of their exact condition or he might not. If there was any uncertainty, it then became necessary for him, after regulating the motion of the car, to pass to the stirrup or step, and get off, so as to manipulate the lever or rod from the ground. There was such a conflict upon this point that the question was clearly one for the jury.

As to the third question, the possibility of passing behind the brake wheel, and between it and the end of the car, two witnesses employed at the plant where the car was delivered after the accident, one its superintendent, and the other the shipping foreman, both testified that they were on the car the day after the accident, and attempted to pass behind the brake wheel but could not. It is true some photographs of the car were taken two years after the accident, showing that at that time a person was able to pass behind the brake wheel, but the photographs, as well as the testimony, showed that at that time the brake rod had been bent outward from the end of the car, so that there were four or five inches more space between the brake wheel and the car than there was when the brake staff was standing perpendicular. Four or five inches might readily make the difference between being able to squeeze through and being obliged to go around.

Taking the view of the evidence most favorable to the plaintiff, we have a case where the brakeman stepped upon a bumper in order to get around the brake and reach the stirrup or step used to get off the car. He did this because it was necessary for him to reach the ground in order to be ready to manipulate the lever which controlled the couplers, and he went around the brake because there was no room for him to go between the brake wheel and the end of the car. Along with these facts, we have the custom which certainly obtained on this belt line, of using the bumper as a foothold in going around the brake. All the brakemen testified to it, and it would seem a custom natural enough in the lack of room between the brake wheel and car to pass that way.

It is to be observed that this is not a case where, an appliance having been furnished for the purpose under consideration, the employé illegitimately used another furnished solely for a different purpose, as in The Persian Monarch, 55 Fed. 333, 5 C. C. A. 117, and Maxfield v. Graveson, 131 Fed. 841, 65 C. C. A. 595, and cases cited. Under the view which the jury might have taken, there was no way provided for the brakeman to get from the inside to the outside of the brake, except by going around it, and in doing so, the natural thing was to step on the bumper. The custom grew out of the exigency of the situation, and must have been known to the railway company. At any rate, the jury might have so found, and that, under the circumstances, the company was guilty of negligence in not inspecting the bumpers to find whether they were safe, and in not keeping them safe for such use. 1 LaBatt Master & Servant, § 28; Lauter v. Duckworth (1897), 19 Ind. App. 535, 48 N. E. 864; Coates v. R. R., 153 Mass. 297, 26 N. E. 864, 10 L. R. A. 769; Coley v. R. R., 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817; Dunn v. R. R., 107 Fed. 666, 46 C. C. A. 546; Miller v. Ry. (C. C.) 17 Fed. 67; Young v. R. R., 69 N. H. 356, 41 Atl. 268.

Believing the case was one for the jury, the judgment is reversed, and the cause remanded for a new trial.

THE FLUSHING.

(Circuit Court of Appeals, Second Circuit. April 2, 1906.)

Nos. 182, 183.

1. TOWAGE—LIABILITY OF TUG FOR LOSS OF TOW—INSUFFICIENT ANCHOR.
   A finding by the trial court that where barges being towed in Long Island Sound were without anchors, as was often the case, it was the custom for the tug to furnish them anchors when required, *held* sustained by the evidence, as also a finding that a tug was negligent in failing to furnish to barges in its tow, left while it distributed other tows, an anchor sufficient to hold them in ordinary weather which rendered it liable for their loss by dragging the anchor and drifting on the rocks.
2. SAME—CUSTOM OF TUG TO FURNISH ANCHOR FOR TOW—LIABILITY FOR NEGLIGENT USE.
   Where a tug furnishes an anchor and cable for the use of a tow which is without one, although in accordance with a custom in such cases, it is in effect, a loan, and the tug is not responsible for the manner in which the anchor is used by the tow.

   Lacombe, Circuit Judge, dissenting.

Appeals from the District Court of the United States from the Eastern District of New York.

These causes come here upon appeals from decrees of the United States District Court for the Eastern District of New York, dividing damages and costs in a case of towage. The opinion of the court below is reported in 134 Fed. 757.

La Roy S. Gove, for appellant.

Martin A. Ryan, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. The opinion of the court below fully and accurately states the facts whereon it reached the conclusion that the libelants' barges were negligent in not providing themselves with anchors, and that, in such cases, it was the custom of the tug to furnish an anchor for her tows, and that the tug was negligent in leaving the barges with an insufficient anchor, and that, if the captain of the barge Rogers was negligent in paying out the line of the anchor which was furnished by the tug, this was the negligence of the tug. The libelants have not appealed, and the faults charged against the tug by claimant, other than those sustained by the court, as above, are discussed by the court in its opinion and disposed of adversely to the contention of the claimant and in accordance with the weight of the conflicting evidence.

The questions here presented for review are whether it is customary for tugs to furnish anchors in such cases, and as to the alleged negligence in handling the anchor furnished by the tug. There is an irreconcilable conflict of testimony as to custom. These boats were Erie Canal scows or lakers, belonging in the ordinary class of coal barges. It appears to be customary for boats of this class which go down east or farther north than Long Island Sound to carry their own anchors. Five witnesses for libelants testify that such boats when running up the Sound never carry anchors, but that the tug always supplies one; five witnesses for claimant testify that it is customary for such boats to carry their own anchors; one of libelants' witnesses carried such an anchor on his own boat; another had occasionally seen them on such boats. One witness for claimant testified that, of the boats towed by him, nineteen, owned by one company, were fitted with anchors, and that his tugboat supplied the anchors for three boats belonging to another party, and that:

"Pretty much all the boats that run there [to Greenwich or Stamford] as a regular thing carry anchors. The outside boats that come in once in a while don't; the boats that navigate around the harbor don't."

Another witness for claimant testified that a few of the barges and coal boats were fitted with anchors, but that "it is a rare thing for them to have them."

Barber, the claimant, testifies as follows:

"Q. What is the custom as to boats plying on the Sound to Greenwich, Mamaroneck and other places east of that, in the carrying of anchors themselves? A. It is customary for them to have anchors. * * * Q. You have been going up there, as you say, for a number of years, haven't you? A. Yes. Q. Whenever you have had boats like the Kilfoyle and the O'Callahan, boats of that style, haven't you always supplied the anchors? A. Not always. Of course, when they don't have them, we have to, if we want an anchor. As a rule, they all have anchors."

A careful analysis of all the testimony shows the correctness of the conclusion of the court below "that vessels like those in tow often carried no anchor," and that "in such cases, the custom of the tug was to furnish the anchor." But we are unable to concur in the conclusion

of the court below that after the tug had provided the tows with a cable and anchor, "if there was a neglect to pay out the line, it was the negligence of the tug." There is no evidence of any contract to this effect or of any custom on the part of a tug to oversee or control the use of such appliances when furnished by it, or to insure their proper operation. Such a course would be manifestly impracticable, as in the case at bar, where the anchor was furnished for the express purpose of enabling the tug to leave one portion of the tow in charge of the men on board the scows while she was taking other boats to their destination under a contract for such detention for distribution, which the court below has properly found was assented to by the whole tow. It was, in effect, a loan of the anchor and cable to the rest of the boats, because they were unprovided with one, and, assuming it to have been sufficient for the required purpose, the men on the boats were responsible for the manner of its subsequent use. The question therefore arises whether the respondent was negligent in failing to furnish an anchor sufficient for the requirements of the barges on this occasion. The evidence conclusively shows that the captain of the barge Rogers, which carried the anchor, was grossly negligent. Although the anchor was provided with some 60 fathoms of 4½ inch cable, he had only some 50 or 75 feet thereof out when the barges started to drag, a mile away from the rocks, and he did not pay out any more for about an hour because "it was such a slow drag at the beginning," and he "had an idea it was enough out," and so, as testified to by claimant, he said:

"We didn't know we were dragging till we were so close to the rocks that we couldn't slack out any line; we didn't have room."

The findings of the court below on this branch of the case are as follows:

"The tug was forewarned of the predicament in which she found herself and the three boats committed to her care. For such difficulty she made no provision, and left the tow without making proper provision. * * * Whatever the weight of the anchor, it was insufficient to hold the tow against the southwest wind, which gradually became strong but not violent."

If this finding were based on the testimony of witnesses produced in court, we should be concluded thereby. But in the present case all of the testimony as to the sufficiency of the anchor, except that of the confessedly negligent captain of the Rogers, was taken out of court, and we have, therefore, critically examined the evidence on this point. There is much testimony to show that the anchor was sufficient to hold the barges if it had been properly handled. It weighed some 200 lbs., the usual weight, as testified to by seven witnesses. Three witnesses testify that no less than an 800 or 1,000 lb. anchor would be sufficient for such boats in ordinary weather or if there was any wind. The fact that each of these canal boats was about 100 feet long and carried a cargo of 250 to 300 tons, and did drag the anchor and drift ashore in a wind, which the evidence shows and the court finds "although severe, was not unusual," supports this testimony.

Therefore, while it is not entirely clear that the loss would have oc-

curred if the captain of the barge had not been negligent in failing to properly pay out the cable, we conclude with some hesitation that the preponderance of the evidence establishes the claim of libelants that the accident was primarily due to the negligent failure of the tug to furnish an anchor of sufficient size for the requirements of the tow, as found by the court below.

The decree is affirmed, with interest and costs.

LACOMBE, Circuit Judge. I dissent. I do not think the tug can be blamed because the boats, which should have had anchors of their own, but did not have them, mishandled the anchor which the tug left them to hold by. On the proofs, I am entirely satisfied that the anchor was heavy enough to hold them, if sufficient of the cable left with it had been payed out.

LEHIGH VALLEY R. CO. v. DELACHESA.

(Circuit Court of Appeals, Second Circuit. April 2, 1906.)

No. 140.

RAILROADS—CONNECTING LINES OPERATED AS SINGLE SYSTEM—LIABILITY FOR NEGLIGENCE OF SUBORDINATE COMPANY.

Where one railroad company controls others through the ownership of their stock and operates the lines of all as a single system, though the general management of each road is retained by the corporation owning it, the relation between the dominant and subordinate companies with respect to traffic originating on the lines of the former is that of principal and agent, and the dominant company is directly liable for an injury to one employed in unloading one of its own cars on the tracks of a subordinate company through the negligence of employés of the latter.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 824, 826.]

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

Allan McCulloh, for plaintiff in error.

E. J. McCrossin, for defendant in error.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. The only assignment of error which it will be necessary to consider is whether the trial judge erred in refusing to direct a verdict for the defendant upon the ground that it was not responsible for the acts of the men by whose fault the plaintiff was injured. The plaintiff, an employé of a firm of stevedores, was injured while unloading iron from a car standing on a sidetrack of the Lehigh Valley Terminal Railroad Company, at the dock of that company at Jersey City. It was undisputed that if the accident was caused by negligence, other than that of the plaintiff or his co-employés wholly or in part, the negligence was that of the men in charge of the dock or the men in charge of the train which backed down upon the car on which the plaintiff was at work. It was established that the track and dock

had been leased by the terminal company to the Easton & Amboy Railroad Company, and that the men in charge of the dock and the men in charge of the train were the employés of the Easton & Amboy Railroad Company. Much evidence was introduced upon the trial for the purpose of showing that the defendant and the Easton & Amboy Railroad Company were a partnership for the business of conducting their joint traffic, and to establish the relations between these two corporations which were considered by this court in Lehigh Valley Railroad Co. v. Dupont, 128 Fed. 840, 64 C. C. A. 478. But the trial judge did not place the liability of the defendant upon the ground that it was answerable for the negligence of its copartner, and only allowed this evidence to be considered upon the question of fact whether the defendant or the Easton & Amboy Railroad Company was in actual control and operation of the freight train and the dock in delivering the iron. He instructed the jury that unless they found that the defendant itself was engaged in delivering the iron (i. e., delivering it on board its cars at the dock), it did not owe any duty to the plaintiff and was not liable. If the evidence authorized the jury to find this to be the fact, and the employés of the Easton & Amboy Company were temporarily the servants of the defendant, for that purpose and solely under its control, it is hardly disputable that the defendant was responsible for the negligence of these employés. We think there was sufficient evidence upon this issue to present a question of fact to the jury. The freight cars and the engine belonged to the defendant; the iron had not been reshipped, but was being delivered from the cars in which it was originally received by the defendant upon the line of its own road. Its relations with the Easton & Amboy Railroad were such that the facts that its cars were being run upon the road of that company, and the employés of that company were conducting the operation of delivering the iron instead of the employés of the defendant, had comparatively little significance. The track and dock, as well as the whole line of the Easton & Amboy Railroad Company, were a part of the Lehigh Valley System, over which the defendant had the potential and ultimate control. It appeared that prior to 1892 the defendant had operated the Easton & Amboy Railroad under a lease, but in that year the lease was annulled by a decree of the state court in a suit brought by the Attorney General. Thereafter the substantial relations between the two roads were the same as before. The defendant owned all the stock of the Lehigh Valley Terminal Company, and that company was the owner of all the stock of the Easton & Amboy Railroad Company. The secretary of the defendant testified that the only difference, so far as the actual operation of the roads was concerned, was that before the decree the records of all the transactions of the two companies had been kept in one set of books, and since that time they had been kept in two sets of books; and that thereafter until the time of the accident the same person was president of both, the same person the general manager of both, the same person the superintendent of both, and the same persons were the heads of the operating departments of both.

We are of the opinion also that the evidence showing the relations,

at the time between the defendant and the Easton & Amboy Railroad Company would have justified the trial judge in instructing the jury that the defendant was liable for the negligent acts of the employés of the Easton & Amboy Railroad Company, upon the principle applied by this court in the Dupont Case. It was conceded upon the argument by the plaintiff in error, and is stated in its brief, that the evidence as to the relations between the two corporations, as summarized in the opinion of the court in that case, was substantially the same in that case and in the case at bar; but it is argued that the principle of that case is not applicable here, because the question there was as to the liability of the defendant to a passenger, while here it is as to its liability to a person as to whom it had no contractual responsibility. We held in the Dupont Case that where the lines of several railroad corporations are conducted as a single road for the purposes of the traffic between different points originating upon either, the corporations may constitute themselves a partnership for the business of such traffic; and when they do, although the general management of each road is retained by the corporation owning it, the several corporations are as to such business, partners, and liable upon the principles of the law of agency. We held that the facts proved established that relation between the defendant and the subordinate companies of its system, including the Easton & Amboy Railroad Company; and finding this to be the relation between the two companies, we held that the defendant was liable for personal injuries received by a passenger who had bought a ticket of the defendant entitling him to transportation over the Easton & Amboy Railroad, and who was injured at a station upon that railroad while attempting to board the train in consequence of an improperly constructed platform. The negligence in that case was the breach of the implied duty of the railroad carrier, to a passenger to provide him with a safe means of access to the train. The negligence in this case is the breach of the implied duty of a carrier, who has invited a plaintiff to engage in unloading its cars, to afford him proper protection while performing the work. We discover no difference in principle between the two cases.

In conclusion it is proper to express our regret that so large a part of the long time occupied in the trial of this case in the court below should have been required in trying to prove the relations between the defendant and the subordinate railroads of its system. Apparently it was difficult, if not impossible, for the plaintiff to ascertain whether the terminal company, the Easton & Amboy Company, or the defendant itself, was responsible for his injuries. The question was not one of practical importance to the defendant, but merely whether it should be called upon to pay out of one or another of its several purses. It does seem as if the court below should have been spared this expenditure of time.

The judgment is affirmed.

JOHANSON v. SONDHEIM & DOBBINS.

(Circuit Court of Appeals, Ninth Circuit. May 14, 1906.)

No. 1,285.

CONTRACTS—ACTION FOR BREACH—INSUFFICIENCY OF COMPLAINT.

A complaint alleged that after a breach by defendant of a contract to transport plaintiff and certain property on defendant's vessel from one point to another "it was then and there agreed" that defendant would transport the property on the same terms on a following vessel, not alleged to have been owned or controlled by defendant, and that such vessel would reach the port of destination "at substantially the same time" as defendant's; that plaintiff shipped on the the following vessel but by reason of delays it did not arrive until several days later than defendant's vessel whereby plaintiff was damaged. *Held*, that such complaint did not state a cause of action, there being no contract nor consideration alleged which would render defendant responsible for the delay complained of.

In Error to the District Court of the United States for the Third Division of the District of Alaska.

Louis K. Pratt (Carl M. Johnson, of counsel), for plaintiff in error.

E. E. Cushman and Heilig & Tozier, for defendants in error.

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

GILBERT, Circuit Judge, The plaintiff in error seeks by this writ of error to review the ruling of the court below in sustaining the objections of the defendants in error to the introduction of any evidence on the part of the plaintiff in error on the trial on the ground that the complaint of the plaintiff in error failed to state a cause of action, and in directing the jury to return a verdict for the defendants in error. The complaint alleged in substance the following: That the defendants in error were the owners of the steamer Monarch, which was plying between Dawson in the Yukon territory of Canada and Chena in the district of Alaska; that on or about July 26, 1904, the plaintiff in error and the defendants in error entered into a verbal contract, by the terms of which the latter agreed to transport for the former a boiler, engine, and other machinery connected with a sawmill at Eagle in said district of Alaska, a team of horses and wagon, the plaintiff in error and two of his employés, from Eagle to Chena, for the agreed price of $55 per ton for the freight, and $40 each for the plaintiff in error and his employés; that on or about August 1, 1904, the plaintiff in error had his said freight upon the landing at Eagle, ready for shipment, at which time the defendants in error with their said steamer reached Eagle en route to Chena, and that the latter then and there informed plaintiff in error that they were unable, for lack of room, to ship said freight on said steamer as they had agreed to do, "and then and there agreed with this plaintiff to forward the same and also this plaintiff and his said employés from Eagle to Chena upon the steamer Oil City upon the same terms as above mentioned, and further agreed that said freight and passengers should and would be delivered and landed at Chena substantially the same

time as would be the case were they to go upon the said steamer Monarch." The complaint proceeded to allege that about August 7th, the Oil City left Eagle with the freight and passengers, but that there were delays en route and expenses and loss of time resulting from the failure of the plaintiff in error to arrive at Chena until 11 days after the arrival of the Monarch to the damage of the plaintiff in error in the sum of $922.50. The case came on for trial in the District Court, a jury was impaneled, and the plaintiff in error had taken the stand and commenced to testify when the court, on the objection of the defendants in error, excluded all evidence, on the ground that the complaint wholly failed to state a cause of action, and directed the jury to sign a general verdict in favor of the defendants, which was done and judgment was entered thereon.

It is impossible to find in the complaint the statement of any cause of action against the defendants in error. There is first alleged a contract between the plaintiff in error and the defendants in error for the transportation of freight and passengers for an agreed compensation upon a certain steamer owned by the defendants in error and a breach of that contract, but damages are not assigned to the breach, and the action is not brought upon that contract. The complaint then proceeds to allege that after the Monarch arrived at Eagle and her owners had informed the plaintiff in error that they were unable for lack of room to carry his freight, they "then and there agreed" to forward the same on another vessel upon the same terms. That agreement is not alleged as a contract. No consideration therefor is stated. If the complaint had alleged that in consideration of their breach of their contract the defendants in error undertook to transport the freight and passengers on the Oil City to Chena within a stipulated time, a different case would be presented. As it is, the allegations as to what occurred between the parties on August 1st, at Eagle, fall short of showing that the defendants in error made a contract or assumed any liability. The plaintiff in error admits in his brief that the Oil City did not belong to the defendants in error, and was not under their control. There is nothing in the complaint to show that the defendants in error contracted to be or became responsible for the delays which retarded that vessel. It is true, the complaint says that it was agreed that the freight and passengers would reach Chena by the Oil City substantially at the time of the arrival of the Monarch at that port, but that agreement as it is alleged, amounts to no more than a representation on the part of the defendants in error that such would be the case. The substance of the pleading is that after the breach of the first agreement the plaintiff in error agreed to ship his freight and take passage on the Oil City on the assurance of the defendants in error that the latter would carry the same on the terms provided in the original agreement and would arrive at Chena substantially as soon as did the Monarch.

The plaintiff in error made no effort to amend his complaint. The defendants in error were entitled to judgment on the pleadings as they stood, and there was no error in entering the judgment as it was entered for the defendants in error.

The judgment is affirmed.

UNITED STATES v. HERZOG.

(Circuit Court of Appeals, Second Circuit. December 20, 1905.)

No. 54 (3,495).

1. CUSTOMS DUTIES—CLASSIFICATION—LABELS IN THE PIECE.
In construing the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 320, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661], for "labels, for garments or other articles, composed of cotton," *held* that labels are not to be excluded therefrom because in the piece and requiring to be cut apart before used as labels.

2. SAME—"COMPOSED OF COTTON"—ARTICLES IN CHIEF VALUE OF COTTON.
Labels of cotton and silk, cotton the chief component, are not to be excluded from the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 320, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661], for labels "composed of cotton," because not composed wholly of cotton.

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

For decision below, see 135 Fed. 919, reversing a decision of the Board of United States General Appraisers, G. A. 5,553, T. D. 24,939, which had affirmed the assessment of duty by the Collector of Customs at the port of New York, on merchandise imported by A. Herzog.

The opinion of the Board reads in part as follows:

HOWELL, General Appraiser. The merchandise in question was returned by the appraiser as "labels of silk and cotton, cotton chief value," and was classified by the collector as dutiable * * * under the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 320, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661], for "labels, for garments or other articles, composed of cotton or other vegetable fiber." The protestant claims that the merchandise is properly dutiable * * * under paragraph 322, Schedule I, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661], as a manufacture of cotton. * * * It appears from an examination of the samples admitted in evidence that the goods consist of woven strips of colored cotton, about two inches in width, and several yards in length, into which are woven in coarse silk, at intervals varying from 3 to 6 inches, the names of certain shoe companies, together with a word designed to indicate a particular style of shoe, the goods being intended, when properly cut, to be sewn or otherwise attached inside the tops of shoes. It does not clearly appear upon what theory the protestant's claims are based. The only testimony in the case is that of the importer, who, in addition to proving the samples and admitting that the goods are composed in chief value of cotton, testified that he had handled these goods for two years and that they are sold in the wholesale trade as shoe top facings. If it is contended that these articles have a commercial designation which would exclude them from classification as labels, the evidence is entirely insufficient to sustain such contention. As was said by Judge Lacombe, in charging the jury in Batterson v. Magone (C. C.) 48 Fed. 289: "Of course it is not enough for a party who claims that his article is not within the ordinary meaning of the terms of common speech to show that it always has in trade some special name that it is called by, unless he goes further and shows that in that same trade the general term, which otherwise would cover it, is used exclusively for articles other than the one as to which he claims the special designation."

The burden of proof in such cases is on the importer, and the testimony of a single interested witness is insufficient to establish commercial designation. Neuss v. U. S. (C. C.) 142 Fed. 281. In Re Wolff, G. A. 4,269 (T. D. 20,047), this board, in passing upon woven cotton initials, had the benefit of the testimony

of manufacturers and dealers in all kinds of labels, and in that case found from the preponderance of the evidence "that there is no essential difference in the meaning of the term 'label' as used in commerce and in common speech. According to standard lexicographers, the term, so far as it relates to articles of the general character of these in question, includes a slip or tag of paper or other material, bearing the inscription in the form of a word or words, name, monogram, letter, scroll, or trade-mark, indicating the character, origin, owner, or destination of the article to which it is attached." In our opinion the articles here in question unmistakably belong to that class of goods known as labels; and, as such, being composed in chief value of cotton, are specially provided for in the paragraph in the tariff act under which duty was assessed. The protest is accordingly overruled, and the assessment of duty affirmed.

The foregoing decision was reversed by the circuit court on the ground that the goods were not labels because, not being cut, something more remained to be done to them; also, on the ground that they could not be said to be "composed of cotton," within the meaning of the law, because made in part of silk.

D. Frank Lloyd, Asst. U. S. Atty.
Frederick W. Brooks, for the importer.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. Decree reversed.

THE KAISER WILHELM DER GROSSE.

(Circuit Court of Appeals, Second Circuit. April 2, 1906.)

No. 178.

SHIPPING—DUMPING OF DECK LOAD BY LIGHTER—LIABILITY OF STEAMSHIP FOR CAUSING SWELL.

While a lighter with mahogany logs piled on her deck to a height of 12 or 14 feet was unloading at a pier, the waves produced by a passing vessel caused her to break her moorings and strike two or three times violently against the pier, thereby shifting her cargo, and causing her to list to starboard toward the pier. After she had resumed unloading and a log weighing some 2500 pounds had been swung over the pier by means of a boom 60 feet long fastened to the mast 9 feet above the deck, she suddenly careened toward the pier, and a large number of the logs rolled from her deck and were lost. *Held*, that conceding the correctness of a finding that respondent steamship produced the swell which caused the original shifting of the logs, the facts did not show that to have been the proximate cause of the loss, so as to render the steamship liable therefor, but rather that it was due to the negligence of those in charge of the lighter, whose duty it was to correct the list before subjecting her to the additional overturning force of the boom and the weight at its end.

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

For opinion below, see 134 Fed. 1012.

Joseph Larocque, Jr., for appellant.
A. F. Cushman, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. The decree appealed from condemned the steamship for the value of certain mahogany logs which were cast

overboard and lost by the lighter "Continental," as is alleged by displacement waves caused by the negligent navigation of the steamship.

The averments of the libel, and the findings of the district judge, in respect to the circumstances of the loss, are not sustained by the proofs. The averments and findings are that the waves from the steamship caused the lighter to break from her moorings and dump part of her cargo of logs. The facts are that after the lighter had made fast on her starboard side to the dock, and had unloaded some of the logs, the waves produced by some passing vessel caused her to loosen her moorings and strike two or three times violently against the dock, thereby shifting her cargo, and causing her to list to starboard; and after the waves had subsided, and about ten minutes had elapsed, and after she had again commenced unloading, she suddenly careened towards the dock to such an extent that 126 logs rolled off her deck.

The testimony is conflicting upon the issue whether any dangerous swells were caused by the navigation of the steamship, and also upon the issue whether the list to starboard of the lighter was due to any unusual waves. The testimony of several of the eye witnesses was very unreliable, as it appears to have been influenced by prejudice or excessive zeal; but as these witnesses were examined in the presence of the District Judge, we do not feel authorized to disturb his findings upon these issues. Accepting these findings as correct, we think the libellant was not entitled to recover, because the evidence does not satisfactorily establish that the misfortune was attributable to the original listing of the lighter, and is more consistent with the theory that it was attributable to the want of due care subsequently upon the part of her master and crew.

The mahogany logs were of the average weight of 2,500 pounds each, and were stowed upon the deck of the lighter in tiers about 12 or 14 feet high. They were unloaded by means of a derrick, the boom of which was 60 feet long, and was fastened to the mast 9 feet above the deck of the lighter. Three of the logs had been unloaded before the waves appeared. After they had subsided the unloading was resumed without any further precautions, and it was while the first log was being swung over the dock that the lighter careened so violently that more than half her deck load rolled into the water. Just how far the boom had been swung out at the time does not appear. If it had been swung out at right angles, the weight of the log at the end of the boom would have been equivalent to an overturning force of about 75 tons. If the lighter was under the influence of a list to starboard the weight of the log would be a still more important factor. The disaster was accelerated by the rolling towards the dock of some of the logs which had shifted when the original list occurred, and which rolled while the log at the end of the boom was swinging over the dock. The concurrence of these two causes accounts for the disaster. The original shifting of cargo and listing of the lighter were not the proximate cause of the accident, if the accident would not have happened except for the intervening negligence of those in charge of the lighter. There had been ample time and opportunity for those in charge of the lighter to discover whether the cargo had shifted, and

whether the vessel was listing towards the dock. If this had occurred they should have seen it, and when they resumed unloading should have taken some precautions to correct the situation. The burden of proof was upon the libellant, and the testimony is as consistent with the theory that the accident was caused by the negligence of those in charge of the lighter, as with the theory that it was caused by the fault of the steamship.

The decree is reversed, with costs.

BECK v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 2, 1906.)

No. 101.

1. CRIMINAL LAW—TRIAL—ISSUES.

Where the defendant in a criminal case was tried without having interposed a plea to any of the counts of the indictment except one, to which he pleaded not guilty, the issue made by such plea is the only one which can be tried.

2. POST OFFICE—USING MAILS TO DEFRAUD—VARIANCE BETWEEN INDICTMENT AND PROOF.

A defendant charged in the indictment with having devised a scheme to defraud, to be effected by means of the post office establishment, in violation of Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3696], must be shown to have devised the particular scheme specified in the indictment, and cannot be convicted on evidence that is as consistent with a different scheme, which, although equally within the statute, is not charged.

[Ed. Note.—Use of mails to defraud, see note to Timmons v. United States, 30 C. C. A. 86.]

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

Max J. Kohler, for plaintiff in error.
Henry L. Stimson, U. S. Atty.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

WALLACE, Circuit Judge. Upon the authority of Crain v. United States, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097, as the defendant was tried without having interposed a plea to any of the counts of the indictment except one, it must be held that there was nothing for the jury to try except the issue made by the plea of not guilty to that count. That count charged the defendant with an offense under section 5480 of the Revised Statutes [U. S. Comp. St. 1901, p. 3696], which consisted (1) in having devised a scheme to defraud divers persons to the jury unknown by inducing them to purchase certain green paper, supposing they were purchasing the counterfeit obligations of the United States; (2) to be effected by opening correspondence with such persons by means of the post office establishment of the United States; and (3) which scheme defendant attempted to execute by mailing a letter in the post office at the city of New York on the 29th day of July, 1902, addressed to one Du Bois, containing, among other

things, instructions how to communicate with the seller. The evidence upon the trial did not show that such a scheme to defraud had been devised. The evidence was consistent with a scheme to sell counterfeit money, rather than one to sell green paper as counterfeit money. The trial judge instructed the jury that they could convict if they found the defendant had devised either scheme. This instruction was doubtless given because some of the other counts in the indictment alleged the scheme as being one to sell counterfeit money, and the court assumed that the defendant was upon trial under all the counts. The instruction was duly excepted to, and reaches an error which must lead to a reversal of the judgment. The effect of the instruction was to authorize the jury to convict the defendant of an offense for which he was not upon trial. One of the essential elements of the offense created by section 5480 is that the person charged must have devised one of the schemes therein enumerated. The defendant was on trial for one offense, and he may have been convicted of another.

The record presents a serious question, whether the evidence of the Rankin transaction, which took place nearly a year after the offense for which the defendant was tried, was competent; but there are no exceptions which sufficiently reach the point.

The judgment is reversed.

VON FABER-CASTELL v. FABER.

(Circuit Court of Appeals, Second Circuit. April 25, 1906.)

No. 180.

TRADE-NAMES—"FABER" PENCILS—UNFAIR COMPETITION.

Defendant, John Eberhard Faber, *held* not entitled to use the word "Faber" without the prefix "E." or "J. E." or "Eberhard" or "J. Eberhard" on lead pencils sold in competition with the German house of A. W. Faber.

[Ed. Note.—Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

On Motion to Amend Mandate or for Leave to File Bill of Review.

For former opinion, see 139 Fed. 257.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. This court did not intend to decide that the defendant was entitled to use the word "Faber" as applied to pencils and stationers' goods without the prefix "E." or "J. E." or "Eberhard" or "J. Eberhard," and indeed the only question which was argued upon the appeal was whether he had been guilty of an unfair use of the word with some one of these different prefixes. The decree of the court below, however, enjoined him from the use of the word "Faber" or "Faber Pencil Company," or "E. Faber Pencil Company" or any like or similar designation in which the name "Faber" is used without the prefix "Eberhard" or "John E." or "J. Eberhard."

In order to remove any doubt as to the effect of the mandate which this court has issued directing the Circuit Court to dismiss the bill, we

have concluded to grant leave to the petitioner to file a bill of review in the Circuit Court to modify its decree of August 8, 1905, made pursuant to the mandate of this court, so as to provide that the bill of complaint be not wholly dismissed and enjoining the defendant from using the word "Faber" without some one of the prefexes mentioned, and to grant leave to the Circuit Court upon hearing such bill of review to modify its decree accordingly.

STANDARD COMPUTING SCALE CO. v. COMPUTING SCALE CO.

(Circuit Court of Appeals, Sixth Circuit. May 12, 1906.)

No. 1,485.

APPEAL—REVERSAL—INSUFFICIENCY OF RECORD.

Where the record fails to show facts essential to a proper decision of the case by the appellate court, it will reverse the decree on its own motion, and remand the case for a rehearing with directions to permit the taking of further evidence.

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

Charles H. Fisk, for appellant.

Paul A. Staley and Border Bowman, for appellee.

PER CURIAM. The court finds itself unable, upon the transcript from the court below, to determine with any degree of certainty the rights of the parties to this litigation.

It is therefore ordered, upon our motion, upon authority of Barber v. Coit, 118 Fed. 272, 55 C. C. A. 145, and the cases there cited, that the decree of the court below be set aside, and the case remanded to the court below, with direction to remand to the rules, with leave to both parties to take such additional evidence as they may be advised. The appellant will pay all of the costs of this appeal. The costs below will abide final decree there.

MARLIN FIREARMS CO. v. DINNAN.

(Circuit Court of Appeals, Second Circuit. April 2, 1906.)

No. 115.

PATENTS—INFRINGEMENT—"TAKE-DOWN" GUNS.

The Hepburn patent, No. 584,177, for a gun of the "take-down" pattern, and relating to means whereby the barrel and stock portions may be readily detached from each other, covers merely improvements on the prior art, and its claims must be narrowly construed. As so construed, *held* not infringed.

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

For opinion below, see 139 Fed. 658.

Louis C. Raegener and Milton E. Robinson, for appellant.

Robert C. Mitchell, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. The decision of the court below was that claims 1, 2, 3, 4, 7, and 8 of the patent to Hepburn (No. 584,177, granted June 9, 1897) were valid and had been infringed by the defendant. The assignment of error which has been argued upon this appeal is whether the court below correctly decided that the claims had been infringed.

The first four claims cover an invention in "take-down" guns, and specify the means whereby the barrel portion may be readily detached from the stock portion for convenience in packing and transporting the gun. The invention is more particularly described in the specification and illustrated in the drawings as relating to a magazine firearm, but the four claims are not limited to a firearm of that description, and the specification is carefully framed to exclude the necessity of such a limitation. The fourth claim is the broader of the four, and it is conceded that, unless that one has been infringed, infringement cannot be established of the other three. It reads as follows:

"(4) In a firearm, a barrel portion carrying a rearwardly-extending side plate, a stock portion carrying a forwardly-extending side plate, attaching-tenons carried by said plates, a recess in the stock portion to receive the tenon of the barrel portion, and a recess in the barrel portion to receive the tenon of the stock portion, and means for detachably holding said parts in an engaged position."

The parts enumerated reside in the breech-casing or receiver of the gun, which is a chamber between the barrel and stock for holding the lock and breech-operating mechanism of the gun. The claim cannot be given the broad construction due to a pioneer invention, because Hepburn was merely an improver in the prior art. This is sufficiently shown by the patent to Mason of December 6, 1892, which describes an invention which "consists in making the portion of the receiver which carries the barrel detachable from the remainder of the receiver which is attached to the stock, combined with mechanism for securely locking the parts together, yet so as to permit their ready sepa-

ration." The patent to Bennett of the same date is for a similar invention. Nor can the claim be construed to cover any arrangement of plates, mortices, and tenons in the receiver of a "take-down" gun, for assembling and detaching the barrel portion and the stock portion together with means for detachably holding the parts in an engaged position. This arrangement is shown in the Mason patent, and also in the Bennett patent. In each of these patents the receiver is assembled and detached by a lower plate attached to the stock portion, the side plates remaining attached to the barrel portion, and the side plates and the bottom plate are provided with tenons which fit into corresponding recesses in the other part of the receiver, and a screw is employed (as is done in the patent in suit) as the means for holding the assembled parts in an engaged position. What Hepburn did that was new was to assemble and separate a receiver at the side plates, by providing that one side plate should remain attached to the stock portion, and the other to the barrel portion. This, of course, involved the provision of suitable tenons and mortices.

It is apparent, from what has been said respecting the prior art, that the fourth claim must be limited to an arrangement of side plates and tenons substantially such as is shown in the patent. According to the specification, the side plates must be attached, one of them (D) to the barrel portion of the receiver, and the other (F) to the stock portion. The side plate attached to the stock portion is provided with a tenon (F') "projecting into an under-cut recess" in the barrel portion. The side plate (D) is provided with a tenon (D') "adapted to project under an abutment or projection (I) in the upper tang of the stock portion of the arm." The specification proceeds:

"Adjacent to the tenon (D') is a recess (D^2) to correspond substantially to the shape of the abutment (I), so that when the parts are assembled the abutment (I) will enter therein, preventing vertical displacement of the parts."

The gun of the defendant has the side plates of the claim, and the side plate attached to the stock portion is provided with a tenon which may be deemed the equivalent of that shown in the patent; the tenon and its recess being substantially like those shown in the Bennett patent. But it does not have any tenon in the side plate which is attached to the barrel. The attempt, by the expert, for the complainant to treat the projecting head of the screw upon which the hammer is mounted as a tenon for this side plate, is too absurd to merit discussion. In the defendant's gun there is a tenon in the stock portion of the receiver which fits into a recess in the top plate of the barrel portion, but these are not the equivalents of any recess or tenon shown in the patent. The receiver of the patent has a top plate, but the top plate has no recess, and, of course, there is no corresponding tenon in the stock portion of the receiver. Considered collectively the arrangement of tenons and recesses is not that of the patent, because they do not co-operate in the same way. The specification says:

"The operation of detaching the stock portion from the barrel comprises: First, loosening the screw (J), second, swinging the stock so as to free the

tenon (D') from its recess; and, lastly, drawing the stock rearwardly to withdraw the tenon (F') from the recess in the reinforce (G). To attach the parts the steps are reversed."

In the defendant's gun, after loosening the screw the stock must first be drawn rearwardly to enable the tenon to be freed from its recess. Thus, while the tenons of the patent must first be loosened latitudinally, those of the defendant's gun must be loosened longitudinally.

The claim makes attaching tenons carried by both side plates one of its elements, and corresponding recesses to receive these tenons another element. As the defendant's gun has only one of the tenons and recesses, it does not infringe the claim. It was open to the defendant to avail himself of the arrangement by which one side plate was to be carried by the stock portion of the receiver, and the other by the barrel portion. If that in itself had been patentable, it is unfortunate for the complainant that a claim for such an arrangement was not inserted in the patent. But the patentee saw fit to limit the claims to such an arrangement when reinforced by a particular location of tenons and recesses, and the claim cannot be enlarged by construction by omitting these parts.

It remains to consider claims 7 and 8. Claim 7 is as follows:

"In a firearm, a barrel portion varying a rearwardly extending side plate, and an overlapping top piece, a projection carried by said side plate underneath said top piece and spaced apart therefrom, a reciprocating breech-bolt in the space between said top plate and said projection, and means for detachably holding said breech-bolt in its operative position."

It is admitted that all the elements of this claim are found similarly combined in the prior Hepburn patent, No. 434,062, except the "means for detachably holding said breech-bolt in its operative position." The only grounds on which complainant seeks to avoid anticipation are that the prior Hepburn patent was not for a "take-down" gun, and that the means therein shown for holding the bolt in position are inoperative when the gun is taken apart. But this claim is not confined, in terms, to a "take-down" gun, but is for the combination in "a firearm." Furthermore, it does not specify the elements covered by claims 1, 2, 3, and 4, which are essential in the construction of a "take-down" gun. It is admitted that the sole other difference in construction between the prior patent and that in suit consists in the means for holding the bolt in position. These means comprise a groove on one side of the breech-bolt and a corresponding rib on its support "by which means," as the patentee says, "the said breech-bolt is prevented from becoming accidentally detached from its support." This construction is nothing except the ordinary tongue and groove common in the general field of the arts, and is utterly devoid of any claim to patentable novelty. Even if it could be supported on any theory, it is not infringed by defendant's retaining device, which is mounted on its action bar, is not carried by the side plate, and operates in a totally different manner.

These same considerations apply to claim 8. This claim, however, does embrace the elements of a "take-down" gun, and is confined in

terms to a magazine firearm. We think, however, in view of the conclusions reached as to claim 4, that this claim cannot be broadened to embrace any construction other than that described in the specifications. It is clear from the language of this claim that the "means for detachably securing said parts in the operative position" are the retaining device for the breech-bolt covered by claim 7, from which claim it is only differentiated by the inclusion of the "take-down" elements in a magazine firearm.

The decree is reversed, with costs, and with instructions to the court below to dismiss the bill with costs.

MARLIN FIREARMS CO. v. KELLOGG.

(Circuit Court of Appeals, Second Circuit. April 6, 1906.)]

No. 176.

PATENTS—INFRINGEMENT—BREECH-LOADING GUNS.

The Hepburn patent, No. 434,062, for a breech-loading gun, claim 27, which relates to an improved hook extractor, *held* not infringed.

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

For opinion below, see 139 Fed. 31.

Milton E. Robinson, for appellant.

Robert C. Mitchell, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. This appeal questions the correctness of the decision of the court below that claim 27 of the complainant's patent (No. 434,062, for breach-loading guns, granted to Hepburn August 12, 1890) was valid, and had been infringed by the defendant.

The part of the specification upon which the claim is founded is as follows:

"The solid walls of the breech bolt thus take all the strain brought upon the shank of the extractor, and there are no holding screws to come loose or wear out. On one side of the shank is a projection which fits in a corresponding recess formed in the side wall of the long recess, as shown, and which serves to lock the extractor in place and prevent it from being pulled endwise out of its seat when extracting the shell. The extractor thus made is simply set in the recess without other fastening; it being prevented from rising by the top wall of the frame when the breech bolt is in position, but being free to be lifted out when the bolt is detached. By this construction I avoid the use of any pin or screw and am enabled to remove the extractor whenever desired by the thumb and finger without the use of a tool."

The claim is as follows:

"(27) In combination with a reciprocating breech bolt for a gun, the spring hook extractor, t, set in a longitudinal recess or groove cut in said bolt in position to hold the shank of the extractor against the strain of its elastic hook and [in the act of engaging the cartridge] by the opposite solid

walls of said groove; the said extractor being held against longitudinal movement in said groove by an enlargement arranged to fit in a corresponding recess in the bolt, substantially as described."

The claim covers an improvement upon spring-hook extractors in breech-loading guns, such as had been shown in the prior patent to Barton (original and reissue) and the earlier patent to Hepburn, of April 2, 1889, which improvement consists in details of construction which may possibly have involved invention; but if so, invention of a very limited scope. The extractor of the defendant does not have one of these details of construction which, by the claim, is made essential. It is not "held against longitudinal movement in said groove by an enlargement" [the projection, w] "arranged to fit in a corresponding recess in the bolt." The extractor of the defendant's gun is secured by the use of a pin, and cannot be removed "by the thumb and finger" or "without the use of tools"; and, therefore, differs materially from the extractor described in the specification and specified in the claim. The pin in the defendant's gun passes not only through the extractor, but entirely through the breech bolt. It is not an equivalent of the projection, because the invention described in the specification consists in part in dispensing with the pin or screw and substituting therefor the projection.

The decision of the court below practically makes the claim a new one, and broadens it to cover an extractor which, if it could have been the subject of a patent, is not the subject of the claim.

Because infringement was not established, the decree is reversed, with costs, and with instructions to the court below to dismiss the bill, with costs.

SCHOCK v. OLSEN & TILGNER MFG. CO. et al.

(Circuit Court, N. D. Illinois, E. D. February 2, 1906.)

No. 26,488.

PATENTS—INFRINGEMENT—BARREL WASHERS.

The Klamt patent, No. 400,346, and the Schock patent, No. 605,138, each for a barrel-washing apparatus, construed, and, as limited by the prior art, *held* not infringed.

In Equity. On final hearing.

Briesen & Knauth, for complainant.
Banning & Banning, for defendants.

KOHLSAAT, Circuit Judge. The complainant filed his application in the patent office May 14, 1897, for a barrel washer. Some of the claims therein stated were rejected on the patent issued to Klamt March 26, 1889, No. 400,346, for a barrel-washing machine. Thereupon complainant purchased the Klamt patent, and now asserts that it contains certain basic claims broader in scope than those of his own patent. For this reason he now brings suit upon claims 1, 2, and 3 of the last-named patent, and claims 1–5, 7, and 8 of the Schock patent, which read as follows:

Klamt patent, No. 400,346:

"(1) The improved automatic barrel-washing machine herein described, combining a tank adapted for filling barrels with water, top and end brushes operated by levers for washing and scrubbing said barrels, a tank adapted for cleansing and rinsing the barrels after being washed and scrubbed, rollers to cause the barrel to revolve, and an arm for automatically transferring the barrel to the rinsing tank, as and for the purposes set forth.

"(2) An automatic barrel washer, combining a plurality of washing tanks, a carrier for conveying or transferring the keg or barrel from one tank to the next, and a scrubber or washer for removing the adhering dirt in the transfer, as set forth.

"(3) In a barrel-washing machine, a water tank, a revolving shaft provided with arms for receiving, holding, and automatically discharging the barrel from the tank, pawl and ratchet wheel for regulating the motion of the shaft, crank, levers, and rods connecting said shaft with the main driving shaft of the machine, substantially as described and for the purposes set forth."

Schock patent, No. 605,138:

"(1) In a barrel-washing apparatus, the combination of a barrel feed tank, an inclined run in said tank adapted to support a plurality of barrels, and to enable them to move thereon in one direction, and revolving hooks and means for revolving them in the opposite direction, so that they will mechanically pick the first of said barrels off of the inclined run in the feed tank, substantially as described.

"(2) In an apparatus for soaking, scrubbing, and washing barrels at one continuous operation, the combination of a scrubbing device, a feed tank, mechanism for transferring the barrels from the feed tank to the scrubber, and gravity runs within the feed tank for automatically feeding barrels in one direction to the transferring mechanism moving in the opposite direction.

"(3) In a barrel-washing apparatus, the combination of a barrel feed tank, gravity runs therein in pivotal connection with the tank, and means for adjusting the said runs so as to give the keg the desired quantity of water, so that large and small packages can be supplied with water to the desired extent, substantially as described.

"(4) In a barrel-washing apparatus, the combination of a barrel feed tank, movable gravity runs therein, means for raising and lowering one end of the runs whereby to supply the barrels on the runs with the desired quantity of water, and means for lifting the barrels off of said runs.

"(5) In a barrel-washing apparatus, the combination of a barrel feed tank, gravity runs therein, arms for picking up barrels from the gravity runs and delivering the same from the tank, and gear for operating the arms in a direction opposite to the motion of the barrels on the gravity runs. * * *

"(7) In an apparatus for soaking, scrubbing, and washing barrels by one continuous operation, the combination of the barrel feed tank, inclined runs therein, means for adjusting the runs to various inclinations, means for lifting the barrels from the barrel feed tank, and a barrel scrubber to which the barrels are delivered by the lifting mechanism, the barrel in the scrubber being automatically discharged and replaced by the next succeeding barrel delivered from the lifting means.

"(8) In an apparatus for soaking, scrubbing, and washing barrels by one continuous operation, the combination of a barrel feed tank adapted to contain a plurality of barrels, inclined gravity runs within said tank, along which runs the barrels are free to move from end to end, a barrel scrubber, revolving hooks moving in a direction opposite to that of the feed of the barrels, said hooks being adapted to lift the first barrel of the series off the runs, and deliver it from above to the scrubber; the barrel in the scrubber being automatically replaced by the next succeeding barrel delivered from the revolving hooks."

Claims 1 and 2 of the Klamt patent are for a two tank barrel-washing machine, with scrubbing mechanism located between the two tanks. The barrels to be cleaned are first plunged into a long tank of hot water, where they are submerged and soaked inside and out for the purpose of dissolving the unclean substances. They are then moved slowly along curved guideways, rolling and taking water as they go, to the opposite end of the tank onto rollers, where they are rotated rapidly against end and side brushes, which scour off the loosened matter. At the same time the water inside is violently agitated by the rolling process. The bung and spiggot holes being open, the water gradually escapes, carrying the dirt with it. The barrels are then carried to the cold water tank and rinsed. Claim 3 calls for one of the tanks, but does not say which one, and sets out the specific receiving, discharging, and operating devices, not particularly involved on this hearing. From the time the barrels are placed in the tank until they are delivered upon the rollers, they are forced along by rotating arms.

The claims of the Schock patent in suit call for a long tank having an inclined run, two skids higher at the receiving end than at the discharging end, means for raising or lowering the discharge end thereof, so that it may be adapted to different sized barrels, revolving hooks arranged to pick up the barrel from the lower end of the skids and deliver it to the scrubber, thence to be removed by impact with the succeeding barrel. The scrubber and its operation are substantially those of the prior art. The difference between the two consists mainly in the inclined runway or skids, whereby the barrel is automatically moved to the lifting arm at the discharge end of the tank, and the absence of the second tank. The arrangement is simple, and, according to the record, very satisfactory. If it is to be treated as a valid combination, as appears to be conceded, I see no reason in the present suit for joining the Klamt patent.

Complainant, Schock, in applying for his own patent, insisted that the latter patent did not cover an operative device. This point is not insisted on in the briefs, and need not be further considered. Defendants' device is shown in a blue print, marked "Complainant's Exhibit 5." It undoubtedly contains many of the elements of the Schock patent.

For the defendants, it is insisted that both in the prior art and in prior public use that patent is anticipated. Every element in the combination is old. The hot water tank, the rotating rollers, and the adjacent brushing device are in the combination shown in the Gottfried patent, No. 450,149, issued April 14, 1891, as were complainant's lifting hooks or arms. With regard to the means for adjusting the discharge end of the skids in order to vary the depth of water, the patent office held that it required no invention to make anything adjustable, and the claims covering that matter were rejected, as appears from the file wrapper and contents of the Schock patent. To the same effect was the holding of the patent office as to the inclined or gravity runs. These appear in patent No. 489,066, granted Anderson, January 3, 1893, for a barrel washer. This latter patent, however, does not make the forward movement of the barrels in the tank depend alone upon gravity, but assists such advance by positive mechanical propulsion, which serves also to lift the barrel from the tank onto the approach to the scouring device. In view of the above, it is evident that, unless complainant's patent contains patentable novelty, in that it provides in combination with the other devices of the prior art for (1) inclined skids creating a gravity run, and (2) a stop and other mechanism for feeding the barrels to the scrubber. it becomes so narrowed that defendants do not infringe. Upon these points defendants invoke prior public use.

According to a number of witnesses, defendants Olsen and Tilgner in 1892 placed several Anderson barrel washing machines in position for the Blatz brewery. These witnesses further show that in 1894 one of these tanks was stripped of its mechanical propelling mechanism, and fitted with inclined skids, i. e., gravity runs, and that lifting arms were substituted for the lifting device of the Anderson patent. There is some confusion between the witnesses as to the incline of the skids or track. Some of the witnesses swear that it was present, others did not notice particularly, while some assert that the barrels were advanced by force exerted by a man in charge; that they did not move freely toward the lifting arms at the discharge end of the tank. On the whole, it seems to be fairly established that there was some incline to the skids, though not enough to cause the barrels to resist the action of the water and move freely toward the discharge. Undoubtedly, it is of advantage that the decline should be sufficient to cause the barrels to gravitate to the lifting arm. Much of the record and briefs is taken up with this tank. It had, as an Anderson tank, a descending track or runway for the barrels. This was removed, and rails or skids were constructed in lieu thereof, so that the gravity run was before those working the change at the time. This tank was used in

this way for about six months regularly, and thereafter only on occasion when needed. When this tank was abandoned, the hooks and other parts of the mechanism were transferred to another tank, and so on up to the beginning of this suit. Defendants' tank resembles this modified Anderson tank quite as closely as it does that of Schock. There also appear in evidence certain other barrel-washing tanks used respectively at the Cream City Brewery and the West Side Brewery, Chicago, Ill. The latter discloses a gravity run from the receiving end to the discharging arms, upon skids or tracks, as well as a stop. The model of this tank, marked "Defendants' Exhibit, West Side Brewery 1889, Barrel Soaking Tank," is identified by witnesses. Its details vary from those of the patent, but show all the principles required to make it operative, as to make its work of cleansing barrels a continuous operation. The Cream City Brewery tank is similar to the Blatz machine, but has a horizontal track. Both of these tanks were in use before the Schock patent was applied for or invented. The fact that the tanks of the latter patent have gone into extended use is persuasive as to their merit. Whatever that is must be found outside the defendants' device. In view of the state of the art and the facts showing prior use, I am of the opinion that none of the claims in suit is infringed by defendant.

The bill is dismissed for want of equity.

AMERICAN GRAPHOPHONE CO. v. UNIVERSAL TALKING MACHINE MFG. CO.

(Circuit Court, S. D. New York. February 19, 1906.)

PATENTS—ANTICIPATION—PROCESS FOR MAKING SOUND RECORDS.

The Jones patent, No. 688,739, for a method of producing sound records for use in talking machines of the gramophone type, in which the original record is produced by cutting or engraving the sound groove on a plate of waxlike material by means of the vibrations of the stylus, and a metallic matrix is formed thereon by electrolysis, from which the duplicate records are made by impression, is void for anticipation in the prior art.

In Equity. On final hearing.

See 118 Fed. 1020.

Elisha K. Camp (Philip Mauro and C. A. L. Massie, of counsel), for complainant.

Horace Pettit, for defendant.

HAZEL, District Judge. This action relates to the validity and infringement of patent No. 688,739, dated December 10, 1901, granted to Joseph W. Jones, on application filed November 19, 1897, for production of sound-records. The suit was originally brought by the patentee, but subsequently the American Graphophone Company acquired the absolute ownership of the patent by purchase, and thereupon a supplemental bill was filed bringing in the present complainant. This invention has for its particular object a method of duplicating or producing copies of an original sound-record of the zigzag

type, which was especially adapted for use in a talking machine known as the "Gramophone," invented by Emile Berliner. At the date of the patent in suit, the phonograph, the invention of Edison, the graphophone, the invention of Bell & Tainter, and the gramophone were known to the art and their distinguishing characteristics well understood. A brief summary, therefore, of the different styles of sound-records will suffice. Original sound-records of the Berliner patent, No. 548,623, consist of flat zinc records having etched on their surfaces a great number of infinitely small undulatory grooves of uniform depth, representing sound-waves. The sound-record of the invention adapted for use in talking machines, of which Mr. Edison and Messrs. Bell and Tainter were the inventors, consisted of cylindrical tablets having cut or engraved on their surfaces vertical undulations or irregularities of varying depth. In this controversy, we are not concerned with the construction of a machine or apparatus embodying the reproducing style, the adjustment of the record tablet, the reproducer diaphragm, the laterally undulating record, nor, indeed, the mechanical steps by which the record is enabled to effectuate the result. The distinctive purpose of the patentee, as stated by him, was the process or method of duplicating or multiplying a sound-record having lateral undulations of even depth. This object involved the method already known of producing the original or master record, the subsequent steps of making a metallic matrix by electrolysis, separating the same from the original record, and thereupon repeatedly pressing the matrix into a suitable yielding material so as to produce a vendible article. The claims which are descriptive of the alleged invention read as follows:

"(1) The herein described method of producing sound-records, which consists in cutting or engraving upon a tablet of suitable material, by means of the lateral vibrations of a suitable stylus, a record-groove of appreciable and practically uniform depth and having lateral undulations corresponding to the sound-waves, next coating the same with a conducting material, then forming a matrix thereon by electrolysis, and finally separating this matrix and pressing the same into a tablet of suitable material, substantially as described.

"(2) The process of producing commercial sound-records of the type indicated, which consists of first preparing a flat tablet or disk of soft waxlike material, then engraving thereon by means of the lateral vibrations of a suitable stylus a record-groove of appreciable and uniform depth and having lateral undulations corresponding to sound-waves, next rendering the surface thereof electrically conductive, then forming a matrix thereon by electrolysis, next separating the matrix from the original record disk without the use of heat, and finally impressing said matrix into a disk of suitable material to form the ultimate record, substantially as described."

Claim 2 contains the element of removing the matrix from the master record without the employment of heat. In other respects it is similar to the first. The defenses interposed are anticipation, noninfringement, want of patentability, in that the process described in the specification is for a mode of operation in which no elemental change is accomplished or chemical action effected. The latter defense will be briefly considered first. Does the process disclose a patentable invention? Assuming that the patent does not involve a chemical effect, though electroplating is one of the elements, it never-

theless is thought that the series of acts described in the Jones patent produce a definite and useful result essentially different from that described in the patents to Berliner, and one that would be patentable if the steps taken were not fully disclosed in patents of prior date. It is always important in considering a process patent to have in mind the fact that a similarity of machinery used to effectuate the result is wholly immaterial. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968. The patent is granted for the way the thing is accomplished, including the series of steps used to produce the article. That an old result brought into existence by a treatment upon certain materials theretofore unknown is entitled to the protection of the patent laws cannot be disputed. Cochrane v. Deener, 94 U. S. 780, 24 L. Ed. 514; Lawther v. Hamilton, 124 U. S. 1, 8 Sup. Ct. 342, 31 L. Ed. 325; Eastern Paper Bag Co. v. Standard Paper Bag Co. (C. C.) 30 Fed. 63; Crane v. Price, 1 Web. Pat. Cas. 626. By analogy, the same principle governs a process which depends upon the correlation of different mechanical elements to accomplish a new and beneficial result. In Kirchberger v. American Acetylene Co. (C. C.) 124 Fed. 764, affirmed 128 Fed. 599, 64 C. C. A. 107, Judge Ray comprehensively stated the rule as follows:

"When a patented process or machine proves a failure, is inoperative, and another follows, and is a success, in its operation, the latter is a new invention and patentable, even though we have the same machinery or parts of machinery, but they are combined or put together in a new way; and this is true even if the latter combination closely follows and resembles the first, provided there be a difference. In such case it is evident that the later patentee has succeeded where the other failed; that he has discovered or invented the desired thing to accomplish a new and useful result; that his change, however unimportant it may seem to the observer, is the key to the whole situation."

That a sound-record of the type in question, and the materials by which the result is attained (except the graving element), separately considered, were familiarly known, is not seriously disputed. Nor is it contended that the patentee was a pioneer in making sound-records. Whether the different steps of the process in suit were old must be ascertained by an examination of the antecedent art. Such art as understood by the patentee is thus stated in the specifications:

"Heretofore, records of this character, generally known as 'gramophone records,' have been produced by first tracing the lateral undulations or zigzags in a fatty (inky) film that protects an etching-surface, then etching this tracing into the material to form a groove, then running a blunt stylus through this groove to smooth the ragged etched surface, and finally electroplating this touched-up surface and pressing the matrix so formed into a suitable material to form the commercial record."

The above method, at the date of the invention, was concededly practiced to produce the master record of the gramophone, as claimed in patent No. 382,790, and in later improvements patents issued to Mr. Berliner. The elicited facts show that the departure of the patentee from the process of Berliner consisted of abandoning the etching feature and adopting in its stead a method of cutting or engraving in a substance of less resistence. Complainant claims that the process by which cylindrical records were engraved is unsuitable

to sound records having a groove of uniform depth. This claim, however, is stoutly resisted by the expert witnesses for the defendant. The question is whether Jones discovered a radically different method for duplicating sound records of the zigzag type. The patentee, further describing his process, says:

"This original record is then (after cutting or engraving the wax) prepared for receiving the electroplate deposit by coating its surface with an electric conducting medium, such, for instance, as carbon (graphite), as commonly employed in the process of electroplating, or, as a substitute, nitrate of silver. This coated plate is then placed in an electroplating bath, and a layer of metal (nickel, steel, etc.) is deposited upon it. The thin shell or matrix thus formed is then separated from the original record, which may be used repeatedly in the same manner, to form other matrices."

The evidence shows that the lateral undulations after engraving the material appear upon the matrix in the shape of a ridge, thus enabling an exact reproduction of the original sound grooves upon suitable material. The defendant claims, and the proofs show, that the Jones process was practiced and applied to cylindrical records in several prior British and American patents. Stress is placed by complainant upon the important element of engraving a waxlike composition from which a suitable metallic matrix could be made; but, in view of the state of the art, its novelty is doubtful. In the Rosenthal & Frank patent, No. 474,410, of 1892, a method of scratching a laterally undulating groove directly upon the record tablet is shown. This patent does not suggest a method of duplicating the record, and accordingly is of doubtful relevancy. The Adams-Randall British patent of 1889 simply indicates engraving upon a waxlike substance a record such as is claimed in the specification in suit, but no process for making a matrix and reproducing a record therefrom is shown. The Edison (British) patent to Gouraud, No. 12,593, of 1888, discloses means for cutting or engraving a laterally undulating groove of uniform depth. No electroplating process for producing a matrix is described, but the feature of cutting or engraving in a flat sheet or tablet of wax is clearly shown. In the Edison (British) patent to Gouraud, No. 15,206, of 1891 (Figure 20), a similar method is disclosed. By these publications it is apparent that the idea of cutting or engraving a sound-record of uniform depth did not originate with Jones, although it may be doubted whether the patents mentioned contemplated the precise process in suit. An important reference is the United States patent to Edison, No. 382,419, of 1888, in which is shown a duplicating process, including as an element a metallic matrix. The specification says that in a prior patent the patentee disclosed a process of depositing a layer of metal over the surface of a wax cylinder, and then dissolving out the wax, leaving upon the inside a mould of the record. It is practically admitted that the prior British patent, No. 1,544, of 1878, was unsuccessful, and accordingly the patentee conceived the idea of depositing metal over the recording surface of a wax phonogram of the cylindrical type and melting the wax so as to lengthwise separate the cylinder. The patent states:

"The result is a flat or cylindrical knurling surface having the record in relief, so that by rolling a wax phonogram-blank upon it the original record will be reproduced."

The patent further states:

"The duplicate phonogram-blanks * * * are preferably of a wax composition, which is too hard to be practically indented directly in the phonograph, although softer compositions may be employed, or materials other than wax."

It will be observed that the element of engraving a sound-record on a cylindrical wax tablet and forming a matrix by electrolysis directly from the master record is here shown. The specification omits to indicate the particular type of record to which the process is applicable, but it is quite probable that Mr. Edison had in mind a record of the vertically undulating type. I am unable to agree with complainant that cutting or engraving upon a cylindrical wax record, as stated by Edison and Gouraud patents (though it may not have been in hard wax), followed by electroplating and using the matrix to duplicate vertical undulations, did not suggest the Jones process.

This brings me to another important reference cited by the defendant in anticipation of the claims in suit. It is a close approach to the Jones invention, though likewise referring to a cylindrical record. In the British patent to Young, No. 1,487, of 1894, a clear process for duplicating the article in question is shown. There, the record was prepared upon a wax cylinder, then coated with plumbago in order to make it electrically conductive, and then it was immersed in an electric copper-plating bath, giving it a metallic surface. Upon removal it was heated and the wax drained off, leaving the original wax impression in relief upon the reverse side of the electroplating. The patentee then inserted therein a cylinder of celluloid, rubber, or other yielding material. In this manner correct impressions from the electroplate were taken, and, when the yielding material became cool, the duplicate record could readily be removed from the electro. The specification also states that the process related "to the phonograph, graphophone, gramophone and similar sound recording and reproducing instruments." Complainant claims that this process was impracticable, and various obstacles are raised against its favorable consideration. It is urged that the master record, because of the necessity of melting the wax, must be destroyed and the duplicate must be collapsed before it can be withdrawn from the matrix. It is obvious that slightly different steps would be necessary to produce a flat matrix, and that it would be unnecessary to dissolve the master record if the process were applied to records of the zigzag type. The skilled artisan doubtless would have had little difficulty in adjusting the various elements, so that a flat sound record of the type in question could have been produced without experimentation or the trials of an inventor. I think that the patent not only indicates that the process described might substantially be used in the way pointed out by Jones, but also that the patentee contemplated the application of his invention to the disk record. Moreover, that it was old at the date of the Jones invention to engrave or cut a sound record of uniform depth

directly upon a so-called master matrix finds support in the testimony of Berliner, Sanders, and Levy, witnesses for the defendant in an action brought by complainant against the American Record Company, which was argued and submitted before this court at the same term that this action was submitted, but which has not yet been decided. It appears from such evidence that a number of sound-records were cut or engraved, as distinguished from the etching process, by Mr. Berliner during the summer of 1896; the grooves being directly cut or engraved in lead and copper plate without applying any etching material. In this situation, giving consideration to the prior state of the art, the cutting or engraving on a wax composition is not thought to have been a patentable discovery. But complainant vigorously insists that the Jones process went into immediate use, displacing other methods of duplicating records, and accordingly must be regarded by the court as a meritorious and patentable improvement. The force of this argument, however, is not perceivable, in view of the fact that the Bell & Tainter patent, No. 341,214, of May 6, 1886, owned by the complainant, and to which I have not yet alluded, broadly claimed the process in suit. Claims 1 and 9, fairly indicating the character of the invention, read:

"(1) The method of forming a record of sounds by impressing sonorous vibrations upon a style, and thereby cutting in a solid body the record corresponding in form to the sound-waves, in contradistinction to the formation of sound-records by indenting a foil with a vibratory style, or cutting a strip by vibrating it against a revolving disk cutter, substantially as described."

"(9) The method of forming a sound or speech record which consists in engraving or cutting the same in wax or waxlike composition, substantially as described."

Referring again to the evidence in the suit against the American Record Company, the document filed in October, 1881, by Bell & Tainter, in the Smithsonian Institute at Washington, specifically refers to the feature of cutting or engraving both the vertically undulating and zigzag process and to the duplication of phonograms. The specification, inter alia, omitting nonessentials, says:

"The essentially new feature * * * is the removal of material to form the record by a cutting, gouging or graving action of the vibrating style, * * * in engraving or cutting the record in a waxy or amorphous and slightly cohesive substance."

And further:

"In combining with the disk of a recording and reproducing apparatus in which the record is formed on the face of said disk in a volute or spiral by cutting or otherwise by any known suitable means, mechanism for giving to said disk a uniform surface speed under the recorder."

That the recording mechanism was of the vertically undulatory type, and not the uniform depth type as already intimated, is unimportant. Both types are closely allied and, as said, commonly understood. The quoted claims of the Bell & Tainter patent were broad, and the specification does not indicate a narrow scope. It is thought plain from the evidence that Berliner felt constrained to await the expiration of the Bell & Tainter patent before practicing a process which he believed

was covered by the said claims. Upon this point, after narrating certain prior experiences, in relation to cutting the record in a hard material, he testifies:

"In fact, this whole matter of cutting a gramophone record directly in wax or other solid material was thoroughly familiar to all of us, but, on account of the very broad scope of the Bell & Tainter patents, no attempt was made to make such records for commercial use, because we felt sure that the Bell & Tainter patents would be sustained against them, and, as I had interested outside capital in the gramophone, it was my aim to steer clear of all legal entanglements as much as possible and give them a free field in which to work."

The next point relates to the lecture published by Mr. Berliner at Philadelphia, on the subject of the gramophone, in which he mentioned certain disadvantages in the sound-record, and it is claimed that he was endeavoring by experimentation to overcome the problem or difficulties in his process. The evidence indicates that Mr. Berliner did not mean to be understood as stating that his process was defective or inoperative, but that he simply meant to make clear to his audience that the surfaces of the duplicates were not polished or finished in appearance on account exclusively of the inefficiencies of the electrotypers. It also appears in evidence that Mr. Berliner filed an application for a patent, claiming that the process as described in the patent in suit was his invention. An interference was declared between him and Jones, and priority of invention awarded to the latter. From this occurrence, the inference is suggested that the Jones process was a marked advance in the art. While the proceeding was pending in the Patent Office, the later application of Berliner was withdrawn by him on the ground that the process was not patentable. According to the explanation of the witness Berliner, the plausibility of which is apparent, he thought that there was no substantial reason why the views of the Patent Office in relation to the alleged invention should not be ascertained, especially as Jones claimed to be the inventor. The file wrapper and contents show that the patent in controversy was rejected about eight times, upon the ground of want of patentability, in view of the prior patents to Edison, Berliner, No. 548,623, Young, Rosenthal & Frank, Bell & Tainter, and Gouraud, No. 15,206. Subsequently, however, the patent was granted by the commissioner of patents, owing, doubtless, to the earnest and skillful arguments of counsel that the process differed essentially from the prior art, and also that harmful effects of the process then in use were removed by the improvement.

It is urged by counsel for complainant that the process described in the Berliner patent was incapable of duplicating the sound-records with the high degree of success attained by the improvement patent, but the claim is not sufficiently established by the evidence. This is not a case wherein the substitution of one thing for another accomplishes a beneficial result which the skilled in the art had in vain sought to bring about. In other words, the step by which the tablet is cut into or engraved by the lateral movements of the stylus, instead of such undulations being traced or etched, was perhaps a step for-

ward. Old ideas and suggestions, however, which are found in prior publications, were used to produce the better result. This achievement did not involve the ingenuity of an inventor, but comes within the limits of the skilled in that class of workmanship. What the patentee accomplished is thought to fall within the rule laid down in the following cases: Locomotive Works v. Medart, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899; Smith v. Nichols, 88 U. S. 112, 22 L. Ed. 566; Pennsylvania R. Co. v. Locomotive Co., 110 U. S. 490, 4 Sup. Ct. 220, 28 L. Ed. 222.

Inasmuch as the proofs satisfy me that the patent in suit is anticipated by the prior art, it follows that the bill must be dismissed, with costs.

AMERICAN GRAPHOPHONE CO. v. AMERICAN RECORD CO.

(Circuit Court, S. D. New York. February 19, 1906.)

PATENTS—ANTICIPATION—PRODUCTION OF SOUND RECORDS.

The Jones patent, No. 688,739, for a method of producing sound records for talking machines, is void for anticipation in the prior art.

In Equity. On final hearing.

Elisha K. Camp (Philip Mauro, Reeve Lewis, and C. A. L. Massie, of counsel), for complainant.

Samuel Owen Edmonds, for defendant.

HAZEL, District Judge. This suit in equity relates to the Joseph W. Jones patent, No. 688,739, granted December 10, 1901, for "production of sound records." Complainant is owner of the patent by assignment. The defendant challenges the validity of the patent and denies infringement. This case was argued before me and submitted at the same term of court at which the action involving the same patent, entitled "American Graphophone Company against Universal Talking Machine Manufacturing Company," was heard and submitted. In the argument one case followed the other; the Universal Company case being argued first. In that case, I have to-day handed down an opinion (145 Fed. 636) holding that the involved claims, two in number, were anticipated by the prior art as appeared by the patents of Adams-Randall, of 1899; Gouraud, Nos. 12,593 of 1888 and 15,206 of 1891; Edison, No. 382,419 of 1888; Young, No. 1,487 of 1894; Bell & Tainter, No. 341,214 of May 6, 1886; Berliner, No. 548,623.

For the reasons there stated, the bill is dismissed, with costs.

AUTOMATIC RACKING MACH. CO. v. WHITE RACKER CO. et al.

(Circuit Court, N. D. Illinois, E. D. February 2, 1906.)

No. 27,966.

1. PATENTS—CONCLUSIVENESS OF DECISION OF PATENT OFFICE—SUIT FOR INFRINGEMENT—ESTOPPEL TO DENY VALIDITY.

The defeated party in an interference proceeding in the patent office, which involved only the issue of priority of invention, is not estopped by

the decision to contest the validity of the patent granted to the successful party, when sued for its infringement on the ground of lack of patentable novelty or invention.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 164, 165.]

2. SAME—SETTLEMENT BY LICENSEE—ESTOPPEL AGAINST LICENSEE.

The settlement by a licensee under a patent of a suit brought against it for infringement of another patent does not estop its licensor, who was not a party, and did not participate in the settlement, from subsequently contesting the validity of the patent sued on.

3. SAME—PRELIMINARY INJUNCTION.

A preliminary injunction against infringement of the Gangwisch patent, No. 647,298, for an apparatus for racking beer, denied. on the ground that its validity was not established by adjudication nor public acquiescence, and was contested by defendant, and could not be determined on the showing made.

In Equity. On motion for preliminary injunction.

John W. Mundy, for complainant.
Banning & Banning, for defendants.

KOHLSAAT, Circuit Judge. This is a motion for a preliminary injunction to restrain defendants from infringing claim 19 of patent No. 647,298, granted to Richard H. Gangwich April 10, 1900, for an apparatus for racking beer. The patent has 46 claims; the injunction, however, being asked as to one claim only (claim 19), which is as follows:

"(19) In a filling machine, a combination of the filling-tube adapted to enter the receptacle, an air-cylinder, and a piston therein secured to said filling-tube, and adapted to operate same, substantially as shown and described."

There has been no adjudication as to any of the claims of said patent. Complainant bases its motion on the grounds that the moving papers show public acquiescence in the validity of the patent, as well as facts constituting an estoppel on the part of defendants to deny its validity. The application for the Gangwisch patent was filed October 16, 1895. While said application was pending, Royal C. and H. A. White filed in the patent office an application for a patent upon a similar machine. Two interferences were declared upon said pending applications—the first in 1897 on claims not at this time involved, and the second on December 18, 1898, with reference to said claim 19. In the first interference the Whites were paid $1,000 by Gangwisch, and withdrew in his favor. In the second, involving the claim here in issue, no contest was made by White, and the decision thereon was likewise in favor of Gangwisch. The Gangwisch patent was subsequently assigned to complainant herein. The moving papers show that a suit for infringement was begun by the original owners of the Gangwisch patent against complainant herein, who was operating under the Colby patent, No. 651,651, for a racking machine, which litigation was settled by complainant taking a license under said Gangwisch patent. Subsequently complainant purchased said patent. Suits were then brought by complainant against alleged infringers of these two patents in three several instances, and the litigation in each

case was settled; the alleged infringer either retiring from the field, or taking a license under the Gangwisch patent. One of these was Charles Kaestner & Co., which said concern was operating under the White patent, No. 588,308, under an agreement with Royal C. White, defendant herein, providing for the payment of royalties to said White. By a settlement with the Automatic Racking Machine Company on or about December 19, 1904, in a suit brought by said company against Fortune Bros. Brewing Company and Kaestner & Co. for infringement of the Gangwisch and Colby patents, Kaestner & Co. retired from the business of manufacturing and selling racking machines, and submitted to the entry of a permanent injunction against themselves in complainant's favor. White was not a party to this suit by name. It is insisted by complainant on this motion that White was a partner in the enterprise of Kaestner & Co., and is bound by the settlement agreement of complainant with them, and that he is therefore now estopped to deny the validity of the Gangwisch patent, or of any claim therein. Shortly after the Kaestner settlement and their retirement from business, White organized the White Racker Company, also made a defendant herein, which said company is at present engaged in selling racking machines.

That defendants' device is an infringement of claim 19 of the Gangwisch patent is not denied. The motion for the injunction is resisted on the ground that the claim is for a double use of an old device, and therefore void. That defendants are not estopped to assert the want of patentable novelty in the subject-matter of said claim by reason of the proceedings in the patent office seems clear. Haughey v. Lee, 151 U. S. 282, 14 Sup. Ct. 331, 38 L. Ed. 162. The issue in the interference proceedings was that of priority of invention alone, and was in no way decisive of the question as to whether the subject-matter of the claim was the result of more than mechanical skill. Apart, then, from the presence in this suit of a defendant who was a stranger to those proceedings, White himself can raise the question of invention, unless the Kaestner settlement forecloses him. I am unable to find from the facts presented on this motion that it does. At the time of the settlement in question, Kaestner & Co. was a corporation. The relation between it and White, so far as can be ascertained from the somewhat indefinite facts before the court, seems to have been that of licensee and licensor. White did not sign the agreement for settlement with complainant, and he denies the statement made by the moving papers that he knew of and approved the terms thereof. In my judgment, the record presented for the purposes of this motion would not justify a finding adverse to his right to be heard upon the question of the validity of the patent.

Coming, then, to consider the matter upon the merits, the evidence does not satisfy me that a preliminary injunction should issue on the record as it now stands. The history of the litigation over the patent is of a nature that leaves it uncertain whether the defense to those suits was hopeless, or whether it was merely inexpedient, in the judgment of the various defendants, to continue such litigation; and the question of the value of these various settlements as denoting public

acquiescence in the validity of the Gangwisch patent is further confused by the presence of the Colby patent as a factor therein. It appears that the Colby patent has been sustained by the court, and that fact may have been controlling in effecting the settlement. The evidence is clear that, so far as White is concerned, he has steadily declined to acknowledge the validity of said claim in suit, and has been engaged since 1898 in building and selling racking machines which infringed claim 19, and complainant was aware of said infringement. Why complainant delayed seven years before bringing suit against him does not appear, and the delay must be considered on this motion against complainant's right to an injunction. Blakey v. Kurtz (C. C.) 78 Fed. 368. Defendant cites 36 patents of the prior art in support of the contention that the claim herein is void. There is no discussion of these patents by complainant's expert, nor does the record afford adequate means for ascertaining their bearing as anticipatory references. Complainant's expert states generally that he knows of nothing that can be produced to impugn the novelty of said claim. There is nothing before the court to show that he knows of and has considered in this connection these various patents cited by defendants. Upon such a showing, I find myself unable to adjudge as to the validity of said claim.

The case should go to final hearing and be determined on full proofs. No reason appears why the proof cannot be completed within a short time. If the issue is to be narrowed to claim 19, certainly no extended period for the taking of testimony is necessary. No showing is made by complainant as to the inability of defendants to respond in damages should an injunction and accounting eventually go against them.

For these reasons, the motion for a preliminary injunction will be denied at the present time.

MUNROE v. RAILWAY APPLIANCE CO.

(Circuit Court, N. D. Illinois, E. D. February 2, 1906.)

No. 26,920.

PATENTS—NOVELTY—CAR STARTER.

The Ripberger patent, No. 493,736, for a car starter, although merely for an improvement in such devices, discloses patentable novelty, and is valid. Also *held* infringed.

In Equity. On final hearing.

Frank T. Brown, for complainant.

Banning & Banning, for defendant.

KOHLSAAT, Circuit Judge. This cause is now before the court on final hearing. Complainant brings suit for infringement of patent No. 493,736, granted to Jacob Ripberger and Charles Manne, assignee, on March 21, 1893, for a car starter. Both title and infringement are conceded, and the defense rests wholly upon lack of patentable novel-

ty in view of the state of the art. The one claim of the patent reads as follows:

"The combination, in a car starter, of the lever, A, having a wedge-shaped toe, B, a pair of jaws, D, D', slotted vertically at d, d', and pivoted to each other by a single bolt, E, and a pin, C, that traverses said toe, B, and slots, d, d', and descends within said slots when said lever is depressed, all as herein described, and for the purposes stated."

The device is one of many in the art designed for use in giving cars a start by hand, and then edging them along to the desired position. This requires a tool which can be fixed firmly to the rail when in operation and then easily released from such fixed relation to the rail in order that the car may be followed up and kept in motion. It must be light enough to be readily portable. The patent in suit calls for two flaring jaws with vertical slots in their upper limbs through which a bolt runs in such manner that it may slide up and down in the slots, passing through a hole made in an extension of the part of a lever bar called the "toe" of the bar in the patent. This toe is tapering from the bar to its outer edge for the purpose of acting as a wedge upon the upper portion of the jaws, when pressed down between them. The lower portions of the jaws are pivoted together by a pin running at right angles to the slot and lever handle pin above described. The jaws terminate in actual jaws or clamps, similar to those of the ordinary pincers. When the lower end of the lever is placed against the car wheel, and the handle is pressed down, the toe of the lever operating with the pin in the slots is forced into the narrowing space of the upper limbs of the jaws with the result that they are spread, whereby the lower jaws or clamps are made to grip the rail and hold the device in fixed position so long as required. The lever thus becomes fulcrumed upon the inside of the upper arms. When the lever handle is raised, the grip is released and the starter can be removed to another position at will. The action is the reverse of that of pincers. In the latter the upper limbs are drawn together to cause the lower limbs to grip an object. In this patent, that result is obtained by spreading the upper limbs. Every element of the patent is old.

Defendant makes reference to the De Graw patent, No. 14,154, granted January 29, 1856, for a car starter. Nothing but the drawings appear in the record. It discloses gripping jaws connected upon a common bar or plate by two longitudinal pins. The operation is upon the same principle, but the whole device is different from that of the patent in suit. The patent issued to Underhill, March 14, 1882, for a car starter, No. 255,054, is practically the same as the starter here in suit, lacking only the longitudinal pin which holds the jaws in fixed relations. This is entirely wanting. As a consequence, the lower limbs of the Underhill device are wobbly and uncertain in action. It is evidently a matter of some difficulty to secure them in position to be clamped upon the rail. The device of patent No. 259,598, granted to Stone, June 13, 1882, for an apparatus for moving cars, discloses the same longitudinal pivoting of the lower limbs of the jaws as that of complainant's device, but lacks the pivot and slots

in the upper limbs of the jaws. The lever is pivoted above the upper limbs of the jaws. In operation it drives the plunger upon which it is pivoted, down upon an arrangement of links pivoted to a slide forming a fulcrum while in the descent they spread the upper arms of the jaws, and cause the lower arms to clamp the rail just as the patent in suit. The starter of the patent issued to Wheeler, January 31, 1873, No. 135,187, consists of an upright frame, having two legs terminating in clamping devices. Those operate upon the wedge principle just as in the patent in suit. The wedges are placed between the upper limbs of the jaws and are pivoted upon a bolt which passes through them respectively into slots in the upper limbs, just as in the device before the court. They are operated without any lever. A rope or chain moves over a drum in the upper frame of the device which, when drawn taut, tilts the whole frame whereby the wedges are driven down just as in the present case. The lower limbs of the jaws are pinioned together, but not by a longitudinal bolt. Both of the pins run at right angles to the inner and outer faces of the upper arms of the jaws. Thus it will be seen that whatever there is of novelty in complainant's device must consist in the use of the lower longitudinal bolt, holding the lower limbs of the clamping jaws in fixed relation to each other when not in use, in combination with a lever handle, pivoted on a separate pivot at right angles thereto, and acting as a wedge.

I find no device in the prior art which combines a lever handle having a so-called toe integral therewith, designed to clinch the clamps upon the rails by a downward pressure, with jaws, the lower limbs of which are held in fixed relation to each other by means of a single pivot, either longitudinal or otherwise. The Wheeler patent attains that fixed relation by means of a transverse pivot, but has no handle. The result obtained by the tilting of the frame of the Wheeler starter might be deemed an equivalent of the handle pressure, were the patent in suit primary. It is not only not primary, but very narrow, if sustainable at all. The Underhill patent which calls for the only lever-handle device in the prior art, lacks only the means for a fixed relation in its lower limbs, as above shown, and is otherwise identical with the patent in suit. It is insisted by complainant that the use of the longitudinal pivot is of great advantage, in that the strain upon the thread and head of the pins or bolts is thus avoided; a position which seems to be sustained by the facts. This, however, is theoretical as it does not appear that complainant has ever manufactured, and far less, put in use the device of his patent, although it was granted almost 13 years ago. He merely selected the pivot arrangement of the Stone patent in place of that found in the Wheeler patent. In doing so he seems to have hit upon a starter which in course of time appealed to defendant. Undoubtedly complainant had the right to withhold the benefit of his discovery, if it be one, from the public for the term of 17 years. It is fair to assume that defendant concluded to put complainant's device into public use, and take his chances of being able to show that complainant had made no invention. Therefore the parties are before the court without any equities other than

complainant's right as owner of the patent. While the invention is very close to the line, yet, considering the advantages of the device of the patent in suit over the prior art in respect to its convenient, new and simple arrangement, together with the great advantage which follows slight advance in the "starter" art, I deem the patent possessed of a degree of novelty sufficient to justify the court in sustaining it.

It is therefore ordered that an injunction issue as prayed.

AMERICAN CEREAL CO. v. ORIENTAL FOOD CO.

(Circuit Court, N. D. Illinois. E. D. February 2, 1906.)

No. 27,964.

PATENTS—SUIT FOR INFRINGEMENT—SUFFICIENCY OF BILL.

A bill for infringement of a patent is not demurrable because of its failure to allege that the invention was not patented in a foreign country more than seven months prior to the filing of the application in this country; the provision of Rev. St. § 4887, as amended by Act March 3, 1897, c. 391, § 3, 29 Stat. 692 [U. S. Comp. St. 1901 p. 3382], denying the right to a patent in case of such foreign patenting more than seven months prior to the application, being a matter of defense to be pleaded by answer.

In Equity. On special demurrer to bill.

Jones & Addington and Robert H. Parkinson, for complainant.
Rector & Hibben, for defendant.

KOHLSAAT, Circuit Judge. This cause comes before the court on special demurrer. The ground stated is that the bill does not negative the seven months' clause of section 4887 of the Revised Statutes [U. S. Comp. St. 1901, p. 3382], in force at the date of the application for the patent in suit. I am of the opinion that, in a proceeding for infringement of a patent, the provisions of that section constitute matters of defense and must be set up in an answer, and not by demurrer.

The demurrer is overruled.

In re SALMON et al.

In re HENRY COUNTY et al.

(District Court, W. D. Missouri, W. D. April 30, 1906.)

1. BANKS AND BANKING—DEPOSITS—RELATION OF DEPOSITOR AND BANK—TAXES.

The deposit of money in a bank establishes the relation of debtor and creditor between the depositor and the bank, and this, though the fund deposited arose from taxes levied for municipal and school purposes.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, §§ 289, 290.]

2. CONTRACTS—AGREEMENT TO STIFLE COMPETITION—VALIDITY.

The controlling banks in two of the largest cities and towns of a county, with a view to stifling competition among themselves whereby they would obtain the use of the county's moneys at reduced rates, agreed that one of them should obtain the money on an understood bid. In order to give color to a competitive bidding, another bank put in a bid lower than that it knew would be offered by the favored bank, with the distinct understanding that the latter, on becoming the depositary, should parcel out the deposits among all the banks in the combination in given proportions, the allottees paying on the respective sums the amount of interest the favored bank agreed to pay to the county, and that the funds paid under the agreement to the combining banks should only be subject to withdrawal on checks or warrants drawn by the county. *Held*, that such combination was a fraud on the county and invalid.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 654, 657.]

3. BANKRUPTCY—BANK DEPOSITS—RIGHTS OF CREDITORS.

Where several banks entered into an illegal combination to suppress bidding for county funds, under an agreement providing that, after the successful bidder obtained the funds, they should be apportioned among the members of the combination, and that such funds should not be subject to check, except for the payment of drafts and warrants drawn by the county, on the bankruptcy of the successful bidder, and the discovery of such scheme, the county was entitled to rescind and recover funds in the possession of another of the conspiring banks as against the bankrupt's general creditors.

See 143 Fed. 395.

I. P. Ryland, for trustee in bankruptcy.
James D. Lindsay, for Henry county.
C. A. Calvird, for Citizens' Bank of Clinton, Mo.

PHILIPS, District Judge. This cause has been submitted upon an agreed statement of facts filed herein, to which reference is made, the substance of which is that at the May term, 1903, of the county court of Henry county, Mo., the court caused notice to be published, as required by the state statute, advertising for bids from banks and others to be designated as the county depositary of the public funds of the county; the law providing that the bank offering the largest rate of interest for said deposits should be designated the county depositary and receive the county deposits. Prior thereto an agreement existed between the firm of Salmon & Salmon, private bankers, the Citizens' Bank of Clinton, Mo., and the Citizens' & Farmers' Banks of Windsor in said county, to the effect that said four banks, being the principal banks in said towns at the date of the submission of the bids, should not compete with each other for said funds. It was agreed that said bank of Windsor would not submit any bids; that the Citizens' Bank of Clinton should submit a bid a little less than that bid by Salmon & Salmon, so that the latter might become the highest bidder, and thereby become the depositary of said funds; and that, after the funds were so received by Salmon & Salmon, they should be apportioned among the respective banks in a designated proportion. At said May term, 1903, of the county court, the Citizens' Bank submitted a bid of 2¼ per cent. on daily balances for the privilege of being designated said depositary, and Salmon & Salmon submitted

a bid of 2⅓ per cent., and upon the submission of such bids the award was made to said Salmon & Salmon, who filed their bond as such depositary in the sum of $200,000, with approved security. This bond required Salmon & Salmon, upon the presentation of all checks drawn upon them as such depositary by the treasurer of the county, to pay the same. Thereafter the funds of the county were so deposited with said Salmon & Salmon up to the 20th day of June, 1905. A written agreement was entered into between Salmon & Salmon and said Citizens' Bank of date July 1, 1903, reciting the fact of said Salmon & Salmon becoming the depositary of said county funds, by which Salmon & Salmon agreed to keep on deposit with and permit the Citizens' Bank to use a certain portion of the county funds, to be determined in a specified manner; the Citizens' Bank agreeing to pay for the use of said money the contract rate of interest at which the award was made to Salmon & Salmon, to be paid monthly in the same manner as the depositary was to pay Henry county. The deposits made by the county as aforesaid consisted of currency, checks, and drafts, such as are usually deposited in the ordinary course of business with banks. The total of these deposits for the period indicated was approximately $320,000, and during that period the county drew its checks on the depositary, which were paid to the amount, approximately, of $700 more than the deposits within the same period. There was, however, on June 1, 1903, on deposit with Salmon & Salmon to the credit of the county the sum of $64,464.69; and on June 20, 1905, the balance to the credit of the county was $63,976.77. In pursuance of the said agreements, Salmon & Salmon deposited with the Citizens' Bank funds by cashiers' checks, which the latter bank kept on its books as a special account with Salmon & Salmon therefor. The agreement was that the funds so received and held by the Citizens' bank were not to be checked upon by Salmon & Salmon in the usual course of business, but only for the purpose of responding to warrants or checks drawn by the county upon Salmon & Salmon.

On June 20, 1905, Salmon & Salmon became insolvent, and at the suit of creditors, instituted in the state circuit court, a receiver was appointed for them. At that time the sum of $16,000 was on deposit with the Citizens' Bank under the terms of the aforesaid arrangement between it and Salmon & Salmon. Afterwards Salmon & Salmon, on petition of certain creditors, was adjudged bankrupt in the United States District Court for this District. The said balance so found in the possession of the Citizens' Bank at the time of the insolvency of Salmon & Salmon was claimed by the trustee in bankruptcy and also by Henry county. The question as to which of the claimants is entitled to this fund was brought into this court by appropriate pleadings, and by consent of the parties submitted to its determination.

It is conceded by the respective counsel in this case that the well-settled rule of law is that a deposit of money in a bank or with a banking concern establishes the relation of creditor and debtor between the depositor and the depositary. The deposit does not partake

of the nature of a trust fund, but becomes an asset of the bank, whereby Salmon & Salmon became a simple debtor to the depositor, subject to its call check for the payment thereof. And it may also be conceded that, although the fund so deposited arose from taxes for municipal or school purposes, it did not alter the relation of mere creditor and debtor, and that in case of bankruptcy of the depositary such depositor is not entitled to any preference over other creditors of the bank in the distribution of the assets of the estate. Multnomah County v. Oregon National Bank (C. C.) 61 Fed. 912; Spokane County v. Clark (C. C.) 61 Fed. 538; Brown v. Board of Commissioners (Kan. Sup.) 50 Pac. 888; Board of Commissioners v. American Loan & Trust Company (Minn.) 78 N. W. 113; Hall County v. Thomssen (Neb.) 89 N. W. 393; In re State Treasurer's Settlement (Neb.) 70 N. W. 532, 36 L. R. A. 746; McNulta v. West Chicago Park Commissioners, 99 Fed. 900, 40 C. C. A. 155.

In the view I take of the merits of this controversy it is not essential to discuss the question argued by the respective counsel as to whether or not the relation of cestui que trust and trustee existed between Salmon & Salmon and the Citizens' Bank, or whether or not the funds in the hands of the Citizens' Bank were so impressed with an implied trust as to enable Henry county to pursue it in the hands of the bank. The scheme of the statute authorizing the deposit of county funds with a depositary paying the highest rate of interest therefor had among its objects to put an end to the practice of county treasurers enriching themselves off of the use of the public funds of the county, and to secure the profit of such letting to the county. The purpose and object of letting the funds go to the highest and best bidder was to secure competition among the banks, whereby the county would realize the highest rate of interest obtainable in an open and fair contest. From the agreed statement of facts it appears that the controlling banks in two of the largest cities or towns in Henry county, with a view to stifling competition among themselves, whereby they would obtain the use of the county moneys at reduced rates, entered into a secret combination among themselves, whereby the banking institution of Salmon & Salmon should certainly obtain the money on an understood bid. To give color only to a competitive bidding, the Citizens' Bank put in a bid lower than that it knew would be offered by Salmon & Salmon. The distinct understanding and agreement among themselves was that, while Salmon & Salmon would thus become the ostensible depositary of the entire public funds of the county, the same should thereafter be parceled out among all the banks in the combination, in given proportions; the allottees paying on the respective sums the amount of interest Salmon & Salmon promised to pay to the county. That such a combination was a fraud upon the county and void, as in contravention of sound public policy, hardly needs the citation of authorities to maintain. It is a uniform, inflexible rule of law that all such combinations, the effect of which is to stifle competition in bidding at public or private sales, or in the letting of public works, and, on principle, in the letting to hire of public moneys, are immoral, vicious and void.

Engelman v. Skrainka, 14 Mo. App. 438; Wooton v. Hinkle, 20 Mo. 290; Hook v. Turner, 22 Mo. 333; Durfee v. Moran, 57 Mo. 374–379; Swan v. Chorpenning, 20 Cal. 182; Gibbs v. Smith, 115 Mass. 592; People v. Stephens, 71 N. Y. 527; Finck v. Granite Co., 187 Mo. 244, 86 S. W. 213, 106 Am. St. Rep. 452; Bishop on Contracts, § 528; Greenhood on Public Policy, etc., p. 183 et seq. The common sense of justice accords to the county every reasonable measure of protection against such deception and imposition practiced by the parties to such illicit combination. It had the right to rescind the contract between it and Salmon & Salmon, and recall the money deposited with them, whenever it became advised of that compact among the banks. But for the failure of Salmon & Salmon, and the passing of their books under public scrutiny, this secret compact and the allotment of county funds to the Citizens' Bank would not have become known. When it was displayed the county had the right to go after the wrongdoers for restitution.

It is a well settled rule of law that, where A. sells B. goods on credit, in ignorance of the fact that C. is a dormant partner of B. the vendor may maintain action against C. for the price of the goods, on the ground that B. was acting as the agent of the secret partner. Richardson M. & Co. v. Farmer, 36 Mo., loc. cit. 36, 37, 88 Am. Dec. 129. Akin to this principle, it has been held that, where a vendor assumes to convey land, of which he represents himself to be the owner, but to which he has no title, and receives a deposit of the purchase money, really for the benefit of himself and another party secretly interested in the transaction, he acted as agent for such third party who received a share of the deposit, and that both parties are liable to the vendee jointly for the sum so received by the ostensible vendor. Dashaway v. Rogers, 79 Cal. 211, 21 Pac. 742. So, when the Citizens' Bank entered into a secret compact with Salmon & Salmon to obtain the use of the public moneys of Henry county at a low rate of interest, to be effected by suppressing competitive bidding therefor, and it put forth the concern of Salmon & Salmon to thus obtain the money, Salmon & Salmon were in fact and law acting as the agent of the Citizens' Bank to thus obtain for its benefit a designated portion of said funds. It in fact and law was a concealed principal as to the amount so allotted to it.

Salmon & Salmon were not to, and did not, receive any benefit from the money allotted, under the agreement, to the Citizens' Bank. When that fact became known to the county, after the declared bankruptcy of Salmon & Salmon, and it so acquired the money, why should the county not have the right to go directly after the Citizens' Bank, a principal in fact, for the $16,000 found in its hands? Salmon & Salmon were not entitled to that money as against the county, and the trustee in bankruptcy acquired no greater right thereto than had Salmon & Salmon at the time of the institution of the bankruptcy proceeding against them and the adjudication thereunder. York Manufacturing Company v. Arthur Cassell et al. (recently reported in advance sheets of the Supreme Court of the United States, No. 208, October Term, 1905) 26 Sup. Ct. 481, 50 L. Ed. ——.

No general creditor of Salmon & Salmon could claim that fund in the hands of the Citizens' Bank as against the county, it seems to me, for two reasons: (1) Because the bank was, in contemplation of law, a principal debtor of the county therefor; and (2) because, under the agreement between Salmon & Salmon and the Citizens' Bank, the money held by the bank was only demandable by Salmon & Salmon to meet warrants drawn by the county on the fund. City of Marquette v. Wilkinson, 119 Mich. 413, 78 N. W. 474, 43 L. R. A. 840.

It results that my conclusion on the law arising from the agreed statement of facts is that the county of Henry is entitled to the $16,000 in the hands of the Citizens' Bank of Clinton, Mo. It is accordingly so ordered.

UNITED STATES v. CERTAIN LANDS IN THE TOWN OF NARRAGANSETT, R. I.

(Circuit Court, D. Rhode Island. May 16, 1906.)

1. EMINENT DOMAIN—CONDEMNATION OF LAND FOR HARBOR PURPOSES—DISCRETIONARY POWER OF SECRETARY OF WAR.

An appropriation act of Congress made an appropriation for improving the Point Judith harbor of refuge, Rhode Island, under direction of the Secretary of War, and provided that the amount should be applied "in extending the easterly or shore arm of the breakwater and continuing it to the shore, with a view of providing a shelter for a landing place for the passengers, crews, and cargoes of vessels in distress and other vessels, and for the life boats of the Point Judith life-saving service." *Held*, that under a fair construction of the act, having in view the purpose of the improvement, it authorized the taking not only of such part of the shore as the end of the breakwater should actually rest upon, but of such additional land as would give the government control of the shore terminus, and of a landing place for passengers, cargoes and life boats, with access to a highway over its own land, and that the determination of the amount required for such purposes was committed to the discretion of the Secretary of War, whose judgment could not be controlled or reviewed by the courts unless his authority was clearly exceeded.

2. SAME.

Act Aug. 1, 1888, c. 728, 25 Stat. 357 [U. S. Comp. St. 1901, p. 2516], providing for proceedings for the condemnation of land for public use by the United States confers no general authority to acquire land, but only authority to institute proceedings for condemnation where its acquirement is otherwise authorized, but by Act April 24, 1888, c. 194, 25 Stat. 94 [U. S. Comp. St. 1901, p. 3525], the Secretary of War is directly given the right to institute proceedings for "condemnation of any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law," and under such act he is intrusted with the power and duty of determining specifically what land, right of way, or material is needed for such works as are authorized by law.

On Demurrer to Answer of Margaret D. L. Robinson.

Charles A. Wilson, U. S. Dist. Atty.

James Tillinghast and Wm. R. Tillinghast, for Margaret D. L. Robinson.

BROWN, District Judge. Appropriation Act March 3, 1905, c. 1482, 33 Stat. 1119, contains the following provision:

"Improving Point Judith harbor of refuge, Rhode Island, one hundred thousand dollars: Provided, that a contract or contracts may be entered into by the Secretary of War for such materials and work as may be necessary to prosecute said project, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate one hundred thousand dollars, exclusive of the amounts herein and heretofore appropriated: Provided further, that the amounts herein appropriated and authorized, with any existing balances on hand to the credit of such improvement, shall be applied in extending the easterly or shore arm of the breakwater and continuing it to the shore, with a view of providing a shelter for a landing place for the passengers, crews, and cargoes of vessels in distress, and other vessels, and for the lifeboats of the Point Judith life-saving service."

It is conceded that the extension of the easterly or shore arm of the breakwater, and continuing it to the shore, will necessarily require the taking of a few feet of the shore, of the width of the end of this arm of the breakwater, and incidentally a few feet of the adjacent bank to protect it, and to prevent the sea from making around and undermining the shore end of the breakwater. It is contended, however, that the taking of a tract of land, comprising 1.39 acres, with a shore front of 294 feet, is unauthorized.

The answer of Margaret D. L. Robinson, to which the United States demurs, denies the power to condemn any more land than is needed to connect the shore arm of the breakwater with the shore; and also denies that the whole of the land described in the petition for condemnation (to wit, 1.39 acres), can be required, and that any necessity exists for the United States to acquire the whole of said land. It is conceded that there is a necessity for taking some land, and that the Secretary of War or other authorized official of the government must make a determination of the amount needed; but it is contended that, in the absence of express legislative action defining the amount of property, the power to take is limited to the necessity, and that the necessity of taking particular property is a question for the courts. In substance, the defendant argues that although the Secretary of War has instructed the United States Attorney to proceed for the condemnation of the specific tract of 1.39 acres, in so doing, he has exceeded the authority conferred upon him by statute, for the reason that he seeks to take more land than is necessary.

I am of the opinion that it sufficiently appears from the petition that the Secretary of War has exercised a discretionary power conferred upon him by law, and that his discretion so exercised is not reviewable by this court. Decatur v. Paulding, 14 Pet. 497, 10 L. Ed. 559, 609; Cooley on Const. Lim. (5th Ed.) 668, 669; Douglass v. Byrnes (C. C.) 59 Fed. 29, 32.

While it is doubtless true that an act done under the color of authority and ostensibly in the exercise of discretion may be so clearly in excess of authority, or in abuse of authority, as to require the courts to declare it to be such, and therefore of no effect, the answer does not show any facts from which it may be inferred that the Secretary of War has exceeded the discretion conferred upon him by

Congress. The answer, in effect, disputes the judgment of the Secretary of War that a tract of this size is required or necessary.

The distinction between reviewing the judgment of an officer clothed with discretionary power, and determining whether his act is in excess of his authority, should be carefully observed. The Secretary of War, I think, is given power to acquire such an amount of land as is reasonably required to connect the breakwater firmly with the upland, and as will give reasonable facilities for access to the structure both for construction and maintenance. I seriously doubt whether the necessity for taking 1.39 acres could be questioned even if the act authorized merely a connection with the shore.

The purpose of the appropriation is "Improving Point Judith harbor of refuge." The breakwaters have created a new shelter for ships; and it would be no strained construction to say that a suitable landing place was reasonably necessary for a harbor of refuge. While the act is clumsily expressed, I am of the opinion that the following clause shows clearly the intent of Congress:

"With a view of providing a shelter for a landing place for the passengers, crews, and cargoes of vessels in distress, and other vessels, and for the lifeboats of the Point Judith life-saving service."

That this landing place is to be under government control appears from the defined object of the landing place. Upon a fair construction of this act, the extension of the breakwater to the shore reasonably requires the taking not only of such part of the shore as the breakwater shall actually rest upon, but of such additional part of the shore as will give the government control of the shore terminus of the breakwater, of a landing place for persons, cargoes, and lifeboats, and of access to highways through its own land. If the land immediately adjacent to the shore end of this extensive government work should remain in private ownership, the intent of Congress would be defeated.

The defendant contends that Act Aug. 1, 1888, c. 728, 25 Stat. 357 [U. S. Comp. St. 1901, p. 2516] entitled, "An act to authorize condemnation of land for sites of public buildings, and for other purposes," does not confer a general authority to acquire land, but only authority to institute condemnation proceedings in furtherance of, or in execution of authority otherwise granted to procure real estate for public purposes. A mere reading of this statute shows clearly that this contention is correct. The act is as follows:

"That in every case in which the Secretary of the Treasury, or any other officer of the government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the government to do so, and the United States circuit or district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.

"Sec. 2. The practice, pleadings, forms and modes of proceeding in causes

arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding."

Chappell v. United States, 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510, clearly recognizes the necessity for other authority than that conferred by chapter 728, by the reference to Rev. St. §§ 4658, 4660, [U. S. Comp. St. 1901, pp. 3141, 3142]. But the authority of the Secretary of War does not rest solely upon the appropriation act of March 3, 1905. Act April 24, 1888, c. 194, 25 Stat. 94 [U. S. Comp. St. 1901, p. 3525], confers upon the Secretary of War the right to institute proceedings for "condemnation of any land, right of way, or material needed to enable him to maintain, operate, or prosecute works for the improvement of rivers and harbors for which provision has been made by law." I interpret this act to mean that in the prosecution of the work of harbor improvement the Secretary of War is intrusted with the power and duty of determining specifically what land, right of way, or material is needed for such works as are authorized by law.

It is well settled that it is not necessary that Congress itself should select the particular land. Chappell v. United States, 160 U. S. 510, 16 Sup. Ct. 397, 40 L. Ed. 510; Kohl v. United States, 91 U. S. 367, 23 L. Ed. 449. Congress has provided for no judicial review of the judgment of the Secretary of War, and the right to such review does not arise by implication. It is held also that the extent to which private property shall be taken for the public use rests wholly in the legislative discretion, subject only to the restraint that just compensation shall be made. Shoemaker v. United States, 147 U. S. 282, 298, 13 Sup. Ct. 361, 37 L. Ed. 170. Where the case is such that it is proper to delegate the power to appropriate property, it is also competent to delegate the authority to decide upon the necessity for its taking. Cooley on Const. Lim. (5th Ed.) 668–670.

While the taking of property must always be limited to the necessity of the case, and consequently, no more can be appropriated in any instance than the proper tribunal shall adjudge to be needed for the particular use for which the appropriation is made, the Secretary of War is authorized by Congress to make the judgment as to what land is needed. It cannot be said that the Secretary of War, in taking more land than that upon which the breakwater is actually to rest, has exceeded the limits of a proper judgment as to what is required for carrying out the purposes expressed by Congress.

The demurrer is sustained.

In re HATCHER.

No. 486.

(District Court, W. D. Texas, Waco Division. May 28, 1906.)

BANKRUPTCY—COSTS OF ADMINISTRATION—NOTICE OF APPLICATION FOR DISCHARGE.

A bankrupt who advances the money necesary to pay for the issuance and publication of notices of his application for discharge is entitled, under General Orders No. 10, to repayment of the same out of the estate as part of the costs of administration.

In Bankruptcy. On petition for review of order of referee.

Hatcher was adjudged bankrupt upon the petition of creditors. In due season he filed his application for discharge and paid the sum of $5.45 for the issuance and publication of necessary notices of the proceeding. For the sum thus paid, covering the issuance and publication of notices to creditors, he claims reimbursement. The claim was denied by the referee in an order of which the following is a copy: "On this day the petition of the bankrupt, for the allowance to him of the costs of issuing and publishing the notices required to be issued on applications for discharge, having been by me examined and fully considered, and being of opinion that such charge, being one solely for the benefit of the bankrupt, is not such a charge as the law contemplates shall be allowed to said bankrupt out of the bankrupt estate, it is therefore ordered that the application for the allowance of such charge be and the same is hereby in all things refused." The bankrupt seasonably filed a petition to review the order, in which it is claimed that the action of the referee was erroneous for the following reason: "That such order was and is erroneous, in that it refuses to allow to this bankrupt the cost of the issuance and the publication of notices required under the law upon applications for discharge in bankruptcy; the bankrupt having theretofore turned over all of his assets and property to the trustee herein, and being entitled, under the law, to such notices as are required by law to have his application for discharge herein considered and acted upon by the court."

Sleeper & Kendall, for bankrupt.

MAXEY, District Judge (after stating the facts). Upon the subject of notices to creditors, it is provided by section 58 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]), among other things, as follows:

"Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of * * * (2) all hearings upon applications for the confirmation of compositions for the discharge of bankrupts."

Form 57 (89 Fed. lvii; 32 C. C. A. lxxxi), promulgated by the Supreme Court, as well as the order adopted by this court, requires (1) that notices of the hearings, upon applications for discharge, shall be published in a newspaper, etc.; and (2) that the "clerk shall send by mail to all known creditors copies of the petition and the order, addressed to them at their places of residence as stated." By section 64 of the act of bankruptcy (30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), it is provided that:

"The debts to have priority, except as herein provided, and to be paid in full out of the bankrupt estates, and the order of payment shall be * * * (3) the cost of administration," etc.

And General Order No. 10 of the Supreme Court (89 Fed. vi; 32 C. C. A. xiii) provides:

"Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same."

From an examination of the act of bankruptcy and the orders of court it thus appears: (1) That costs of administration are payable out of the bankrupt's estate; (2) notices must be given to creditors of hearings upon applications for the discharge of bankrupts; (3) notices so required to be given must be published in a newspaper and sent by the clerk through the mails to creditors; and (4) moneys advanced by the bankrupt to the referee, clerk, and marshal for the publication and mailing of notices shall be repaid him out of the estate as part of the costs of administration. The application for discharge and the issuance, publication, and mailing of notices to creditors, upon the application, constitute a step, and one of extreme importance to the bankrupt, in the administration of the estate. That notices of the hearing of the application for discharge in the present case were legally issued and published is not denied. The cost of the notices was advanced by the bankrupt; and General Order No. 10, quoted above, requires the money so advanced to be repaid him out of the estate.

It follows that the referee erred in passing the order complained of, and the same should be reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed. And it is so ordered.

SPERRY & HUTCHINSON CO. v. ASCH et al.

CROWN STAMP CO. v. BEAL et al.

(Circuit Court, E. D. Pennsylvania. June 9, 1906.)

Nos. 12, 13.

INJUNCTION—TRADING STAMP COMPANIES—UNAUTHORIZED USE OF STAMPS.

Preliminary injunctions granted on applications by trading stamp companies, prohibiting the unauthorized use of their stamps by defendants.

In Equity. On motion for preliminary injunction and demurrer to bill in each case.

Clement B. Wood and John Hall Jones, for complainants.

C. E. Lex, Melick, Potter & Dechert, Maxwell Stevenson, and Theodore F. Jenkins, for defendants.

J. B. McPHERSON, District Judge. The legal questions involved in this controversy between trading stamp companies and unauthorized issuers of the stamps have been decided so often by other courts in favor of the complainants that I should not feel called upon to set myself in opposition to their decisions unless I were impelled to do

so by a clear conviction that they were wrong. As I am far from feeling such a conviction, I shall follow their decisions without discussion, and, as a result, shall direct an order to be entered in each case that a preliminary injunction issue forthwith against each of the defendants who have been served with process—some of them, indeed, by stipulation filed having already agreed that such injunction may issue—and also, that the demurrer, which was filed and argued at the time when the motion for an injunction was brought before the court, be overruled. I may add that, if the use of trading stamps is so objectionable as many of the defendants aver, there is a simple and effective way to stop it. Unless merchants buy them and issue them to their customers, the trading stamp companies must go out of business, and the remedy, therefore, if one be needed, seems to lie with the merchants themselves, rather than with the courts.

WERTHEIM COAL & COKE CO. v. HARDING et al.

(Circuit Court, E. D. Pennsylvania. June 9, 1906.)

No. 33.

NEW TRIAL—SUFFICIENCY OF GROUNDS—CONFLICTING EVIDENCE.

An issue of fact *held* to be so far doubtful under the evidence that the court would not be warranted in setting aside the verdict of the jury thereon.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 144.]

On Motion for New Trial.

T. B. Harned and Melick, Potter & Dechert, for plaintiff.
Wm. E. Chapman and Alex. Simpson, Jr., for defendants.

J. B. McPHERSON, District Judge. This case presented a pure question of fact, which from the defendants' point of view is so plain that the verdict against them ought to be characterized as "perverse," and should therefore be summarily set aside. To some extent I am in harmony with this position, for I am rather inclined to believe that if I had been a juror I should have favored a verdict for the defendants; but when I come to go over the evidence as it is preserved in the record, I cannot avoid the conclusion that the verdict is not without sufficient support. The oral testimony is in direct conflict, but the weight of it is against the defendants, and even the letters, on which so much stress is properly laid, are not wholly to be counted on that side. Taking all of the evidence together, I think it must in fairness be said that the issue was so far doubtful as to forbid the judge to substitute his own opinion on the facts in the place of the opinion of the jury.

A new trial is therefore refused.

OLDS v. CURLETTE.

(Circuit Court, S. D. New York. December 1, 1905.)

COURTS—STATE LAWS AS RULES OF DECISION IN FEDERAL COURTS—USURY—CONDITIONS PRECEDENT TO SUIT FOR CANCELLATION OF MORTGAGE.

A complainant may maintain a suit in equity in a federal court for the cancellation of an alleged usurious mortgage without averring an offer to pay the money borrowed with legal interest, where the right to such relief is given by the state statute.

[Ed. Note.—State laws as rules of decision in federal courts, see note to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

In Equity. On demurrer to bill.

F. M. Olds, for complainant.

T. F. Buck, for defendant.

WALLACE, Circuit Judge. At the conclusion of the argument of this case in overruling the plea decision was reserved upon the demurrer to the bill for the purpose of considering the single question whether the complainant could ask relief in equity for the cancellation of an alleged usurious mortgage without averring an offer to pay the money loaned with legal interest. If the suit had been brought in the state court, the complainant would undoubtedly have been entitled to the relief, because the state usury laws expressly so provide for it notwithstanding a borrower has not paid and did not offer to pay the amount. The federal courts when sitting in equity administer the principles of equity jurisprudence as they prevail in these courts without regard to any state legislation as to the remedy. But the case of Missouri, etc., Trust Co. v. Krumseig, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474, is a decision expressly in point in favor of the complainant.

The demurrer is accordingly overruled, with costs, but with leave to the defendant to answer.

NEW YORK, N. H. & H. R. CO. v. CITY OF NEW YORK et al.

(Circuit Court, S. D. New York. December 1, 1905.)

COURTS—JURISDICTION—INDISPENSABLE PARTIES—SUIT BY LESSEE TO AVOID LOCAL ASSESSMENT—STATE STATUTE.

A state statute giving a tenant under a lease for more than 10 years the right to maintain an action in his own name to remove a cloud upon title will be given effect by a federal court, and under such statute the lessor is not an indispensable party to a suit by a lessee for ninety-nine years, obligated by the terms of the lease to pay all taxes and assessments against the property, to set aside an assessment for local improvements on the ground of its invalidity.

In Equity. On demurrer to bill for want of jurisdiction.

Mr. Luce, for complainant.

E. C. Kindelberger, for defendant.

WALLACE, Circuit Judge. The demurrer to the bill of complaint is to the jurisdiction of the court, because (1) there is not the requisite diversity of citizenship between the parties; and (2) the bill does not present a case which substantially involves the construction of the Constitution of the United States, but is one which is merely colorable.

The action is in equity to vacate certain assessments for a local improvement made by the taxing authorities of the City of New York against the Harlem River & Port Chester Railroad Company, and which became a lien upon the lands of that company. The complainant is the lessee of that company for the term of 99 years, and is obligated by the terms of the lease to pay all taxes and assessments levied upon the leased premises. The theory of the bill is that the assessment is void because unconstitutional. The bill alleges that the lessor is a proper and necessary party defendant because the assessments are a lien upon the real estate.

It cannot be seriously contended that the lessee is under obligation to pay any void assessment. The bill does not allege that the assessments are claimed to be valid by the lessor, nor does the bill allege the existence of any controversy between the complainant and that company growing out of the assessments. It follows that, if the lessor is as alleged a necessary party to the controversy, its interests are identical with those of the complainant.

I am of the opinion that the real controversy is wholly between the complainant and the city of New York, and that the other defendant is not a necessary party to it. The case is somewhat analogous to Morse v. South (C. C.) 80 Fed. 206, in this respect. The complainant, being in possession under the lease, is entitled to maintain the action to protect his rights as lessee. The statute of this state allows an action to remove a cloud upon title to be brought by a tenant under a lease of more than 10 years, and the federal courts give effect to such a statute. Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52. As the lessor is not an indispensable party, although a proper one, the complainant can, if he so chooses, dismiss the bill as to it. Horn v. Lockhart, 17 Wall. (U. S.) 570, 21 L. Ed. 657; Oxley Stave Co. v. Cooper's Int. Union (C. C.) 72 Fed. 695, 697; Sioux City, etc., v. Trust Co. of No. America, 27 C. C. A. 73, 82 Fed. 124; Mason v. Dullagham, 27 C. C. A. 296, 82 Fed. 689.

As the court has jurisdiction because of the requisite diversity of citizenship between the parties, it is unnecessary to inquire whether it has also jurisdiction because a federal question is involved.

The demurrer is overruled, with costs.

In re RYBURN.

(District Court, D. Connecticut. April 2, 1906.)

No. 185.

BANKRUPTCY—REOPENING ESTATE—EFFECT OF ORDER.

An order reopening an estate in bankruptcy after it had been closed, made on petition of creditors alleging that real estate transferred by the bankrupt shortly prior to his adjudication, and not scheduled by him nor

administered upon as a part of his estate, had been ascertained since the closing of the estate to have been fraudulently conveyed to conceal the same from his creditors and to belong to his estate, does not of itself authorize the bringing of a suit against the grantee to recover such property, and has no other effect than to leave the matter in the hands of the referee to cause the election of a trustee and to authorize such suit; or not, as he shall deem proper under the facts shown.

In Bankruptcy. On petition of Margaret E. Mooney, executrix to reopen hearing.

An order was made reopening the estate of the bankrupt on petition and affidavits of creditors showing that real estate transferred by him a short time before the bankruptcy, and not scheduled nor administered as part of his estate, was conveyed either as security only or in trust to be held for his benefit in fraud of his creditors. Subsequently Margaret E. Mooney, executrix of the estate of the grantee of such property, filed a petition to reopen the hearing on which such order was made, alleging that a suit had been brought against her to recover the property by one claiming to be trustee of the estate, and that the claims on which it was based were fictitious and vexatious. To this petition a demurrer and motion to dismiss were filed by the creditors.

De Forest & Klein and Canfield & Judson, for petitioner.
Stoddard, Marsh & Boardman, for claimants.

PLATT, District Judge. If such a situation exists, as suggested by counsel for the executrix, it would seem that the referee in charge of the matter in Fairfield county is the proper party to address. He is competent to take care that the bankrupt shall not use the creditors of the estate as stool pigeons. After a trustee on the estate opened April 2d shall have been appointed, he cannot go into the state courts without authority. It is not understood that the order reopening the estate can be construed as containing such authority. So far as the court is now concerned, it appears that certain property had been transferred by the bankrupt, prior to his adjudication; that it was omitted from his schedules and made no part in the settlement of his estate; that since such settlement facts have been discovered which lead creditors to believe that the transfer was fraudulent. They cannot act, without the estate shall be opened and a trustee elected. As the first step in such process, and an indispensable one, the court ordered the estate reopened, upon affidavit, on April 2d. Beyond that reopening, the matter rests for a time under the supervision and control of an exceedingly efficient referee. I am of the opinion that the showing at the ex parte hearing was proper and sufficient to support the order.

The petition of Margaret E. Mooney, executrix, asking for a reopening of the order of April 2, 1906, is dismissed. No action will be taken at present regarding costs.

PARULO v. PHILADELPHIA & R. RY. CO.

(Circuit Court, S. D. New York. June 4, 1906.)

1. RAILROADS—PUSHING TRESPASSER FROM MOVING TRAIN—QUESTION FOR JURY.

Plaintiff in an action against a railroad company for a personal injury testified that, while he was stealing a ride at night on top of a freight car, a man with a lantern whom he could not recognize came over the top of the cars and ordered him off, and when he did not go kicked him from where he sat between the cars, and he was run over and injured. The trainmen all testified, and each denied seeing plaintiff or anyone else on the train except themselves, and each denied being on top of the cars at the time and place of the injury. It was shown that the brakeman and a flagman each had a lantern, and that it was the brakeman's duty, under the rules of the company, to be on top of the cars and to put off any trespasser. *Held*, that the question whether or not plaintiff was in fact kicked or pushed from the car by a servant of defendant, as he claimed, was one for the jury.

[Ed. Note.—Rights of trespassers on train, see note to Southern Ry. Co. v. Shaw, 31 C. C. A. 76.]

2. EVIDENCE—ADMISSIONS—ACQUIESCENCE IN STATEMENTS OF ANOTHER.

To render statements made by another in the presence of a party, and not contradicted by him, binding upon him as admissions, it must clearly appear that he heard and understood them, and that the circumstances were such that his acquiescence therein may fairly be inferred from his silence.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 771–774.]

3. SAME—IGNORANCE OF LANGUAGE.

Where plaintiff, an Italian who had just been run over by a railroad train which crushed both his feet, had so little knowledge of English that the physician could not converse with him, and procured another Italian, who could speak English to some extent, to ask plaintiff questions, the testimony of the physician as to the answers as translated by him by the interpreter is not admissible to show admissions by plaintiff respecting the manner of his injury; it not being shown that the translation was correct, or that plaintiff was in such physical condition or had sufficient knowledge of the language to either hear or understand the answers as given in English.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 773.]

4. TRIAL—CONFLICTING EVIDENCE—INSTRUCTIONS.

Where plaintiff testified that he climbed to the top of a freight car at night while the train was stopped at a station, that it started almost immediately, and a few seconds later he was pushed from the top of the car, and it was shown that he was run over and very severely injured, but the trainmen testified that the train while on an up grade did not stop, the jury were properly instructed that it was their duty to reconcile the evidence if possible, and that they were not necessarily required to disbelieve plaintiff's testimony that he was thrown from the top of the car, even if they found that it did not fully stop, if they believed that it was moving so slowly that plaintiff could climb upon it, and that by reason of his injury immediately afterward his recollection was confused, and he was honestly mistaken.

5. RAILROADS—ACTION FOR INJURY OF PERSON ON TRAIN—INSTRUCTIONS.

Instructions reviewed in an action against a railroad company to recover for the injury of a person alleged to have been thrown or pushed from a moving train, and *held* not to contain error prejudicial to the defendant.

Motion by defendant to set aside the verdict of the jury in favor of the plaintiff and for a new trial, on the grounds that the verdict is contrary to the evidence and law and upon the exceptions taken upon the trial.

Thomas J. O'Neill, for plaintiff.
Pierre M. Brown, for defendant.

RAY, District Judge. This action has been twice tried. On the first trial the jury disagreed. On the second trial the jury found a verdict for the plaintiff in the sum of $2,000. On the evening of November 7, 1902, the plaintiff, who was working as a stone mason at a place called "Rock Hill," a few miles north of Perkasie, a station on defendant's railroad, being at Perkasie and desiring to go to his home, and having five pounds of meat in a package, went down to the station. He claims that as he arrived close to the station he found a freight train at a standstill, with the engine near the water tank a short distance above and north of the station, the cars extending for some distance to the south of it; that he clambered up the side and to the top of the car some three or four cars back and to the south of the engine, and seated himself on the front end of the car, with his feet hanging down between it and the one next in front. He claims that a few seconds after he had so seated himself the train started on north, and that it had proceeded but a few hundred feet when a man with a lantern, whom he does not claim to recognize, came up behind him, and told him, "Get off the train. I told him a couple of times 'Wait until the train stops.' He said, 'You won't get off, you son of a bitch.' I said 'wait until the train stops,' and he kicked me right off between the two cars." Says he looked at the man, but did not see who he was, and cannot identify him, it was so dark. Says, in substance, that after climbing about a couple of hundred feet, meaning that he crawled, "I walked down on my hands and knees, and hollered," with the blood flowing. That he came to a box car, and remembers nothing else. "I had my senses lost." Says he remembers nothing of being in the depot, but came to his senses in the hospital at Bethlehem. One foot was crushed partially off, and the other wholly severed. At Perkasie the road is double tracked, and runs north and south. The east track is the north-bound track and west track is the south-bound track. This train was on the north-bound track. There is a beaten path or track along the outside of the east rail or the east track, where, evidently, the injuries were received. On the inner rail of this north-bound or east track, at a point 400 or 500 feet north of the depot, some blood and shreds of flesh were found that night, and blood marks and signs of some body dragging along led from that point west across the west or south-bound track, and down into a roadway, and then southerly towards the depot. A witness heard a cry, and later saw the plaintiff crawling along this roadway southerly. He took plaintiff to the freight car, and then followed these marks back to the blood and flesh on the rail. One of his shoes was found close by. This tends to corroborate plaintiff as to the claim that the train had proceeded but a few seconds from the

depot when he was injured. Moving slowly on this up grade, or getting under headway, it would have proceeded about that distance. The plaintiff was stealing a ride. He did not expect or intend to pay fare. The defendant contended that the plaintiff was not on the train, or that if he was he fell off, and was neither pushed nor kicked off; that if pushed or kicked off it was by some interloper or stranger to the train; that it is more probable he was attempting to board the train moving on this up grade, and so fell and went under the car and was injured. The defendant called a witness, one of its employés, who testified that on the Monday following the accident he saw plaintiff in the hospital, and that he asked the plaintiff how he was hurt, and plaintiff said he was walking by the side of the track, and stopped to light his pipe, and the wind blew him under. The defendant contended that the crew of the train consisted of but five men—the engineer, the fireman, the conductor, one brakeman, and a flagman. All these were called and sworn. All except Miller, the fireman, claim the train did not stop that night at Perkasie station, but passed at the rate, one says, of about 8 to 10 miles per hour along there. The engineer, fireman, and conductor say they were on the engine or tender, and that the brakeman was there also, as they passed Perkasie, and that the flagman was in the top of the caboose at the rear end of the train. They all say they did not see any one on the train except this crew, and did not push or kick any one off. The contention was and is that the plaintiff did not furnish any evidence that any employé of defendant on that train either pushed or kicked him off; that there is no evidence to sustain such a finding, or to justify the court in submitting the question to the jury. The evidence is that the trainman or brakeman and the flagman, who sometimés acted as brakeman, carried lanterns, and that both were on the train: that the rules of the company required the brakeman to be up on the top of the train—on top of the cars—when ascending or descending grades, and that this train at and on leaving Perkasie was on a heavy ascending grade; that in stormy weather he was permitted to go on the engine and warm; that this was a cold, but not a stormy, night; that the rules of the company also required him to put off any interloper or person stealing a ride; that Perkasie is a village of some 5,000 to 7,000 population. The plaintiff testified that after the train was in full motion some person walking on the top of that train, coming from the rear, ordered him off, and then kicked him off; that this person carried a lantern.

In the absence of proof to the contrary, the fair presumption is, and the jury would be justified in finding, that the brakeman, who carried a lantern, was on the top of the train, where his duty and the rules of the company required him to be. This was especially true in view of the evidence of the brakeman, his evasions and manner. There is no presumption that any interloper or stranger to the train was there with a lantern ordering the plaintiff off. Then was not the jury justified in finding that this brakeman was on the top of the train, and that he, seeing the plaintiff, an interloper, there, in the discharge of his duty as he understood it, and the train, accord-

ing to the story of the plaintiff, being but slowly in motion, and not having proceeded more than 500 feet, first ordered plaintiff off, and then, he not getting off, kicked or pushed him off? The evidence is that the train was then approaching a tunnel some 800 feet further north, and the jury might say or find that, being on the top of the train, where his duty required him to be, as he passed Perkasie station on this heavy up grade, this brakeman, on his way to the engine, to be there while passing the tunnel, or to warm, came across the plaintiff, and first ordered and then pushed him off, and then passed on to the engine, and that the fireman and conductor may have forgotten or may be mistaken as to just when he got there. This brakeman was not frank in all his statements. On the direct he was asked:

"Why are you, as the brakeman of a train, on the tank of the engine? A. My duties are any place my services are required. On the down grade they are required on the train, and on the upgrade—when you are going down a hill my services are required on a train, and when we get to the up grade I am no good out on a train. I certainly will not put on a brake. Q. Where do you go? A. I crawl up to the tank—up to the fireman—if necessary, shovel coal if it is needed."

On the cross-examination:

"Q. Let us see how fresh your recollection is as to the rules which are written? A. Yes, sir. Q. In print? A. Yes, sir. * * * Q. What do the rules say about your staying on top of the train? A. Why the rule is for a brakeman to do all possible, do anything. Q. Won't you answer the question, What do the rules say with reference to your staying on top of the train? A. Am I not giving it to you? Q. No; you are not, you are going to make a speech. Answer that question please. This is in print you know. A. The rule says that a brakeman will stay on the train ascending and descending grades. Q. Ascending and descending? A. Yes, sir. Q. That he shall stay on top of the train? A. Yes, sir. Q. And you were ascending a grade at this time? A. Yes, sir."

From this and other evidence, clearly the jury were not bound to believe his testimony. It is plain that the witness evaded as long as possible, admitting that if on the tender of the engine, where he claimed he was on leaving Perkasie, he was there in violation of the rules of the company.

It was a fair question of fact for the jury whether or not this brakeman kicked the plaintiff off the train when it was in motion at the place in question. The defendant excepted to the ruling of the court sustaining objections to certain questions put to Dr. Williams and to the witness Levi Texter. After the accident and the finding of the plaintiff he was taken into a freight car—one on a siding. Dr. Williams, the local physician of the defendant, was sent for, and he saw the plaintiff. He says:

"Part of one foot was cut off, and the other was cut off near the heel. It was smashed. * * * He was not unconscious at any time when I saw him. At no time. * * * It was a dangerous wound; if not attended to properly it would be fatal. He seemed to be suffering great pain. Q. Did you have any conversation direct with him yourself while he was there in the railroad station? A. I made an effort to, but I could not get anything out of him one way or the other for a long time, and the section hands, I

asked them to ask him, and he said something to them and he to them and they told me. Q. You did not talk to him directly yourself, did you? A. No, sir. Q. You cannot speak Italian? A. No, sir; the section hands were Italians. * * * Q. Then after you had asked this sectionman to ask the plaintiff that [how the accident happened], did the sectionman talk to the plaintiff in Italian? A. I do not know what he talked. He talked something. I cannot tell you what it was. He did not talk English, I know that. Q. He said something to him? A. Yes, sir. Q. Did the plaintiff say something to the sectionman after that? A. The sectionman; yes, sir. Q. Did the sectionman then say something to you? A. Yes. Q. What did the sectionman say to you? Was this in the presence of the plaintiff? A. Yes. Q. What did the sectionman say to you?"

This was objected to as incompetent, irrelevent, and immaterial, and plaintiff's counsel said: "I suppose the theory upon which it is offered is that this sectionman is supposed to have correctly interpreted what he told him." To this defendant's counsel by silence assented. The Court: "You mean there is no proof that the sectionman understood what was said to him?" Plaintiff's Counsel: "Yes." The Court: "Or that this man stated correctly what he said?" Plaintiff's Counsel: "Absolutely." The court then sustained the objection. Defendant's Counsel: "Do you admit that the plaintiff understood English to any extent?" Plaintiff's Counsel: "No, I do not know how much English he spoke." Defendant's counsel then excepted. At this time there was no evidence before the court that the plaintiff could speak or understand a word of English. The witness had failed to get any reply to his question. There was no error here. It appeared that the plaintiff was an Italian, and on the trial spoke but little English, and understood it with great difficulty. It was evident to the court that he did not and could not have understood what was said by the sectionman in English. On cross-examination this man asked the doctor:

"Q. And when you spoke in English to the man he evidently did not understand you; at all events he did not reply? A. I could not get anything out of him. Q. He did not reply when you spoke to him in English? A. I cannot say whether he said anything or not; but he did not say anything that was intelligent to me."

A. M. Sperry was then called by the defendant, and he said that on the Monday following the accident he went to the hospital, and talked with the plaintiff in English, and he understood plaintiff and plaintiff seemed to understand him. "I asked him first where he lived, and all about him, and he told me he worked in a stone crusher at Rock Hill, and he had been down to Perkasie, and was getting back, and walking up along the railroad, and he stopped to light his pipe, and the wind blew him under the train." Says his talk with the plaintiff was just long enough for him to tell him (witness) that.

Dr. Williams was then recalled, and said it took quite a while before they found out plaintiff's name the night of the injury. Defendant's counsel then said:

"I will now ask the question, What was the conversation between yourself and this sectionman after the plaintiff had spoken to the sectionman, as aforesaid?"

This was objected to, and the objection sustained, but no exception was taken.

Levi Texter was called. He said he was present when the doctor spoke to one of the sectionmen, and asked him to ask the plaintiff how the accident happened. "Q. After that did the plaintiff make any statement to this sectionman? A. Well, he said— Q. I do not want you to say, because the court is going to rule it out. Did this plaintiff then say something to the sectionman? A. Yes, sir. Q. In Italian? A. In a language that I did not understand what it was. Q. Immediately after this sectionman said something in English to the doctor? A. Yes, sir; he did. Q. What was it?" This was objected to. (To the court he then said he did not understand what the sectionman said to the plaintiff, or what the plaintiff said, if he said anything; took them for words.) "Q. Do you know they were words? A. A sound. Q. They made a sound, of course, but do you know that these sounds were words? A. No, sir; I could not say that. Q. Do you know any Italian? A. No, sir; I do not." The court then sustained the objection. These Italian sectionmen were not produced. Their absence was attempted to be accounted for by the statement of a witness that they left the employment of defendant in July after the accident, stating they were going to Italy.

It is now claimed that it was error to reject the statement of the sectionman made to Dr. Williams in the presence of the plaintiff when he lay in the condition described, and under the circumstances described, as his silence might be considered as an acquiescence in that statement. It is not everything that is said in the presence of a party to a litigation in reference to the subject-matter thereof that may be given in evidence against him when he remains silent, and his silence is relied upon as an implied admission of the truth or correctness of the statement. If the party in whose presence the statement was made was physically and mentally able to hear and understand, and sufficiently near to hear, and the statement was of a character that would under the circumstances naturally call upon him for a denial or qualification if untrue, and he was at liberty to deny or qualify, then it may be given in evidence against him; otherwise, not. Schilling v. Union R. Co. of N. Y. C., 77 App. Div. 74, 78 N. Y. Supp. 1015; Commonwealth v. Kenney, 12 Metc. (Mass.) 235–237, 46 Am. Dec. 672; People v. Koerner, 154 N. Y. 357, 374, 375, 48 N. E. 730; Lanergan v. People, 39 N. Y. 41; 1 Greenleaf on Evidence (15th Ed.) § 197; 2 Wigmore on Evidence, § 1071; La Bau v. Vanderbilt, 3 Redf. Sur. 384; 1 Elliott on Evidence, §§ 221, 230, 231. Evidence of this kind must always be received with caution. Corser v. Paul, 41 N. H. 24, 77 Am. Dec. 753. Whether the circumstances are such as to call for a reply is a preliminary question for the court. Pierce's Adm'r v. Pierce, 66 Vt. 369, 29 Atl. 364; People v. Mallon, 103 Cal. 513, 514, 37 Pac. 512; Schilling v. Union Railway Co., 77 App. Div. 77, 78 N. Y. Supp. 1015.

In Schilling v. Union Railway Company, 77 App. Div. 74, 78 N. Y. Supp. 1015, the court held:

"In an action to recover damages for personal injuries, a hospital surgeon, who went to the plaintiff's house with an ambulance to take her to the hospital, and found her lying upon a couch seriously injured and suffering from shock, but not unconscious, should not be allowed to testify to statements made in the plaintiff's presence concerning the manner in which the accident happened, and to which the plaintiff made no reply, unless it appears that at the time such statement was made the plaintiff was cognizant of what was said, and was in a condition to understand and appreciate it."

In Lanergan v. People, 39 N. Y. 39, the court held:

"A conversation between witness and prisoner's wife, to be competent evidence against the prisoner, must have taken place in his immediate presence and hearing."

And at page 41 the learned court said (all concurring):

"That conversation could be evidence only on the theory that it took place in the presence of the accused, and that not merely in his bodily presence, but in his hearing and understanding."

In Greenleaf on Evidence, vol. 1 (15th Ed.) § 197, the rule is thus stated:

"But acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party. And whether it is acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or the language fully understood, by the party, before any inference can be drawn from his passiveness or silence. The circumstances, too, must be not only such as afforded him an opportunity to act or to speak, but such, also, as would properly and naturally call for some action or reply from men similarly situated."

In People v. Koerner, 154 N. Y. 357, 48 N. E. 730, the court held:

"(12) Statement by another in presence of party—Admission by acquiescence—Silence. A party's acquiescence in the statement of another, made in his presence, to have the effect of an admission, must exhibit some act of voluntary demeanor or conduct; it must plainly appear that such statement was fully known and understood by the party before any inference can be drawn from his passiveness or silence, and the circumstances must not only be such as afforded him an opportunity to act or speak, but also such as would properly or naturally call for some action or reply from men similarly situated.

"(13) Statement made in presence of apparently unconscious defendant—Erroneous admission in evidence—Reversible error. On a trial for murder, in which defect of reason at the time of the act was interposed as a defense, a witness for the prosecution, who had testified as a medical expert that in his opinion the defendant was "shamming" when apparently unconscious immediately after the homicide, was permitted to testify, over the defendant's objection, that he stated to a police officer, in the presence of the defendant and while the latter was apparently unconscious, that he 'didn't see there was very much the matter with the man; that he was probably faking.' Held, that the evidence was incompetent and improper, being merely hearsay, or the statement of a witness to a third party, unless made under such circumstances as to be binding upon the defendant; that the silence of the defendant, under the circumstances, did not raise a presumption of acquiescence in the witness's remark so as to render it competent as an admission; and that the ruling admitting the statement in evidence constituted a harmful error, calling for a reversal."

At pages 374 and 375 of 154 N. Y., at page 736 of 48 N. E., the learned court said:

"A party's acquiescence, to have the effect of an admission, must exhibit some act of voluntary demeanor or conduct. When the claimed acquiescence is in the conduct or in the language of others, it must plainly appear that such conduct or language was fully known and fully understood by the party before any inference can be drawn from his passiveness or silence. Moreover, the circumstances must not only be such as afforded him an opportunity to act or to speak, but also such as would properly or naturally call for some action or reply from men similarly situated. Declarations or statements made in the presence of a party are received in evidence, not as evidence in themselves, but to ascertain what reply the party to be affected makes to them. If he is silent when he ought to have denied, the presumption of acquiescence arises. But it is clearly otherwise when his silence is of a character which does not justify such an inference. Thus, when a person is asleep, or intoxicated, or deaf, or a foreigner unable to understand the language employed, he cannot be prejudiced by statements made by others in his presence. Nor is such silence an assent, unless the statements were such as to properly call for a response. The rule in regard to admissions inferred from acquiescence in the verbal statements of others is to be applied with careful discrimination. As was said by Best, C. J., in Child v. Grace, 2 C. & P. 193: 'Really, it is most dangerous evidence.' It should always be received with caution, and ought not to be admitted unless the evidence is of direct declarations of a kind which naturally call for contradiction, or some assertion made to a party with respect to his rights, in which, by silence, he acquiesces."

In Commonwealth v. Kenney, 53 Mass. 237, 46 Am. Dec. 672, Chief Justice Shaw said:

"In some cases, where a similar declaration is made in one's hearing, and he makes no reply, it may be a tacit admission of the facts. But this depends on two facts—first, whether he hears and understands the statement and comprehends its bearing; and, secondly, whether the truth of the facts embraced in the statement is within his own knowledge or not; whether he is in such a situation that he is at liberty to make any reply; and whether the statement is made under such circumstances, and by such persons, as naturally to call for a reply, if he did not intend to admit it."

In Elliott on Evidence, vol. 1, § 221, it is said:

"But in order that admissions may be inferred from silence or acquiescence it must usually appear that the language or the conduct in question was known and understood by the party claimed to have acquiesced therein, and that he was naturally called upon to take some action or make some response thereto. Such evidence should be received with caution."

See, also, Whitney v. Houghton, 127 Mass. 527. Says Elliott, citing this Whitney Case:

"So it may be stated generally that when the circumstances are such that no reasonable inference of acquiescence can be drawn from the silence of a party, the statements should not be received as admissions."

Applying these rules to the case now before the court, it is evident that the statement made by the sectionman, whose ability to understand English and whose plainness of speech in English were not disclosed, under the circumstances of this case was not proper to go to the jury, and was properly excluded. Within a very short time before the statement was made in his presence both feet had been crushed off. The shock was great, and he was exhausted from great pain and loss of blood. The doctor was unable to get anything from him. It was with great difficulty and only after repeated efforts that they ascertained his name. There was no shadow of evidence

that he heard or paid any attention to what this sectionman said to the doctor. Clearly, "no reasonable inference of acquiescence could be drawn from the silence" of the plaintiff under the circumstances proved by the witnesses and not disputed. Under such circumstances, it cannot be properly presumed or inferred, or even reasonably supposed, that he listened or paid attention to, much less understood or comprehended, what was said to the doctor by this Italian laborer, who soon thereafter left for Italy, assuming he did, and whose knowledge of and ability to speak English must have been imperfect. If the plaintiff could not understand the English of the doctor, is it reasonable to suppose he understood that of this Italian sectionman, who was speaking to the doctor and not to him? The case is within and governed by the Schilling Case and the Koerner Case cited, as well as by the general rule laid down by Greenleaf and Elliott, supra.

In Wright v. Maseras, 56 Barb. (N. Y.) 521, the facts are different. That case was before the justice without a jury, and the defendant showed by his actions in taking out his money and showing it that he understood what was said. Here the case is barren of any fact or act indicating in the remotest degree that Parulo heard or understood what the sectionman said. It was not for the jury to hear the evidence, and then guess or speculate that plaintiff might have heard it and acquiesced. In no event was it evidence of itself, but only permissible to ascertain what reply the plaintiff ought to have made. Under the circumstances, he was not called upon to enter into a discussion with the sectionman as to the correctness of his statements to the doctor, which in all human probability he did not hear.

The defendant's counsel excepted to that part of the judge's charge in which he said:

"But, gentlemen, the determination of this case does not rest necessarily upon the question whether or not that train stopped there. It may have so slowed up that the plaintiff, thinking it was at a standstill, or substantially so, in view of his subsequent injuries, in view of his pain and suffering, not only there at the station where he was injured, but later on in the hospital, may have forgotten, and he may have got onto it when it was slowed down, and he may honestly now believe and testify honestly that it was at a standstill. It is not necessary, to make him fail in this case, to brand him as a perjurer, because he may think that the train did absolutely stop; but it is very important evidence as bearing on the question of how he received his injuries, and when, and on the question whether or not he got onto that train down there at the depot, or whether he was attempting to get onto it up above the depot, or was there walking by the side of it, and was drawn under in some way. All that is for your consideration and for your thought."

On the taking that exception the court said:

"The Court: I say that it is the duty of a jury always, taking all the evidence and all the circumstances and surroundings, to reconcile the evidence if you can consistently with the truthfulness of all the witnesses. If you cannot do that, then, of course, you must find who speaks falsely and who speaks the truth. It is your duty first to reconcile it if you can; so that you would be warranted in finding in this case that this train did not come to a full dead stop, but that it so slowed down that the plaintiff was able to safely gain a seat on the train, and that, in view of his subsequent injuries and pain and suffering and the lapse of time, he may have forgotten that it was slowly in motion, and he may now honestly believe that it came to a full stop when it did not; and to that I give you an exception."

I can discover no error in the charge as given on this subject. The plaintiff testified the train was at a standstill when he got on, and moved on almost immediately thereafter; while those on the train in charge of it, excepting the fireman, Miller, testified it did not stop. The station agent, Arn, said he could not remember or tell whether it did or not stop without his record; that his duty was to record the arrival and departure of trains, and his record showed that this train passed, but did not show that it stopped. He said that this train stopped at Perkasie sometimes, but not usually: that a representative of plaintiff's attorney came to him some time after the accident, and that he told him it did stop at Perkasie on the night in question. He also testified that at that time it was his recollection that this train did stop at Perkasie that night, and he had in mind the occasion in question. The fireman, who was on the tender of the engine, had no recollection on the subject. There was evidence it would stop for water if water was needed. More than three years had elapsed since the accident when these witnesses testified. Perkasie was quite a large town, and this was an up grade. The plaintiff was severely and dangerously injured that night, and suffered great pain. It is not unreasonable, but in fact reasonable and quite probable, that by reason of his pain and suffering and the events of the night his recollection as to the stopping of the train had become somewhat confused. But he could not be mistaken about actually getting thereon. Either the plaintiff was mistaken, or some of defendant's witnesses were honestly mistaken, or plaintiff or these witnesses, or some one or more, deliberately committed perjury. The train may have stopped for a few seconds, and defendant's witnesses may have forgotten the fact, and they may have been honest in saying it did not stop, or they may be mistaken as to its speed if it did not stop. It may have been moving very slowly, and plaintiff's honest recollection may be that it absolutely stopped. If moving slowly, plaintiff could have gotten on easily. This is not a case where getting on the train was impossible unless the train stopped. The jury was not compelled to find it stopped in order to find that plaintiff was seated safely on the car, or that it did not stop, and hence plaintiff could not recover as he could not have been on the train. The court more than once repeated that the evidence as to the train stopping was very important. It was the duty of the jury to reconcile the evidence of all the witnesses consistently with the truthfulness of all, if it could be done reasonably. The court had the right so to say. Blashfield, Instructions to Juries, § 270; Sackett, Instructions to Juries, p. 32.

The defendant's counsel then requested the court to charge "that there is no evidence in the case that there were more than five employés on the train, and those five have been produced in court." The court said:

"That is so, but somebody else may have gotten on the train. You have a right to consider that. Somebody else may have gotten on the train and kicked him off. But you have got to find and there must be evidence that it was some employé of the defendant acting within the general scope of his authority that kicked him off, or else the defendant is not liable. Of course, if the jury believe

that somebody else got on the train, and came along there and kicked him off, and it was not one of the servants of the defendant acting within the general scope of his authority—that is, having the right to be on that train and engaged in working the train and managing it—even if it was an employé of the company—if you believe that, then, of course, it will be your duty to find for the defendant."

The court not only charged the exact request of the defendant's counsel, but pointed out explicitly that some one else—that is, some one not a member of the crew of five on the train, who were produced in court—might have got on the train and kicked the plaintiff off. The court also stated that if such a person got on the train and kicked plaintiff off, and such person was an employé of the defendant, the defendant was not liable unless such person had the right to be on the train, and was engaged in working and managing the train, and also explicitly stated there must be evidence of that fact. All this was in the interest of the defendant, and intended to be, and followed the direct instruction that there was no evidence in the case that there were more than five employés on the train, and that they had been produced in court. These five comprised the crew, composed of employés of the defendant, engaged in working and managing the train. This instruction was tantamount to saying that one of the five must have kicked plaintiff off, and the charge before that had limited this number to the conductor and brakeman. The court had expressly charged, and no exception was taken to it, that:

"As the plaintiff was on the freight train of the defendant, if there without invitation or right to be and remain there, was not a passenger, but, as the phrase goes, was stealing a ride, his only right was not to be injured by the willful, wanton, or reckless acts of the defendant or of its agents or servants; and the only duty of the defendant to him was not to injure him by positive intentional act, or by willful, reckless, or wanton acts; that is, not to willfully, wantonly, or recklessly injure him. The defendant had the right to remove the plaintiff by the use of all necessary force after ordering him off, in case he refused to go, on stopping the train at a reasonably safe place, but it had no right to remove him while the train was in motion by actual force or by threats of violence. Actual force applied to remove the plaintiff, or threats of personal violence made to cause him to jump off, while the train was in such rapid motion as to make getting off obviously dangerous, if such threats were made, under such circumstances and conditions as to show a purpose and an ability to execute them, would constitute willful or wanton or reckless acts. But the defendant would not be liable for such an act, or the consequences of it, if it resulted in injury to the plaintiff, unless it was done by some agent or servant of the defendant on or about the train or road being run by the defendant, and having at the time some duty to perform to the defendant, and when such servant or agent was engaged in the performance or discharge of some express or implied duty to the defendant, and was acting within the general scope of his employment and duty. That is, gentlemen, if the plaintiff was there, and if some agent or servant pushed him or kicked him off, that agent or servant must at the time have been engaged in the performance of some duty, not in doing that particular act, but must have been engaged on the train in the performance of his general duties, and he must have had it in his mind that he had a duty to perform to the defendant in putting the plaintiff off, and he must have put him off in the supposition, or having it in mind, that he was carrying out the orders of his master in putting him off; not the mode or manner, not that that was within his mind, that he was ordered to do it in that manner, but that it was his duty to put him off the train, so that he was acting within the general scope of his employment and his duty. If the plaintiff was pushed,

or kicked, or driven from this car in question, having gained a seat thereon, while and when it was in motion, such as to make it dangerous to get off, on the evening in question, by some servant, agent, or employé of the defendant, and that agent, servant, or employé was on that train in the employ of the defendant, and acting generally in the discharge of some express or implied duty to the defendant, and was engaged in the execution of some express or implied authority in performing such duties to the defendant, and was acting within the general scope of his employment or authority, and had that in mind in doing what he did, then defendant is liable for the immediate results and consequent damage to the plaintiff. But if the act mentioned was done by some agent or servant or employé of defendant who was temporarily on the train, and who had no duty there, express or implied, as to interlopers or trespassers, or by some agent, servant, or employé of the defendant who went outside of his general employment or duty and the general scope of his employment, and did the act or acts to gratify or serve some spite, malice, or ill will or purpose of his own, then the defendant is not liable. The evidence here is that the trainman or brakeman had orders and it was his duty to remove trespassers on the train—persons stealing a ride. The conductor of a freight train and trainmen thereon engaged in running it have an implied authority to expel or remove therefrom persons stealing rides thereon, not intending to pay fare, in the absence of rules or instructions requiring it; but in doing this they must not use unnecessary or excessive force, or do it at dangerous places or at dangerous times, such as when the train is in motion, so as to render such removal or getting from the train obviously dangerous. They may not act recklessly or wantonly in making such removal, or expose the person removed or driven off to unnecessary peril or danger. If they do that while they are acting within the general scope of their employment in putting off or driving off trespassers and wrongdoers, then as they are acting in the line of their duty, within the general scope of their authority, and have it in mind to serve the master, then the master is liable for such wrong or such excessive force. But if they go outside of that entirely, I repeat, to gratify some malice or spite or ill will of their own—to serve some purpose of their own—then the railroad company would not be liable."

The plaintiff had proved, without objection or exception, by the witness, Cohen, that Arn, the station agent, stated to him that on this train on the night in question there was a green or extra brakeman. The defendant's counsel, immediately following the charge expressly made as requested, that "there is no evidence in the case that there were more than five employés upon the train, and those five have been produced in court," and following the suggestion made by plaintiff's counsel that the brakeman testified that nobody else with a lantern got on the train, and the statement of the court, "the jury will determine," said:

"There has been some statement by my friend about an unknown employé. I now ask your honor to charge that there is no evidence in the case that there were more than five employés on the train, and those five have been produced in court."

This was but an exact repetition of the request just made and complied with without limitation, and the court was not bound to repeat it, and did not refuse to so charge, but had so charged.

The court said:

"The witness says that, when he went down there and made these inquiries, the station agent there said that there was a green brakeman on the train, and that the company had been looking for him, and had been unable to find him. Defendant's Counsel: Yes. The Court: He said that; was it true? Defendant's Counsel: I except to your honor's refusal to charge as requested. The Court: "There is no positive evidence here that there was anybody else on that

train. The conductor, the fireman, the brakeman, the flagman, all swear that there was nobody else on that train that night. But you have here that statement, and that is contradicted. You can take it for what it is worth."

Defendant's counsel excepted. This all related to the mere possible presence of some other person on that train that night. But there was no evidence this person had any duty there, or was engaged in running the train, as the court but a moment before had said there must be. In view of the prior charge it could not have been prejudicial to the defendant.

The defendant's counsel insisted on the trial and insists now that under the evidence the jury were justified in finding that plaintiff was kicked off, but that it was done by some person who got on the train, but who had no duty to perform there, and hence was not acting within the scope of his employment in doing what he did. The defendant's counsel now says:

"Aside from what was said in argument upon the trial, it is not incredible or impossible but that some stranger, tramp, or quarry foreman might have gotten on this train with a lantern, and from motives of sheer spite, or desiring to pose with the authority of an employé, have kicked the plaintiff off."

With the evidence before the jury unobjected to, and with no motion to strike it out or request that the jury be instructed to disregard it, that the station agent asserted the presence of a green brakeman on that train that night, not, however, as a part of the crew, the court more than once emphasized the fact that to make the defendant liable the person who kicked plaintiff off, if he was kicked off, must have been not only an employé, but an employé of defendant on that train, having a duty to perform there, and engaged in running it, and acting at the time in the discharge of a duty to the company, and having the discharge or performance of that duty in mind, and that there must be evidence to that effect. The defendant's counsel asked the court to charge "that the plaintiff is an interested witness, and the jury are not bound to believe his testimony unless corroborated by other evidence." The court said in response:

"The Court: You are not bound to believe it, even if it is corroborated. So with the defendant's witnesses. You are not bound to believe it. When a witness comes before a court and jury, and he is entirely disinterested, and he knows whereof he speaks, and his manner and his statements are fair and candid, and he is not impeached in any way or contradicted, and there are no inherent improbabilities in his story, then it is the duty of the jury to believe him. But if he is interested, if his manner is such that you do not put confidence in him, such as indicates that he is telling a falsehood, or if his story, in view of all the conceded and known facts, is improbable, either plainly so or because of inherent contradictions is improbable, then the jury have a right to disregard it, and if it is sufficiently improbable you ought to disregard it. All that appeals to your common sense and experience."

The charge made was more favorable than requested.

The defendant's counsel also requested the court to charge:

"That the jury are the sole judges of the facts, and that they are not to substitute for their own judgment as to the facts any comment on the testimony made by the judge presiding." The Court: "I decline to charge any differently from what I have charged."

While no point is raised now on this refusal, it is proper to say that in the sentences immediately preceding this request the court had said to the jury:

"You should take the evidence of the witnesses—take them altogether—and determine how the fact is. It is a fact for you to find whether the train stopped, and it is for your determination—all these questions of fact, the credibility of the witnesses—it is all for you."

And but a moment after this request the court said:

"In fact you will consider all the facts and all circumstances attending the transaction, and all the statements of the witnesses, and determine who tells the truth and what the truth is. It is for you, gentlemen."

And early in the charge:

"I am going over this evidence briefly, so that you will have it in mind. If I do not state it exactly as you remember it, you are the judges of the fact, and you will correct me. I am only doing it in a general way, so that you will understand the issue and the law applicable, and not with any intention or purpose of directing what your verdict shall be, or influencing you in any way in that regard."

As the court had repeatedly told the jury they were the judges of the facts, that the facts were for them, and that if in referring to the evidence the court differed from the recollection of the jury the memory of the jury must control, and that the court had no intention or purpose of influencing the jury in any way, it was not called upon to charge further on that subject. The court carefully refrained from expressing any opinion as to the weight or sufficiency of the evidence, but left all questions of fact to the jury. There was no error in refusing to charge differently than the court had charged. Rucker v. Wheeler, 127 U. S. 85, 8 Sup. Ct. 1142, 32 L. Ed. 102; Doyle v. Union Pacific R. Co., 147 U. S. 413, 13 Sup. Ct. 333, 37 L. Ed. 223; U. S. v. Philadelphia & Reading R. Co., 123 U. S. 113, 8 Sup. Ct. 77, 31 L. Ed. 138; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. Ed. 257; Doyle v. Boston & Albany R. Co., 82 Fed. 869, 27 C. C. A. 264.

The court was not requested to instruct the jury to disregard the evidence of the witness Cohen as to the statement made by the depot agent, and hence the court committed no error in failing to do that. Marks v. King, 64 N. Y. 628; Gawtry v. Doane, 51 N. Y. 84.

In Marks v. King, supra, the rule is stated:

"Evidence admitted upon a trial by jury, either without an objection or properly under objection, which for any reason should not be considered by the jury, is not necessarily to be stricken out on motion, but may be retained in the discretion of the court. The remedy of the party is to ask for instructions to the jury that they disregard it."

The rule of law as to plaintiff's liability for the willful or reckless acts of its brakeman or other servants, if they were guilty of any on the occasion in question, was correctly stated. Girvin v. N. Y. C. & H. R. Co., 166 N. Y. 289, 59 N. E. 921; Mott v. Consumers' Ice Co., 73 N. Y. 543; Ansteth v. Buffalo R. Co., 145 N. Y. 210, 39 N. E. 708, 45 Am. St. Rep. 607; Leonard v. Boston & Albany R. Co., 170 Mass. 318, 49 N. E. 621; Planz v. Boston & Albany R. Co., 157 Mass.

377, 32 N. E. 356, 17 L. R. A. 835; West Jersey & S. R. Co. v. Welsh, 62 N. J. Law, 655, 42 Atl. 736, 72 Am. St. Rep. 659; O'Banion v. M. P. R. Co., 65 Kan. 352, 69 Pac. 353.

The attention of the jury was directed to all the claims of the defendant, and generally to all of its evidence, and it was explicitly charged that because of the interest of the plaintiff the jury was not bound to believe his testimony even if he was corroborated. They were expressly cautioned against being affected by sympathy for the plaintiff or prejudice against the defendant because it was a railroad corporation. In fact the plaintiff's counsel had not appealed to the sympathies of the jury, or made any effort to excite the prejudice or passion of the jury. The defendant's defenses were more than once pressed upon the attention of the jury, and given equally as great, if not greater, prominence than was the plaintiff's contention. The jury was also told that negligence could not be presumed, but must be proved to the satisfaction of the jury by a fair preponderance of evidence, and that the plaintiff must have proved his case by a fair preponderance of evidence or the defendant was entitled to a verdict. The trial was had before a fair and impartial and very intelligent jury, and there was no suspicion that it was influenced by anything except the evidence and the rules of law laid down by the court.

Taking the evidence altogether, the plaintiff, who was fair and candid in his manner and statements, sustained his case by a fair preponderance of legal evidence, and, as there was no prejudicial error, the motion for a new trial is denied.

BRAMHALL, DEANE CO. v. INTERNATIONAL MERCANTILE MARINE CO.

(District Court, S. D. New York. May 18, 1906.)

SHIPPING—FITTINGS SUPPLIED TO CHARTERER—RIGHT OF VENDOR TO REMOVE ON RESCISSION OF SALE.

Culinary fittings supplied at the instance of a charterer and affixed to a vessel cannot be removed by the vendor on a claim of rescission based on an alleged fraud by false representations made by the vendee, unless the vessel is placed in as good condition as she was before the installation of such fittings, in so far as their removal would injuriously affect her; nor can the owner of the vessel be required to pay for the fittings, which are of little or no value to it, on the refusal of the vendor to remove them on such terms.

In Admiralty.

Wheeler, Cortis & Haight, for libellant.
Robinson, Biddle & Ward, for respondent.

ADAMS, District Judge. This action was brought by the Bramhall, Deane Company against The International Mercantile Marine Company, a New Jersey Corporation, to recover the value of certain supplies, consisting of cooking apparatus, galley fixtures, bake ovens, steam kettles and cooking utensils, sold and delivered on the steamship Pennsylvania, owned by the respondent, in September, 1904, at

the instance of the Nautical Preparatory School, a corporation of Rhode Island.

The libellant claims that the school became insolvent in September, 1904, and upon being advised of such fact, the libellant gave notice to the school, to its receiver in Rhode Island, and to the respondent, of the rescission of the contract of sale, on the ground of fraud, and demanded possession of the property. The libellant further alleges that the said receiver, by order of court, abandoned all claim and title to a large part of the property still on board of the Pennsylvania. After said abandonment, the libellant, on or about the 3rd day of November, 1904, demanded that said property should be surrendered to it by the respondent, but the latter refused to give up any part of the same and converted it to its own use to the libellant's damage in the sum of $1,500. It further alleges, in the alternative, that on or about the said time the libellant delivered on board the said steamship the same goods, which it particularly sets forth in an appendix annexed to the libel, and at the time of delivery the respondent had chartered the said steamship to the said school with knowledge that she was to be outfitted by the school for a long ocean voyage, and allowed the libellant to go on board and render valuable services and to supply valuable fixtures. It further alleges that the respondent rescinded the charter and took possession of the steamer which was of enhanced value by reason of the work done and materials furnished by the libellant, whereby the respondent was unjustly enriched at the expense of the libellant and is indebted to it in the said sum which is the reasonable value of the said work and materials.

The respondent denies many of the material allegations of the libel and alleges:

"Seventh. And for a separate defence the respondent avers that without admitting the libellant's right in the premises it agreed that the libellant might remove from the said steamship all the unattached supplies it had furnished to the Nautical Preparatory School, and also all the fixtures, provided that in the case of the latter it should restore the steamship to the same condition in which she was before they were attached; and the respondent avers that the libellant has removed the unattached supplies, but has refused to remove the fixtures upon the terms aforesaid."

At the conclusion of the trial I expressed the view that the libellant could not recover, because even if it was entitled to rescind and recover the goods, it lost such right when it declined to take the things back, subject to the condition of putting the vessel in the condition she was before they were put on board, and that I could not then see why the vessel should be made to suffer because the parties allowed the school to obtain credit. I stated, however, that if the libellant wished me to examine the case further, I would do so and the case could be submitted to me on briefs. After considerable delay, the case was finally submitted.

The facts, as disclosed by the testimony and a stipulation of the parties, are briefly as follows:

The Nautical Preparatory School went into possession of the Pennsylvania under a charter dated prior to September 1st, and on that date applied to the libellant for galley supplies for the steamship,

which required extensive alterations to fit her for the school's purposes. In July, 1904, the libellant made enquiries of R. G. Dun & Co., a mercantile agency, for a statement of the financial standing of the school, with a view of ascertaining whether that company was a good financial risk and if it was worth while to sell to it. A report was received which, among other things, stated that the school had already enrolled 200 pupils, which would insure the company about $320,000 to meet the running expenses for a year, and further that the company had an undisputed claim of $76,500 against a responsible ship building and engineering company secured by a good mortgage on the real and personal property of the concern. The libellant considered the report favorable and concluded to furnish the goods, which it did to the extent stated.

The charter party provided that the charterer should have the right to make at its own expense any alterations it needed, subject to the owner's approval in writing, and that the charterer should at the expiration of the contract return the steamer to the owner in the same condition she was in on the 1st of June, the time of delivery, reasonable wear and tear excepted. The contract also provided for a bond to protect the owner from all liens against her. The bond was to be in the sum of $50,000, or in the alternative certain amounts, equivalent thereto, at different periods. Under the charter the school furnished the supplies in question which it obtained from the libellant. The steam piping system with which they were connected was furnished by other parties, the libellant simply connecting its own apparatus with theirs.

After this work was done, the school was declared insolvent and a receiver appointed in Rhode Island. The respondent then withdrew the vessel from the charterer's possession and claimed the right to retain possession of the cooking appliances furnished by the libellant unless the latter would in removing them, should it desire to take that course, restore the steamer to the same condition in which she was before they were attached.

The libellant claims that it was entitled to rescind its contract because it was made in reliance upon the Dun report that it had furnished a cash bond of $50,000, enrolled 200 pupils and that the entire capital had been subscribed. When the school was declared insolvent, it appeared that the statements respecting its financial condition were, if not actually false, at least misleading, and the libellant claiming they were false elected to rescind the sale.

The situation is left somewhat uncertain by the testimony. It is urged by the libellant that a Mr. Eiswold, the vice president and general manager of the school, made the statements to the Dun agency upon which the report was based and he was put upon the witness stand by the libellant. It was proved by him that no security towards the $50,000 was given excepting $10,000, which sum was deposited with the respondent; that it had not enrolled 200 paying pupils but it had actually 68 or 70, representing contracts for tuition amounting to about $89,000, upon which there had been paid $17,500. Later the enrollments increased, so that about the middle of September there

were 150 pupils, each of whom had paid the full tuition fee of $1,280, representing altogether contracts with the company for tuition amounting to $192,000. Out of this money, the school had paid large sums in consideration of which it had received property. Notwithstanding the scheme was attended with some prosperity at the outset, the managers subsequently found that the enrollments did not come up to their expectations and events happened, the loss by fire of the steamboat Slocum, for example, which discouraged parents from sending their children on the water for tuition. The managers saw that they could not meet the liabilities of the school and a receiver was asked for and obtained.

A claim, similar to the one under consideration, was made upon the receiver by the Bramhall, Deane Company and he applied to the court for instructions, representing that the right to remove the property was denied by the owner of the steamer and stating:

"Fifth. There are also on the Pennsylvania certain galley furnishings which were purchased from the Bramhall, Deane Company of New York at a cost approximately of $1,500. These furnishings have been claimed by the Bramhall, Deane Company on the ground that by reason of the fraud in the contract of purchase, the title thereto never passed to the Nautical Preparatory School. These galley furnishings are attached to the piping system of the ship.

"Ninth. So far as the property heretofore mentioned is connected with the piping system of the ship, the International Mercantile Marine Company deny the right of the Receiver to remove the same unless under the terms of the charter party entered into between the International Mercantile Marine Company and the Nautical School, the Receiver returns the Pennsylvania to it in the same order and condition as she was on the first day of June, 1904, reasonable wear and tear only excepted. This will necessitate the complete readjustment of the piping system of the ship. The Pennsylvania, when taken by the Nautical School, was equipped as a freighter and the piping system was so constructed as to be above the spar deck, and not to run through any of the decks where cargo was stored. This was altered by the Nautical School at a very large expense, so that the piping at the present time runs through the decks where the cargo would be carried if the ship is used as a freighter, and if it is necessary by reason of the removal of the property placed thereon, which is connected with the piping system, to replace the piping in the condition in which it was when the Pennsylvania was received on the first day of June, 1904, from the International Mercantile Marine Company, the expense of the replacement of such piping would so far exceed the value of the property taken from the ship."

The court in Rhode Island thereupon made this order:

"The above matter came on for hearing on the first day of November, 1904, on the petition of the Receiver for instructions with reference to the removal of certain property attached to the S. S. Pennsylvania, and was argued by the counsel and thereupon, upon consideration thereof, it is ordered and decreed that the Receiver be and he is hereby instructed and directed not to remove but to abandon so much of the property thereon, which was placed there by the American Laundry Machinery Company, as is connected with the steam and water piping system of the ship and with the electric wiring of the ship; not to remove but to abandon so much of the property which was purchased from the Bramhall, Deane Company as is attached to the steam and water piping system of said ship, not to remove but to abandon the plumbing equipment and all wood work such as cupboards, lockers, etc., which were placed thereon by the Nautical Preparatory School. * * *"

It appears, therefore, that the goods, for the value of which recovery is sought, were abandoned by the receiver, under the instructions of the court, for the substantial reason that it would not be for the benefit of the estate to remove them from the ship.

The libellant made a claim to recover $2,167.76 from the receiver, covering the goods in question here, using the report of the Mercantile Agency, there alleged, as here, to have been the basis of the credit of 30 days extended to the school. In the testimony there in support of the claim, it was stated that the claimant had been offered the goods but upon the condition that the claimant should restore that portion of the ship to which the goods were attached to its original condition. The attaching cost was the sum of $150. The conditions were regarded as prohibitory and not availed of. On the examination before the receiver, it appeared that the goods had been used for a short time and, in that way, became second hand, and this was considered by the Bramhall Company in claiming damages. Thus the Bramhall Company was claiming title to the goods before the receiver but owing to their being attached to the ship, they were practically worthless, the value was claimed as damages, with an additional sum for detention.

Of course, if the libellant was entitled to remove the goods, as such a construction was contemplated by the respondent's contract of letting, it should not be precluded from asserting such right as it might have in the matter by any slight damage to the ship incident to the removal of the fittings, but it is not at all clear that only a slight damage would have been done. I do not think that the respondent was entitled to require that the ship should be put into the condition she was before the installation of the libellant's fittings, so far as that condition required the replacing, for example, of any old boilers or fittings of that description, which were in her and removed to give place to the new fitings, but I do think that in removing the libellant's fittings, no material injury should be done to the ship, and it has not been made clear to me that the fittings could, from their nature, be removed without substantial detriment to the vessel.

It is urged by the respondent, citing Conrow v. Little, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693, and Terry v. Munger, 121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216, 18 Am. St. Rep. 803, that with full knowledge of the situation, including the alleged falsity of the representations made by the school to the Dun Company, the libellant elected to treat the transaction as a sale and to claim the price of the goods from the receiver. The libellant's attitude before the receiver is not perfectly clear. It filed a claim with him for the goods but at the same time filed a claim for damages, based upon a theory of rescission. On the 26th of February, it withdrew the first mentioned claim and amended its claim so that it rested upon the claimed fraud. Nevertheless a claim remained with the receiver. It does not appear that the libellant is pursuing inconsistent remedies, so as to preclude it from seeking this one but upon the ground stated above, and pursuant to the one expressed at the trial, I do not think the libellant should succeed. It would be obviously unjust to require the respondent to pay damages

to the libellant under the circumstances of this case, because of the detention of a quantity of material affixed to its vessel by the libellant, the vessel having been damaged in the installation, and the material of itself being of very little value to any one and probably of none to the respondent. I do not see any reason for putting the libellant in a better condition than the other creditors, if it has to be done at the expense, to any extent, of this one, which appears to have been a much larger loser through the unfortunate enterprise.

Libel dismissed.

PRESTON v. McNEIL LUMBER CO.

(Circuit Court, M. D. Pennsylvania. May 12, 1906.)

No. 40.

CONTRACTS—SALE OF STANDING TIMBER—EVIDENCE TO CHANGE BOUNDARY.

Evidence considered, and *held* insufficient to sustain the burden of proof resting upon defendants to establish their claim that the boundary of a tract of land on which they bought the standing timber from plaintiff, as described in the contract of sale, was different from the boundary as shown on the ground by plaintiff and which by the terms of the contract he guarantied to be the true boundary.

At Law. On trial by the court without a jury.

See 143 Fed. 555.

D. W. Baldwin and E. H. Owlett, for plaintiff.

H. A. Knapp and Moses Shire, for defendant.

ARCHBALD, District Judge. No particular point of law is involved in this case. It is purely a question of fact. Notwithstanding which the parties have agreed to submit the case to the court without a jury, and the opinion to be filed will therefore necessarily consist merely in a discussion of the evidence and an announcement of the conclusions reached.

By a written agreement, made December 9, 1903, a copy of which is attached to the statement, the plaintiff, James Preston, sold to the defendants, Peter and Catherine McNeil, doing business as the McNeil Lumber Company, all the timber standing and down upon two certain tracts of land in Farmington township, Tioga county, Pa., for the price of $9,300 which the defendants undertook to pay in certain installments, all of which have been met, except the final one of $2,800, which was to become due and payable September 1, 1905, and was to carry interest at 6 per cent. from September 1st of the preceding year; and it is to recover this that the present suit is brought. The defendants contend that they were not allowed to take the whole of the timber contracted for, and they therefore resist the action, although the value of that which they claim to have been withheld would not in any event amount in value to more than about $1,800.

The principal controversy is with regard to the second tract, identified by the agreement as part of the premises purchased of Robert Casebeer, bounded and described as follows:

"North by the cleared fields of the first party hereto [Preston]; west by the cleared fields of the same; south by the cleared fields belonging to David Kemp; and east by the cleared fields of the first party, and also by a straight line running from the corner of the first party's cleared fields through the woods to lands of David Kemp, along the line of old blazed trees and stumps."

It is this last line that is in dispute, the defendants claiming that it is some four or five rods further over to the east than where the plaintiff says it is, taking in from six to eight acres more of land, upon which there is about 165,000 feet of timber, mainly hemlock. Reserved also to the plaintiff by the agreement from the other tract, was a strip on the west side, which is described as having once been cut over and subsequently grown up with a small second growth; with regard to which it was provided, that if the defendants, after looking it over, considered that there was any timber on it which they cared for, the plaintiff should give them the same amount and kinds from his other lands; which it is charged that, upon the exercise of this option by the defendants, he has refused to do. These are the two points at issue between the parties.

The land was not inspected nor the sale effected by the defendants personally, but by and upon the report of S. S. Philips and C. T. Dennis, who were in their employ, who went upon the ground with the plaintiff, and were shown where the line that is now in dispute was supposed to be; and it is upon their testimony as to where this was, that the defendants now rely. The plaintiff moreover guarantied in the agreement, that the lines were as they had been so shown to these parties, and to this, therefore, he is now of course to be held. The reference to this in the agreement, however, was not made, as it might seem, at the instance of the defendants, but according to Mr. Smith who drew it, and whose statement, corroborated as it is by others who were present, I accept, was inserted by him upon his own motion, as a matter of precaution, growing out of his experience of its effectiveness in another case. While, then, full legal force is to be given to the provision, it loses not a little of its significance, as a matter of fact, by reason of this. It is still undoubtedly to be taken as determining where the disputed line is, which the defendants are entitled to have declared and established as it was so pointed out by the plaintiff; but that is all.

Taking the agreement as it reads, the tract in controversy is bounded, as we have seen, upon its easterly side, by "a straight line running from the corner of the first party's [Preston's] cleared fields, through the woods, to lands of David Kemp, along the line of old blazed trees and stumps." The line which naturally fulfills this description is the one contended for by the plaintiff, and it must therefore prevail over that claimed by the defendants, unless, having regard to the weight of the evidence and the guaranty referred to, it clearly cannot. It is the only line which starts from the corner of the plaintiff's cleared field—a sufficiently well defined and not easily mistakable monument —or comes anywhere near to doing so; and it is also the exact rectilinear extension of the east side of the Casebeer lot, of which, according to the recitals in the agreement, the tract sold was a part.

While on the other hand the location claimed by Philips and Dennis not only breaks the continuity of this line making a decided jog or angle in it, where it is described as straight; but it tacks on, as an appendage to what is declared to be taken from the Casebeer lot, a part of the Hoyt lot, derived from an entirely separate and independent source. As then the line which is so contended for can only be followed by doing violence in this way to the description of it found in the agreement, there is necessarily a decided burden upon the party who seeks to make this out, and the question is whether it has been successfully met, which depends on the force to be given to the testimony of Philips and Dennis, upon which as already stated the defendants are compelled to rely.

According to the statement of these parties, when the plaintiff was showing them his lands, he took them up through the cleared fields to the woods, and there pointed out a line of blazed trees, which ran through to the Kemp line. On the first of these, located a little way in from the edge of the timber, Dennis cut a V-shaped mark with his knife, in the surveyor's blaze, in order to be able to recognize it again; and upon this controversy having arisen, going to the place by himself, separate and apart from Philips, he claims to have found and identified it. This tree he fixes, where Philips also maintains that the line is; the two thus, independently of each other, having apparently arrived at one and the same result. It must be confessed that on its face this is strong evidence in favor of the defendants, and is not lightly to be set aside. Unfortunately however for the defendants, there is other evidence which calls it seriously in question; and while I am satisfied that these parties are entirely honest in their belief, I am convinced that they are in fact mistaken. Not only is Philips shown by several witnesses to have declared, before any controversy had arisen, that the line is where it is now contended for by the plaintiff, but the one which he and Dennis claimed to identify fails to fulfill in an essential particular, not only the description found in the agreement, but that which they themselves give of the one to which they were taken; and that is, that there were blazed trees and stumps along it having regular surveyors' marks upon them, indicative of an established lot or land line. There are trees and stumps of this kind upon the line as the plaintiff claims it, running practically all the way through to the Kemp property; and identified as this is, by actual survey, with the easterly line of the Casebeer tract, these trees are thus found where they ought and would be expected to be; while on the other hand, and in marked contrast therewith, there are no such blazed trees, nor anything to suggest a land line, where it is located by Philips and Dennis. It is true that there is an opening into the woods and an old roadway at that point, leading into a sugar bush, and there may be trees along it which show blazings; but nothing by way of surveyors' marks, which are quite different. The identification by Dennis which under the circumstances is the one of chief importance, rests therefore entirely on the mark which he cut with his knife and claims to have found again, although not, as it would appear without some little search and difficulty. And however satisfactory and convincing

to his own mind this identification may be, its value here is made to depend upon the one means which he adopted, discarding others equally significant none of which he seems to have been guided by. It is true that he says there were blazed trees along there; but he only followed the supposed line for a hundred feet or so, which amounted to nothing. It is to be borne in mind, also, that the dispute had arisen when he went there, and that he knew that Philips claimed the line to be beyond where they had cut to; and also that with the timber down and the slashings extending up to the edge of the Casebeer lot, it presented quite a different aspect from the time when he first went through there. All these are considerations which rob his alleged identification of much of its significance, and make way for the other evidence which fixes the location elsewhere. With regard to Philips, as already stated, his testimony is seriously called in question, by several witnesses who swear that he pointed out the line to them, or in their hearing, as along where it is now claimed to be by the plaintiff, particularly indicating it to some of them, as running about 16 feet up on the trunk of a hemlock tree, which had tipped part way over, thus confirming the testimony of the plaintiff, that when he was showing the line this tree was recognized as having fallen across it, Dennis cutting a notch in it, to so mark it.

In this state of the evidence, the controlling thing to my mind is the course of marked trees, which are to be found along the one line, and are absent from the other, without which, as already intimated, it does not meet either the description given of it by the agreement or by the parties on whom the defendants rely. That there were no such trees running from the one picked out by Dennis, is not only testified to by the plaintiff and his witnesses, but by Durkin, the surveyor, whom Philips put in there to run the line, who says that he saw none, notwithstanding that Philips claims to have pointed them out. As still further discrediting the line which was run by this surveyor under the instructions of Philips, it follows no particular direction or course, simply starting at the tree shown him by the same, and ending at the corner of Kemp's field. Not touching at any point the line of the Casebeer lot of which it is supposed to be a part, conforming to nothing, and disregarding the marks and monuments called for on the ground, it requires a good deal of a stretch to accept it as the line which should prevail here. I am satisfied, therefore, that Philips and Dennis are mistaken, and that the line shown them is the one to which the timber has been cut, and not the one to the east of that to which they claim. The defendants have therefore obtained all that they are entitled to under this part of the agreement, and must pay what they owe upon it unless they have a defense in what still remains.

The other point in dispute, however, is easily disposed of. The plaintiff, as already stated, reserved to himself the second growth on an undefined strip extending along the west side of the first or lower tract, which the defendants were to be compensated for by other timber, if there was anything on it which they found that they cared for. It is claimed that compensation was made by certain dead and down timber which the defendants were allowed to cut on the disputed

piece, discussed above, in addition to a few small pines on the lower job. The reservation of this second growth timber, it will be noted, was an absolute one, all that the plaintiff was required to do being to give the defendants an equivalent. The matter was thus expressly left open for adjustment, and it is not as though the contention that it had been disposed of in this way was a makeshift. About the time of the dispute over the line of the second tract, the defendants got a bill for some 13,000 feet of lumber of special sizes, which Philips asked and got leave of the plaintiff to fill from the dead and down timber, which he proceeded to cut; although it did not turn out so well as he expected. In value and amount this was about the equivalent of the second growth timber reserved, helped out by the few small pines which have been spoken of. It has never been paid for, and the dispute with regard to its ownership having now been determined in favor of the plaintiff, it thus forms a fair basis not only for the settlement which is claimed to have been made with regard to it but for an offset or adjustment, here and now, if there has been none. It is denied that there ever was any such settlement or arrangement, and it is pointed out that it is entirely inconsistent with the claim of ownership made by the defendants to the disputed piece. On the other hand, however, it is relied upon as a circumstance, discrediting Philips' testimony on the other branch of the case. But whatever may be said of it, the evidence of a settlement is too direct and positive to be put aside. Not only is it testified to by the plaintiff and his son, but by Crofut and several others who worked on the job. Indirectly, also, if I understand his testimony, it is corroborated by Philips himself, who admits that he had a conversation with the plaintiff the day the mill was taken down in which it was suggested that he, the plaintiff, would allow as much per thousand for the timber reserved as Philips would allow for the 12,000 or 13,000 feet which he had taken from the disputed piece. That he (Philips), as the party in charge of the operation, had authority to make the adjustment claimed, there can be no question, and that he in fact did so I have no doubt. This satisfied the agreement in all respects, and the defendants having obtained out of it all that they bargained for must pay the plaintiff the balance due.

Judgment is therefore directed to be entered in favor of the plaintiff and against the defendants for the sum of $3,085.60; being the amount of the final installment, $2,800, with interest from September 1, 1904, to this date.

PORTLAND FLOURING MILLS CO. v. PORTLAND & ASIATIC S. S. CO. et al.

(District Court, D. Oregon. March 19, 1906.)

No. 4,800.

1. SHIPPING—LIEN FOR FREIGHT—EFFECT OF EXPRESS RESERVATION.

A provision of a bill of lading issued by a steamship company that "the carrier shall have a lien on the goods for all freights, primages, and charges" does not affect or change the nature of the lien, which is simply

the maritime lien as understood in the jurisprudence of the United States, to preserve which the retaining of possession is essential, although such provision may in some cases preserve the lien where it would otherwise be deemed waived by other provisions relating to the time and manner of paying the freight.

2. SAME—WAIVER.

The usual provision of a bill of lading that the cargo shall be delivered to the person named or his assigns, "he or they paying the freight," is designed for the benefit of the owner or master in recognition of his right to a lien, and does not impose on him the duty of insisting on payment of the freight before delivery, but he is free to waive his lien and hold the shipper therefor.

3. SAME—PAYMENT BY SURETY—RIGHT OF SUBROGATION.

Libelant, as shipper of a cargo of flour, became bound for the freight, but only as surety for the consignees, who were the owners of the cargo and primarily liable for the freight. The vessel having stranded, her owner abandoned her to the insurer as well as the cargo, a portion of which was salved and sold and the proceeds received by respondent, which was its insurer. Subsequently the insurer of the freight recovered the same from libelant, which thereupon brought suit to recover the amount from respondent, claiming to be subrogated to the carriers' lien for the freight upon the cargo and its proceeds. *Held*, that such lien was lost by the abandonment of the cargo to respondent, which the carrier had the right to make, and there was therefore no claim against the fund arising therefrom to support a right of subrogation.

In Admiralty. On exceptions to libel.

After stating that the several companies parties to this proceeding were incorporated, the libel proceeds in effect as follows:

About August 29, 1901, libelant entered into a contract with a Chinese syndicate at Hong Kong, China, for the sale and shipment of 40,000 barrels of flour during the months of September, October, November, and December following, to be delivered by libelant on board ship at Portland, Or., or on Puget Sound; the buyers to pay the freight, as the respondent Portland & Asiatic Steamship Company well knew; insurance to be effected by libelant upon the flour at buyers' expense, and payment to be made by drafts drawn upon buyers at 60 days' sight, through the Chartered Bank of India, Australia & China, with bills of lading and insurance policies attached. During December, 1901, libelant, at Portland, Or., delivered on board the steamship Knight Companion, chartered and operated by the Portland & Asiatic, certain flour, namely: 98,000 pounds to be delivered to libelant, or its assigns, at Hong Kong, China, "Notify Wing Chong Lee"; 1,060,654 pounds, same delivery, "Notify Kwong Tuck Wing"; 2,121,112 pounds, same delivery, "Notify Kwong Yick Woo"; and 3,181,766 pounds, same delivery, "Notify Wing Chong Lee." For each of such shipments the Portland & Asiatic issued and delivered to libelant bills of lading, which contained provisions, among others, as follows: (1) That the freight was to be paid thereon at the rate of $5 per ton of 2,000 pounds, gold, at Hong Kong; (2) that such freight was to be collected in United States gold coin or its equivalent at the point of destination and delivery; (3) that the carrier shall have a lien on the goods for all freights, primages, and charges; (4) that if, on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper; (5) that the bill of lading duly indorsed must be given up to the ship's consignee in exchange for delivery order; (6) the several freights and primages to be considered as earned, steamer or goods lost or not lost, at any stage of the entire transit.

In truth and in fact, as between libelant and the buyers, the freight upon such shipments was to be paid by the buyers, of which the Portland & Asiatic had knowledge prior to the issuance of such bills of lading, and the words "Notify," etc., were intended, as between the Portland

& Asiatic and libelant. to designate the respective persons to whom the flour was to be delivered. Insurance upon the flour was effected by libelant, in the name of itself and assigns and in amount representing invoice cost and 40 per cent., with respondent Commercial Union Assurance Company, in accordance with buyers' instructions and at their expense. At and prior to time of delivery aboard ship, respondents well knew that libelant had sold such flour to the buyers, delivery on board said vessel at Portland, and that the freight thereon from Portland to Hong Kong was for buyers' account, the Portland & Asiatic having agreed to collect such freight from buyers at Hong Kong upon arrival of steamer and delivery of flour, and the respective bills of lading having been issued in pursuance of such agreement. Libelant indorsed the bills of lading and insurance policies, and attached the same to the drafts drawn upon the respective buyers for the invoice cost of such flour and insurance premiums advanced for buyers' account, and caused such drafts to be forwarded to the Chartered Bank of India, Australia & China, at Hong Kong.

About February 2, 1902, on the Japanese coast, the Knight Companion, laden with such shipments, grounded and stranded, and, together with her cargo, was immediately abandoned by her master and crew, without any necessity therefor and without any attempt at salvage of her cargo, or any notification to libelant; the said ship being abandoned to the underwriters thereof as a total loss. Salvage of cargo was begun by Japanese fishermen, and about February 6, 1902, one Rennie Tipple, the surveyor to Lloyd's agent and local underwriters, took charge of the operations, which resulted in the salvage of a large portion of the flour so shipped by libelant. The salved flour was sold under authority of a meeting of local agents of underwriters February 26, 1902, and the proceeds thereof deposited with the Yokohama Specie Bank, to the joint credit of Samuel Samuel & Co., who were the Japanese agents of the Portland & Asiatic, and H. R. Playfair, who was the Japanese agent of the assurance company, and the net proceeds of the flour so shipped by libelant and so salved, after deducting expenses of salvage, amounted to $21,447.98, which said sum was largely in excess of freight upon the entire shipment. In the price at which said salved flour was sold was included a freight value of $5 per ton. No abandonment of such flour was ever made by libelant to insurers, nor was libelant ever notified by the Portland & Asiatic of the loss of the ship, or of the salvage of such flour; and, at the time of such salvage, sale, and deposit, said bills of lading and such policies were in the possession of the Chartered Bank of India, Australia & China at Hong Kong, and libelant had never consented to such sale, nor was it advised thereof.

About June 25, 1902, the British & Foreign Marine Insurance Company, to which, as insurer of the freight on the Knight Companion, the Portland and Asiatic had, on March 20, 1902, abandoned such freight, brought suit in this court against libelant for the recovery of $16,376.51, being the freight upon such shipment made by libelant, and such proceedings were had that, on November 21, 1904, a final decree was rendered in favor of said insurance company against libelant, in a sum with interest and costs aggregating $19,391.61. On December 7, 1904, libelant was compelled to, and did, pay the decree, and has since endeavored to collect the amount from the said Chinese consignees of the flour, but has been, and still is, unable to do so in any part. The Portland & Asiatic and the assurance company, by their respective agents, on November 4, 1902, wrongfully converted to the use of, and paid over to, said assurance company the proceeds of the said salved flour, which moneys constituted a fund out of which said freight could, and the libelant was claiming it should, be paid, as both the respondents well knew. The libelant, by and under said former suit, has been compelled to pay moneys which said Chinese buyers should have paid, as the respondents at all times well knew, and which libelant is unable to secure to be paid by the said Chinese buyers. The respondent assurance company claimed and received said salved flour, and the proceeds thereof, claiming to be subrogor or assignee of said Chinese consignees, and not otherwise; and, by the claim and receipt of said moneys, said assurance company itself became

liable for, and obligated to pay to libelant, the moneys which the libelant was compelled to pay as aforesaid, but which in truth and in fact should have been paid by said consignees. Wherefore libelant prays that the court pronounce in favor of its demand. Respondents have each interposed three exceptions. The first challenges the libel on its merits. The other two suggest indefiniteness and uncertainty.

Williams, Wood & Linthicum and J. C. Flanders, for libelant.
Snow & McCamant, for respondents.

WOLVERTON, District Judge (after stating the facts). In the view I entertain of the matters presented, it will be necessary to consider the first exception only. A disposal of that will determine the cause on its merits.

Plaintiff's theory of the libel is as well expressed as could be by its counsel in their brief submitted with the argument. I quote as they state it:

"Our claim against this fund arises from the doctrine of subrogation, that is to say, having paid the Portland & Asiatic, or its assigns, the freight, which, as between the Chinamen and ourselves, was due from the Chinamen, we are subrogated to the rights of the Portland & Asiatic against the Chinamen themselves and against the salved flour or its proceeds, and the respondent, the Commercial Union Assurance Company, limited, having acquired possession of this fund by subrogation from the Chinamen, hold it subject to all the claims and liens against it which would have subsisted in the hands of the Chinamen; that, it being true in the law of subrogation that he who has paid to a creditor the debt of another is subrogated to all the rights of that creditor against that other, and that he who takes by assignment the right of another to a fund takes it with all the burdens and obligations which that fund would have been chargeable with in the hands of his assignor, it is in legal theory the same as if the Portland & Asiatic in this present suit were seeking to make its freight money out of the flour itself in the hands of the Chinamen."

Under the allegations of the libel and the exposition of the libelant's theory, the Chinamen must be treated as though they were the actual principals for the payment of this freight money to the Portland & Asiatic and the libelant their surety, although the bills of lading would indicate that the parties sustain the reverse relation; but the Portland & Asiatic, having knowledge of such relations, is bound to the observance of such obligations as would arise on the assumption that they actually existed. This is not a matter that was tried and determined in the former suit of the British & Foreign Marine Insurance Company against the libelant, although the result of that suit leads one to doubt the correctness in fact of libelant's hypothesis here. But be that as it may, I am warranted in putting the contention of res judicata made by the respondents out of the case at the outset, and considering the questions arising, giving libelant all the benefits it is legally entitled to under the theory advanced.

For a clear understanding of what is to follow, it should be premised that, generally speaking, subrogation in equity arises under the following conditions: First, the person insisting upon its benefits must have paid a debt due to a third party before he can be substituted to that party's rights; and, second, in doing so he must not act as a mere volunteer, but on compulsion, to save himself from

loss by reason of a superior lien or claim on the part of the person to whom he pays the debt, as in cases of sureties, prior mortgagees, etc. The right is never accorded to one who is a mere volunteer in paying the debt of one person to another. See Ætna Life Insurance Co. v. Middleport, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537, from the syllabus of which case the legal statement is largely taken. A very clear enunciation of the doctrine itself is made by Chancellor Johnson, in Gadsen v. Brown, Speer's Eq. (S. C.) 37, 41, cited in the above case. He says:

"The doctrine of subrogation is a pure unmixed equity, having its foundation in the principles of natural justice, and from its very nature never could have been intended for the relief of those who were in any condition in which they were at liberty to elect whether they would or would not be bound; and, as far as I have been able to learn its history, it never has been so applied. If one with the perfect knowledge of the facts will part with his money, or bind himself by his contract in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound who could not choose but abide the penalty."

So has Chancellor Walworth spoken, in the case of Sandford v. McLean, 3 Paige (N. Y.) 122, 23 Am. Dec. 773, also cited in the above case:

"It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect."

See, also, a reaffirmation of the doctrine as announced in Ætna Insurance Co. v. Middleport, in Prairie City Bank v. United States, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412.

So that, in order for libelant to prevail, it must have been surety for the Chinamen for the payment of the freight money to the Portland & Asiatic, a condition which may be conceded for the sake of the consideration of the case. Further, in the aspect in which libelant puts it, the Portland & Asiatic must have had a lien upon the cargo of flour, or the proceeds thereof, when the freight money was paid to it by libelant, and the libelant must have paid such money, not as a volunteer, but because it was bound to pay the same in its relation as surety for the Chinamen. If all these things existed seriatim, then the libelant was subrogated to the rights of the Portland & Asiatic under its lien, and is entitled to the same relief that the Portland & Asiatic would have had had it pursued the lien as a remedy for making its freight money. If not, the basis of libelant's theory is wanting, because it has no existence in fact, and it is not entitled to the relief demanded.

The lien relied upon, through which subrogation is claimed, is the shipowner's lien for freight for the carriage of goods. Such lien depends upon possession, and its preservation upon a continuance of possession. Scrutton on Charter Parties & Bills of Lading, arts. 149, 150, 136. A clear statement of the nature of the lien is made by

Mr. Chief Justice Taney, in the case of Bags of Linseed, 1 Black, 108, 112, 113, 17 L. Ed. 35. He says:

"Undoubtedly the shipowner has a right to retain the goods until the freight is paid, and has, therefore, a lien upon them for the amount; and, as contracts of affreightment are regarded by the courts of the United States as maritime contracts, over which the courts of admiralty have jurisdiction, the shipowner may enforce his lien by a proceeding in rem in the proper court. But this lien is not in the nature of a hypothecation, which will remain a charge upon the goods after the shipowner has parted from the possession, but is analogous to the lien given by the common law to the carrier on land, who is not bound to deliver them to the party until his fare is paid; and, if he delivers them, the incumbrance of the lien does not follow them in the hands of the owner or consignee. It is nothing more than the right to withhold the goods, and it is inseparably associated with his possession, and dependent upon it. The lien of the carrier by water for his freight, under the ordinary bill of lading, although it is maritime, yet it stands upon the same ground with the carrier by land, and arises from his right to retain the possession until the freight is paid, and is lost by an unconditional delivery to the consignee. It is suggested in the argument for the appellant that, as a general rule, maritime liens do not depend on possession of the thing upon which the lien exists; but this proposition cannot be maintained in the courts of admiralty of the United States. And, whatever may be the doctrine in the courts on the continent of Europe, where the civil law is established, it has been decided in this court that the maritime lien for a general average in a case of jettison, and the lien for freight, depend upon the possession of the goods, and arise from the right to retain them until the amount of the lien is paid"—citing Cutler v. Rae, 7 How. 729, 12 L. Ed. 890, 1221; Dupont de Nemours & Co. v. Vance and Others, 19 How. 171, 15 L. Ed. 584.

"Hypothecation, when applied to maritime transactions," it is said, "is perhaps about the same as bottomry or respondentia, though it is usually predicated of a loan by the master on the vessel, freight, or cargo, made in order to raise money for the necessities of the voyage. In a more general sense, it is a pledge to secure any debt or engagement without a delivery or possession." 15 Am. & Eng. Enc. (2d Ed.) 905. This definition renders the distinction intended to be made by the distinguished jurist by the use of the term "hypothecation" very obvious, and it emphasizes the condition contained in the rule that the shipowner's lien for the carriage of goods, or for freight money, is one dependent upon possession, and that when the possession is lost the lien ceases to be available.

So in a later case, The Bird of Paradise, 5 Wall. 545, 555, 18 L. Ed. 662, Mr. Justice Clifford says:

"Such a lien is regarded in the jurisprudence of the United States as a maritime lien, because it arises from the usages of commerce, independently of the agreement of the parties, and not from any statutory regulations. Legal effect of such a lien is that the shipowner, as carrier by water, may retain the goods until the freight is paid, or he may enforce the same by a proceeding in rem in the District Court. But it is not the same as the privileged claim of the civil law, nor is it an hypothecation of the cargo which will remain a charge upon the goods after the shipowner has parted unconditionally with the possession. Although the lien is maritime and cognizable in the admiralty, yet it stands upon the same ground with the lien of the carrier on land, and arises from the right of the shipowner to retain the possession of the goods until the freight is paid, and is lost by an unconditional delivery to the consignee."

These are sufficient of the cases to establish in maritime jurisprudence the legal character of the lien. The circumstance that it is specifically stipulated in the bill of lading "that the carrier shall have a lien on the goods for all freights, primages, and charges" does not affect or change the nature of the lien with which the goods are incumbered. It is simply the maritime lien, as understood by the jurisprudence of the United States, with the usual effect and limitations which the law ordinarily implies, that is preserved and confirmed by the express agreement of the parties, and none other. The agreement does not constitute a hypothecation whereby the lien attaches and continues effective without reference to the condition of possession essential to the ordinary maritime lien on the cargo for freight charges. It has an advantage, however, in its favor that does not affect this case. Being express, such agreement may at times, dependent upon the nature of the stipulations imposed, evidence an intention adverse to a waiver where otherwise the lien might be deemed, under the usual conditions attending the bill of lading, to have been renounced. "If there is an express stipulation for a lien for freight," say the authors of the American and English Encyclopedia (volume 7 [2d Ed.], p. 275), "such lien may be considered as preserved to the shipowner, notwithstanding there are in the contract of affreightment provisions as to the time and place of the payment of freight which might otherwise be construed as showing an intention on the part of the shipowner to waive his lien." In further support of the view thus indicated, see The Bird of Paradise, supra; The Kimball, 3 Wall. 37, 18 L. Ed. 50; The Volunteer, Fed. Cas. No. 16,991, 28 Fed. Cas. 1260; Fourteen Horses, etc., Fed. Cas. No. 4,990, 9 Fed. Cas. 602; Howard et al. v. Macondray et al., 7 Gray (Mass.) 516.

The insertion of the usual clause in bills of lading that the cargo is to be delivered to the person named, or his assigns, "he or they paying the freight," is designed for the benefit of the master or shipowner, and not for that of the shipper or consignor, and is but a recognition or assertion of the former's right to retain the goods carried until his lien is satisfied by payment of the freight. It therefore imposes no obligation on the master or owner to insist on the payment of the freight before delivery of the cargo. If he prefers to waive his right of lien, and to deliver the goods without payment of the freight, his right to resort to the shipper still remains. Wooster et al. v. Tarr et al., 8 Allen (Mass.) 270, 85 Am. Dec. 707; Holt et al. v. Westcott et al., 43 Me. 445, 69 Am. Dec. 74; Christy v. Row, 1 Taunton, 300; Shepard v. De Bernales, 13 East, 565; Domett v. Beckford, 5 Barn. & Adolp. 223.

So it was said in Jobbitt v. Goundry, 29 Barb. (N. Y.) 509, 511:

"It seems to be established that a clause in a bill of lading, which directs the carrier to collect the freight of the consignee of the goods, on delivery, does not, in case of the carrier's neglect to collect of him, discharge the consignor's liability to pay the same."

See, also, Collins v. Union Transfer Company, 10 Watts (Pa.) 384.

I am impressed, therefore, that the clause under consideration, as

shown by the libel, namely, "that such freight was to be collected * * * at the point of destination and delivery," is tantamount to a direction only to the owner to collect such freight at destination, but that it does not impose upon him such an obligation to do so that his failure in that regard would disentitle him to look to the shipper, notwithstanding, for the payment of such freight. This does not overlook the theory of counsel that the Chinamen are the real principals and the libelant their surety for the payment of such freight; but it does not help the surety, as it is only obligated as the principal is obligated, and can claim no different effect for the contract than the principal, and therefore, when the agreement of the parties allows the shipowner to waive the lien for freight and look to the principal solely, the surety cannot complain, because its suretyship relates to the very same contract. It is bound as its principal is bound, and the duties and obligations of the shipowner are not changed that there was a surety also for the payment of such freight. If the lien continued to assert itself, the surety would be subrogated to that interest in place of the shipowner; but the relations of the lien do not change the duties and obligations of the owner.

Such being the nature of the lien that the Portland and Asiatic had upon the flour for the freight charges, and such its rights and obligations, it not only waived its lien, as it had a right to do, but it lost it absolutely when it abandoned the cargo to the underwriters, as it thereby surrendered possession, thus depriving itself of an essential in the retention of such lien. The lien being lost, the alleged fact, which must be taken as true, that the proceeds of the salved flour came into the Yokohama Specie Bank to the joint credit of the agents of the Portland & Asiatic and the assurance company, could not be effective to restore it, so that there is no lien upon such proceeds, into whosesoever hands they have come. Without the lien, it is manifest that there could be no subrogation, and consequently the libelant can lay no claim to the fund now in the hands of the assurance company, which represents the salved flour. The allegation that no abandonment of such flour was ever made by libelant to insurers must be read in connection with the averment that the Portland & Asiatic abandoned the cargo to the underwriters, which is tantamount to saying that the shipowners abandoned possession; and this is equivalent to an abandonment of the lien.

There is, however, another provision in the bill of lading that is pertinent, if not of vital importance, in the present inquiry. It is the sixth as enumerated in the libel, and is as follows: "The several freights and primages to be considered as earned, steamer or goods lost or not lost, at any stage of the entire transit." In the case of Nelson et al. v. Association for the Protection of Commercial Interests, etc., 43 L. J. (N. S.) 218, the bill of lading read: "Freight for the said goods to be paid in Liverpool [the point of destination] by the consignees, as per margin, ship lost or not lost." The shipowners abandoned the voyage, as the Portland & Asiatic did in the present instance, and the respondent salved a portion of the goods. Upon these the shipowners claimed a lien, after they had been sent to their

destination by the salvors, and it was held by the court that they were not so entitled. In determining the cause, Brett, one of the justices, says:

"Upon the arrival of the goods at the port of destination, no lien existed, for the goods were forwarded by other persons than the plaintiffs. If the shippers were bound to pay the freight, whether the ship was lost or not lost, there was no lien at all, for the right to lien does not arise unless the payment of the freight is to be on the delivery of the cargo; if the freight is payable without delivery of the cargo, lien does not accrue."

That case differs from the one at bar only in the fact that by the bill of lading here the parties have expressly agreed that the carrier should have a lien for all freights; but, as I have seen, the agreement does not vary the nature or effect of the lien, and if therefore the lien was lost in that case by abandonment of the goods to the respondent, who salved a portion of them, it was lost in this case by an abandonment to the underwriters.

I am of the opinion that the libel is without merit, and the exception will therefore be sustained.

BARNES v. MULTNOMAH COUNTY.

(Circuit Court, D. Oregon. May 7, 1906.)

No. 3,011.

1. COUNTIES—CONVEYANCE TO COMMISSIONERS—EFFECT.
   B. & C. Comp. Or. § 2519, provides that all real estate conveyed by any form of conveyance to the inhabitants of any county, or to other persons "for the use of such county," shall be deemed the property of the county to the same effect as if made to the inhabitants of the county by their corporate name. *Held*, that a conveyance of land to certain grantees, county commissioners of M. county, and their assigns, constituted a conveyance to the county, though it did not recite that it was "for the use of such county."

2. SAME—PURPOSE OF CONVEYANCE—RIGHT TO HOLD—OBJECTIONS—ESTOPPEL.
   A county being authorized to purchase and hold lands for some purposes by B. & C. Comp. Or. § 2518, empowering a county to purchase and hold for its own use "land lying within its own limits," the objection that a county to which land was conveyed had no power to take the land for the purposes intended could only be raised by the state, and not by the grantor's heirs.

3. DEEDS—CONSIDERATION—ADEQUACY.
   An agreement by a county to furnish its grantor, while he lived on the land conveyed to the county, food, clothing, and supplies as long as he should live was a sufficient consideration to support the conveyance.
   [Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 26.]

4. SAME—SEAL.
   Where a deed was supported by an actual executed consideration, the omission of the grantor's personal seal, in so far as the same was necessary to import a consideration, was immaterial.

5. SAME—CURING DEFECTS—RETROACTIVE LEGISLATION.
   The omission of the personal seal of the grantor in a deed of certain land to a county was cured by the subsequent passage of B. & C. Comp. Or. § 5377, providing that all deeds to real property previously executed

which shall have been signed by the grantors in due form shall be sufficient in law to convey the legal title, without any other execution or acknowledgment whatsoever, etc.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 98.]

6. SAME—CONSTRUCTION—CONTRACT TO CONVEY.

A deed from which the personal seal of the grantor was omitted, but which was otherwise validly executed, operated as a conveyance of the grantor's title in equity, and not as a mere contract to convey, which could not be validated by subsequent curative legislation.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 98, 102.]

This is an action in ejectment. After stating the necessary jurisdictional facts, the complaint alleges that the plaintiff is the owner in fee simple, and entitled to the immediate possession, of the real property in dispute (describing it), and that no one is in the actual possession of said premises, but that defendant is acting as owner thereof. The answer denies each and every allegation of the complaint, and for a separate defense alleges that prior to October 1, 1859, one John Barnes was the owner of a certain donation land claim, that the tract of land described in the complaint is a part of such claim, and that defendant is seized of an estate in fee simple, and is entitled to the possession of said tract through conveyance from the donee. The plaintiff, for reply, after denying the allegation relative to defendant's seisin, sets up that the only claim had by defendant in and to the land in dispute is by virtue of a certain writing (setting the same out by copy). The writing purports to be a deed of conveyance of the following tenor: "I, John Barnes, * * * in consideration of $500 paid to me by E. Hamilton, W. S. Ladd, and Caleb Ritchie, county commissioners of said (Multnomah) county, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, and convey unto said commissioners and assigns forever the following real estate," describing the land in dispute. The instrument is witnessed by three witnesses, and acknowledged before the county clerk, but the private seal of the grantor is wanting. The reply further alleges that the consideration stated in the writing was not the true consideration, and that neither the said sum of $500 nor any sum was paid or agreed to be paid by such commissioners, but that the sole and only consideration therefor was that on October 1, 1859, the said John Barnes being the owner in fee simple of his donation land claim, of the then value of over $3,000, the said county commissioners attempted to agree with him, in consideration that he should sign the above instrument or writing, that said Multnomah county would furnish him with a living on said land, food, clothing, and supplies, so long as he should live, and that Barnes signed and delivered said paper upon said alleged consideration, and not otherwise; that the defendant, or the said commissioners, or any of them, never at any time took possession of said land, or any part thereof; that about 30 days after the signing of said paper John Barnes died intestate, and that plaintiff has succeeded to his interest in the premises. Upon the filing of such reply, the defendant moved the court for judgment on the pleadings in its favor dismissing the complaint, and for the recovery of costs and disbursements.

U. S. G. Marquam, for plaintiff.

John Manning, Dist. Atty., and Carey & Mays, Special Counsel, for defendant.

WOLVERTON, District Judge (after stating the facts). The questions presented are upon the motion for judgment. From the pleadings it appears that defendant's title, if it has any, to the property in dispute is dependent upon the deed set out in the reply. It is shown further by the reply what the true consideration therefor was; so that in reality the court has before it on these pleadings all the

facts necessary to a determination as to the validity of this deed, and the transaction itself, by which it was attempted to convey the property to the county. I say to the county, as the conveyance, if operative to transfer title, was, in effect, a conveyance to the county. Section 2519, B. & C. Comp.

It is urged that, as the words "for the use of such county," employed in the statute, are not contained in the deed, it is without any validity as a transfer to the municipality. I do not so construe the statute. The language was not designed as operative words of a grant in such cases, but to indicate that any property so transferred, that was intended for the use of the county, should be treated and considered and held to be the property of the county. It does not need a declaration in the conveyance, therefore, that the property is for the use of the county in such cases, but it is sufficient that it was designed and intended that it should go by the transfer adopted to the county, and not to the treasurer or committee, etc., as individuals. It is apparent, from the present deed being made to the commissioners by their title, and their assigns, that the property was designed for the use of the county, and for none other.

But plaintiff's counsel further insists that defendant is without capacity to take or hold the property, because it was not in fact purchased or taken over for the use of the county, nor was or is it employed for such a purpose. I am of the opinion, however, that the plaintiff is not in a position to raise the question. The matter has been practically decided by the case of Raley v. Umatilla County, 15 Or. 172, 13 Pac. 890, 3 Am. St. Rep. 142. That was a case instituted for the purpose of quieting the plaintiffs' title to a certain block of land, conveyed to the county in consideration of one dollar, "for the special use, and none other, of educational purposes," requiring that there should be erected thereon a college or institution of learning. It was there insisted, as it is here, that the county was not capacitated to take the property, and therefore that the heirs of the grantor were not precluded from claiming or asserting title thereto. The court, after holding that the county was competent to take in that instance, was seemingly not contented to rest the case on that ground alone, and continued with its exposition, speaking through Mr. Justice Strahan, as follows:

"But if the premise contended for by the appellants were conceded, the conclusion which they seek to draw from it would not follow. The statute plainly confers upon counties the power to acquire and hold real property for certain purposes, and the appellants' contention is that this deed conveys property to the county outside of and for other and different purposes than those specified in the statute. This is a question which these plaintiffs cannot be permitted to raise, and in which they have no interest. That could only be done at the instance of the state."

Thus, in effect, holding that, notwithstanding the county may not have the requisite power to hold property for the purpose for which it might be conveyed, yet, having authority to hold for some purpose, and a conveyance having been made, the grantor is precluded from questioning the capacity of the county to take that which he has conveyed, which is a matter entirely for the state. The principle is well

stated in Chambers v. City of St. Louis, 29 Mo. 543 (a case cited in Raley v. Umatilla County), where it is said:

"The city is duly incorporated with authority to hold, purchase, and convey such real and personal estate as the purposes of the corporation shall require; and if, in holding and purchasing real estate, she passes the exact line of her power, it belongs to the government of the state to exact a forfeiture of her charter, and it is not for the courts, in a collateral way, to determine the question of misuser by declaring void the conveyances made in good faith. In this view of the subject we are fully sustained by the authorities."

See, also, Heiskell v. Chickasaw Lodge, 87 Tenn. 668, 686, 11 S. W. 825, 4 L. R. A. 699, and Barrow v. Turnpike Co., 9 Humph. (Tenn.) 307.

The statute (section 2518, B. & C. Comp.) empowers the county to purchase and hold for its use "lands lying within its own limits." Here is authority to purchase and hold land, but whether in fact it has purchased, or whether a particular piece of land it has taken over to itself was for the use of the county, are questions that, while they may concern the individual as a member of the body politic, are not such as he is permitted to raise. This is essentially so as it relates to the individual in general. These are matters for the public service, for the state, as indicated by the authorities above. If the individual in general cannot question the use for which realty is purchased by the county, there exists no greater reason why the individual who has parted with his land to the county for a consideration should be permitted to question it. He stands in no better position for urging, that the property is not properly or appropriately for the use of the county than the individual in general. The property is not his when he has parted with it, and, having no interest therein, he can with no greater reason be heard to urge that it is not, or cannot be, for the use of the county; so that unless it appears that the deed set out in the reply is insufficient for some reason to convey this property to the county, the plaintiff cannot now question the title by which the county holds.

It is further contended that the deed was without consideration to uphold it, and, not being under seal, none would be imported or implied, and that by reason of these infirmities, and of the further condition that the county was incapacitated to take and hold the property, the Legislature could not cure or validate the deed, or make it operative and efficacious as an instrument of conveyance of title. Ordinarily speaking, there could be no question that the consideration is sufficient; it need not be adequate. It is sufficient if it is valuable, and, if valuable, however small it may be, if no creditor's rights come in conflict, or if the transaction is accompanied by no fraud or undue influence, express or implied, the consideration will support the conveyance. 13 Cyc. 533. It will hardly be questioned that a promise or agreement to support the grantor during his life, and especially where the support has been provided, is sufficient to uphold a deed made in consideration thereof. There are many such instances that have received the approval of the courts, and it is unnecessary to cite authorities in support of the proposition. So I take it that, if the real

consideration for the execution of the deed in question was that the county should furnish the grantor "while he lives on said land, food, clothing, and supplies" as long as he should live, as alleged in the reply, it was sufficient to support the conveyance.

The reply shows that the grantor died about 30 days after the signing of the paper, and it is consequential to assume that the county rendered the services agreed upon in the meanwhile, so that the consideration is a past one, and the undertaking on the part of the county wholly executed. The seal is therefore not needful in the way of affixing or importing a consideration, as the deed is supported by an actual consideration that has been wholly executed. Under the statute of Oregon the private seal of the grantor is made requisite to the execution of a valid deed conveying real property, but it is not such an essential that the Legislature may not have dispensed with it, and hence, if omitted, may not have validated by retrospective legislation. This identical question has been settled by the case of Stanley v. Smith, 15 Or. 505, 16 Pac. 174. That was an action of ejectment, and the question arose by reason of a deed being offered in evidence, over objection that it was without a private seal. The court, however, admitted it, because it was said that it had been cured by an act of the Legislature adopted in 1878, now known as section 5377, B. & C. Comp. The act provides that:

"All deeds to real property heretofore executed in this state which shall have been signed by the grantors in due form shall be sufficient in law to convey the legal title * * * from the grantors to the grantees, without any other execution or acknowledgment whatever; and such deeds so executed shall be received in evidence in all courts in this state, and be conclusive evidence of the title to the lands therein described against the grantors, their heirs and assigns."

The court says in that case:

"There is nothing in the Constitution of this state prohibiting the passage of retrospective laws in such cases, and, where not prohibited, the power of the Legislature to pass them has been generally sustained. The formalities required in the execution of a deed are purely statutory, and it is always competent for the Legislature to declare by what form of conveyance the title to real property may be transferred."

The court then quotes the rule applicable to curative statutes, as laid down by Mr. Cooley in his work on Constitutional Limitations (section 371), as follows:

"If the thing wanting or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the Legislature might have dispensed with by a prior statute, then it is not beyond the power of the Legislature to dispense with it by a subsequent statute. And if the irregularity consists in doing some act which the Legislature might have made immaterial by prior law, it is clearly competent to make the same immaterial by a subsequent law."

The principle has been several times subsequently reaffirmed by the Oregon Supreme Court. Nottage v. City of Portland, 35 Or. 539, 58 Pac. 883, 76 Am. St. Rep. 513; Thomas v. Portland, 40 Or. 50, 66 Pac. 439; Real Estate Co. v. Gambell, 41 Or. 61, 66 Pac. 441; Ferguson v. Kaboth, 43 Or. 414, 73 Pac. 200, 74 Pac. 466.

The defect of the want of a private seal is a formal matter only, and in all such cases it is generally held that the Legislature has com-

petent authority under the Constitution to cure or validate by retrospective legislation. Of course, it could not cure such defects as want of power in the grantor to convey, as is instanced by the case of Shonk v. Brown, 61 Pa. 320. Nor could it execute a will for the parties, as shown in the case of Alter's Appeal, 67 Pa. 341, 5 Am. Rep. 433. Nor could it cure a deed void for uncertainty. Lowe v. Harris, 112 N. C. 472, 17 S. E. 539, 22 L. R. A. 379. Nor could it probably cure a deed executed by a minor, where the procedure had not been in accordance with law, as is instanced in the case of Mills v. Charleton, 29 Wis. 400, 9 Am. Rep. 578. But the case at bar is not one involving the principles announced in those causes.

It is quite a different thing where the county or corporation not expressly authorized to take is invoking the aid of a court of equity through which to acquire title which has never previously vested. In such a case the court will not lend its aid to enable the corporation to acquire a thing it cannot hold. Case v. Kelly, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513; Chesnut v. Shane's Lessee, 16 Ohio, 599, 47 Am. Dec. 387. Where, however, the grantor has passed his title to an entity competent in any degree to hold it, although not for the specific use for which it is empowered to hold, then it is clearly a matter for the state to determine whether it should properly retain and enjoy the property. The grantor, having parted with his property, can have no further interest to subserve.

Counsel makes the point that the deed without a seal was, in effect, only a contract to convey (citing Hill v. Cooper, 6 Or. 181, and South Portland Land Co. v. Munger, 36 Or. 457, 54 Pac. 815, 60 Pac. 5); and, if so treated, the Legislature could not infuse into it the vitality of a deed. True, the court in these cases sustained the contention there made that the deeds without seal should be treated, for the purpose of obtaining specific performance, as contracts to convey; but the court did not hold that such instruments were insusceptible of validation as deeds of conveyance. But an instrument like the one under consideration is something more than a mere contract to convey. The parties fully intended that it should operate as a completed conveyance, and supposed that such was its actual effect, and such would have been its effect were it not for the omitted seal. As it was, it conveyed the equity, and needed but the seal to carry the legal title. It must be granted that the Legislature could not change a contract of sale into a deed for the parties; but where the parties have not intended a contract of sale merely, but a completed conveyance, and have failed in a formal particular only, they stand in a very different attitude, and the Legislature may validate the instrument retrospectively. I could not, therefore, treat this writing as a contract to convey merely for the purpose of determining the effect of the curative legislation, but must treat it as an imperfect conveyance, and, so treated, it has been cured by such legislation. I hold, therefore, that the deed, aided by the subsequent legislation, is effective to convey the legal title, and that plaintiff is in no position to question the use for which it is held. He is therefore without a cause of action, as shown by the pleadings. The motion for judgment will be sustained as made, and such will be the order of the court.

UNITED STATES LACE CURTAIN MILLS v. OCEANIC STEAM NAVIGATION CO., Limited.

(District Court, S. D. New York. May 3, 1906.)

SHIPPING—DAMAGE TO CARGO—VALIDITY OF LIMITATION OF LIABILITY IN BILL OF LADING.

A condition in bills of lading issued by a steamship company, limiting its liability in case of loss to a specified sum per package unless the value of the goods shall be expressed therein, is not an agreed valuation of the goods, and is invalid to relieve the company from liability for the full loss in case of their loss or injury through negligence, but a limitation to the invoice or declared value is reasonable and enforceable.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 663–665, 708; vol. 44, Cent. Dig. Shipping, § 495.]

In Admiralty. Suit for damage to cargo.

Black & Kneeland, for libellant.

Robinson, Biddle & Ward, for respondent.

ADAMS, District Judge. This libel was filed by the United States Lace Curtain Mills to recover the damages sustained through certain machinery shipped on the Oceanic Steam Navigation Company's steamship Georgic at Liverpool on the 30th of December, 1904, being injured during the voyage. The shipment consisted of 12 pieces and 11 cases of lace curtain machinery, 2 of which were cases 38 or 40 feet long. The action relates to one of these cases, which the libellant contends was broken on board the vessel and the contents, long bars used in curtain machines, so injured that it was necessary to send them back to England for repairs.

The respondent claims that the machinery was delivered in New York in good order and condition, and further denies the libellant's allegation that the damage, if any, was not caused by any peril lawfully excepted in the bill of lading but was due to fault of neglect of the respondent in the loading, stowage, custody or care of said cargo. It then sets up a claim contained in the bill of lading that it should not be liable for any sum exceeding £20 per package unless the value should be expressed in the bill of lading and freight paid thereon. A further defence is pleaded that, in any event, the bill of lading contained a condition that the respondent should not be liable for more than the invoice or declared value of the goods whichever should be less.

The testimony shows that the case in question, No. 355, was examined early in January, 1905, on the respondent's wharf a few days after arrival, by the treasurer of the libellant, who found it in a badly broken condition, with a considerable bend in it, so that it was out of shape. After calling the respondent's attention to it, the case was sent by the libellant to Kingston, New York, where its manufacturing plant was located, and the contents removed. It was found that all the bars were bent, so that it was impossible to use the machinery and it was returned to the manufacturers, there being no facilities for repairing in this country. It was subsequently returned here after a bill of $598.57 had been incurred.

There is a contention on the respondent's part that there is no credible proof that damage existed when the case was delivered to the libellant and urges the probability of it having been injured after delivery, as it was subjected then to the strain of transportation by lighter and by rail. The libellant's contention that the package was in bad order when delivered to it at New York is, I think, reasonably well sustained by the treasurer's testimony and the necessary conclusion is that the contents of the case received injury while in respondent's possession. In this respect, the libellant is entitled to have its claim sustained.

Another question is, what damages should be allowed. The bill of lading provides:

"1. It is also mutually agreed that the Company shall not be liable for any sum exceeding £20 per package for goods of whatever description, nor for any amount in respect of Gold, Silver, Bullion, Specie, Jewellery, and articles used for Jewellery, Precious Stones or Metals, Documents, Paintings, Pictures, Engravings, Statuary, or any other valuable goods of whatever description, unless the value of such shall be herein expressed and freight as may be agreed paid thereon."

The libellant contends:

"(1st) That the clause of the bill of lading quoted amounts at most to an agreement for partial exemption from liability, and is not a contract agreeing upon the value of the goods, and liquidating damages for loss thereof.

"(2nd) That a limitation to £20 for a case or package of this description is entirely unreasonable."

The respondent contends that the amount should not be over £20 and after referring to clause 1 of the bill of lading, quoted supra, urges in brief as follows:

"No value was expressed in the bill of lading, and therefore the parties have agreed that the Company shall not be liable for more than £20 for any package. A clause differently worded, but construed as if worded in the same way, was enforced by Brown, J., and by the Circuit Court of Appeals in Calderon v. Atlas S. S. Co. (D. C.) 64 Fed. 874, and 69 Fed. 574, 16 C. C. A. 332. It is true that these decisions were reversed by the Supreme Court in 170 U. S. 272, 278, but only because the clause was literally construed as relieving the carrier of any liability whatever, and therefore against public policy."

The law in this connection is well expressed in Amer. & Eng. Enc. of Law, v. 5, p. 333, as follows:

"The criterion by which the validity of such stipulations is to be determined, where the loss is one caused by the carrier's negligence, lies in determining whether the value placed upon the article as the limit of liability is an agreed value, fixed by consent of both parties and constituting the basis upon which the freight charges are calculated, or whether it is an arbitrary value, printed in all bills of lading or shipping contracts, and concerning the fairness of which the shipper has not been questioned. In the former case the authorities are practically agreed that such a stipulation is valid, but in the latter case it is of no force when the loss results from negligence."

The Hart Case—Hart v. Pennsylvania Railroad Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717—is the leading case on this branch of the law. There it was held that where a contract of carriage, signed

by the shipper, is fairly made with a carrier, agreeing on a valuation of the property carried, with a rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, the contract will be upheld. In discussing the matter, the court said (112 U. S. 340, 343, 5 Sup. Ct. 156, 28 L. Ed. 717):

"The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract. * * *

"The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and for protecting himself against extravagant and fanciful valuations. Squire v. New York Central R. R. Co., 98 Mass. 239, 245, 93 Am. Dec. 162, and cases there cited."

The case under consideration does not fall within the terms of the Hart Case. There was here no value expressed in the bill of lading, nor a signed agreement with respect to it. The Calderon Case relied upon was reversed by the Supreme Court and, in any event, is not an authority in point, because it lacked the essential features of a lawful limitation. The limiting clause there was (69 Fed. 575, 16 C. C. A. 632):

"(1) It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewelry, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks, or for goods of any description which are above the value of $100 per package, unless bills of lading are signed therefor with the value therein expressed, and a special agreement is made."

Judge Wallace in his dissenting opinion, 69 Fed. 577–579, 16 C. C. A. 332, says:

"General words exempting him [the carrier] from liability under particular circumstances do not protect him from the consequences of his own negligence. If it had been the purpose of the condition, explicitly expressed, to lessen the liability of the steamship company from the consequences of a loss arising from its own negligence or that of its agents, the condition would have been prohibited, and therefore void, by the act of congress. In order to give it any effect, it must be read as though it were not intended to apply to such a loss. The condition is not one whereby the shipper and carrier agree in advance, by the terms of the contract, upon the value of the goods, and limit the liability of the carrier to a sum not to exceed the valuation; * * *.

"There is no injustice in restricting a shipper's claim for damages to the value he places on his property for transportation. Where the contract and the rate of freight are based upon an assumed fictitious value of the goods carried, the parties are bound to that value in case of loss. McCance v. Railroad Co., 34 Law J. Exch. 39. Where there is an agreed valuation stated in the contract, that is assumed as the basis of the carrier's compensation and responsibility. Such a valuation would necessarily, in the absence of fraud, conclude both the shipper and the carrier upon any enquiry as to the amount of damages arising from a loss, and the contract would therefore extend to any kind of a liability,—the liability of the carrier as an insurer as well as for a negligent loss. In the present case there was no statement of the value of the goods. The bill of lading was delivered

after the steamship company had received the goods, and, as delivered, it was silent in respect to their value. Construing it as intended to exempt the steamship company from liability beyond the value of $100 per package, the contract between the parties was merely that this sum should be deemed the limit of the company's liability. Such a contract is not the equivalent of one valuing the goods, and the exemption, therefore, does not reach a loss by the carrier's negligence. This was distinctly adjudged in Magnin v. Dinsmore, 56 N. Y. 168, and Westcott v. Fargo, 61 N. Y. 542, 19 Am. Rep. 300, and in both of these cases it was held that a condition to exempt the carrier from liability for loss beyond a specified sum, in the absence of a statement of value by the shipper, would not exempt him from liability for loss by his own negligence. On the contrary, in Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575, where the condition provided that the goods should be valued at a specified sum, in the absence of a statement in the contract of a different value, the same court held the carrier's liability to be limited to that sum, in the absence of the statement, although the loss was by his own negligence.

"The authorities are elaborately considered and reviewed in Railway Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311, and the conclusion reached that a condition limiting the liability of a carrier, in case of loss, to a specified sum, in the absence of a statement of a different value, is not a valuation of the goods, and does not relieve the carrier from liability for the whole value in case of a negligent loss.

"The steamship company could have exacted from the libelant a statement of the value of his goods, if it had seen fit to do so, or it could have required him to agree that they should be regarded as of a certain value in the absence of a statement upon his part of a different value; but it did neither, and only stipulated with him that it should not be liable beyond a specified sum in case of loss. The law presumes that this agreement does not refer to a loss by the carrier's negligence."

The Supreme Court, in reversing the Circuit Court of Appeals, said (Calderon v. Atlas S. S. Co., 170 U. S. 281, 282, 18 Sup. Ct. 588, 592, 42 L. Ed. 1033):

"In this case the contract is one prepared by the respondent itself for the general purposes of its business. With every opportunity for a choice of language, it used a form of expression which clearly indicated a desire to exempt itself altogether from liability for goods exceeding $100 in value per package, and it has no right to complain if the courts hold it to have intended what it so plainly expressed. * * *

"Under this interpretation there is a clear attempt on the part of the carrier to exonerate itself from all responsibility for goods exceeding the value of $100 per package. Such exemption is not only prohibited by the Harter Act, but is held to be invalid in a series of cases in this court, culminating in Chicago, Milwaukee etc. Railway v. Solan, 169 U. S. 133, 135, 18 Sup. Ct. 289, 42 L. Ed. 688, wherein it was said that 'any contract by which a common carrier of goods or passengers undertakes to exempt himself from all responsibility for loss or damage arising from the negligence of himself or servants, is void as against public policy, as attempting to put off the essential duties resting upon every public carrier by virtue of his employment, and as tending to defeat the fundamental principle upon which the law of common carriers was established.' The difficulty is not removed by the fact that the carrier may render itself liable for these goods, if 'bills of lading are signed therefor, with the value therein expressed and a special agreement is made.' This would enable the carrier to do, as was done in this case—give a bill of lading in which no value was expressed, under which it would not be liable at all for the safe transportation and proper delivery of the property. This would be in direct contravention of the Harter Act. Indeed, we understand it to be practically conceded that under the construction we have given to this clause of the contract the exemption would be unreasonable and invalid."

In the case of Railway Company v. Wynn, 88 Tenn. 320, at page 330, 14 S. W. 311, at page 313, referred to by Judge Wallace, it was said:

"The cases of Hart v. Pennsylvania Railroad Company, 112 U. S. 331; 5 Sup. Ct. 151, 28 L. Ed. 717; Graves v Railroad Company, 137 Mass. 33, 50 Am. Rep. 282; Harvey v. Railroad Company, 74 Mo. 539; Brehme v. Dinsmore, 25 Md. 329; Railroad Company v. Sherrod, 84 Ala. 178, 4 South. 29, are not at all in conflict with our opinion in this case. They were decided upon an entirely dissimilar state of facts, and from a wholly different point of view; that is to say, it appeared to the court, in each and every one of those cases, that there was an agreed valuation stated in the contract as the basis of the carrier's charges and responsibility; and the courts very properly held that in such cases the shipper was estopped to claim a greater sum than the agreed valuation."

There can be no doubt of the liability of the respondent here because of negligence in failing to deliver the shipment in the good order and condition in which it was received and it does not seem that the recovery can be limited to $100, but the limitation to the invoice or declared value of the goods is admitted to be reasonable and enforceable.

There will be a decree for the libellant, with an order of reference to ascertain the amount of damages it has sustained, not exceeding the invoice or declared value.

THE JOHN McCRAKEN.

THE COLUMBIA.

(District Court, D. Oregon. April 30, 1906.)

No. 4,827.

ADMIRALTY—SUITS IN REM—VESSELS OWNED BY MUNICIPALITY.

Vessels owned by the port of Portland, which is a municipal corporation created by the law of Oregon and charged with the duty of improving and maintaining navigation in the harbor of Portland and vicinity, and which are used by it in such work, are devoted to a public use, and are not subject to seizure by the United States or any other libelant in a civil suit in rem against them in a court of admiralty to recover damages for a maritime tort.

In Admiralty. On motion to vacate warrant of arrest.

This is a proceeding, by libel in rem, preferred by the United States against the tug John McCraken and the dredge Columbia, their engines, boilers, etc., for the recovery of damages arising from a collision with the Manzanita, a lighthouse tender, the property of the United States, alleged to have been caused by the negligence of the masters of the vessels libeled. It is shown by the libel that the vessels at fault are the property of the port of Portland, and were being navigated on the Columbia river, as tug and tow, from a point one-half mile above Coffee Island, up the river on the Oregon side, and that, while being so navigated, the collision complained of occurred. Seizure was made by the marshal in pursuance of the proceeding thus instituted.

The port of Portland now moves that the warrant of arrest by authority of which the seizure was made be vacated and set aside. In support of the motion claimant shows to the court: First, that it is a municipal corporation, created and existing under certain acts of the legislative assembly of

the state of Oregon, and is and was at the time of the alleged collision the sole owner of the vessels complained against; and, second, that the claimant is charged by the state with the duty, among other things, of creating and maintaining a ship channel within the limits of the port of Portland, and in the waters of the Willamette and Columbia rivers between said port and the sea, and is actively engaged in said work; that said vessels were built and are maintained by the claimant, and were at the time of the collision being employed in the furtherance of the work referred to, by reason whereof it is alleged that said vessels are not subject to the jurisdiction of this court, nor to seizure under the process thereof.

W. C. Bristol, U. S. Atty., for libelant.
Williams, Wood & Linthicum, for claimant.

WOLVERTON, District Judge (after stating the facts). Counsel for claimant contend, broadly, as indicated by the motion, that the vessels are not subject to seizure, by reason of the fact that they are the property of a municipal corporation, necessary to the furtherance of its operations, and are being employed in the public service and for a public use. The contention challenges the jurisdiction of the court to entertain the libel under such conditions. The questions thus presented are of vital interest, and I have endeavored to give them considerate attention. The manner of raising the issues, and its sufficiency for the purpose, will be discussed later in the opinion. The port of Portland is constituted a municipal corporation by an act of the legislative assembly of the state of Oregon, with power to sue and be sued, and to improve the harbor in the Willamette river at the city of Portland, and the channel of the Willamette and Columbia rivers between said harbor and the sea. It is also given full control, so far as the state has authority thereto, over such harbor and rivers. Sections 4635–4638, B. & C. Comp. The constitutionality of the act was brought to a test in the case of Cook v. Port of Portland, 20 Or. 580, 27 Pac. 263, 13 L. R. A. 533. It is there declared in effect that the port of Portland is a municipal corporation, and that its purposes and powers are "all public, political, or governmental," and that the corporation, and the commissioners who exercise its powers, are as well the agents of the state, delegated to exercise a part of its prerogatives. "The sole object of the corporation," says Mr. Justice Bean, speaking for the court, "is to so improve the Willamette and Columbia rivers at the city of Portland and between that point and the sea as to create and maintain a ship channel of a specified depth, and for this purpose it is given full power over these rivers, so far as the state can grant the same." The corporation being organized to perform a public service or function, and the vessels being employed in its service, they must be held presumptively to have been employed for a public use. The authorities are apparently in unison upon the proposition that a vessel, being the property of a municipality devoted to public uses, and necessary for carrying on some essential operations of the government, is not liable to seizure in a suit in rem, in admiralty, for a maritime tort. The Seneca, Fed. Cas. No. 12,668; The Fidelity, Fed. Cas. No. 4,757, same case on appeal, No. 4,758; Long v. The Tampico (D. C.) 16 Fed. 491; Brickley, Administrator, v. City

of Boston (C. C.) 20 Fed. 207; The F. C. Latrobe (D. C.) 28 Fed. 377.

Says Blatchford, District Judge, in the case of The Fidelity, supra:

"The tug was, by an authorized act of the city government, devoted to public use. She was public property, and the public use to which she was devoted was a specific use. Such property, belonging to any governmental body, federal, state, or municipal, cannot be seized to satisfy an execution on a judgment. Darlington v. Mayor, etc., 31 N. Y. 193, 88 Am. Dec. 248. Nor can it be seized by process in advance, to be held as security for a judgment which may be recovered. Such action has the effect of interfering with the public officers in the discharge of their public duties, by depriving them of necessary instruments for the discharge of those duties."

In the same case, on appeal to the Circuit Court, Mr. Chief Justice Waite, sitting as Circuit Justice, says:

"It is well settled, that public property, devoted to public uses, and necessary for carrying on the operations of the government, is not subject to seizure and sale on execution. * * * It would seem to be clear, that, if the instruments of government cannot be seized to pay a debt after judgment, they cannot before."

The reasons for the rule are found tersely, but aptly, stated in Klein v. New Orleans, 99 U. S. 149, 150, 25 L. Ed. 430:

"Municipal corporations are the local agencies of the government creating them, and their powers are such as belong to sovereignty. Property and revenue necessary for the exercise of these powsrs become part of the machinery of government, and to permit a creditor to seize and sell them to collect his debt would be to permit him in some degree to destroy the government itself."

So also it was said, in The F. C. Latrobe, supra:

"And when, in the performance of any duty, either imposed upon or assumed by it, the municipality employs maritime instrumentalities, I think it should be held answerable under the maritime law, with those exceptions only which public policy absolutely requires. If the vessel belonging to the municipality is used by it as a necessary instrument in the exercise of some municipal function, then, as was held by the chief justice in the case of The Fidelity, public policy requires that the municipality shall not be deprived of its use."

As it respects the United States, the proposition is, broadly asserted, that no suit in rem can be maintained against the property of the government when it would be necessary to take such property out of its possession by any writ or process of the court. The Davis, 10 Wall. 15, 19 L. Ed. 875; The Siren, 7 Wall. 152, 19 L. Ed. 129; Briggs v. Light-Boats, 11 Allen (Mass.) 157. The doctrine is not directly involved here, except that it serves to indicate that by a rigid rule the government will not suffer its property to be taken from the possession of itself or its officers, through the process of the courts, without its consent; no suit or action being maintainable against the United States without authorization from Congress. The observation is relevant, however, in view of the insistence of the district attorney that, as the vessels libeled were proceeding, as alleged in the libel, in violation of the navigation laws of the United States, therefore, the laws of the general government being the paramount law of the land, the government, through its courts, could seize such

vessels and subject them to the payment of the damages sustained by the collision. The fundamental principle, as it relates to the autonomy of government between the national and state organisms, has been recently announced by Mr. Justice Brewer, in the case of the Matter of Heff, 197 U. S. 488, 505, 25 Sup. Ct. 506, 510, 49 L. Ed. 848, as follows:

"In this republic there is a dual system of government, national and state. Each within its own domain is supreme, and one of the chief functions of this court is to preserve the balance between them, protecting each in the powers it possesses and preventing any trespass thereon by the other."

Thus it appears that the national government is as careful that the functions of the state governments, and the instrumentalities by which they are exercised and controlled, shall not be impinged upon, and their powers hampered and impeded, as it is jealous that its own organism be not shorn of any of its authority or fettered in the maintenance of its supremacy. I take it, therefore, that it will not invade the rights of the state, or of any of its municipalities exercising the powers of the state, nor in any way clog the powers of local self-government, unless it be in a case where the national laws, validly enacted under the Constitution, come in conflict with the laws and ordinances of the state and its municipalities. In such latter case, the laws of the general government, it must be admitted, are supreme, and in that sense are the supreme law of the land. This is not a test, however, as it relates to the supremacy of any national law over a state law or a municipal ordinance. Nor is the proceeding criminal in its purpose, nor one to condemn the vessels complained against for any violation of law; but the ordinary one for libel between suitors; the general government being the libelant and the port of Portland the claimant or respondent; and there exists no reason, so far as I have been able to discover, why the municipality is not entitled to the same defense against the general government as it could rightfully interpose against a private suitor. Indeed, it appears to me that the policy of the general government is in consonance with this view, and that, under that policy, it is bound to accord to the municipality the same defense as if the libelant were a private suitor proceeding against the ships of such municipality. The port of Portland was exercising its powers, within the limits of its jurisdiction, according to the legislation of the state; and the vessels in question being the property of the municipality, employed in the public use and necessary to the purposes to which they were being devoted, I am led to the conclusion that the principle of law first herein announced is applicable, and that such vessels are not subject to seizure at the hands of the government, in a proceeding by libel in rem against them. There is apparently a conflict of judicial opinion as to whether a lien ever attaches, as against the government or a municipality, as it pertains to a vessel owned thereby and devoted to a public service. Mr. Justice Field, in the case of The Siren, supra, plainly says that:

"For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding in rem, except where the

vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose."

While, on the other hand, Mr. Chief Justice Waite, in the case of The Fidelity, supra, seems to be of the opinion that no such lien can exist. He says:

"It seems to me that the same principle which forbids the seizure to pay a debt, forbids the lien, which can only be enforced by a seizure."

It would appear that, if there was no claim or lien, the court would be without any jurisdiction whatever to entertain the proceeding by libel in rem; but that if, on the other hand, there was such a claim, the jurisdiction would exist, and the matter could be tried out, the parties consenting. See cases cited in The Siren. But, in any event, the property would not be subject to seizure against the objection of the government or municipality. This discussion is apropos to the suggestion of the government that the objection to the seizure could not be properly made by motion to vacate or set aside the warrant of arrest, and that it should be made by claim and answer. But if the seizure could not be maintained in any event, there appears no reason why the motion would not reach the question. The facts sufficiently appear, from the libel and the motion, by which it becomes apparent that the seizure cannot be maintained.

The motion will, therefore, be allowed, and the warrant of arrest vacated.

UNITED STATES v. COLLINS.

(District Court, D. Oregon. April 27, 1906.)

No. 4,855.

1. WITNESSES—PRODUCTION OF DOCUMENTS—BOOKS OF PARTNERSHIP.

A showing that books of account which a witness is required by a subpœna to produce are the books of a partnership of which he is a member and are not in his custody except as a member of the firm, without more, affords no ground of excuse of his refusal to produce them.

2. SAME—CLAIM OF PRIVILEGE.

A claim of privilege under the fifth constitutional amendment is insufficient to excuse the failure to produce books as required by a subpœna duces tecum where it is based solely on the statement of the person making the claim that the books if produced will constitute evidence which will tend to incriminate him, and he has not moreover been sworn as a witness. To entitle him to make such claim he must have been sworn as a witness, and must satisfy the court that there is reasonable ground therefor by something further than his mere assertion.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1064, 1066.]

Proceeding for Contempt.

John J. Collins was subpœnaed to appear in court and testify as a witness in behalf of the United States, and was required by such subpœna to

bring with him each and every record, book, paper, file, or instrument, or other record in his possession or under his control, showing, or containing, or having therein any matter or thing pertaining or relating to the business of E. Dorgan, or Francis Devine, or Dorgan & Devine, associated together either with him, the said Collins, or separately, within and during the years 1902 and 1903, whether made or entered by him, or by Dorgan or Devine, or either or any of them, in respect of said business. He appeared in obedience to the subpœna (the purpose of which, it should be said, was to procure his testimony before the grand jury, now in session), but has refused to bring with him any record, book, paper, file, or instrument called for. The witness is now here to answer the complaint of the district attorney, and show cause why he is not in contempt of the court in refusing to obey such subpœna. He shows that E. Dorgan, Francis Devine, and himself were at the dates mentioned, and now are, partners doing business at Albany, Or., under the firm name of "E. Dorgan & Co."; that the records, books, etc., of such firm are the only records of the nature called for of which he has any knowledge, and that the same were not, at the time of the service of the subpœna, and are not now, in his custody, except as one of the members of the firm; and, further, that such books, etc., if produced, will constitute such evidence as would tend to incriminate him, the said Collins, and render him liable to prosecution and conviction for a crime against the United States; and that, under the fifth amendment to the federal Constitution, he claims the privilege accorded him of refusing to produce such records, books, etc. Thereupon, he prays a dismissal of the proceeding.

W. C. Bristol, U. S. Atty.
L. M. Curl and Percy R. Kelly, for defendant.

WOLVERTON, District Judge (after stating the facts). Two reasons, it will be seen, are assigned by Collins why he should not be required to bring the records, books, etc., called for by the subpœna: First, that they are in the hands of a partnership, of which he is a member only; and, second, that if produced they will constitute evidence, the tendency of which will be to incriminate him, or to render him subject to prosecution for a crime against the United States. Of these, in their order, it is familiar law that every member of a firm is an agent thereof; but not only this, he is ordinarily as much entitled to the records, books, files, etc., of the firm as any other member; and the simple fact, as alleged here, in effect, that the records, etc., are in the possession and under the control of the firm does not hinder the defendant in the least from bringing them away. He says they are not under his control or in his custody except as one of the members of the firm; thus leaving the palpable inference that they are under the control of the firm—he having as much right to their possession as any other member. Such a state of facts manifestly does not, without further showing that he is unable for some pertinent reason to bring them, excuse his refusal. The firm has not denied him the right, or taken the books and records away out of his reach, and, being a member, he is able to bring them for aught that is shown.

As to the second reason urged why defendant should be excused from producing the documents, the showing made is manifestly insufficient, for two reasons: First, the act solely of bringing the papers, conceding that they do contain matters tending to the witness's incrimination, will not subject him to prosecution and conviction of a crime; and, second, his mere statement that such records and papers do contain matters that,

if disclosed, would tend to his incrimination, is insufficient to excuse him. The constitutional guaranty under the fifth amendment is that "no person * * * shall be compelled, in any criminal case, to be a witness against himself." It has been determined that the object of this guaranty, broadly construed, "was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." Counselman v. Hitchcock, 142 U. S. 547, 562, 12 Sup. Ct. 195, 35 L. Ed. 1110. And so it was said in Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, construing the fourth amendment in connection with the fifth that "any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government." Under the fifth amendment, therefore, it would seem that the party invoking its aid by way of claiming exemption, must first be a witness; and under the fourth, the compulsory production of his papers must be for the purpose of convicting him of a crime. Now, a party is not properly a witness, qualified to testify, until he has taken the prescribed oath, and it is only as a witness that he can claim the exemption, so that until he has become a witness, the guaranty that the amendment affords him is not being impinged upon, and he is not in a position to assert that he is being compelled to testify against himself. It was conceded, and so held by the court, in United States v. Kimball (C. C.) 117 Fed. 156, that:

"It is well settled that a witness cannot claim his constitutional privilege until he is sworn. He must take the oath, so that his assertion of privilege shall be made under that sanction."

After citing authorities in support of the principle, the court proceeds as follows:

"If a person cannot claim his privilege until he has been sworn, it logically follows that the constitutional provision cannot until that time be violated. It cannot be violated before it can be invoked for his protection; hence the conclusion is that compulsion, within the meaning of the Constitution, does not arise from mere summoning and swearing the witness."

Such being the law, and the reason of it, a priori, it would not be an infraction of the Constitution to require the party by subpœna duces tecum, while not under oath or a qualified witness, to bring his papers containing incriminating evidence. Until he is called upon to disclose the incriminating matter involving himself in a transgression of law for which he might be subject to prosecution, he is not in a position to claim the exemption.

Proceeding to the second reason, it was held by Lord Chief Justice Cockburn, in Queen v. Boyes, 1 B. & S. 311, 321, that:

"To entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer, although if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any

particular question. * * * The object of the law is to afford to a party, called upon to give evidence in a proceeding inter alios, protection against being brought by means of his own evidence within the penalties of the law."

I have quoted the above from Brown v. Walker, 161 U. S. 591, 599, 600, 16 Sup. Ct. 644, 40 L. Ed. 819, without verifying the English case. So it was said in United States v. McCarthy (C. C.) 18 Fed. 87:

"It is not sufficient to excuse the witness from answering that he may in his own mind think his answer to the question might by possibility lead to some criminal charge against him, or tend to convict him of it, if made. The court must be able to perceive that there is reasonable ground to apprehend danger to the witness from his being compelled to answer."

While this case is overruled in the main by Counselman v. Hitchcock, supra, yet as to this announcement of the law, it is approved by the case of Brown v. Walker, supra, in making the quotation from Lord Chief Justice Cockburn above given.

Now, the answer of Collins goes no further than to declare that these records, books, papers, etc., if produced, will constitute such evidence as would tend to incriminate him; it does not appear how, and in what way. The subject-matter of the investigation under way before the grand jury is not given; nor is it shown what relation he sustains thereto, or how, or in what manner, the subject-matter of the records will affect him, except by the sheerest conclusion. If the mere assertion of a witness required to bring with him documents under a subpœna, that they contain matter incriminating him, were sufficient to exonerate him from obeying the mandate of the court, it would be useless to attempt to obtain any such documentary evidence in many instances, as a party's interest would overcome his veracity in statement, he not being subject to the penalties of the violation of an oath. The real situation is strongly stated in Brown v. Walker, supra. The court says:

"The danger of extending the principle announced in Counselman v. Hitchcock is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege."

I am of the opinion that the witness has not excused his refusal to obey the mandate of the subpœna. He will therefore be required to produce the papers called for by tomorrow morning at 11 o'clock, under the subpœna, and in default thereof, will be committed to the county jail of Multnomah county, Or., until he shall produce the same.

And it is further ordered that he pay the costs of this proceeding.

NEW YORK & CUBA MAIL S. S. CO. v. ROYAL EXCHANGE ASSURANCE.

(District Court, S. D. New York. March 28, 1906.)

INSURANCE—VALUED MARINE POLICY ON FREIGHT—PARTIAL LOSS.

A marine policy insuring a vessel for one year in a stated amount against loss of freight "on board or not on board," "carried or not carried," "full interest admitted; the policy being deemed sufficient proof of interest," does not render the insurer liable for the full valued amount on a partial loss, and on a stranding of the vessel, preventing the completion of a voyage, it is entitled to a deduction of freight prepaid, and the amount earned by forwarding a portion of the cargo, above the cost of the salvage, and its liability is limited to the proportion of the face of the policy that the amount of the actual loss bears to the amount of the freight which would have been earned had the voyage been completed.

In Admiralty. Suit on marine policy of insurance.

Wing, Putnam & Burlingham, for libellant.
Butler, Notman & Mynderse, for respondent.

ADAMS, District Judge. This action was brought by The New York & Cuba Mail Steamship Company against The Royal Exchange Assurance to recover on a marine insurance policy the sum of £2062, or $10,034.74 in United States Currency, by reason of a loss suffered through the stranding of the steamer Vigilancia on Colorado Reef about 87 miles west of Havana, in January, 1901.

The libel alleges that on October 13th, 1900, the respondent issued to the libellant, at its home office in London, the policy in suit for one year from October 7th, 1900, on freight on board or not on board, valued at £2062 (or actual freight, if more) on the steamer Vigilancia, owned by the libellant, for which the libellant paid full premium at the rate of three pounds five shillings per cent. It further alleges that the Vigilancia was employed in trade between New York, Cuban and Mexican ports, carrying chiefly general cargo and passengers, and that she was seaworthy at all the times before January 14th, 1901. It is further alleged that the Vigilancia left Vera Cruz January 10th, and Progreso January 12th, 1901; that on January 14th, she stranded on Colorado Reef, whereby she was so damaged and disabled as to be unable to proceed or extricate herself and was by such perils wholly prevented from earning her pending freight; that a part of her cargo was destroyed and such as could be got off the wreck was forwarded at a cost which exceeded the whole freight collectible at destination, so that the libellant lost all its freight on the voyage. It is further alleged that after the steamer had remained aground for about 5 months, during which time parts of her structure were cut away, she was floated by salvors, who brought her to New York, where she was undergoing repairs until after the 7th of October, 1901, so that she was never able to resume her service during the currency of the policy. It is further alleged that the libellant made claim upon the respondent for payment of the insurance, in amount as above stated, with interest from March 1st, 1901, but no part has been paid and the whole amount is still due and owing.

The answer admits the issuance of the policy but denies that the

full terms and conditions thereof are set forth and calls for the production of the original. It further admits the facts respecting the steamer excepting that it has no knowledge as to the necessity or cost of forwarding the cargo. It further admits that in June, 1901, the steamer was brought to New York by the salvors and that a demand was made upon it for the payment of the amount of the policy which the respondent declined to pay. It further alleges as follows:

"Eighth: Further answering said libel the respondent upon information and belief avers that the amount of freight on board at the time of the stranding of the said steamer was much less than £2062 and that of said freight a portion had been prepaid and a portion was at the ship-owner's risk; that a large quantity of the cargo destined for Havana was forwarded to that port and freight thereon collected from the consignees, and that a large quantity of the cargo destined for New York was forwarded to that port and freight thereon collected from the consignees; that no abandonment of the freight has ever been made by the libellant to the respondent, and the respondent has no knowledge or information of facts warranting an abandonment; that the libellant has never supplied any facts upon which the loss under the policy could be properly adjusted; that any loss should be adjusted according to the law and custom of England, where the contract of insurance was issued, if such laws or customs differ from those of the United States, which cannot be known to respondent until the facts respecting the alleged loss are made known; that the respondent has always been ready and prepared to pay any sum for which it might be responsible under its said policy of insurance upon a proper adjustment, but that the respondent is not responsible for a total loss under the said policy."

The issues of fact raised by the pleadings have been determined by the following stipulation:

"It is hereby stipulated that the annexed statement of freight moneys may be admitted in evidence.

A part of the prepaid freight $1173.00 from Vera Cruz was for the carriage of cattle and horses carried under a bill of lading which provided that freight on each animal shipped should be prepaid, and that 'no part of which is to be refunded for account of death or any other accident to said animals.'

The rest of the prepaid freight $2294.41 was upon cargo carried under bills of lading containing the following clause:

No. 14. 'Also that freight payable on weight or measurement shall be paid either on gross weight or measurement landed from steamer or on bill of lading weight or measurements, as carrier elects; that full freight shall be paid on damaged or unsound goods, but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage; that freight prepaid shall not be returned, goods or vessel lost or not lost; and if on any sale of the goods for freight or charges or for any lien by carrier thereon there is a deficiency, the shipper agrees to pay the same.'

The libellant had engaged cargo at Havana for transportation to New York by a Line of steamers owned by the libellant, which cargo was intended to be shipped on the Vigilancia, the freight upon which was about $3,000, but exact figures are not now obtainable. If this item is material it is to be rated at $3,000, subject to correction. That cargo was carried to New York by the next sailing of a steamer of said Line.

The difference between the original freight collectible at New York ($3,241.02) and the freight collectible on cargo saved for New York ($986.51) is accounted for by cargo lost or jettisoned, by reason of the stranding of the Vigilancia.

The Vigilancia sailed from Vera Cruz January 10th, 1901, for New York, via Progreso and Havana, stranded on January 14th before reaching Havana, and was finally floated on June 2nd, 1901.

. . . . . .

She arrived at New York in hands of the salvors on June 14th, 1901, and was sold on July 10th, 1901. She was thereafter repaired, but the repairs were not completed until about May 20th, 1902. The underwriters who insured the hull of the Vigilancia paid a total loss upon an abandonment.

Before the 20th day of June, 1901, a written demand was made in London upon the Royal Exchange Assurance as follows:

'As this vessel, after having her machinery taken out of her, has been floated, and has left Havana for New York, where in all probability she will be put up for sale by auction (all the ship Underwriters having long since paid a total loss) we think you will now consider that the time has arrived when a total loss should be settled on your freight policy, and shall be obliged by your settlement accordingly.'

Dated New York, November 22, 1905.

New York & Cuba Mail S. S. Co. v. Royal Exchange.

Statement of Freight-Moneys.

Steamer Vigilancia.

Sailed from Vera Cruz Jan. 10/01		
" " Progreso Jan 12/01		
Freight collectible at Havana, none.		
Freight prepaid to Havana from Progreso	$2,020.45	
" " " " from Vera Cruz	1,350.71	
" " to Hamburg from Progreso	10.50	
Freight prepaid to New York from Vera Cruz	85.75	
	$3,467.41	
Freight collectible at New York, incl. European cargo	$3,628.24	
Deduct proportion of freight to Europe	207.22	
		$3,421.02
Mexican interior charges collectible (not collected) included in above $3,421.02	$ 236.16	
Original Mexican freight collectible at New York on cargo saved from the Vigilancia	$ 986.51	
Freight paid steamers for carrying cargo saved from the Vigilancia to New York	$ 858.79	
Watching charges, etc. at Havana	89.70	
Total collected at New York	$ 948.49	
Collectible at New York	986.51	
Paid other steamers	948.49	
Difference	$ 38.02"	

The question at issue is stated to be, whether the valuation is to stand as made, or if the prepaid freight and the above sum of $38.02 are to be deducted proportionately from the valuation.

The contentions of the libellant are:

"First. The valuation being in a time policy is to be deemed a continuing agreement to fix the amount of the libellant's insurable interest in the freight on any passage during the currency of the policy.

Second. The authorities that permit the opening of a freight valuation on the averment of short interest, have no application to this policy.

Third. There is no issue in the pleadings sufficient to support the deductions claimed.

Fourth. No abandonment was necessary."

The contentions of the respondent are:

"First. There was no total loss of freight.

Second. The respondent admits now, as it has always admitted, that there has been a loss under the policy, and admits its liability therefor.

Third. No account need be taken of the freight which has been engaged by the libellant at Havana.

Fourth. A recovery may be had only upon an adjustment based upon the libellant's own loss.

Fifth. There has been no constructive total loss.

Sixth. Upon no plea should the libellant be permitted to recover the amount of its demand.

Seventh. The recovery should be without any allowance for interest charges.

Eighth. The decree should be without costs."

It appears that there was no actual total loss of freight, as freight on some of the cargo, that for Havana, was prepaid and consequently not at risk. Moreover, some of the Havana cargo was delivered at destination and freight thereon earned and received. Some of the New York cargo was also delivered at destination. But the expense of delivering it was substantially equivalent to the value, a balance of $38.02 only, remaining above the necessary disbursements, so that the insured, at the time of commencing action, had received more than half of the actual freight for the voyage. He had received $1173. for freight from Vera Cruz for the carriage of cattle and horses, no part of which was to be refunded on account of death, or accident to the animals, and he had also received $2,294.41 in connection with the bill of lading which provided that it should not be returned in case of loss. Adding to these two sums the said amount of $38.02, the total saving of freight to the libellant was $3,505.43. It is urged by the respondent that the actual freight on board was $6,888.43 and that deducting $3,505.43, the actual loss of freight was $3,383. or $49^{1}/_{10}\%$ of the actual freight and the libellant is therefore entitled to recover $4,927.04.

Under these circumstances, what is the libellant entitled to recover? There was no total loss of freight. The insured had received or was entitled to receive, more than half the actual freight for the voyage. The libellant claims for a total loss on the theory that the insurance deals only with the freight moneys that were at the ship-owner's risk and the above excluded amount not being so, the valued policy covered only the amount at risk, which though actually less than the value, was nevertheless recoverable because the contract provision "carried or not carried" "on board or not on board" created an indemnity for the agreed measure of libellant's insurable interest, namely £2062.

The respondent refers to the decision of Wolcott v. Eagle Insurance Co. (Mass.) 4 Pick. 429, where it was said (page 436):

"If, by mistake or design, the assured should put on board only part of the goods to which he intended the valuation should apply, we think it clear that he could not recover as if the whole subject matter of the valuation had been put on board; but that in case of loss, he should recover such proportion of the valuation as the goods which were on board and at risk, should bear to the whole valuation."

It does not appear that there was any mistake or design here with respect to an overvaluation. There was unquestionably some freight at risk and it is urged that the case is covered by the remarks of Judge

Story in Alsop v. Commercial Ins. Co., 1 Sumn. 451, 1 Fed. Cas. 564, where it was said (page 570):

"There is this difference between policies in America and policies in England, containing stipulations, like those in the present policy, 'interest or no interest,' or 'without farther proof of interest than the policy,' that in the latter country, such policies being prohibited as wager policies, the insertion of the prohibited words in the policy is proof de facto, that they are mere wagers; whereas in America such policies are not treated as necessarily purporting to be wager policies; but they are deemed policies on interest, if the parties so understood, and agreed. So it was held in Amory v. Gilman, 2 Mass. 1, and in Clendining v. Church, 3 Caines (N. Y.) 141. Prima facie they so import; that the implication may be rebutted by proofs or admissions.

Now, in the present case, it is (as I have already stated) admitted, that the defendants meant to enter into a policy on interest, and not into a wager policy. They did not intend to wager or game, but to insure substantive interests. Whatever, then, the terms used are, the policy is to be deemed in point of law an interest policy. The plaintiff insists, that he meant it to be an interest policy; and if he had a substantive interest on board the ship, capable of being insured, I cannot perceive upon what principle the defendants can now treat it as a gaming policy. The policy was a wager policy, as to both parties, or as to neither party. It has not a double character, as a policy on interest as to one, and not as to the other. If it be a policy on interest, then undoubtedly the plaintiff cannot recover, unless he shows an interest; for, in Massachusetts, at least, the doctrine of Goddart v. Garrett, 2 Vern. 269, is in full force."

That was a case of a valued interest on profits and turned principally on whether it was a wagering policy or a policy on interest. It was held to be the latter and a verdict for the full amount of the policy, was sustained on a motion for a new trial, the court pointing out that it was clearly a case of interest, to a substantial amount. At the end of Judge Story's opinion, however, he intimated that if a party insures property, expected to be on board of a ship to a large amount, upon a valued policy, and much less is in fact shipped, he is entitled to recover in case of loss a proportion pro rata only, notwithstanding the valuation.

Much of the freight here had been prepaid and was therefore not at risk, and a small amount was earned. The libellant at the time of commencing action, had received more than half of the actual freight for the voyage. There is a well marked distinction between losses on valued policies of vessels and the goods and freight on board.

In discussing the question, valued policies being involved, Judge Brown in the International Nav. Co. v. Atlantic Mut. Ins. Co. (D. C.) 100 Fed. 304, said (pages 317, 318):

"4. The defendants further contend generally, and on the same ground as above stated, that as the St. Paul was valued in these policies at only about two-thirds of her actual value, the insurers are not liable for more than that proportion of their insurance upon any partial loss, whatever its amount or nature; claiming that the same rule of deduction that is applicable to goods, should be applied to every loss on ship also, when once the amount of the loss is ascertained.

No doubt that is substantially the result of the rule applied to partial losses of goods under valued policies. The damaged goods are to be sold on arrival, and the gross proceeds compared with the market value of sound goods at the port of discharge; and the ratio of the loss to the sound value, as thus ascertained, is the proportion to be paid by each underwriter upon his policy. This was the rule applied by a special jury of merchants

to whom Lord Mansfield submitted the question in the leading case of Lewis v. Rucker, and which he afterwards on reargument illustrated and confirmed. 2 Burrows, 1167. It is now firmly established as respects merchandise. Phil. Ins. § 1203; 2 Arn. Ins. (6th Ed.) 928–933; Tyser, Ins. §§ 215, 225; McArthur, Ins. p. 247; Gow, Ins. p. 196; Johnson v. Sheddon, 2 East, 581; Tunno v. Edwards, 12 East, 488; Lawrence v. Insurance Co., 3 Johns. Cas. (N. Y.) 217; Insurance Co. v. Buckner, 5 Miss. 63; Stanton v. Insurance Co., 6 Miss. 744; Insurance Co. v. McGlashen, 54 Ill. 513, 5 Am. Rep. 162; Francis v. Boulton, 65 Law, J. Q. B. Div. 153. This general rule as to goods has been recently recognized by the supreme court also in the case of London Assur. Co. v. Companhia de Moagens, 167 U. S. 171, 17 Sup. Ct. 785, 43 L. Ed. 113, and the same rule seems applicable to partial losses of freight when the gross freight is ascertainable. 2 Arn. Ins. (6th Ed.) 949; McArthur, Ins. 235; Gow, Ins. 202; Griswold v. Insurance Co., 3 Blatchf. 231, Fed. Cas. No. 5,840; Fay v. Insurance Co., 16 Gray (Mass.) 455."

It was said in Denoon v. The Home and Colonial Assurance Company (Limited), 1 Aspinall Mar. Cas. N. S. 309 (at page 312):

"A valuation of freight refers prima facie to the freight of a full cargo, or the charter of the entire ship, and in this case there was nothing to show the underwriters that the valuation was of less than such full freight."

Here by reason, principally, of the prepayment a large part of the freight money was actually in the hands of the insured. The underwriter had no means of knowing the fact of such prepayment and it cannot be assumed that there was an intention to pay the full valued amount in case of a partial loss. If all the freight were lost, no matter that it was considerably less than the valuation, the libellant would doubtless be entitled to recover the full amount, but such does not seem to be the case, where only a part of the amount at risk is lost. It is urged by the libellant that as the contract provides: "Full interest admitted; the policy being deemed sufficient proof of interest," the respondent can not now question the amount. It seems, however, that such provision does not prevent the consideration that the freight has to some extent been realized by the libellant, nor justify a recovery of insurance thereon under the contract.

The actual freight on board was $6,888.43, excluding from consideration the freight of $207.22 to be earned by the trans Atlantic carriage. Of this amount, it seems that the libellant received $3,467.41 in advance and $38.02 the balance remaining of the New York freight after deducting the expense of earning it. The actual loss of freight was, therefore, $3,383.00 or 49 1/10% of the actual freight. Applying such percentage of loss to the valuation, £2,062, or $10,034.72, the libellant was entitled to recover $4,927.04. No adequate reason appears why the libellant should be deprived of interest or costs, and they will be allowed.

Decree accordingly.

GRAHAM v. OREGON R. & NAV. CO.

(District Court, S. D. New York. April 9, 1906.)

CONTRACTS—EVIDENCE TO ESTABLISH—ACTION FOR BREACH.

Evidence considered, and *held* not to establish a contract between libelant and respondent to operate libelant's steamships and respondent's railroad as a through line of transportation for goods between oriental ports and

points in the United States, for the breach of which libelant sued, but to show that, while there were negotiations looking to such a contract and a temporary agreement was made for interchange of traffic between the parties, the contract for a definite term claimed was never consummated.

In Admiralty. Suit for breach of contract. On final hearing.

Thomas D. Rambaut and J. Parker Kirlin, for libellant.
R. D. Benedict and Maxwell Evarts, for respondent.

ADAMS, District Judge. This action was brought by Robert A. Graham against The Oregon Railroad and Navigation Company to recover the damages alleged to have been sustained by him by reason of the breach of an agreement made on or about October 1st, 1900, at Portland, Oregon, for the furnishing by the libellant of steam vessels to run monthly between Portland and ports in China and Japan and to carry cargoes to be furnished by the respondent in trade between points in the United States, Canada and Europe and the said ports in the Orient. The matter has been before the court several times, on the question of jurisdiction (134 Fed. 454; 135 Fed. 608), and of the authority of the court to allow an amendment, where an exception to the jurisdiction is sustained (134 Fed. 692). The libels were set forth at length in those decisions and it is unnecessary to re-state the claims here. Briefly, the libellant claims that a contract for 3 years was made and the breach of it, involving damages to him of $683,931. The respondent again urges the lack of jurisdiction and denies that any such agreement as claimed was made but alleges that in the summer and fall of 1900, it was arranging to put on a steamship line of its own to cover the points and until that arrangement was perfected, it exchanged freights with the steamships of the libellant temporarily on a basis of the division of the through rates, it being understood that the libellant was not to cut rates, and further alleges that an agreement was drawn by Mr. Campbell, the traffic manager of the respondent, for submission to and approval by the president and directors of the respondent, covering the terms of the proposed temporary arrangement. The respondent further alleges that in March, 1901, the libellant notified the respondent that he was going to send his steamships to San Francisco, and in the meantime would make certain rates of freight, which was a cutting of rates, and that thereupon the respondent rightfully ceased to have any further dealings with him.

The question of jurisdiction has again been argued at great length, and the respondent urges three other points, viz.: that Mr. Campbell, the traffic manager of the respondent, had no authority to execute the contract alleged by the libellant and that there was no ratification of it by the respondent; that the contract which the libellant alleges was made by Mr. Campbell was never made, and if such contract had been made, the action of the libellant in cutting rates was a breach of it.

The question of jurisdiction is an important one and it is very doubtful if the libellant has by the testimony brought himself within the amendment to the libel, which was allowed upon the allegation that the negotiations culminated in an agreement, which referred to Appendix A as a memorandum incidental to the main contract. In the original

libel Appendix A was alleged as a statement of the terms of the agreement, but in the amended libel it was alleged that such Appendix, instead of being a statement of the terms of the agreement was subsidiary thereto and merely incidental. It was held that the new allegation made the alleged agreement a maritime one within the authorities and therefore within the jurisdiction of the court ([C. C.] 135 Fed. 611). The case, as made by the evidence, seems to show such a state of affairs as made the contract one not within the jurisdiction of court under the authority first cited in the matter (134 Fed. 462-464), but it is not necessary to determine the case upon this question, as its presentation has put before the court the testimony in full and I have thereby become convinced that upon the merits the libellant has not made out a case upon which recovery should be allowed. The controversy upon the question of jurisdiction, however, has furnished a part of the material upon which a conclusion is reached that the contract which the libellant alleges was made with Mr. Campbell was not in fact ever made. This conclusion dispenses with the necessity of considering the other points raised by the respondent.

Some of the considerations which have led me to the conclusion, apart from my impressions on the trial from the bearing of the witnesses, which were decidedly favorable to the respondent, are as follows:

The libellant has put himself in a false position with respect to the claimed agreement. When he verified the original libel, he swore that Exhibit A was the agreement. When it was held that the original libel would not sustain a claim of jurisdiction of this court, he swore that Exhibit A was merely incidental to another agreement, which set forth a maritime cause of action. When he testified in court he said several times that Exhibit A was the agreement upon which he based his right of recovery.

It appears that the respondent had a contract for its Orient business with the Northern Pacific Steamship Company, operating from Tacoma, dated August 28th, 1897. It expired by its terms in 3 years, that is August 28th, 1900, but was extended for thirty days by mutual consent. This was executed for the Steamship Company by George B. Dodwell, for himself and partners, and was therefore known as the Dodwell contract. When this contract was about expiring, there were negotiations between the libellant and Mr. Campbell respecting the Oriental business. The libellant had some steamers at his disposal and desiring to make a contract to replace the expiring contract, he called upon Mr. Campbell and broached the topic. There is a strong dispute as to what took place, the libellant contending that a 3 years' contract was the subject of negotiation and Mr. Campbell that his company at the time was about arranging for a line of its own and would do no more than make a temporary arrangement for the interchange of business and allow the libellant the same rates his company had to pay in the Dodwell contract. There were a number of interviews in September and October, at one of which a Mr. Creighton was present. He was to represent the libellant in the Orient, in the management of his business there and testified strongly in his favor. It is urged by the

libellant that the fact of Creighton giving up a remunerative position, as he testified he did, and going to China was inconsistent with any other understanding on Creighton's part than that the libellant had a 3 years' contract, but it is almost as consistent with an understanding that the libellant intended to establish a line of his own to the Orient for the period of 3 years and the expectation that he would get a contract for that time with the respondent. Creighton knew that the contract had not been executed when he left for China, although it was necessary that it should be signed by the president of the respondent to make it valid and binding. He knew that some officer of the respondent, at least, should sign it, if not the president, nevertheless he went away with the knowledge that it was not executed by any one on the part of the respondent. After reaching China, be cabled to the libellant, on the 26th or 27th of November: "What information have you of permanent exclusive arrangement—railway. I must know—Mail not yet arrived." To this, the libellant cabled November 29th: "* * * Have permanent exclusive arrangement." There was in fact, nothing in the way of such an agreement existing at the time. Creighton was still unsatisfied and he cabled on the 1st of December directly to Campbell asking for a message that he was "authorized to contract east bound shipments" in connection with the respondent. This cable was not produced but is mentioned in a telegram from Campbell to Miller, the assistant general freight agent of the respondent, dated December 3rd, 1900, as follows:

"Portland, December 3, 1900.

B. Campbell, Care Auditorium Annex, Chicago, Ill.

Graham's representative anxious to know if decision been reached relative to interchange of west-bound traffic and whether he is authorized to solicit such traffic. Creighton cables asking for message from you representing he is authorized to contract east-bound shipments in connection with our line.

R. B. Miller."

Campbell's reply to Miller was as follows:

"Chicago, Dec. 4, 1900.

R. B. Miller, A. G. F. A. O. R. & N. Co., Portland, Or.

Conference with Graham not contemplate our company having and connection with agencies unable to grant Creighton's request. If particular shipment west bound in sight to move before my return wire and will authorize on it.

B. Campbell."

Exhibit M was not produced and put in evidence but there was satisfactory evidence of the receipt of such a communication from Creighton in view of the fact that there is nothing said by Creighton with reference thereto, nor by the libellant denying that he knew of Campbell receiving such a cable and communicating it to Miller, I think it may be safely concluded that it was sent and received. The telegram of Miller, with the reply of Campbell, tends to show that as late as December 4th, the parties understood that no agreement had been made but was merely in contemplation.

The conduct of the respondent is opposed to the idea that a contract for any definite time had been made.

It was engaged in the employment of steamers to supply a line of its

own and actually chartered two steamers in New York, the Indrapura and the Indravelli, some time in November, 1900. They reached Portland in March or possibly later.

Campbell testified that, at the libellant's request, he formulated a memorandum such as he, the witness, could recommend and submit to the President of the respondent, Mr. Mohler, for approval and execution. The memorandum was sent to Mr. Cotton, the counsel of the respondent, on the 12th of November, for the purpose of having an agreement prepared on the suggested lines. In view of such action, it is not credible that any agreement already existed with the libellant. It is not conceivable that such action would have been taken simply for the purpose of making evidence, and the action of Campbell is not reconcilable with the existence of the contract claimed by the libellant, on any other theory.

Mr. Mohler, after testifying to the Dodwell agreement, said that the respondent had made plans to establish an independent line of steamships and commenced in May, 1900, to negotiate for ships and that in November, 1900, the first chartering was made through the New York office; that the libellant called upon him twice in the fall of 1900, and asked if the contract could not be hurried up and Mohler replied that the matter was in the hands of the law department and he could take no action until it came to him. His attention was called to several conversations the libellant testified took place between them and he said the libellant's account of them was absolutely untrue.

Mr. Cotton, who was secretary and general attorney of the respondent, testified that he had some conversation with the libellant in Salem, Oregon, with reference to a contract but he had in mind a form of contract which Campbell had sent to him and he, the witness, told the libellant that he would take it up as soon as he could get to it, after his business with the Legislature in Salem was through. The libellant's contention was that Exhibit 3, which he said contained the contract agreed upon, was merely being copied. This witness said that was not true, the fact being that he was preparing a contract on the lines furnished him by Campbell.

In November, the libellant was using the steamship Eva. Miller telegraphed to Campbell then in Chicago, on the 27th:

"'Eva' about ready to sail from other side. Has cargo for eastern points. Graham's representative desires to know if we will take it on basis proposed agreement, otherwise will make different arrangements and wishes to cable Hong Kong at once. Please advise."

To this Campbell replied the 28th:

"We will take Eva's cargo on basis terms proposed agreement."

These telegrams were called to the libellant's attention by a letter to him from Miller, dated November 28th. In addition to showing the respondent's view of the situation, all the circumstances tend to demonstrate that the libellant then knew that the respondent did not recognize any thing more than a proposed agreement. It is not perceived how he could believe at that time that there was a binding contract which had been in force from the 1st of October. The fact that he admits he asked

Campbell to sign the contract and the latter replied it would have to be signed by Mohler, shows his understanding of the matter.

The libellant says he asked Mohler to sign the contract, which is inconsistent with the existence of any contract. He also asked Cotton for a signed contract and must have known in its absence that none existed. All the circumstances hereinbefore indicated are entirely inconsistent with the libellant's present claim.

There is much in the testimony to indicate that the libellant hoped, and possibly expected, to get the contract he now insists was made, but nothing of much force to show that he believed it was actually consummated. He was corresponding with Campbell in March, 1901, respecting business for his steamers but nothing to indicate that any contract existed. He claims the great improbability of his diverting two steamers then in his employ from profitable business and chartering a number of steamers for a contract that he only expected. He urges that at the time of his first arrival in Portland, he had two steamers under charter, the Eva and the Universe, and subsequently chartered three more, the Adata, the Carmarthenshire and the Monmouthshire. It is disputed that he lost any profitable use of his ships, but however that may be, his conduct does not satisfactorily prove anything more than that he was willing to incur risks for the sake of establishing a supposedly remunerative business. By reason of not obtaining the contract, he doubtless lost some money and failed to make much more than he expected to, but it is not apparent how the respondent is liable for such result. The respondent did give him employment for his vessels for a time and would have continued to do so for a part of them, but under conditions which did not suit him. It is said by the respondent that he did not live up to his temporary contract respecting rates but cut them in violation of the compact. That question has been suggested but has not been considered by me for the reason that the conclusion reached that there was no such contract as the libellant claimed is decisive of the case.

After the dismissal of his vessels in Portland, the libellant came to New York to get into communication with the head and principal owner of the respondent's line. There has been considerable argument on both sides with respect to what then took place, which included a proposition on the libellant's part for a settlement, but I do not deem it necessary to discuss the events, as I do not think they have much, if any, bearing upon the final disposition of the case.

Rulings on the motions with respect to testimony under depositions are indicated on the briefs. Orders should be submitted thereon.

Libel dismissed.

THE JOHN H. STARIN (two cases).
THE JAMAICA.

(District Court, S. D. New York. April 3, 1906.)

1. COLLISIONS—STEAM VESSELS CROSSING—VIOLATION OF RULES.

A collision occurred in the East river in the daytime between the steamer Starin passing down and the ferryboat Jamaica crossing from the Brooklyn side and as a result the Starin was forced against and

injured a barge lying in a slip on the Manhattan side. Each vessel gave and persisted in signals announcing its intention of crossing ahead of the other, and the Starin, at the time of her first signal, ported her wheel, and again later so that the collision occurred within about 100 feet of the Manhattan docks. *Held*, that both vessels were in fault for persisting in such intention, the Jamaica also for violation of articles 19, 22 and 23 of the inland navigation rules of June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883], which required her as the vessel having the other on her own starboard side to keep out of the way, to avoid crossing ahead and to slacken her speed or stop, and the Starin for violation of article 21, which required her to keep her course and speed, and that both were liable for the resulting injury to libelant's barge.

2. SAME—INSISTENCE ON RIGHT OF WAY.

There is no right of way on which a vessel is entitled to insist when it is obvious that it will result in danger of a collision.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 17.]

In Admiralty. Suit for collision.

Hyland & Zabriskie, for McLain.
James J. Macklin, for the Starin.
Wheeler, Cortis & Haight and Clarence B. Smith, for the Jamaica.

ADAMS, District Judge. This action was brought by Bernard McLain, the owner of the barge Bernard McLain, Jr., against the steamboat John H. Starin to recover the damages suffered through collision between those vessels in the afternoon of the 13th day of February, 1905. The McLain was lying, outside of 2 other boats, on the upper side of pier 61, about 20 feet from the end. The Starin was proceeding down the river, bound for the foot of Cortlandt Street, Manhattan, and changed towards Manhattan to avoid the ferryboat Jamaica, which was bound from her slip at the foot of Grand Street, Brooklyn, to her slip just north of pier 61, Manhattan. The claimant of the Starin brought in the Jamaica by petition. The tide was ebb, the current running about 1½ miles per hour. The weather was clear.

The Starin was proceeding, at the rate of 8 miles, to the eastward of the 10th Street buoy and just after passing it, saw the Jamaica emerging from her slip at the foot of Grand Street, and claims that she, the Starin, then near the buoy, blew a signal of 1 whistle to the Jamaica; that the latter did not reply, and the Starin repeated the signal, still without eliciting a reply; that on blowing the 2d signal the Starin ported her helm; that after a short time, she blew another signal of 1 blast and ported her helm still more; that to this signal she received a reply of 2 blasts from the ferryboat; that the Starin then having reached a point about off Houston Street, blew another signal of 1 blast, put her helm further to port and rang bells to stop and reverse, the vessels then being about 300 feet apart; that the ferryboat kept on and, with her starboard side, struck the Starin a heavy blow on her port bow, doing considerable damage to the steamer; that the collision took place off about pier 61, and about 100 feet off the Manhattan shore; that the force of the blow turned the Starin around to the starboard so that she struck the McLain,

lying at the pier; that the Jamaica at the time of the collision was heading nearly directly across the river and still going ahead; that the Jamaica kept her full speed of 8 miles an hour (having rung a jingle bell after she had crossed the middle of the river) until the collision and after the collision she rang bells to reverse; that when the jingle bell was rung by the Jamica, the Starin was in the vicinity of 3rd Street and the former had crossed the middle of the river; that the pilot of the Jamaica saw the Starin plainly off the 10th Street buoy before the Jamaica emerged from her slip and all the time the Starin was going to the starboard; that the pilot of the Jamaica knew that the repeated signal of 1 blast given by the Starin meant that she would continue to cross the bow of the Jamaica and she had notice enough of such intention; that the usual course of steamers coming down the river is to bend around after passing the buoy under a port helm; that the course inclines towards the Manhattan shore; that the Starin headed a little more that way on account of the Jamaica. The contention of the Starin is that the Jamaica was solely in fault for the collision because she did not obey articles 19, 22 and 23 of the Navigation Rules. Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]. They provide as follows:

"Art. 19. When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

Art. 23. Every steam-vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

The Jamaica contends that when the Starin had reached a point east of the 10th Street buoy, and was probably 500 to 600 feet from the Brooklyn shore, the Jamaica was ⅓ to ½ out of her slip; that a signal of 2 blasts was blown by her to the Starin, which was crossed by a signal of 1 blast from the Starin; that the Jamaica continued to repeat her signal of 2 blasts, which in every case was crossed by the Starin; that after the Jamaica had blown a 2 blast signal twice, seeing the Starin was swinging towards the Manhattan shore, the Jamaica blew alarm whistles, followed by a signal of 2 blasts to signify her insistence upon her course; that those signals were repeated several times by the Jamaica and every time crossed by the Starin; that both of the vessels were making about 8 miles per hour over the land; that the Jamaica as she came out of her slip was under a port helm one turn, which prevented her sagging against the Brooklyn wharves, in which direction she was forced by the tide; that her course was down and across the river, but seeing the Starin heading towards Manhattan, the Jamaica allowed her wheel to run, and later starboarded a little, so that she might swing further down the river out of the way of the Starin; that this change was made about in the middle of the river, but she continued her general course towards Manhattan, and when as close to it as she could safely go, she ported and came up near the wharves towards her slip, so that it was then

impossible for the Starin to pass ahead of her; that the Starin, starting near the 10th Street buoy under a port helm, swung at first slowly to the starboard, then with increasing speed, following the Jamaica, finally colliding with her about 100 feet off pier 61; that the Jamaica was then headed about N. N. W. and angling towards the Manhattan wharves and the Starin directly across the river; that the Starin was an overtaking vessel and should have slackened her speed and permitted the Jamaica to pass ahead instead of following her around; that the first navigation signal was given by the Jamaica, the burdened vessel; that she was entitled under Pilot Rule 2, which directs that such vessel shall indicate by "two blasts, her intention of directing her course to port, which signals must be promptly answered by the steamer having the right of way"; that this rule expressly gives the burdened vessel the right to decide whether she will avoid collision by passing ahead or astern of the vessel on her starboard hand; that it was perfectly safe for the Jamaica to cross in front of the Starin; that a line drawn between the two ferry slips, will intersect the course of the Starin at a point 1,950 feet from the 10th Street buoy and 600 feet from the stern of the Jamaica in her position half way out of her slip and taking the effect of the tide into consideration, the Jamaica would have to go 700 feet only, while the Starin was going 2,175; that thus the Jamaica had to go less one-third as far as the Starin; that the testimony of impartial witnesses shows that the Starin by maintaining her course and speed would have passed safely astern of the Jamaica; that the Jamaica, as the burdened vessel, indicated a safe method of avoiding the Starin and had the right to determine it under Rule 2; that it was the right and duty of the Jamaica to indicate the course she should pursue and there was no occasion for the Starin to do otherwise and a single blast from her merely meant that she intended to keep her course and speed; that her signal was entirely unnecessary and only likely to lead to complications and it is improbable that she gave it.

It is urged by the Jamaica that the duties of the respective vessels are determined by articles 19, 21 and 22 (19 and 22 have been quoted above) 21 provides:

"Art. 21. Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed."

Pilot Rule No. 2 is also cited by the Jamaica. It reads as follows:

"Rule II. When steamers are approaching each other in an oblique direction, as shown in the diagrams of the fourth and fifth situations, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other, which latter vessel shall keep her course and speed; the steamer vessel having the other on her starboard side indicating by one blast of her whistle her intention to direct her course to starboard, so as to cross the stern of the other steamer; and two blasts, her intention of directing her course to port, which signals must be promptly answered by the steamer having the right of way, but the giving and answering signals by a vessel required to keep her course shall not vary the duties and obligations of the respective vessels."

It is further contended by the Jamaica that she expected the Starin to keep her course and speed and did not wish any change to be

made; that if the rule had been observed on the Starin's part there would have been no collision.

It appears that the Starin was coming down the river at the rate of about 8 miles an hour, as aided by the tide, and that the Jamaica could have made her trip across at about the same general rate of speed. If the latter could have gone directly across, it is probable that there would have been ample time for her to have crossed the Starin's bow in safety, but the Jamaica could not get under full headway immediately and the tide carried her down, so that before the intersecting point could be reached she traversed considerably more than the direct distance, and some of the time, at a slower rate of speed than when under full headway. I think she should not have attempted under the circumstances to go ahead, especially as she observed that the Starin was not keeping a straight course down the river but going towards Manhattan, from the beginning under a port helm. The Jamica violated Articles 22 and 23 and should be condemned for endeavoring to pass ahead.

The Starin's duty under the starboard hand rule, was to keep her course and speed but she failed altogether in the former respect in changing constantly to the starboard and by the time the vessels came together, she was very near the Manhattan side.

This is a case where a collision was brought about, not only with danger to the vessels themselves and the people on board, but also to a third party's boat lying motionless at a wharf in a supposedly safe place, through the persistent effort on the part of each vessel to pass ahead of the other. Each fancied she had the right of way, but there is no such right when it is obvious that if adhered to, it will result in danger of a collision.

There will be a decree for McLain against both of the defending vessels, and they will each have a decree against the other for half damages. Orders of reference will accompany the decrees.

SWENSON v. SNARE & TRIEST CO.

(District Court, S. D. New York. March 20, 1906.)

1. BAILMENT—LIABILITY OF BAILEE—EVIDENCE OF NEGLIGENCE.
   While there must be sufficient evidence to warrant a finding of negligence to fix liability on a bailee, such evidence may be supplied by presumption, and such presumption arises against a bailee for hire, where it appears that the subject of the bailment was injured or destroyed while in his custody by an accident such as in the ordinary course of things does not happen when due care is exercised.
   [Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bailment, § 124.]

2. SHIPPING—CHARTERER OF PILE DRIVER—LIABILITY FOR LOSS BY CAPSIZING.
   The capsizing of a pile driver while being towed by respondent company to which it had been chartered, *held*, under the evidence, not due to unseaworthiness, but to improper towing in turning it too suddenly, which rendered respondent liable for the damages.

In Admiralty.

Hyland & Zabriskie, for libellant.

Hector M. Hitchings, for respondent.

ADAMS, District Judge. This action was brought by Johan Swenson against the Snare & Triest Company to recover the damages incident to the sinking of a pile driver belonging to him and chartered to the respondent, in the East River on the night of the 30th of July, 1905, while being towed from Flushing to Manhattan; also to recover $48 for 8 days hire of the vessel under the contract. There is no dispute about the hire being due, but the claim for damages is resisted because it is alleged that the sinking was not caused by any negligence on the part of the respondent but was due to the unseaworthiness of the vessel.

The pile driver was from 50 to 60 feet long, 23 feet wide and 4 or 5 feet deep. It is shown by the libellant's testimony that he bought her in 1901, but it does not appear at what price. She had been lying on the mud flats of South Cove, New Jersey, for several months or a year before the purchase. The libellant said she was old at the time, half of the machinery had been stolen from her and the water stood in her. He said that he repaired her, however, thoroughly, giving her everything that was needed, spending about $2,000 on her, and in 1905, spent about $850 more, and she was then in good condition. It appears that after the repairs, she was hired out and worked satisfactorily. The hirers have testified that in 1903 and 1904, the vessel was in good condition and that she worked at Kings Bridge from November, 1904, until about the middle of February or March, 1905, and no trouble was had with her. A witness testified that he examined her a week before she was chartered to the respondent and she was then in good condition; that he had examined her on the dry dock prior to being caulked. The master of the steamtug which took her from the libellant's place for delivery to the respondent, says that she towed there safely, which tends to indicate her seaworthy condition at the time, and this is reinforced by the admitted fact that on this occasion she towed from Flushing to the place of the accident in apparently good condition. It is shown that the respondent made an examination before it took possession of her but the men who made the examination, still in the respondent's employ, was not called as a witness. A subordinate of such man was called, however, who, while admitting that his superior had reported favorably on the vessel, attempted to condemn her. The respondent was satisfied with the favorable report and took possession. After that the driver withstood towing to Flushing, did several days work and then was towed safely back as far as the Brooklyn Bridge, and up to almost the time of the accident was reported to be all right by the respondent's man on board in response to enquiries from the master of the tug.

The testimony of a majority of the crew is to the effect that the driver turned upside down at the Brooklyn Bridge and shortly afterwards seemed to blow apart from the air and her deck house and loose planks floated away and she herself sank out of sight after drifting down with the ebb tide for 15 or 20 minutes. The next day, July 31st, a diver of the Wrecking Company went to the wreck on a tug about 2 o'clock P. M. He found the ways in the river and they were fastened to and brought up and placed across the boat. He

then put on his diving suit and went down. He found the planks sticking up in every direction and the wreck in a very dilapidated state. This was no doubt true but it was probably due to the boat having been struck by navigating vessels after she was sunk. Another witness for the respondent was the subordinate in its employ above alluded to, who said that he examined the boat and found her so rotten that he could get a handful of wood by merely sticking his hand into it. It seems, however, that the respondent hired the vessel on the report of the first examiner, who was not called to testify, and it is very questionable if the testimony of the subordinate should be accepted with respect to the boat's condition. The other examiner told him, he says, that, "she looked good from the outside" but that he did not go down into the hold. It does not seem that the boat could have been in the condition described by the subordinate. He said that he reported her unsound, nevertheless she was hired. It appears to be entirely inconsistent with the boat's actual condition at the time of hiring. It is evident that a pile driver in the condition described, could not have done her work for years, as she unquestionably did, and been safely towed around New York Harbor and up the East River as far as Flushing Bay.

The dilapidated condition of the wreck, is satisfactorily accounted for by the collisions it was in with vessels, subsequent to the sinking. The wreck was seen by the master of the tug boat Valley Girl on Sunday morning, the 30th, between 9 and 10 o'clock when he noticed a Metropolitan Line steamer coming down. The tug passed both the wreck and the steamer to the westward and the master thought the steamer went to the westward also, but after passing he looked back and the driver had disappeared. He said that he did not know whether the steamer ran over it or not, but it is probable that she did. It also appeared that the ferryboat Brooklyn, running between Whitehall Street, New York, and Atlantic Avenue, Brooklyn, in going to Brooklyn on the 12:48 o'clock trip Sunday morning, struck it; also that a New York Central R. R. Co. tug struck it about 12 o'clock, causing her light to roll and tumble; also that about 3 o'clock the same morning, a tug with two carfloats in tow alongside, passed over it. All these contacts would undoubtedly have the effect of breaking up the wreck.

I do not attach much importance to the so called search for it by the police boat, relied upon by the respondent. Assuming that a diligent effort was made by her to locate the wreck, the fact of her not finding it does not weigh with the positive testimony above alluded to.

The respondent relies upon the doctrine adverted to in Work v. Leathers, 97 U. S. 379, 24 L. Ed. 1012, that a defect in a vessel which is developed without any apparent cause is presumed to have existed when the service began. The law is stated in that case as follows (page 380 of 97 U. S. [24 L. Ed. 1012]):

"Where the owner of a vessel charters her, or offers her for freight, he is bound to see that she is seaworthy and suitable for the service in which she is to be employed. If there be defects known, or not known, he is not excused. He is obliged to keep her in proper repair, unless prevented by perils of the sea or unavoidable accident. Such is the implied contract

where the contrary does not appear. Putnam v. Wood, 3 Mass. 481, 3 Am. Dec. 179; 3 Kent, Com. 205. The owner is liable for the breach of his contract, but the stipulation of seaworthiness is not so far a condition precedent that the hirer is not liable in such case for any of the charter-money. If he uses her, he must pay for the use to the extent to which it goes. 1 Pars. Adm. 265; 3 Kent, Com., supra; Abbott, Shipp. (5th Am. Edd. 340. If a defect without any apparent cause be developed, it is to be presumed it existed when the service began. Talcot v. Commercial Insurance Co., 2 Johns. (N. Y.) 124, 3 Am. Dec. 406."

If the driver sank because, as claimed by some of its witnesses from the Pratt, she suddenly developed a leak at the Bridge and went down in consequence of it, the contention would have much force.

The fact that the respondent's man in charge of the driver was drowned in the accident, deprives us of such light as his testimony might have thrown upon the matter, but it appears that he reported that she was all right just before she turned over, as she did to port. What caused the turning over; was it because she was inherently weak or because something unusual occurred? The respondent urges the former, and the libellant that it was caused by turning the driver too sharply to the starboard in order to make her destination at pier 15, on the Manhattan side. Many of the respondent's witnesses from the tug say positively that there was no such turn, or any turn until after the capsizing. At first, the libellant was not able to meet the preponderance of the testimony to such effect. The legal requirement is that there must be sufficient evidence to warrant a finding of negligence in order to fix liability upon a bailee. Blakeslee v. New York Cent. & H. R. R Co. (C. C. A.) 139 Fed. 239. The necessary evidence can, however, be supplied by presumption. It was said in The Gennessee (C. C. A.) 138 Fed. 549, 550:

"The case is a proper one for the application of the rule that a presumption of negligence arises against a bailee for hire when it appears that the subject of the bailment has been injured or destroyed while within his custody by an accident such as in the ordinary course of things does not happen when a bailee uses due care."

It was urged by the libellant that the case was within the presumption but it is not necessary to determine that because it appeared by subsequent reliable testimony, which, upon a motion made for such purpose, the libellant was permitted to introduce into the case, that the driver was turned suddenly to the starboard. It had appeared in the testimony originally taken, that in turning pile drivers, it was necessary to make a long sweep, so that both of the hawsers could be kept reasonably taut, and that turning suddenly would have a tendency to make one hawser taut and the other slack and list the pile driver to an overturning point. A part of the new evidence was given by a Mr. Myers, who was crossing the 39th Street ferry about midnight from Manhattan to Brooklyn. He said that when they were about mid river, he noticed the tug and pile driver coming down, winding for the Manhattan shore and when she had gone about 500 feet she capsized, then about opposite pier 8 or 10. A day or two afterwards when crossing the Hamilton ferry from Brooklyn, he saw the can buoy, which had been placed to mark the sunken wreck.

Another witness was the pilot of the ferryboat Brooklyn. This boat was running between Manhattan and Brooklyn. She made a trip from the Manhattan side at 12 o'clock and another at 12:24. The pilot saw nothing unusual on the 12 o'clock trip, but on the 12:24, when they had gone 300 or 400 feet he saw the tug 4 or 5 points on his starboard bow, showing her starboard light; he said that after the ferryboat went 3 or 4 lengths further, the tug swung so that he saw both lights, and the object behind her disappeared. Judging from the position of the ferryboat, the object, being the pile driver, must have been near Dimond Reef.

If the driver was turned around rather suddenly, as the new testimony indicates, the capsizing is sufficiently accounted for and it seems to be decisive of the case, because it must have resulted from improper towing by the respondent's agent and not because of any unseaworthiness of the driver. This theory of the case is much more reasonable than the respondent's claim and I feel constrained to adopt it.

There will be a decree for the libellant for the hire due and for the damages, with a reference to ascertain the amount of the latter.

THE ASHER J. HUDSON.

(District Court, S. D. New York. February 27, 1906.)

TOWAGE—ABANDONMENT OF TOW—LIABILITY OF TUG.

An iron barge laden with lumber, while being towed with another barge from a Virginia port to New York, began to leak, and on signal the tug took off her crew, but proceeded with the towing until some time in the night, when the hawser parted, and the barge went adrift somewhere below Sandy Hook, but was not missed until the next morning. The tug proceeded with her other tow to New York, and then went in search of the lost barge, which was found in the possession of salvors. *Held*, on the evidence, that the leaking condition of the barge was not caused by her striking bottom during the towage as alleged, and, in view of the belief of the master of the tug, and of the barge as well, that the barge had foundered because of her iron construction, that the tug was not in fault for not sooner going to her rescue.

In Admiralty. Action against tug for damage to tow and cargo. Questions of fact with reference to fault in abandonment of iron barge in tow, and failure to seek for it subsequently, determined in favor of the tug.

James J. Macklin and La Roy S. Gove, for libellants.
Moen & Kilbreth and Edward R. Baird, Jr., for claimant.

ADAMS, District Judge. This action was brought by Peter Hagan and John J. Hagan, the owners of the barge Centipede and bailees of 385,000 feet of lumber on board, to recover from the tug Asher J. Hudson, the damages suffered by reason of the abandonment of the barge and cargo, while being towed from Portsmouth, Virginia, to New York, in August, 1901. The tow consisting of this barge and the barge R. J. Camp, was towed tandem on hawsers, the Camp being about 150 fathoms behind the tug and the Centipede

about the same distance behind the Camp. The tow started in the morning of August 4th, and on the following morning, about 8 o'clock passed about 2 miles to the eastward of the Winter Quarter Lightship, on a N. E. by N. heading, the usual course with the wind from the eastward, some allowance being made for leeway. The libellant contends that at this point a course was taken to the westward which brought the barge upon some shoals and seriously injured her bottom so that she leaked and subsequently became in a sinking condition.

The libel alleges in this connection:

"Third: Upon information and belief libellants allege: That on or about the 3rd day of August, 1901 the said barge 'Centipede' being in a good and sound condition and laden with said cargo of lumber was taken in tow by the said steam tug 'Asher J. Hudson' at Portsmouth, Va., bound for the Port of New York; that said steamtug also took in tow another barge which was made fast to the stern of the said tug by a hawser, the distance between the stern of the said steamtug and said first barge on said hawser being about 400 feet and that said barge 'Centipede' was made fast to said leading barge, the space between the said barges being also about 400 feet. That said tug and said tow proceeded from the said Port of Portsmouth, Va., and anchored on the flats known as the Atlantic City Flats at Norfolk, Va., and started therefrom on the morning of the 4th of August for the said Port of New York, and continued on her said trip with said barge in safety, but on reaching what is known as the locality of Winter Quarter Shoals, the said steamtug instead of pursuing the usual and customary course where there was sufficient depth of water, edged in and on to the said Winter Quarters Shoals, where the said barge 'Centipede' struck bottom, immediately causing her to leak, which occurred at about 8 o'clock a. m. of August 5th, whereupon the said steamtug was signalled by the said barge, but that no attention was paid thereto, the said steamtug and her tow at the time being in a position to put into, in safety (outside of the damage done her by touching bottom) Chincoteaque Inlet, which would have taken but a very short time, but that said steamtug continued on with her said barges, continuous pumping being necessary on said barge to keep her afloat, the said leak continuing to increase from the damage she had received as aforesaid, and when off Delaware Breakwater, the leaking still increasing and the sea becoming rough, the said steamtug was again signalled, but that no heed was paid thereto, although she could have put in with said barge into the said Delaware Breakwater, but instead thereof the said tug proceeded on until about 40 miles to the southward and eastward of Sandy Hook, and very much out of the usual course pursued by tugs and tows, when the said steamtug at about 6:30 o'clock of the morning of the 6th day of August, took the crew of the said barge on board the said steamtug and abandoned the said barge, and the captain of the steamtug although being requested to put the remaining barge in a place of safety and return to the assistance of the 'Centipede,' refused to do the same and continued on with the leading barge to the Port of New York.

That said barge 'Centipede' was finally picked up by a schooner and with her assistance and the subsequent assistance of a steamtug and wrecking appliances afterwards obtained, was finally, with her cargo, towed into New York. The services of the said schooner, steamtug and wrecking appliances being made the subject of a salvage service against the said barge and her cargo. That upon subsequent inspection of the said barge it was found that she was damaged amidships, her timbers being broken on a line with the center of the said barge, forward and aft.

Fourth: Upon information and belief libellants allege that said damage to said barge was caused through the fault negligence and carelessness of those in charge and controlling the said steamtug.

(1) That those in charge of her navigation were incompetent, she hav-

ing no licensed man on board, covering the waters where she took bottom,
(2) In running out of the usual course and touching bottom at Winter Quarters Shoals,
(3) In not heeding the signal from the said barge."

[This charge of fault was withdrawn on the trial.]

"(4) In not putting into Chincoteaque Inlet,
(5) In not putting into Delaware Breakwater or rendering any assistance to the said barge,
(6) In not taking the remaining barge and placing her in some safe quarter so as to return for the said barge 'Centipede' and take her in tow."

The answer alleges as follows:

"On or about August 3, 1901, the tug Asher J. Hudson with the barge R. J. Camp and the barge Centipede, Proceeded from Portsmouth, Virginia, and anchored on the Atlantic City Flats, at Norfolk, Virginia, whence she started on the morning of August 4th for the port of New York, having in tow the R. J. Camp and Centipede in tandem in the order named, the Centipede being on her own hawser.

The tug and tow proceeded on the voyage, passing the Winter Quarter Shoals about eight a. m. on August 5th, holding a usual and customary course, and leaving the lightship about two miles to the westward on the port hand. All went well that day and the following day, August 6th, until about 3 p. m., when the weather being stormy and the sea rough, distress signals were seen on the Centipede, which was reported by her crew to be leaking badly. The tug succeeded with much difficulty and at great risk in getting the hawser of the Camp aboard and in approaching the Centipede which was then abandoned by her master and crew, who jumped or were hauled on board the tug by heaving lines. The barges, running before the wind and sea were heading on a dangerous coast and it was with much difficulty and great risk to all that the tug got a hawser to the Camp again and resumed the voyage, with the Centipede still in tow behind the Camp, at about 5:30 p. m. At this time there was no harbor nearer than Sandy Hook, about thirty-seven miles to the north and Delaware Breakwater about eighty-three miles to the south.

When abandoned by her master and crew the Centipede was reported by them to be leaking badly and in great danger of foundering before morning on account of her iron hull, and there being no one on board in charge of her wheel she sheered and was buffeted about by the heavy seas so that her hawser was chafed and parted at her bow chock during the night.

The tug arrived in New York without further incident on the morning of August 7th and after safely disposing of the R. J. Camp, left New York to find and render assistance to the Centipede in case she had not foundered. The tug found the Centipede in tow of a schooner and tug off Long Branch and offered assistance, which was refused. In the course of the said towing by the said schooner and tug the said barge sustained further damage, particularly by hitting the bottom and sinking in New York Bay."

The testimony on each side supports the diverse allegations. The questions involved, relate principally to the course taken by the tug after passing Winter Quarter Lightship and to whether proper efforts were made by the tug to rescue the barge, when it was found she was still afloat.

It appears clearly enough that the tug pursued a safe course, that is, she did not turn to the westward after passing the lightship but kept a course that kept the tow clear of all shoals. The accident was probably due to the leaky condition of the barge and lack of adequate pumping. Her bottom was injured by getting ashore somewhere after the voyage commenced but it appears that when she was picked up and brought into New York Harbor, she had been ashore

for some time and that is sufficient to account for the condition of the bottom. The first intimation that the barge was in trouble reached the tug the evening of the 6th, when a passing steamer, which was signalled by the tug, having failed to help the barge, the tug caused the Camp to get up her head sails and herself went to the assistance of the Centipede and succeeded, with considerable difficulty and some danger, in getting a line to the barge by means of which the crew of the barge, through leaping overboard, were rescued and taken on the tug. The voyage was then resumed with both barges in tow but during the night, the Centipede parted her hawser, and it was not until the following morning that she was missed by the tug. When the crew of the barge was removed, the master stated that she was leaking badly and expressed the opinion, in substance, that she could not be saved, upon which the master of the tug relied. His own judgment also was that an iron hulled vessel in her condition would sink and he concluded to proceed on his voyage. The barge's pumps were worked by steam but seem to have thrown but a small stream of water and proved insufficient to keep her free. The weather was bad also and while not of itself a cause of loss, it doubtless contributed thereto. It is impossible in view of all the evidence to believe that the barge struck bottom when drawing no more, if as much, water as the vessels which preceded her in the tow, went through safely, therefore this branch of the case must be decided against the libellant.

Whether proper efforts were subsequently made by the tug to rescue the barge is more difficult to determine. The master of the tug doubtless supposed she was sunk, although lumber laden, which, as well known, ordinarily supports a wooden vessel for some time. What effect such a load has upon an iron vessel does not appear to be as familiar to sea going masters. The master, here, however, when he heard the barge was still afloat, after some hesitation, did go to her aid, but found her in the possession of salvors, who refused to deliver her to the tug or accept any assistance from it. There was not much time lost after the master discovered that the barge was still afloat. If he had started immediately, the situation would probably have been the same. The tug was apparently not in fault for the hesitation about seeking the barge at that time. Whether she was delinquent in not anchoring the Camp inside of Sandy Hook and seeking for the Centipede from there is not so clear. In view of the fact, however, that the barge was iron, and it does not appear how long vessels of that character will float with lumber cargoes, nor how long the barge had been in the possession of the salvors, the case is too doubtful to admit of fixing any liability upon the tug.

The libel is dismissed.

THE WYOMING.

(District Court, S. D. New York. December 18, 1905.)

COLLISION—FERRYBOAT AND OVERTAKING TUG—CHANGE OF COURSE IN VIOLATION OF AGREEMENT BY SIGNAL.

A collision occurred in East river between a ferryboat which was proceeding down the river on her trip from Brooklyn to her slip below on the Manhattan side and an overtaking tug which was passing down the river. It was agreed by signal that the tug should pass to the right, and when she was abreast of the ferryboat one of the vessels sheered and the collision occurred. *Held*, on conflicting evidence, that the place of collision was only a short distance above the ferryboat's slip, and that the collision occurred by reason of her changing her course in order to make her slip in violation of the passing agreement.

[Ed. Note.—Collision by overtaking vessels, see note to The Rebecca, 60 C. C. A. 254.]

In Admiralty. Suit for collision.

Wing, Putnam & Burlingham, for libellants.
Wilcox & Green, for claimant.

ADAMS, District Judge. This action was brought by John D. Dailey and others, the owners of the steamtug Harry G. Runkle, against the ferryboat Wyoming, to recover the damages sustained by them through a collision which happened between the vessels in the East River a little after 4 o'clock in the morning of the 14th day of February, 1905. The Wyoming left her slip at the foot of South Eighth Street, Brooklyn, shortly before the collision, bound for her slip at the foot of Roosevelt Street, Manhattan. The Runkle was proceeding from the foot of Stanton Street, East River, to Canal Street, North River, light. The latter was astern of the Wyoming in going down the East River and proceeding much faster. When she approached astern of the Wyoming, she blew a signal of one blast, signifying her intention of passing to the right. The Wyoming answered with a similar signal and the Runkle attempted to pass that side, when one of the vessels changed her course and a collision ensued, the bow of the Wyoming coming in contact with the port side of the Runkle, from 15 to 30 feet forward of the stern, doing some slight damage to the Wyoming and considerable to the Runkle. The tide was the last of the flood. It was a clear night, dark but good for seeing lights.

Each vessel charges the other with fault in not keeping her course under the agreement and the sole question to be determined is, which one sheered.

The libellants examined three witnesses from their boat; the pilot, who was at the wheel, the master who was writing in the room aft of the pilot house and came there when the whistles were exchanged, and the engineer who was operating the engine. There was a man on the forward deck but he was not examined because he was on the way to Panama. No reason appears, however, to account for the failure to examine him by deposition. It was stated that the latter was coiling down some lines. The accounts of the witnesses in the pilot house

were that the boats were proceeding rather on the Brooklyn side of the river, when the whistles were exchanged and they proceeded in that way until the ferryboat suddenly sheered to the starboard, causing the collision. The engineer saw nothing of the ferryboat before the collision.

The claimant examined six witnesses from its boat; the master at the wheel, a deck hand, a licensed man, in the pilot house and assisting in handling the wheel, a deck hand stationed on the deck forward as lookout, the engineer who was operating the engine, and two passengers, who were sitting in the after cabin on the Manhattan side. Their account of the matter was that the ferryboat was proceeding down the river rather on the Manhattan side and when the signals were exchanged, the tug was approaching from behind and shortly came abreast of the Wyoming, when the tug turned sharply to the port and ran into the ferryboat.

In the original libel, the Wyoming was described as bound from Williamsburgh to Catherine Street, Manhattan, and it is not stated where the collision occurred, nor is it stated in the answer. In the testimony of the libellants, however, it is claimed that the collision happened about 900 feet above the Roosevelt Street slips. The principal part of the testimony on the part of the ferryboat corresponds with such estimate. The master said the collision occurred 5 or 6 piers, 1000 or 1500 feet, above his slip, which was the lower one at Roosevelt Street; the statements of the two deck hands on duty are in conformity with such estimate. That of the engineer, however, differs and makes it a shorter distance from the slip.

The tug claimed that her course was well on the Brooklyn shore and the ferryboat 150 to 200 feet inside, nearer Brooklyn. On the other hand, the ferryboat claimed while she usually passed down on the Brooklyn side, on this occasion she was nearer Manhattan and the tug inside of her, about the distance claimed by the tug, because of an accumulation of ice on the Brooklyn side, which it was necessary to avoid. The preponderance of the testimony sustains the ferryboat's contention in this respect.

There would be little difficulty in concluding that the sheer which was made was that of the tug, were it not for the absence of any probability that she would turn for any purpose of her own. She was not near any point in the river which required any substantial change in her direction down the river, nor was the ferryboat, unless she was much nearer her slip than the testimony, alluded to above, would indicate. If she was near her slip, there was a strong probability that she changed in order to make it. The libellants rely very strongly upon the testimony of the engineer of the ferryboat to sustain a claim that the boat was nearing her slip and turned to the starboard to reach it. The engineer stated that he could not say opposite what point the boat was when he looked out of his window just after the collision; he saw down the river, the bridge and his slip, and received orders to go ahead full speed, which he did and it took less than a minute, while the engine was making 15 or 18 turns, to get into the slip. 24 turns a minute

was the regular full speed so that the distance was considerably less than a minute of full speed.

If the ferryboat reached her slip in such time, which there does not seem to be any reason to doubt, it is clear that she could not have been far from her slip. If it be assumed that her speed before the collision, under the reduction, was about 3 knots per hour, or 300 feet per minute, and it was not changed materially, a full minute would only have sufficed to place her that distance from her slip. If after the collision, under the full speed of her engines which was then given her, she made more headway, it is not probable that it greatly exceeded the previous rate because there was not time for any material acceleration. In any way that the matter can be viewed, so far as appears to me, the engineer's testimony is persuasive of a close approach to the slip, and the collision having been on the Manhattan side, she evidently was very little above her slip at the time of contact. I feel constrained to disregard the statements showing a position further up the river at the time and adopt the engineer's testimony as establishing that the collision occurred when the ferryboat was in a position to turn for her slip and that she changed to the starboard for the purpose of making it.

This conclusion requires a decree for the libellants, with an order of reference.

THE NO. 32. THE OVERBROOK. THE CHARLES McWILLIAMS.

(District Court, S. D. New York. March 2, 1906.)

COLLISION—TOW AND DISTRIBUTING TUG—IMPROPER FORCE USED BY TUG LEAVING SLIP.

The injury of a canal boat forming one of a tow of 21 boats lying at a pier and swinging to some extent across the adjoining slip, by collision with a tug which was lying motionless alongside, *held*, under the evidence, to have been due to the fault of another tug, which, in coming out of the slip with three boats in tow on her sides, forced the other tow outward with more violence than necessary, causing the collision.

In Admiralty. Suit for collision.

Hyland & Zabriskie, for libelant.

Robinson, Biddle & Ward and William S. Montgomery, for No. 32 and the Overbrook.

Carpenter, Park & Symmers, for the Charles McWilliams.

ADAMS, District Judge. This action was brought by William T. Jamison, the owner of the canal boat Katie E. Jamison, against the tugs No. 32 and the Overbrook to recover for the damages sustained by that boat through a collision with the stern of the Overbrook, while the tow was lying, awaiting distribution, at Pier B, Sussex Street, otherwise known as the "Red Star Dock," in Jersey City, about 4 o'clock p. m. of May 2, 1905. The port quarter of the Overbrook came into contact with the starboard side of the Jamison, which was the starboard boat of the 5th tier, about amidships. Two of her planks were broken on the upper part of her starboard side,

the upper one being of oak, 5 inches thick and the other of similar size but of white pine. The top streak, second streak, shear plank and the rail were broken. The Pennsylvania Railroad Company, the claimant of the tugs already mentioned, brought in the tug Charles McWilliams by petition, alleging that she was responsible for the damages, because she pushed the Jamison forcibly against the Overbrook, as the latter was lying motionless by the tow, partly alongside of the boat on the starboard side of the 4th tier and partly alongside of the Jamison. This was denied by the claimants of the McWilliams, who alleged that in going out of the slip, with 3 boats in tow alongside, in a customary manner, she pushed the tail of the tow gently outwards, so that no damage whatever was done by her to the Jamison. The libel alleges that whilst the No. 32 was in the act of pulling the tail of the tow up the river to permit the McWilliams to get out of the slip, the Overbrook backed down and brought her stern in contact with the Jamison and that the damage was caused both by the pulling of No. 32 and the backing of the Overbrook. It is not disputed that the McWilliams was justified in pushing the tail of the tow around if she did it gently and cautiously and the question to be determined is, whether she pushed the Jamison too hard against a motionless vessel or whether the damage was caused as alleged in the libel.

It appears that the two wharves in question, i. e., the Sussex Street wharf and the Morris Street wharf, were some 350 feet apart. but the former extended out into the river about 200 feet further than the latter, so that it was practically 400 feet in a direct line from the end of Sussex Street wharf to the end of Morris Street wharf.

The tow originally consisted of 6 tiers of boats, there being 5 tiers of 4 boats each, and a single boat, the Senator Rice, in the last tier. These boats were each about 100 feet long, and as they were fastened together with but few feet between the tiers, the tow was about 620 feet long. It stretched from the outer part of the lower side of Sussex Street wharf to the end of Morris Street wharf, the Rice extending about a half or two-thirds of her length along the face of the latter, but without being fastened thereto.

The tide was the last of the ebb. The wind was from the southeast, with a velocity of about 14 miles. The effect of the wind was to force the tow to the westward, so that it had a kink in it, or formed a half circle, towards the shore. Some of the boats had been removed from the tow preparatory to distribution, and it is probable that the tow had more flexibility at the time of the accident than when first fastened to the pier. This was particularly so towards the end, where the Rice had extended slightly, about a foot, the length of line fastening her to the boat ahead. In any event, it seems to be well established that a tow of the length described was in the position indicated, which necessarily involved something of a bend. The space between the piers was free. A pier called "The James Reilly Co.'s Pier," has been built there since the accident.

The McWilliams went into the slip while the tow covered the end, finding some space between the Rice and the end of Morris Street

pier. She then took the three boats in tow, 2 on her port and 1 on her starboard side, and pushed the tail of the tow in question out in the river so that she got out with her tow, while No. 32 was lying attached to the Rice. The Overbrook in the meantime had also changed a boat from the tail end of the tow to the 2nd tier and then made fast by a single line to the starboard side of the tow, making the line fast to the outside boat in the 3rd tier, and being 110 feet long, she covered the boat in the 4th tier and her stern lapped a little on the Jamison in the 5th tier.

The testimony on the part of the Railroad Company is that the Overbrook then remained still for several minutes, during which time the McWilliams pushed the tow around, causing the damage.

There is no substantial testimony to contradict that of the Railroad Company. The libelant, on the Jamison, was very indefinite in his statements regarding the Overbrook. He said he saw her move out in the river and then the collision occurred. He assumed that the Overbrook backed into his boat. The testimony on the part of the McWilliams is not much, if at all, stronger. Her witnesses said that their attention was not called to the fact of there having been damage done to the Jamison until a month or more after the occurrence and they really knew nothing about it but said they had a clear recollection of going out slowly and cautiously.

After as careful a study of the testimony as possible, I conclude that neither No. 32 nor the Overbrook was in fault. The principal allegation against the former is that in pulling the tow out, she caused the collision. In fact, she did no pulling until after the Rice was cast loose and was practically motionless when the collision occurred, as far as her own engines were concerned. The chief charge against the Overbrook is that she caused the collision by backing into the side of the Jamison. This is denied by several witnesses from the tug and I see no reason for disbelieving them.

In the absence of fault on the part of the Pennsylvania tugs, it necessarily results that the McWilliams was to blame. The testimony of the No 32's crew is that the McWilliams was pushing the tow under a jingle bell order, notwithstanding a caution from them to the pilot that he was proceeding too fast. It is urged by the McWilliams that the damage could not have occurred as the Pennsylvania Company's witnesses say it did, but such argument is not very persuasive in the face of positive testimony that it so happened and there is nothing, so far as I can see, intrinsically improbable in the situation by reason of the positions of the boats. On the contrary, it seems obvious that when the boats were cramped up with considerable force, the fantail or stern part of the Overbrook would necessarily injure the side of a boat of the character of the Jamison when brought forcibly in contact with it.

The libel against the No. 32 and Overbrook is dismissed. There will be a decree against the McWilliams, with an order of reference.

BURLEE DRY DOCK CO. v. MORRIS & CUMINGS DREDGING CO.

(District Court, S. D. New York. April 13, 1906.)

SHIPPING—CONTRACT FOR REPAIR OF SCOWS—RATES FOR DOCKAGE AND LAY DAYS.

An oral contract for repairs to be made to respondent's scows by libelant, a dry dock company, without rates for docking and lay days being mentioned, only imposed a liability on respondent to pay the customary rates in the harbor of New York where the work was done.

In Admiralty.

Martin A. Ryan, for libellant.
Albert A. Wray, for respondent.

ADAMS, District Judge. This action was brought by the Burlee Dry Dock Company against the Morris & Cumings Dredging Company, to recover a balance claimed to be due through certain transactions occurring between the parties from October 1st, 1899 to August 1st, 1903. When the transactions terminated, the libellant claimed a balance due of $1,975.17, which consisted in part of a number of days' charges for docking the mud scows of the respondent and for lay days, respectively $40. and $20. per day. The respondent admitted the correctness of the balance claimed, except as to $325.36, which consisted of the difference between the said charges and $20. and $10. per day for the said services making $325.36, and made a tender before action of the amount claimed, less the said sum, and upon its being refused by the libellant, paid it into court in full of the claim. The dispute therefore arose on the question of the proper charges for docking and lay days.

The matter was referred to a commissioner, who, after taking testimony, reported that the libellant was entitled to recover at its claimed rates, notwithstanding it appeared that $20. and $10. respectively were the customary rates in the harbor of New York. The commissioner in his report said:

"The respondent urges that the rule of account stated as to the bills prior to August 6th, 1901, and of implied contract as to the bills subsequent to that date, can not be invoked inasmuch as the respondent was compelled to send its scows to libellant's dock, and that in such cases the rule is that only the fair and customary rate can be charged; and that there is an implied contract arising out of the arrangement between the parties that the libellant should charge only the fair and customary rate in New York Harbor.

From the evidence before me I am constrained to find that the customary rate in the Harbor of New York for such scows as respondent had docked at libellant's dock is the sum of $20 for dockage and $10 for lay days.

But in my opinion the respondent's position is untenable. The libel is silent as to any agreement between the parties under which the respondent was to send its boats to be repaired. The allegations in regard to the services of the libellant contained in the libel are as follows:

'Fourth: That between the 28th day of February, 1900 and the 17th day of November 1902, the respondent performed certain dredging services for the libellant, amounting in all to the sum of $7568.93. That the libellant has paid on account in cash the sum of $2500, leaving a balance due respondent amounting to the sum of $5068.93, the same to be used as a set-off

against the libellant's account against the respondent. Nor does the respondent by its answer plead any contract. The only proof of any contract is contained in Mr. Leary's testimony to the following effect:

'The Burlee Dry Dock Company wanted some dredging done and they didn't want to pay cash, they wanted to take it out in trade. We agreed to take half cash and half trade, we to send all our plant there as it needed repairing. We didn't get the half cash and attempted to take the balance in trade and this case is the result of our contract for dredging.'

It is, however, in evidence by Mr. Leary's testimony that during the period covered by libellant's bills, October 1899 to August 1903, the respondent had its vessels repaired at other docks; hence, the assertion by the respondent that it was compelled to send its boats to libellant's dock seems to me untenable. The libellant had failed to pay half of respondent's dredging bill, in cash, having paid only the sum of $2500 of a bill of $7,568.93; the respondent, therefore, voluntarily sent its scows to libellant's dock with the knowledge, first, that the agreement as to half cash had not been carried out; and second, as hereafter discussed, that the libellant's charges were $40 and $20, respectively.

As to the bills prior to August 6th, 1901, I find that the rule of account stated applies. The earliest of these bills was received a year and a half, and the latest of them, nine months before any objection was made to the charges. The receipt and retention of these bills without protest on the part of libellant, rendered them accounts stated, and it is not now open to the respondent to question them. Porter v. Price, 80 Fed. 655, 26 C. C. A. 70; Standard Oil Co. v. Van Etten, 107 U. S. 325, 1 Sup. Ct. 178, 27 L. Ed. 319.

As to the charges subsequent to August 6th, 1901, I am satisfied they were incurred by the respondent after full notice of the intention of the libellant to continue to charge such prices. Mr. Hinton, the superintendent of the libellant, testified to a conversation with Mr. Petze, the secretary of the respondent, shortly after the receipt of the letter of August 6th, 1901: At that conversation the matter of the charges was taken up. Mr. Petze refused to pay at the old rate and Mr. Hinton refused to receive his check at the reduced rate. Mr. Hinton stated that those were regular rates which the libellant charged. In view of the fact that the respondent was under no obligation to send its boats to the libellant for dockage and repairs, the loose arrangement between the parties not compelling such a course; of the fact that libellant's services were considerably in excess of the balance after the payment of $2,500 in cash; of the fact that the respondent had notice that libellant's charges were its usual and regular charges and that it refused to settle back charges for less, and of the fact that it continued to send its boats to libellant's dock, I am of the opinion that the libellant is entitled to charge at the rate of $40 and $20 respectively; and hence, I find that it is entitled to recover from the respondent the sum of $1975.17, with interest from the first day of August, 1903, amounting to $212.33 making in all the sum of $2187.50."

Whereupon the respondent applied here to take further testimony upon the subject, asserting that no real controversy arose over the charges until a balance was struck and that it was ascertained after the decision of the commissioner that written objections had been made to the overcharge in 1900, 1901 and 1902, through a former secretary of the respondent. It was thereupon ordered that the matter be referred back to the commissioner to take further evidence concerning the said objections.

A further report of the commissioner is as follows:

"After the filing of the first report the respondent moved to send the case back for the receipt of further evidence and the court granted the motion. The evidence produced satisfies me that the claim of account stated can not be successfully maintained, and I therefore find that no different rule should be applied to the bills prior to August 6th, 1901, than from the rule applicable to charges subsequent to that date.

I am satisfied that my ruling as to the charges subsequent to August 6th, 1901, is the rule which should be applied to all of the charges. Each party claims that the other is estopped by its acts; respondent claims that the libellant had notice that respondent would not pay the bills at the higher rate; libellant claims that the respondent had notice that the charges were the customary charges and that the boats were sent to the yard of libellant after notice that such charges were to be made.

Neither party should have permitted itself and the other to get into any such situation as the testimony shows. It was the duty of both to end it. Both protested but continued to act under the contract. In my opinion it was the act of the respondent in continuing to send its boats to libellant's yard to be repaired which caused the continuance of the dispute. In other words, the respondent could the more easily and readily have precipitated a settlement by refusing to send any more boats. This continuance was, in my opinion, tantamount to the waiver of the right to claim the deduction.

I see no reason, therefore, to change my former opinion. I had hoped that the new testimony would show some act on the part of one or the other of the parties which would throw further light upon the relation between them, but in my view no such new light has been shed."

The respondent filed exceptions to this report, inter alia, as follows:

"Third: Because the learned Commissioner did not find that when the contract to repair respondent's boats was made, there was an implied contract that respondent would pay only the reasonable market rates prevailing in New York Harbor under said agreement, and that said contract was not modified at any time.

Fourth: Because the learned Commissioner found that the act of the respondent in continuing to send its boats to libellant's yard for repairs, caused the continuance of the dispute between the parties, which amounted to a waiver of respondent's rights; whereas, he should have found that there was no waiver of respondent's rights, and that respondent had a legal right to rest upon its contract, as made."

The proof shows that on April 29th, 1900, the respondent by letter asked if there was any reason why the charge for docking should be so much as $40. The reply, dated April 30, was that it was the libellant's regular charge. On the 13th of June the respondent returned a bill, dated March 31st, where a charge of $40. for docking was made, claiming it was too much and should have been $20. The reply, dated June 15th, was that the charge was the same as to other concerns and was fair. On the 6th day of August, the respondent wrote to the libellant, explaining why deductions of $20. and $10. were made from an account rendered by the libellant, as being excessive. On the 4th of January, 1902, the respondent wrote to the libellant that the charge for docking should be $20. but the latter would not recognize the claim and the dispute eventuated in the tender by the respondent on the basis of $20. and $10., which was refused, as stated above, and this suit was the result.

It was correctly found by the commissioner that the rates of $20. and $10. were the customary charges, which should have been made in view of the rates charged by other concerns, and I find nothing in the record to warrant the allowance of the excessive charges. The act of the respondent in continuing to send its boats to the libellant's yard was not sufficient, in my judgment, to place any obligation upon the respondent to pay more than the services were worth.

The conclusions of the commissioner are overruled and the respondent having tendered and paid into court all that the libellant was justly entitled to, the libel should be dismissed.

THE GOLDEN ROD.

(District Court, S. D. New York. March 29, 1906.)

MARITIME LIENS—COAL SUPPLIES—AGREEMENT FOR LIEN.

A steam yacht was delivered by her owner to another in her home port, under an agreement for her purchase, but was subsequently retaken by the owner because of the purchaser's default. The purchaser, while in possession, placed an agent on board with authority to look after supplies, and such agent contracted with libelant for supplying her with coal, stating at the time that the yacht was "good for her bills." and certain coal was supplied thereunder and charged to the vessel. *Held*, that the representation of the agent was within his authority, as well as that of his principal, and created a maritime lien on the vessel.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Maritime Liens, § 48.]

In Admiralty.

Wing, Putnam & Burlingham, for libellant.
Wilcox & Green, for claimant.

ADAMS, District Judge. This action was brought by the Commercial Coal Company against the Steam Yacht Golden Rod, to recover for certain supplies of coal furnished to her in May and June, 1905, amounting to $296.13. The defence is that the supplies were not furnished upon the credit of the yacht.

It appears that the yacht at the time was owned by Archibald Watt, who made a written agreement with Florence E. Durlacher for the sale of the same to her for $22,000 to be paid in 8 installments of $2,500 each and 1 of $2,000. The agreement was dated May 18, 1905, and the periods for the various payments extended through the following March. Prior to this time, she had been in the possession of the American Power and Construction Company, A. Perry Bliven, General Manager, which held her under an agreement with the owner to put certain repairs upon her and sell her so as to net the owner $14,000, anything above that sum to go to the said company, but if for any reason, she should not be sold before May 1, 1903, the company would pay the owner $12,500 for her exclusive of all charges. Possession was taken by the company under this agreement but it became insolvent the latter part of 1903. Bliven, however, continued in possession, claiming that he had succeeded to the company's rights. He made efforts to sell the yacht and continued in possession until May, 1905, when she went into commission again, after the execution of an agreement between Watt and Mrs. Durlacher. This agreement provided that the yacht was not to be owned by the purchaser until the entire purchase money should be paid and the bill of sale should remain in the meantime in escrow in the hands of Bliven. The yacht, however, went into the possession of Mrs. Durlacher, whose husband acted as her agent in the matter, and was used in a sight seeing enterprise. The yacht so remained until July 17th, when Watt resumed possession, because the purchaser had defaulted in her first payment. While the yacht was in Mrs. Durlacher's possession, the coal in question was supplied.

It is testified by the libellant's agent, McCormick, that in May he went aboard of the yacht for the purpose of selling coal and there saw Bliven, whom he had seen there several times during the previous winter, but made no sales. On the occasion in May, he asked a person whom he met on the yacht for the captain and was directed to Bliven. The agent made arrangements with Bliven for the sale of some coal, which he delivered on board and took receipts for. The first, dated May 25th was for 2 tons and signed A. P. Bliven for McCormick; the next, dated the same, was for 3 tons and similarly signed; the next for 10 tons, was dated June 1st, signed by Bliven, Master; the next, for 10 tons, was signed by Albert Starling, Engineer; the next, June 19th, 5 tons, was signed by M. Durlacher, O. Ludlow; the next, June 22d, 21½ tons, was signed by J. F. Durlacher, per A. P. Bliven.

It appears that Bliven although in one instance signed as master, did not in fact occupy that position. At first he was merely a broker and the agent of the owner. When that instrument went out of effect by reason of the insolvency of Bliven's employer, he remained aboard as the agent of the owner of the yacht to protect his interest but not in any sense as master, or authorized, as far as Watt was concerned, to create liens for supplies required for navigation purposes. When the yacht went into commission, however, the necessity for supplies began and they were ordered by Bliven, who told the agent of the libellant that the yacht was "good for her bills." They were not paid, however, and the libellant having been referred to Mrs. Durlacher's husband, who was her agent in the matter, discontinued the supplies. They were charged to the yacht and subsequently, July 19th, a specification of lien was filed under the state statute. It is contended by the claimant that the specification only applied, if at all, to the supplies furnished subsequent to June 19th, as the limit of 30 days then commenced to run. It is unnecessary, however, to consider the statute, because if, as the libellant contends, there was an agreement for a lien, it is decisive of the case. The question turns on Bliven's authority. It appears that he had none from the owner, Watt, to make a contract binding upon the vessel, but it also appears that Watt turned her over to the purchaser, who entered into an agreement with Bliven, evidenced by the following letter addressed to him:

"June 14, 1905.

Mr. A. Perry Bliven, Brooklyn, N. Y.—Dear Sir: Now that matters in regard to the Golden Rod have been arranged satisfactorily, I appoint you my representative on board Yacht and expect that you will look after my interests the same as if it were myself.

I expect all hands aboard to do their duty and not disregard your orders. I give you full power in this matter. In affairs calling for alterations, repairs other than urgent ones and contracts for supplies please first consult me.

Believing that all aboard will work for the success of the Yacht at all times, I remain

Respectfully, Mrs. F. E. Durlacher
by J. F. Durlacher, Atty."

Bliven testified, that prior to this letter, at the time of the first conversation with the libellant's agent concerning the coal, about the

middle of May, the fact of the yacht being about to commence running was mentioned and an arrangement made for a supply of coal. In such arrangement he represented Mrs. Durlacher, who employed and paid him for looking after the supplies and other things. Bliven testified that the yacht was turned over to Mrs. Durlacher on the 23rd of May, and he made an arrangement with the libellant for a supply of coal, in conformity with the vessel's needs, which would be about 30 tons per week. The facts seem to be that Bliven, speaking for Mrs. Durlacher, made a continuing arrangement for a supply of coal equivalent to about 30 tons each week. This seems to be an agreement for a lien covering the coal supplied by the libellant.

The yacht at the time had been transferred by the owner to Mrs. Durlacher, under the purchasing agreement which provided, inter alia, for a delivery and for indemnity against liens on the yacht. She was accordingly transferred and was in Mrs. Durlacher's possession when the coal was supplied, although the security given to the owner as indemnity against liens turned out to be of little value. There does not seem to be any doubt that Mrs. Durlacher's contract for a lien would have been valid and it seems to me that the representation of her agent that the yacht was "good for her bills" was within his authority and created an enforcible lien.

Decree for the libellant for $296.13, with interest.

RUSSELL et al. v. HARRIMAN LAND CO.

(Circuit Court, E. D. New York. March 29, 1906.)

REMOVAL OF CAUSES—TIME FOR FILING PETITION—STIPULATION EXTENDING TIME TO PLEAD.

A written stipulation by the parties to a suit in the Supreme Court of New York, signed the day after it was brought, providing that no steps should be taken in the cause by either party before a stated time pending a provisional agreement for settlement, that no advantage should be taken of the time that might elapse by reason of the agreement, and in case it should not become effective defendant should have twenty days thereafter in which to make proper defense, estopped plaintiffs from objecting that a petition for removal filed within such 20 days was not in time, stipulations being recognized by Gen. Prac. Rule 24 of the state court as a proper and effective method of extending the time to plead.

On Motion to Remand to State Court.

John E. Ruston, for plaintiffs.

Lindsay, Kremer, Kalish & Palmer, for defendant.

THOMAS, District Judge. On the 27th day of October, 1905, the parties hereto, and another, entered into an agreement whereby were fixed the terms of settlement of differences involved in the above action and in other actions. Such agreement contained the following provision:

"This agreement of settlement is to be binding and effective from this date unless disapproved by a majority of the directors of The Harriman Land Company, and shall be consummated between the parties as soon as approved

by a majority of such directors. Until so approved or disapproved, the parties hereto agree to take no further steps in the litigations above named, and to take no advantage of the time that may elapse by reason of this agreement in the event that the same does not become finally effective. This agreement, unless completed and carried into effect on or before January 1, 1906, shall be treated as of no effect to bind any party hereto after said date, and the defendant in the suit brought by said Russell & Winslow in New York state shall have 20 days thereafter in which to make proper defense."

This action was begun on the 26th day of October, 1905, and pursuant to such agreement the defendant had until on or about the 20th day of January, 1906, to make its defense herein. The conditional agreement between the parties having been defeated by the nonfulfillment of the condition, the defendant on the 11th day of January, 1906, removed the action from the Supreme Court in the county of Kings, state of New York, to the Circuit Court for the Eastern District of New York. The plaintiffs now move to remand upon the ground that such removal was not taken pursuant to section 3 of the removal act (Act Cong. March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 510]), which permits removal "at the time or at any time before the defendant is required by the laws of the state or the rules of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff."

Rule 11 of the general rules of practice of the Supreme Court of the state of New York is as follows:

"Agreements between parties or attorneys to be in writing. No private agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause, shall be binding, unless the same shall have been reduced to the form of an order by consent, and entered, or unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel."

Rule 24 of the Supreme Court provides:

"When the time to serve any pleading has been extended by stipulation or order for twenty days, no further time shall be granted by order, except upon two days' notice to the adverse party of the application for such order."

In Mayer v. Ft. Worth & D. C. R. R. (C. C.) 93 Fed. 601, Judge Lacombe denied a motion to remand the cause, and said:

"It is contended that the cause was removed too late, because, although there had been a stipulation between counsel that time to answer might be extended to a date subsequent to that on which petition for removal was filed, no order of court to that effect had ever been obtained. Such contention is in accordance with the decision of this court in Schipper v. Cordage Co. (C. C.) 72 Fed. 803, and in subsequent cases. As the rules of the state court then stood, it was thought that a mere stipulation to extend [without order] could not be construed as requiring answer to be served on the day named, 'by the rule of the state court,' which is the phrase used in the federal statute. Attention is now called to the revised phraseology of rule 24 [general rules of practice of the state], adopted January 1, 1896, which reads as follows:

'Rule 24. * * * When the time to serve any pleading has been extended by stipulation or order for twenty days, no further time shall be granted by order except upon two days' notice to the adverse party of the application for such order.'

This rule coupled with the stipulation, may fairly be held to make an extension 'by rule of the state court,' and the removal should be held to be in time. The defendant Dodge, who, it is alleged, is a citizen of New York, does not seem to be a necessary party. Motion to remand denied."

A valuable addition has also been made by the decision of Judge Ray, in Groton Bridge & Mfg. Co. v. American Bridge Co. (C. C.) 137 Fed. 284, wherein he holds that:

"The written stipulation extending the time of defendant to plead to a certain date, estopped the plaintiff from saying, in the proceedings to remove the cause that the time in which the defendant was required to answer or plead to the complaint had expired before the arrival of the day named in such stipulation."

Rule 11 of the Supreme Court of the state of New York provides:

"No private agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause, shall be binding, unless the same shall have been reduced to the form of an order by consent, and entered, or unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel."

It is not necessary that the stipulator should be the attorney (McBratney v. R. W. & O. R. R. Co., 87 N. Y. 470); but that point is not raised in this case, as the plaintiffs do not seek to diminish the true intendment and legal effect of the stipulation. They themselves were lawyers, and their attorney was associated with them in business.

It will be observed that by the terms of the agreement the parties stipulated "to take no further steps in the litigations above named, and to take no advantage of the time that may elapse by reason of this agreement in the event that the same does not become finally effective."

It would have been a gross breach of faith had the defendant attempted, before the termination of such agreement, to remove the action to this court. The action was stayed as firmly as if an injunction of the court therefor had been issued and become operative. If during such time by the terms and spirit of the stipulation the defendant could not take any steps whatsoever, even to remove the cause to the federal court, how can it be urged by the plaintiffs that they may take "advantage of the time" that elapsed when they agreed "to take no advantage." The time that elapsed while the action was in abeyance should not be counted as a part of the time within which the defendant was required to plead. The plaintiffs herein agreed that they would take "no advantage of the time that may elapse by reason of this agreement in the event that the same does not become finally effective." It seems clear that they do in fact take advantage of such lapse of time, when they insist that by reason thereof the defendant has lost its right to remove the action to this court.

The motion to remand is denied.

THE MANNIE SWAN.

(District Court, S. D. New York. May 22, 1906.)

SALVAGE—RIGHT TO AWARD—SERVICES WHICH WERE UNNECESSARY AND DETRIMENTAL.

A tug *held* not entitled to a salvage award for pumping water upon and into a barkentine laden with kerosene which was on fire, where the preponderance of the evidence showed that when she arrived the fire was under control and the danger over through the efforts of another tug, and she was informed that her services were not needed, notwithstanding

which she insisted on pumping into the hold, where there had been no fire, to the damage of the cargo.

[Ed. Note.—Salvage awards in federal courts, see note to The Lamington, 30 C. C. A. 280.]

In Admiralty. Suit for salvage.

John F. Foley, for libellants.
Wing, Putnam & Burlingham, for claimant.

ADAMS, District Judge. This action was brought by George W. Stapleton, the master and owner of the steamtug Stapleton, and the other members of the crew, consisting of two men, the engineer and deck hand, against the Barkentine Mannie Swan and her cargo of 28,500 cases of kerosene oil, to recover salvage services alleged to have been rendered in assisting to extinguish a fire which occurred on the vessel on the 12th day of January, 1906, while she was anchored abreast of Stapelton, Staten Island. The answer admits that the Stapleton went alongside of the Swan on the starboard side and took some hose aboard but alleges that the fire was then under control through the efforts of the steam pilot boat New Jersey, which had been summoned from the vicinity, and in a few minutes got complete control of the fire so that nothing remained to excite apprehension beyond some smouldering bedding, with smoke and steam. It is further alleged by the answer that when the Stapleton came alongside, her captain was informed that the services of his tug were not needed, but he insisted upon starting his pumps and playing into the house on deck and throwing a second stream through the forward hatch into the cargo, and that the Stapleton's efforts were of no value and through the pumping into the hold actually resulted in damage to the cargo.

The Swan when built, 15 or 16 years ago, cost $38,000, but was kept in good condition and worth at the time of the fire about $12,000. The cargo before the Stapleton threw water on it was worth about $23,000. It was damaged by the water so that some expenditure was necessary to recondition about 3,000 cases, which were rusted with water and had to be cleaned off, oiled and repacked. The cost of this work does not appear as it was done principally by the Swan's crew, consuming about 5 days.

The question in the case is, were the Stapleton's services of any value. If they were, the libellants should be recompensed, although they were warned when they came to the vessel that the fire was substantially out and their services not needed. On the other hand, if they forced their services where they were not required, they should receive the court's disapproval instead of a salvage award.

The controversy turns simply upon the credibility to be given to the conflicting accounts. The libellants said that the conflagration was raging and dangerous when they reached the vessel, especially on the starboard side, to which they directed their attention. The witnesses for the Swan said that the fire was substantially subdued on that, as well as on the port side, where the New Jersey was lying, and still working.

It appears that when the fire was discovered, the master of the Swan was ashore but was telephoned to at the New York office of the

vessel in South street by the boatswain, who went ashore in a small boat with the master's wife and the steward. When they were approaching the shore, they saw the New Jersey about leaving the pier, opposite the Swan, where she had been lying, for the purpose of going to the assistance of the Swan. The weather had been foggy but lightened up at this time sufficiently for those on the New Jersey to see that the Swan was on fire. The New Jersey threw off her lines and was starting for the Swan, when the boat containing the master's wife and others, reached the pier and asked those on the New Jersey to go to the assistance of the Swan, some 400 yards away. They immediately did so, and reaching the vessel, found there was a fire of some magnitude in the deck house forward containing the engine room, boatswain's room, forecastle, cook's room and galley. This was about 11:35 o'clock. They went to the Swan's port side and put out three lengths of hose, one of which they used on the port side, one through a hatch in the top of the house, and the third on the starboard side, by running it around the deck house forward. The crew of the Swan, consisting of 11 men, had previously vainly endeavored to subdue the flames by the use of buckets. The efforts of the New Jersey were almost immediately effective and the fire in the course of about 20 minutes, was under control, although still smouldering. The Stapleton at this time came alongside on the starboard side, and put her hose aboard, notwithstanding the notice she received of the fire being under control of the New Jersey.

After anxious consideration of the testimony, I have concluded that the Stapleton's services were not needed, of which she had due notice before she rendered them. It appears that they were not only useless but actually detrimental, because there was no fire, or danger of it, in the hold. The deck had been burned to the depth of about ¾ of an inch but the danger was all over when the Stapleton arrived and the water pumped by the New Jersey then actually running over the coamings, some 18 inches high, which surrounded the house on the deck of the vessel. The testimony on behalf of the vessel, and especially that of the pilots from the New Jersey, who were not interested in the matter, having been settled with by the Swan, is entitled to greater credence than that on behalf of the Stapleton, the owner and crew of which were greatly interested in establishing their claim. The testimony of some of the crew of the Swan, given on behalf of the Stapleton, is not entitled to much weight, as it appears that they were sedulously looked after by the master of the Stapleton and had some vague ideas of obtaining some benefit themselves from the proceedings instituted on behalf of the Stapleton.

Libel dismissed.

THE C. J. SAXE et al. (two cases.)

(District Court, S. D. New York. May 21, 1906.)

SEAMEN—LIEN FOR WAGES—PRIORITY OVER CLAIM FOR COLLISION DAMAGES.

Claims of seamen for wages against a vessel are entitled to priority of payment over an award of collision damages against the vessel from the proceeds of her sale in the collision suit, but such right of priority

does not extend to wages due to the pilot, who was actually the master and responsible for the vessel's faulty navigation.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seamen, § 166.]

In Admiralty. On distribution of fund in court.

Butler, Notman & Mynderse, for American Linseed Co.
Richard D. Currier, for Etheridge and others.

ADAMS, District Judge. A collision took place on the 24th of October, 1905, between the American Linseed Company's barge Andy, in tow of the steamtug C. J. Saxe, on a hawser, and the steamer Staatendam. An action was brought by the Linseed Company against both vessels. The owner of the Staatendam appeared in the action and filed a claim, with a stipulation for value. The Saxe did not appear and upon the default, a decree was entered against her, upon which she was sold and the proceeds, some $615, paid into court. In November, 1905, an action was brought by Etheridge and others against the Saxe to recover the wages due them. The expenses of the sale having been deducted, there remains in court the sum of $429.63 to meet the claims, so far as the Saxe was concerned, and the question now presented is as to the proper method of distributing the fund.

There are $1,535.08 due for collision and $310.69 for wages. The $310.69 include a claim of Walter Thompson for $67.50 and a dispute has arisen whether he was pilot or master. It appears that he was charged with the responsibility of engaging the crew, controlling the tug's movements, making agreements for towage, etc., which ordinarily constitute a part of the master's duties. This case does not fall within the line of authorities cited in The Pauline (D. C.) 138 Fed. 271, determining that under certain circumstances, the pilot, though in control of the navigation of the vessel, is not excluded from asserting a lien. Here, it seems that Thompson was actually the master and is not entitled to a lien.

The principal question is one of priority between seamen's wages and collision damages. It is contended for the latter that under The John G. Stevens, 170 U. S. 113, 18 Sup. Ct. 544, 42 L. Ed. 969, and The F. H. Stanwood, 49 Fed. 577, 1 C. C. A. 379, the collision claim, which, if allowed, will absorb the entire fund, is entitled to priority. The Stevens Case is an authority for the proposition that a collision claim is entitled to priority over a statutory lien for supplies previously furnished in a vessel's home port. There is nothing in the opinion of the court, however, manifesting an intention to extend to wages claims the principle that liens arising out of tort are to be preferred to those arising out of seamen's contracts. In that connection the court says (170 U. S. 119, 18 Sup. Ct. 547, 42 L. Ed. 969):

"The case at bar, however, presents no question of the comparative rank of seamen's wages, which may depend upon peculiar considerations, and which, according to the favorite saying of Lord Stowell and of Mr. Justice Story, are sacred liens, and, as long as a plank of the ship remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages.

The whole question was fully considered by Judge Choate in The Steamboat Orient, 10 Ben. 620, Fed. Cas. No. 10,569, and I do not find anything in the more recent decisions to authoritatively overcome the conclusion that the claims of seamen for their wages should be given priority over collision damages. The later decisions, outside of this district, are in conflict, some of them, The Daisy Day (D. C.) 40 Fed. 538, for example, sustain the decisions here, while others, The F. H. Stanwood, supra, for example, take the contrary view. It is urged in connection with the case last cited, that the seamen here being implicated in the Saxe's collision, and, also, having a claim against a solvent owner, are barred from recovery, but I am not convinced that these circumstances are sufficient to defeat the seamen's claims, and I do not find anything to implicate them in the fault. That contention applies with much force to the master's claim. He was conducting the faulty navigation of the vessel and for such reason, as well as that arising from his position as master, he should not be permitted to recover, but the seamen were doubtless free from responsible participation in the negligence, and should not be deprived of their ordinary rights.

A distribution of the fund will be made in conformity herewith.

MOHRSTADT v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Circuit Court, E. D. Missouri, E. D. April 9, 1906.)

No. 4,230.

CLERKS OF COURTS—FEES OF CLERKS OF CIRCUIT COURT—MAKING RETURN TO WRIT OF ERROR.

For making return to an order contained in a writ of error to a Circuit Court directing it "to send the record and proceedings aforesaid with all things concerning the same" to the Appellate Court, the clerk is entitled to charge the fee of 15 cents for each folio authorized for making any "return" by Rev. St. 828 [U. S. Comp. St. 1901, p. 635.]

On Motion to Retax Costs.

M. R. Smith, for plaintiff.

Circuit Clerk, pro se.

ADAMS, District Judge. This is a motion to retax the costs for preparing a return to the order contained in the writ of error issued to this Court directing it "to send the record and proceedings aforesaid with all things concerning the same" to the Circuit Court of Appeals for the Eighth Circuit. The clerk taxed the costs on the basis of 15 cents per folio of the matter contained in the return. The plaintiff insists that the clerk is entitled to only 10 cents per folio. Section 828, Rev. St. [U. S. Comp. St. 1901, p. 635] provides that the clerk shall be entitled to fees "for entering any return, rule, order continuance, judgment, decree, or recognizance, or drawing any bond or making any record, certificate return or report, for each folio fifteen cents." The same section also provides that the clerk shall be en-

titled to fees "for a copy of any entry of record, or of any paper on file, for each folio ten cents." Manifestly there was intended to be a difference in the fees for a mere copy of an entry or paper on file and for an independent return made to any order of court. The writ of error required the clerk of this court to send "the record and proceedings aforesaid with all things concerning the same" to the Court of Appeals within a certain time fixed in the writ.

Manifestly the discharge of this duty by the clerk requires the exercise of discretion and judgment. He is called upon to determine what is "the record and proceedings" in the case, to collect the same together, arrange them, and make a return covering them. He is also called upon to exercise discretion and judgment in the determination of what, if anything, he shall embody in his return under the other language employed in the writ, namely, "with all things concerning the same." Literally speaking, if the clerk is merely to copy all the record and proceedings of a case, he might feel constrained to literally copy all the pleadings that may have been abandoned for new or amended pleadings and many other documents or papers not required for the use of the Appellate Court. He is required to make a return to a specific order of the court, and this return, as already indicated, involves judgment, discretion, and intelligent action, and not merely copying a paper or an entry of record in the case. The return when made and filed in the office of the clerk of the Court of Appeals becomes the original record of that court upon which it proceeds to adjudge the right of the parties. In my opinion, the clerk is right in taxing for this service the fees allowed for a "return," 15 cents a folio. This construction of the statute is held to be correct in McIlwaine v. Ellington et al. (C. C.) 99 Fed. 133. To the same effect, also, is the case of Blain v. Home Ins. Co. (C. C.) 30 Fed. 667.

The motion to retax is denied.

BOARD OF COM'RS OF ONSLOW COUNTY et al. v. TOLLMAN.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1906.)

No. 646.

1. COURTS—FEDERAL COURTS—JURISDICTION—COMITY.

Where a suit was brought by county commissioners against a county treasurer alone in a state court, in which the only relief desired was an injunction to restrain the payment of certain coupons taken from county railroad aid bonds, and there was no attempt in such suit to have the court take possession of the funds applicable to pay such coupons, the mere pendency thereof was no ground for the refusal of the federal courts to take jurisdiction of a suit brought by the holder of certain of such coupons to enforce payment thereof, and to enforce an alleged trust of funds applicable thereto.

2. INJUNCTION—VIOLATION—CONTEMPT.

Where a temporary injunction was issued by a state court in a suit by county commissioners against the county treasurer to restrain the payment of certain county railroad aid bonds, compliance by the county treasurer with the lawful order of a federal court having jurisdiction of the parties, directing payment of such coupons in a suit by the holders thereon, would not constitute a contempt of the state court.

3. SAME—MODIFICATION OF ORDER.

Where, pending an injunction issued by a state court restraining a county treasurer from paying coupons detached from county railroad aid bonds, a valid order requiring such payment was issued by a federal court in another suit, the remedy of the treasurer was not by a stay of proceedings in the federal court, but by an application to the state court to so modify its order as not to restrain the treasurer from obeying the federal court order.

4. COURTS—FEDERAL COURTS—RULES OF DECISION—STATE CONSTITUTION—CONSTRUCTION.

Where at the time certain railroad bonds in question were issued by a county under statutory authority there was no opinion of the Supreme Court of the state construing a section of the state Constitution which it was subsequently claimed was violated by the statute under which the bonds were issued, the holder of coupons detached from such bonds thereon in a suit in a federal court was entitled to have such court put its own construction on such constitutional provision, unaffected by opinions of the state Supreme Court rendered after the issuance of the bonds.

[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.]

5. SAME.

Where a railroad company to which county aid bonds were issued acquired the same before any decision of the state court, construing a constitutional provision, alleged to have been violated by the statute under which the bonds were issued, and was therefore entitled as a bona fide purchaser of the bonds to have a federal court, in an action on coupons taken therefrom put its own construction on such constitutional provision, independent of subsequent opinions rendered by the Supreme Court of the state, the railroad's assignees of the bonds and coupons were entitled to the same rights, though they may have purchased after the rendition of such state decisions.

6. STATUTES—PASSAGE—AYES AND NAYS—ENTRY ON JOURNAL—CONSTITUTION—CONSTRUCTION.

Const. N. C. art. 2, § 14, provides that no law shall be passed to impose any tax, or to allow counties to do so, unless the bill for the purpose shall have been read three several times on three different days, and unless the

ayes and nays on the second and third reading of the bill shall have been entered on the journal. *Held* that, where the House Journal showed that Laws N. C. 1885, p. 439, c. 233, incorporating a railroad, and authorizing the issuance of county aid bonds, was passed by the following vote: "Ayes 94, nays ...; total ..."—such record sufficiently showed that there was no negative vote cast, under the presumption that the clerk of the House charged with the recording of the vote performed his duty, and hence such record constituted a sufficient compliance with the Constitution.

7. SAME—NAMES OF MEMBERS.
Where the House Journal showing the passage of a bill in recording the representatives voting for the same added the respective counties from which representatives came wherever there were two representatives of the same surname, the record was not defective for failure to give the Christian names of the members.

8. SAME—NECESSITY OF ROLL-CALL VOTE.
Acts N. C. 1887, p. 706, c. 404, supplementing and amending an act to amend the charter of the Wilmington, Onslow & East Carolina Railro d Company, was not a law passed for the imposition of a tax, or to allow a tax to be imposed by counties, within Const. art 2, § 14, and was not therefore required by such section to be passed by a roll-call vote.

9. COUNTIES—RAILROAD AID BONDS—ISSUANCE.
Act N. C. 1885, p. 445, c. 233, § 14, providing for the issuance of certain county bonds in aid of a railroad by a board of trustees, did not require that the bonds should be executed by such trustees.

10. SAME—EXECUTION BY COUNTY COMMISSIONERS.
Act N. C. 1885, p. 439, c. 233, authorizing the issuance of certain railroad aid bonds by a county, being silent on the subject of the execution of the bonds, such bonds were properly executed by the county's board of commissioners.

11. SAME—EXECUTION—STATUTES.
Code, N. C., § 702, declares that every county shall be a body corporate and politic. Section 703 declares that the powers of the county shall be exercised by the board of commissioners, or in pursuance of a resolution adopted by them. Section 704 authorizes the county to make contracts, and section 712 declares that the clerk of the board shall record all its proceedings, and enter every resolution or decision concerning the payment of money, and record the vote of each commissioner on any question submitted to the board, if required by any member present. *Held* that, where the records of a board of county commissioners did not show a formal resolution directing the execution of certain railroad aid bonds, but such bonds were shown to have been executed at a meeting of the board convened for that purpose, and that all five members of the board were present during at least a part of the time required for the signing of the bonds, and a majority of them were present during all of such time during which the board was in session, the bonds were properly executed by the board.

12. EVIDENCE—BEST AND SECONDARY—COUNTIES—BONDS—EXECUTION.
In an action on county bonds, parol evidence is admissible to establish the facts concerning their execution.

13. COUNTIES—RAILROAD AID BONDS—DELIVERY—STATUTES.
The provision of Act N. C. 1885, p. 439, c. 233, § 14, requiring delivery of certain county railroad aid bonds authorized by such acts to be delivered by the board of trustees provided for, was directory merely, and hence a delivery of the bonds by the county's board of commissioners did not invalidate them.

14. SAME—INTEREST PAYMENTS—TIME—WAIVER.
A railroad company entitled to railroad aid bonds issued under Laws N. C. 1885, p. 439, c. 233, was entitled to waive the provision of such act

authorizing semiannual interest payments, and hence the fact that the bonds provided for annual interest payments was immaterial.

15. SAME—POWERS—COMPROMISE OF SUIT.
Under Code N. C., § 704, providing that counties shall have power to sue and be sued in the name of their boards of commissioners, to make such contracts and to purchase and hold such personal property as may be necessary for the exercise of their powers, and to make such orders for the disposition or use of their property as the interest of their inhabitants require, a county, on being sued by a railroad company to compel the delivery of county railroad aid bonds, had power to compromise such litigation by surrendering its right to the railroad company's stock, which was of little or no value, in consideration of the railroad company's surrender of its right to receive a substantial portion of the bonds which the county had bound itself to deliver.

16. SAME—SPECIAL TAXATION—TRUSTS.
Where taxes were levied and collected to pay coupons on railroad aid bonds issued by a county, the fund so collected was impressed with a trust in the hands of the county treasurer for the benefit of the owners of the coupons.

17. EQUITY—ADEQUATE REMEDY AT LAW.
Where a county, having issued certain railroad aid bonds, claimed that the bonds were void, and instituted proceedings in a state court to restrain the county treasurer from paying money collected from taxes levied for the payment of coupons on the bonds, the remedy of the holder of such coupons at law was inadequate, and he was therefore entitled to maintain a suit in equity to compel the application of the taxes so collected to the payment of the coupons.

18. APPEAL—ERRORS REVIEWABLE—MODIFICATION OF DECREE.
Where, on appeal from a decree directing application of certain county taxes to the payment of coupons detached from county railroad aid bonds, the fact that the decree erroneously directed the entire tax to be applied to the payment of complainant's coupons was not assigned as error, and appellant's counsel stated in argument that the only question desired to be raised on appeal was the validity or invalidity of the bonds, the Circuit Court of Appeals would not notice such error, although it was authorized to do so by Court of Appeals Rule No. 11 (90 Fed. cxlvi, 31 C. C. A. cxlvi).

Appeal from the Circuit Court of the United States for the Eastern District of North Carolina, at Wilmington.

For opinion below, see 140 Fed. 89.

E. K. Bryan (Duffy & Koonce and W. D. McIver, on the brief), for appellant.

George Rountree (J. O. Carr, on the brief), for appellee.

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

McDOWELL, District Judge. This was a suit in equity, appellee being the complainant below. In 1885 the Legislature of North Carolina passed an act (chapter 233, p. 439, Laws 1885) incorporating the Wilmington, Onslow & East Carolina Railroad Company. So much of that act as is here of importance reads as follows:

"Sec. 13. That any county, township, city or town along or near the line of said railroad, or at any terminal point thereof, or at or near the line of its extension, its branches, lateral or connecting roads, or at their terminal points,

may subscribe to the capital stock of the said company, and to this end it shall be the duty of the county commissioners and the proper authorities of such city or town, upon the written application of any three commissioners appointed in accordance with section four (previous to organization of said company) or the board of directors of the said Wilmington, Onslow and East Carolina Railroad, said application stating the amount which it is desired that said township, county, city or town shall subscribe to the capital stock of said company, together with a petition of at least one-fifth of the qualified voters therein, to appoint a day in which an election shall be held in such county, township, city or town in the manner prescribed by law for holding other elections, at which said election the legally qualified voters shall be entitled to vote for or against such subscription, those favoring such subscription on ballots written or printed 'Subscription,' and those opposing on ballots written or printed 'No Subscription'; such election shall be held after thirty days' notice, specifying the amount of subscription to be voted for, and to what company it is proposed to subscribe, posted at the court-house door and three other public places in said county, township, city or town, at the usual voting places, and by persons appointed in the manner that persons are appointed for holding other elections in said county, township, city or town, and the returns thereof shall be made and the results declared and certified as prescribed by law in such other elections; and such results so certified shall be filed with the register of deeds in said county, city or town, and shall be taken as evidence of the same in any court in this state.

"Sec. 14. That if the result of said election shall show that the majority of the qualified voters of said county, township, city or town favor subscription to the capital stock of said railroad to the amount voted for in such election, then said county commissioners, or the proper authorities of said city or town, shall immediately make such subscription to the capital stock of said railroad, payable in cash or the bonds authorized to be issued under this act, as may be agreed upon, and appoint a board of trustees, consisting of not less than three resident tax-payers of the county, township, city or town so voting, who shall issue the bonds of said county, township, city or town to the amount so voted for at said election, in such forms and denominations and running for such length of time as may be determined on by said county commissioners or proper authorities of such town or city, bearing interest at the rate of six per cent. per annum, and said interest to be payable semiannually and evidenced by coupons on said bonds, and said trustees shall deliver said bonds so issued, or pay in cash as may be agreed, to said Wilmington, Onslow and East Carolina Railroad Company upon receiving therefor for the use and benefit of said county, township, city or town, proper certificates of stock in said Wilmington, Onslow and East Carolina Railroad Company to the amount of subscription so voted as aforesaid: Provided, however, that the said trustees shall deliver to the said Wilmington, Onslow and East Carolina Railroad Company one-fifth of the amount subscribed in bonds or cash as agreed at as early date after said election as it is practicable to have the bonds prepared, balance by instalments of one-fifth, as the work progresses within the county or township making such subscription or in such as the cities or towns making subscriptions may be located, until the grading is done and cross-ties procured for the track in said counties respectively, when amount remaining shall be paid to said Wilmington, Onslow and East Carolina Railroad Company to complete the track, commencing at Wilmington and placing thereon one freight and passenger train combined."

Section 15 provides for the levy of taxes to meet the interest on the bonds above mentioned and for payment of the principal.

The act of 1885 was amended (chapters 89, 404, pp. 172, 706, Laws 1887), but it is unnecessary to set out these amendments.

Under the authority of the above-mentioned statutes, on the petition of the railroad company, the board of commissioners of Onslow

county, N. C., submitted to vote the question of subscribing to $60,000 of the capital stock of the said company. An election was held on January 24, 1888, and the vote was declared and certified to be in favor of the subscription. The company, having constructed a part of its road, tendered to the commissioners half of the stock, and demanded the issue of $30,000 of the county bonds. This demand was refused, and the company brought suit against the board of commissioners. This action was removed to another county, and resulted adversely to the company. On appeal (Railroad v. Com'rs, 116 N. C. 563, 21 S. E. 205) the trial court was reversed. In the meantime the road had been completed, and the name of the company had been changed to Wilmington, New Bern & Norfolk Railway Company, and under this name another action was commenced against the board of commissioners, in which name a county is sued (Code, § 704) to compel the delivery of the remaining $30,000 of bonds. After the result of the appeal in the first action was known, the two actions were settled by compromise. The terms of the compromise agreement will be hereinafter set out. It is sufficient to say here that the agreement was, in effect, that the county should surrender any right to the stock, which was regarded as valueless, and should issue only $40,000 of bonds. Thereupon the two actions were dismissed, the orders of dismissal setting out briefly the nature of the compromise. The bonds—20 for $1,000 each and 40 for $500 each—were executed and delivered to the railway company on March 3, 1896. The bonds provided for interest payable annually on the 1st day of January at 6 per cent., and were in form the ordinary 10–40 year coupon bonds. The recital on the face of the bonds of the authority for their issue will be set out later on.

The bill alleges that the complainant and others purchased the said bonds for value in open market, without any notice of irregularity or illegality; that complainant is the owner of the coupons due on January 1, 1904, from 30 of the $500 bonds and from 19 of the $1,000 bonds, having a face value of $2,040, and that he has duly demanded payment thereof from the treasurer of Onslow county, and that payment has been refused. The bill not only urges the validity of the bonds and coupons under the act of 1885, but asserts that, even if this act be insufficient, authority for the issue of the bonds existed under certain sections of the Code of 1883.

It is further alleged that the reason for the treasurer's refusal is that the commisioners of Onslow county, in an action brought by them against the said treasurer, have secured a temporary injunction from the superior court of that county, restraining him from paying said coupons. It appears from the record before us that this action, which was instituted before complainant's bill was filed, is still pending; that the only decree so far rendered is the one above described; and that the ground for the restraining order is the alleged invalidity of the bonds. The defendants in the suit at bar are the board of commissioners of Onslow County, and E. W. Summersill, the treasurer of said county.

It should also be stated that the bill alleges that the interest coupons falling due prior to those in suit have been regularly paid, and that a tax sufficient to pay said last-mentioned coupons had been levied and collected, and that the fund thus derived is in the hands of the treasurer. The bill alleges a trust in behalf of complainant and the other holders of the coupons; that if not restrained the treasurer will make way with or dispose of the fund in his hands, and prays, inter alia, for a restraining order, and that a receiver be appointed to take and hold the fund pending final decree.

The answer of the defendants need not be set out in detail. It controverts the validity of the bonds on several grounds, which will be hereinafter stated and considered.

The first decree of the court below declares the bonds and coupons valid. The last decree, dated November 11, 1905, reads as follows:

"It appearing to the court, by the petition of the complainant herewith filed, that the defendants refuse to pay the coupons in suit in the main action, and which have heretofore been adjudged to be valid obligations of the county of Onslow, it is ordered that J. O. Carr, Esq., of Wilmington, N. C., be appointed receiver in this behalf, and that the defendants place in his hands and under his control the moneys in the treasury of Onslow county, proceeds of the tax levied for the purpose of paying the coupons on the bonds issued in subscription to the capital stock of the Wilmington, New Bern & Norfolk Railroad, and due on January 1, 1904, together with a sufficient sum, with interest thereon, and that he hold the same subject to the further order of this court. It is also ordered that the said receiver enter into bond, with surety to be approved by the judge of this court, in the penal sum of five thousand dollars, with the conditions for the faithful performance of his trust as such receiver. The defendants allowed to appeal without giving supersedeas bond."

The numerous assignments of error need not be considered in the exact order of assignment.

The first question that should engage our attention arises from the contention that the trial court, on principles of comity, should have declined jurisdiction of this suit because of the pendency in the superior court of Onslow county of the action brought by the board of commissioners against the treasurer of that county. We are unable to find that there was any error here. The action referred to is a suit in equity, founded on what is in essence a pure bill for injunction, to which the board and the treasurer are the only parties. A temporary injunction, restraining the treasurer from paying the coupons here in suit, had been granted prior to the institution of the suit below. So far as we can learn from the record of the action in the superior court, the only possible further relief that can be properly granted in that action is to perpetuate the temporary restraining order. It cannot, of course, be contended that the appellee here would in anywise be bound by any decree rendered in an action to which he is not a party. Hence we can perceive no reason why the court below should have refused to proceed. The mere priority of institution of the action in the superior court does not in the least require that the court below should have refused complainant the relief to which he is entitled. The rule governing the relations of

courts of co-ordinate jurisdiction where there is a conflict of jurisdiction, is clearly and fully stated in Farmers' Loan Co. v. Railroad Co., 177 U. S. 51, 61, 20 Sup. Ct. 564, 568, 44 L. Ed. 667:

"The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where in the progress of the litigation the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to federal and state courts."

But in the action in the superior court that court has not taken possession of the fund, and the action is not in any sense one to enforce a lien, to marshal assets, to administer a trust, to liquidate an insolvent estate, or of a nature at all similar to any such action. We give the members of the board credit for good faith, and therefore we regard the action that they have brought against the treasurer as one intended merely to prevent the treasurer from paying the coupons now in suit until the holder has in some court of competent jurisdiction, having the proper parties before it, decided that the coupons are valid obligations. The members of the board doubtless reasoned that the treasurer had no such interest in the question as to lead him to risk a judgment for costs against himself by refusing to pay the coupons; and, as it was impracticable otherwise to secure an adjudication of the question as to the validity of the coupons, they took the only practicable course open to them to make it incumbent on the coupon holders to sue for payment, and thus enable themselves to contest the validity of the coupons. The suggestion that the treasurer will be in contempt of the superior court should he, in obedience to the order of the court below, pay the fund in his hands to the receiver, seems to us without foundation. If such suggestion be sound, the appellee is as much bound by the decree rendered by the superior court as he would be if he had been made a party to that suit. The injunction of the superior court necessarily means no more than that the treasurer must not voluntarily pay the coupons. It does not mean that he shall not obey the lawful order of another court having jurisdiction of the parties. If the treasurer should, the decree below being affirmed, refuse to deliver the fund in his hands to the receiver, he will be in contempt of the court below; but obedience to such decree cannot be properly regarded as a contempt of the Superior Court. If, however, there be any possible doubt on this point, the remedy of the treasurer is not a stay of proceedings in the court below, but an application to the superior court to so modify its order as not to restrain the treasurer from obeying

the lawful order of a court of co-ordinate jurisdiction and equal rank. And this relief we doubt not will be there readily granted.

We shall next consider the contention that the statutes under which the bonds in question were issued were not enacted in accordance with the requirements of the Constitution of North Carolina.

We have not thought it necessary, in view of the conclusion we have reached, to consider the contention of counsel for appellee that chapter 89, p. 172, Acts 1887, amending the act of 1885, did not require a roll-call vote. We shall assume the contrary. The validity of the act of 1885 and of the amendment, above mentioned is assailed on the ground that article 2, section 14, of the Constitution of North Carolina was not complied with, in that the yeas and nays were not duly entered. The language of article 2, section 14, of the Constitution is, so far as is now material, as follows:

"No law shall be passed * * * to impose any tax * * * , or to allow the counties * * * to do so, unless the bill for the purpose shall have been read three several times * * * which readings shall have been on three different days; * * * and unless the yeas and nays on the second and third reading of the bill shall have been entered on the journal."

The facts as to the journal entries are set forth in the record in three different methods: By certificates made by the Secretary of State; by examined extracts from the printed and published volumes of the journals; and by examined copies of the original journals. The entries as to the vote on the second and third readings of the act of 1885 in the House need not be here set out, as they, if differing in any essential respect, more nearly comply with the interpretation of the Constitution contended for by counsel for appellant than do any of the entries on the Senate Journal, or the entries on the House Journal concerning chapter 89, p. 172, of the Acts of 1887. The ground for appellants' contention is as fully shown as need be by the following copy of the entry made in the Senate Journal of the vote on the second reading of the act of 1885, and the copies of the entry made in the House Journal on the second reading of chapter 89, p. 172, of the Acts of 1887, and the transcript thereof in the House Journal as published:

"Senate Journal, Feby. 26, 1885.

"H. B. No. 461. S. B. No. 727. Bill to incorporate the Wilmington, Onslow and East Carolina Railroad Company, passed its second reading. Ayes, 34. Noes, ..., as follows:

"Those voting in the affirmative were: Messrs. Alexander, Bason, Bond, Brown, Buxton, Chadbourne, Connor, Cooper, Cowan, Dotson, Franklin, Graham, Gudger, Hackett, Hill, Holeman, Horne, Johnston, Kennedy, Lewis, Mason, Means, Parker, Poole, Rountree, Scott, Simmons, Tate, Thomas, Thompson, Todd, Troy, Twitty, Williams—34."

"House Journal, Feby. 11, 1887.

"House of Representatives.

"February 11th, 1887.

"A message is received from the Senate transmitting the following bills and resolutions, which are referred as follows:

"H. B. 744, substitute for S. B. 295. A bill to be entitled 'An act to amend an act to incorporate the Wilmington, Onslow and East Carolina Railroad Company,' being chapter 233, p. 439, of the Laws of 1885. Placed on the calendar.

"House of Representatives.

"February 18th, 1887.

"Calendar.

"H. B. 744. S. B. 295. A bill to incorporate the Wilmington, Onslow and East Carolina Railroad Company, is put on its second reading, and passes by the following vote:

"H. B. —, 744 —

"S. B. —, 295 —

"Messrs. Speaker,

Abell,
Allman,
—Ashcraft,
—Beeson,
Bell,
—Bennett,
—Bingham,
Blevins,
—Blount,
—Brogdon,
—Chandler,
—Chappell,
—Cheek,
—Cherry,
Chillcut,
—Coffey,
—Copeland,
Crawford, of Haywood,
Crawford, of McDowell,
Crenshaw,
—Crisp,
Croom,
—Doughton,
—Davis,
Deaver,
—Dorsett,
—Ellis,
Evans,
—Ewart,
Farmer,
Franklin,
Felton,
Fries,
Gatling,
Gray,
—Green,
Halstead,
—Hampton,
Harrington,
—Hayes,
Hinton,
—Holloway,
—Holman,
Holt,
Hoover,
Howe,
Hull,
—Jordan,
Kell,
—King,
Lane,
Leazar,
—Lindsey,
—Long,
—Lyon,
Macon,
Mangum,
—Manning,
—Martin,
Mills,
Moore,
—Morgan,
—McClure,
—McKinnon,
—McMillan,
—Newsom,
—Oakley,
Osborne,
—Overman,
—Parham,
Parson,
—Paschall,
Patton,
Pearson,
—Person,
—Pinnix,
Pitman,
Pritchard,
—Pritchett,
Proctor,
—Rawls,
—Redding,
—Regan,
—Sanders,
—Sharp,
—Shaw,
—Schenck,
Snell,
—Snipes,
—Sorrell,
—Southerland,
—Speller,
Stancill,
—Stevens,

Stewart,
—Sutton,
—Surratt,
—Swain,
—Temple,
—Thomas,
Tilley,
Turner,
—Ward,
Watson, of Hyde,
Watson, of Vance,
Waters,
—Watts,
Webster, of Caswell,
Wells,
—White, of Halifax,
—White, of Perquimans,
Williams,
—Williamson,
Wilson,
—Wimberly,
—Woody,
—Worth,
—York,

Ayes ..... 69 .....
Nays.....Total....."

The copy of the record as published concerning the vote set out in the extract just above reads as follows:

"House of Representatives.

"Friday, February 18, 1887.

"Bills are taken from the calendar and disposed of as follows:

"H. B. 744. S. B. 295. A bill to [amend, etc., omitted] incorporate the Wilmington, Onslow and East Carolina Railroad Company, is put on its second reading and passes by the following vote: Those voting in the affirmative are:

"Messrs. Ashcraft, Beeson, Bennett, Bingham, Blount, Brogdon, Chandler, Chappell, Cheek, Cherry, Coffey, Copeland, Crisp, Doughton, Davis, Dorsett, Ellis, Ewart, Green, Hampton, Hayes, Holloway, Holman, Jordan, King, Lindsey, Long, Lyon, Manning, Martin, Meares, Morgan, McClure, McKinnon, McMillan, Newsom, Oakley, Overman, Parham, Paschall, Person, Pinnix, Pritchett, Rawls, Redding, Regan, Sanders, Sharp, Shaw, Schenck, Snipes, Sorrell, Southerland, Spellar, Stevens, Sutton, Surratt, Swain, Temple, Thomas, Ward, Watts, White of Halifax, White of Perquimans, Williamson, Wimberly, Woody, Worth, and York—69."

The bonds here in question were delivered to the railroad company in 1896. Just when the appellee purchased the bonds held by him is not shown. It was later than June 19, 1900, but how much later does not appear. We have found no opinion of the Supreme Court of North Carolina bearing upon the construction of the Constitution in regard to the method of recording roll-call votes earlier than Smathers v. Com'rs, 125 N. C. 480 (1899) 34 S. E. 554, and Debnam v Chitty, 131 N. C. 657 (1902), 43 S. E. 3; in other words, at the time the bonds were issued to the railroad company, the Constitution had not been construed in respect to the question now under consideration. We are therefore of opinion that appellee has a right to insist that we put our own construction on the constitutional provision, and that, if we are of opinion that the acts in question were validly enacted, his rights cannot be affected by the two opinions above mentioned. That appellee may have become a purchaser after the publication of the opinion in the Smathers Case or even after that in Debnam v. Chitty, seems to us to be of no moment. The railroad company was a bona fide purchaser for value, and there had then been no decision which so much as suggested the possibility that the Supreme Court of North Carolina would construe article 2, § 14, as it has since done. Consequently, if the railroad company were now the holder of the bonds, and if it were the appellee here, it would have a right to insist that this court put its own construction on the constitutional provision. If so, its suc-

cessor in interest, even if such successor bought with full knowledge of both the above-mentioned opinions, has this same right. Such conclusion is necessary in order to give to the predecessor the full value of its right. See Com'rs v. Bolles, 94 U. S. 104, 109, 24 L. Ed. 46; Com'rs v. Clark, 94 U. S. 278, 286, 24 L. Ed. 59; Cromwell v. County, 96 U. S. 51, 59, 24 L. Ed. 681; New Buffalo v. Iron Co., 105 U. S. 73, 75, 26 L. Ed. 1024. That we should in this case put our own construction on the constitutional provision in question is settled by a long line of decisions by the Supreme Court of the United States, only a few of which need now be mentioned.

In Burgess v. Seligman, 107 U. S. 20, 33, 2 Sup. Ct. 10, 27 L. Ed. 359, it is said:

"So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued."

See, also, Carroll County v. Smith, 111 U. S. 556, 562, 4 Sup. Ct. 539, 28 L. Ed. 517; Bolles v. Brimfield, 120 U. S. 759, 763, 7 Sup. Ct. 736, 30 L. Ed. 786; Folsom v. Ninety-Six, 159 U. S. 611, 627, 16 Sup. Ct. 174, 40 L. Ed. 278; Stanley County v. Coler, 190 U. S. 437, 445, 23 Sup. Ct. 811, 47 L. Ed. 1126; Coler v. Com'rs (C. C.) 89 Fed. 257, 261.

Wilkes County v. Coler, 180 U. S. 506, 519, 21 Sup. Ct. 458, 45 L. Ed. 642, was a case in which the Supreme Court of North Carolina had prior to the issue of the bonds indicated that it would rule as it did in cases decided after the issue of the bonds. We quote:

"After the decision in State v. Patterson, rendered as above stated before the bonds in suit were issued, it might have been anticipated that the same court would hold as they did in the subsequent cases. * * *" Page 517, of 180 U. S., page 462 of 21 Supt. Ct., 45 L. Ed. 642.

Consequently, nothing therein said can be properly considered as more than obiter as applied to the case at bar; for here there had been prior to the issue of the bonds no decision construing the Constitution as has since been done, and no intimation that such construction would ever be given it. We cannot believe that it was intended by the Wilkes county opinion (page 519, of 180 U. S., page 458, of 21 Sup. Ct., 45 L. Ed. 642) to hold that the federal courts cannot, in proper cases, independently construe state constitutions.

In addition to the cases cited hereinabove see Rowan v. Runnels, 5 How. 134, 139, 12 L. Ed. 85; Gelpcke v. Dubuque, 1 Wall. 175, 206, 17 L. Ed. 520; Havemeyer v. Iowa County, 3 Wall. 294, 303, 18 L. Ed. 38; Olcott v. Supervisors, 16 Wall. 678, 690, 21 L. Ed. 382; Thompson v. Perrine, 103 U. S. 806, 819, 26 L. Ed. 612; Taylor v. Ypsilanti, 105 U. S. 60, 70, 26 L. Ed. 1008; New Buffalo v. Iron Co., 105 U. S. 73, 75, 26 L. Ed. 1024; Railway Co. v. Doe, 114 U. S. 340, 352, 5 Sup. Ct. 869, 29 L. Ed. 136; Anderson v. Santa Anna, 116 U. S. 356, 362, 6 Sup. Ct. 413, 29 L. Ed. 633; Pleasant Township v. Insc. Co., 138 U. S. 67, 72, 11 Sup. Ct. 215, 34 L. Ed. 864; Loeb

v. Columbia, 179 U. S. 472, 492, 21 Sup. Ct. 174, 45 L. Ed. 280—all cases in which the Supreme Court of the United States had under consideration the construction of state Constitutions.

In Stanley County v. Coler, 190 U. S. 437, 444, 445, 23 Sup. Ct. 811, 47 L. Ed. 1126, the following language is used:

"The general rule undoubtedly is that we accept the interpretation put by the state courts upon the state Constitutions and statutes. There are exceptions to the rule. * * * Burgess v. Seligman was applied in Folsom v. Ninety-Six, 159 U. S. 611, 16 Sup. Ct. 174, 40 L. Ed. 278, to sustain the validity of bonds issued by the defendant township. * * * After the bonds were issued the Supreme Court of the state decided that the statutes authorizing the issue of the bonds were unconstitutional. There had been no decision to that effect prior to the issuing of the bonds. We held that the decision of the Supreme Court was not binding, and construed the Constitution and statutes for ourselves, and sustained the bonds."

It seems to us, therefore, clear that we should examine and construe the constitutional provision here in question, and in the light of such construction determine the validity or invalidity of the statutes under which the bonds were issued.

We have carefully considered the two North Carolina cases above referred to. In the Smathers Case, supra, the indication is that the court was of opinion that if there were no nay votes on the second or third reading of a roll-call bill, this fact must be affirmatively shown by a statement to this effect on the journal. In this respect, however, the statement of facts and the opinion are quite meagre, and the language of the latter is perhaps properly to be treated as mere dictum, as the statute there under consideration was clearly invalid because the first and second readings in the Senate took place on the same day.

In the case of Debnam v. Chitty, supra, the majority of the court held that the constitutional requirement had not been complied with. We quote as follows:

"We find on one page of the Journal the following written entry: 'H. B. 948, a bill to incorporate the Murfreesboro Railroad Company, passes its third reading by the following vote, and is ordered to be sent to the Senate without engrossment.' On the following page is a printed blank, which, with the entries in ink, reads as follows: 'H. B. 948; S. B. .... Messrs. Speaker (here follows the printed names of all the members of the House, with a simple (...) opposite ninety-four names). Ayes 94; nays ...; total ....' The only written entries are the figures '948' after the capital letters 'H. B.,' the dashes opposite the names, and the figures '94' after the word 'ayes.' The dotted lines after the letters 'H. B.' and 'S. B.,' and after the words 'ayes' and 'nays' and 'total,' are all printed. There is not the scratch of a pen after the words 'nays' and 'total.' From this it appears that 94 members whose names are marked voted in the affirmative, while there is no statement as to those voting in the negative. If there were any members voting in the negative, their names should have been entered upon the journal; while if there were none so voting, that fact should be affirmatively stated. To say that the mere failure to fill out a printed blank is an affirmative declaration that there were no nays is a proposition that does not commend itself either to our views of language or of law."

The following is taken from the dissenting opinion of Judge Clark:

"There being some doubt as to the accuracy of the printed journals, a certified transcript of the passage of this act from the manuscript journals has been made a part of the record, from which it appears as follows:

"'House Journal, 41st day.
"'H. B. 948. Passes its second reading, ayes 70' (names being entered): 'noes, none.'
"'House Journal, 46st day.
"'H. B. 948. Passed third reading by following vote: ayes, 94' (giving names) 'nays, ...'
"The expression, 'Passes by the following vote, ayes 94' (giving names); 'nays, ...,' is as express and intelligent a declaration that there were no negative votes as if the word 'none' had been used.
"'Nays, ...,' after the words, 'passes by following vote,' and giving those voting aye, can convey no other meaning. Is it not hypercritical to say that 'nays, ...,' did not mean that there were no names in the negative?
"The Constitution requires that the 'ayes' and 'noes' shall be entered on the journal, and it cannot be seen that this requirement has been complied with when it does not affirmatively appear that there were no 'noes,' but that fact does sufficiently and clearly appear from above transcript of the journal of the House. It is but just to the plaintiff to say that when he brought this action and filed his complaint, he had only before him the printed journals, which omit the words (on the third reading in the House) 'nays, ...,' which do appear in the manuscript journal."

After the most careful consideration that we have been able to give the subject, we find ourselves unable to adopt the construction given the clause in question by the learned Supreme Court of North Carolina. Recurring now to the journal entries in the case at bar, we are of opinion that these entries comply with the constitutional requirement. We shall for present purposes, without expressing an opinion on the question, assume that if there are a minority of members voting nay on a roll-call bill, a record should be made of such nay votes, as well as of the yea votes. But under this assumption the utmost that can be said, as we think, is that it was the duty of the clerks of the House and Senate to record both the yea and the nay votes. We cannot presume that these officers failed to perform this duty. Indeed the presumption is just the reverse. As was said in Brodnax v. Groom, 64 N. C. 244: "The courts must act on the maxim 'Omnia præsumuntur.'" Giving effect, then, to this presumption, we are bound to act on the supposition that there was no negative vote cast on either of the roll calls above mentioned. It follows that the only votes cast were yeas, and these were recorded. While the yea votes, if any are cast, are to be recorded, and while the nay votes, if any such are cast, are to be recorded; yet if no member votes nay there are of course no nay votes to be recorded. Hence, for the clerk, under such circumstances, to write in words on the journal—"Nay votes none"—seems to us to be mere work of supererogation, certainly not required under any assumption by the letter of the Constitution.

The reasoning above may perhaps be better expressed in slightly different form. It is the duty of the clerk to enter the nay votes as well as the yea votes. If the record shows only yea votes, the clerk has either (1) failed to do his duty; or (2) there were no nay votes. The court, under the circumstances of the case here, must presume that the clerk has done his duty. Consequently, the only permissible deduction is that there were no nay votes. It follows that the clerk has recorded every vote cast, and has certainly complied with the constitutional provision in so far as its meaning is expressed.

In Debnam v. Chitty the Constitution is construed to mean: It is the duty of the clerk to enter the yea and the nay votes, and, if there be no nay votes, it is further his duty to affirmatively so state. The Constitution is not thus written, and we find ourselves unable to reach the conclusion that such intent is either necessarily or fairly to be implied. The subject then under consideration by the constitutional convention was known to be of such far-reaching importance that we are constrained to believe that such intent, had it existed, would not have been left to mere implication. Moreover, we have been able to think of no sufficient reason for adding to the Constitution by implication such a requirement. If all the votes cast are affirmative (and it is clear that such is here the only permissible hypothesis), and if all these are duly entered, we do not perceive why the Constitution makers should have intended that something further be added to the record; especially as such further matter is necessarily a mere conclusion, which under the rules of law must be drawn in any event from the silence of the record. The Constitution in the words selected by its authors requires the entry of votes. In entering on the journal "nay votes none," the clerk is undeniably not entering nay votes. As the Constitution is silent concerning nay votes in cases where the only votes cast are yeas, we think the proper, if not the necessary, implication is that no entry concerning the nonexistent nay votes is required.

But it is not necessary that it should be conclusively shown that the implied intent found by the Supreme Court of North Carolina should not be found to exist. It is all-sufficient if there be a reasonable doubt as to the existence of an intent which can be found only by implication, and surely the absence of any good reason for adding to the requirements of the Constitution by implication is sufficient to create such doubt. "On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such question, and has declared that in no doubtful case would it pronounce a legislative act to be contrary to the Constitution." Dartmouth College v. Woodward, 4 Wheat. 518, 625, 4 L. Ed. 629. "* * * If I could rest my opinion in favor of the constitutionality of the law on which the question arises on no other ground than this doubt, so felt and acknowledged, that alone would in my estimation be a satisfactory vindication of it."

Ogden v. Saunders, 12 Wheat. 213, 270, 6 L. Ed. 606. "The question to be determined is whether the statute in this respect is valid. * * * The duty which the court is called upon to perform is always one of great delicacy, and the power which it brings into activity is only to be exercised in cases entirely free from doubt." Von Hoffman v. City, 4 Wall. 535, 549, 18 L. Ed. 403. "This court has the power to declare an act of Congress to be repugnant to the Constitution, and therefore invalid. But * * * every doubt is to be resolved in favor of the constitutionality of the law." The Mayor v. Cooper, 6 Wall. 247, 251, 18 L. Ed. 851. "In Commonwealth v. Smith [4 Binn. 123] the language of the court was: 'It must be remembered that for weighty reasons it has been assumed as a prin-

ciple in construing Constitutions by the Supreme Court of the United States, by this court, and by every other court of reputation in the United States, that an act of the Legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt.' And in Fletcher v. Peck [6 Cranch, 87, 3 L. Ed. 162] Chief Justice Marshall said: '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 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.' It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt." Legal Tender Cases, 12 Wall. 457, 531, 20 L. Ed. 287. "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. * * * The safety of our institutions depends in no small degree on a strict observance of this salutary rule." Sinking Fund Cases, 99 U. S. 700, 718, 25 L. Ed. 496. "The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." Hooper v. California, 155 U. S. 648, 657, 15 Sup. Ct. 207, 39 L. Ed. 297. "Such act is presumed to be valid unless its invalidity is plain and apparent. No presumption of invalidity can be indulged in; it must be shown clearly and unmistakably. This rule has been stated and followed by this court from the foundation of the government." U. S. v. Ry. Co., 160 U. S. 668, 680, 16 Sup. Ct. 427, 40 L. Ed. 576. "* * * Before a court is justified in holding that the legislative power has been exercised * * * in conflict with restrictions imposed by the fundamental law, the * * * conflict should be clear." Fairbank v. U. S., 181 U. S. 283, 285, 21 Sup. Ct. 648, 45 L. Ed. 862.

It will be observed that we do not base our conclusion on the distinction, noted in the dissenting opinion above quoted in Debnam v. Chitty, between an entire want of entry concerning nonexistent negative votes and the entry—"Nay ...." To write or have printed the word "nay" at the foot of a roll-call record, and to leave entirely blank the space thereafter intended for the number of negative votes, seems to us practically the same thing as making no mention of nay votes. We prefer to base our conclusion on the grounds above stated.

The objection that the record of the voting does not give more than the surnames of the members of the general assembly seems to us to be without merit. From the copy of the House Journal set out above it will be seen that, where there happened to be two members of the House of the same surname, they are distinguished by stating their respective counties. Consequently, giving the surnames on the journal is a sufficient compliance with the Constitution.

The amendment, referred to as chapter 404, p. 706, Acts 1887, was not passed by a roll-call vote. We have been unable, however, to perceive any reason why it should have been necessary to thus enact

it. This act does not impose any tax, or allow any county, city, or town to do so. See Brown v. Stewart, 134 N. C. 357, 46 S. E. 741, Com'rs v. Stafford, 138 N. C. 453, 50 S. E. 862.

One objection to the validity of the bonds is based on the contention that they were not legally executed. The bond copied in the record reads as follows:

"United States of America.

"State of North Carolina. County of Onslow.

"Six Per Cent. Ten-Forty Year Coupon Bond.

"Interest Payable Annually on the First Day of January in Each Year.

"Principal Payable on the First Day of January, A. D., Nineteen Hundred and Thirty-Six.

"Know all men by these presents, that for value received, the County of Onslow, in the State of North Carolina, promises to pay to ——— or bearer, the full sum of five hundred dollars. Lawful money of the United States of America, payable at the office of the County Treasurer of said County of Onslow, on the first day of January, Anno Domini, nineteen hundred and thirty-six, with interest on said principal sum at the rate of six per cent. per annum until paid. Said interest payable annually, on the first day of January, in each year at the office of said Treasurer of the County of Onslow, according to the tenor of the coupons hereto annexed, upon presentation and surrender of said coupons, respectively.

"This bond is one of a series of sixty bonds, forty of which are of the denomination of five hundred dollars each, and twenty of which, are of the denomination of one thousand dollars each. All of like date and tenor aggregating forty thousand dollars, and numbered consecutively from one (1) to sixty (60), inclusive; with option to said county of Onslow, to redeem any or all of the bonds of this series, at any interest period, after ten years, from the date thereof, upon payment of principal and all interest due at the time of redemption; executed and delivered in pursuance of a vote of a majority of the qualified voters of the said county of Onslow at an election held in said county, on the twenty-fourth day of January, 1888. By order of the Board of County Commissioners of said Onslow County, pursuant to an Act of the General Assembly of North Carolina. Entitled 'An Act to incorporate the Wilmington, Onslow and East Carolina Railroad Company.' Ratified the fifth day of March, Anno Domini, eighteen hundred and eighty-five, and acts amendatory thereof.

"In witness whereof, the said County of Onslow, has caused this bond to be signed by the Chairman of its Board of County Commissioners, and countersigned by the clerk of said board, and by the Treasurer of the said County, and has caused its corporate seal to be hereto affixed, and the attached coupons to be attested by the signature of the said Treasurer of the County this first day of January, Anno Domini, eighteen hundred and ninety-six.

"C. C. Morton,

"Clerk of the Board of County Commissioners of Onslow County, N. C.

"D. J. Sanders,

"Chairman of the Board of County Commissioners of Onslow Co., N. C.

"[Seal of Board of Commissioners of Onslow County.]

"J. F. Cox, Treasurer of Onslow County, N. C."

In considering the question here raised we shall leave out of view any possible application of the doctrine of estoppel. The language of the act of 1885, in so far as now of importance, is found in section 14, ante. The amendments do not seem to affect the question before us. While the act above quoted is not as specific as it might be concerning the execution of the bonds, we are satisfied that the direction that the bonds "of said county" are to be "issued" by a

board of trustees should not be construed as requiring that the bonds should be executed by the trustees. The word "issue" was, we think, used in its ordinary sense, and means "send out," "emit," "deliver." See 4 Words & Phrases, 3779, Corning v. Com'rs, 102 Fed. 57, 60, 42 C. C. A. 154; Perkins County v. Graff, 114 Fed. 441, 444, 52 C. C. A. 243. As the act of 1885 is therefore silent on the subject of the execution of the bonds, we think the intent was that the bonds should be executed by the board of commissioners of Onslow county. By section 702 of the Code of North Carolina, every county is declared a body politic and corporate. By section 703 the powers of a county are to be exercised by the board of commissioners, or in pursuance of a resolution adopted by them. One of the powers of the counties to be thus exercised is (section 704, Code) to make contracts. By section 712 it is made the duty of the clerk of the board "to record all the proceedings of the board; to enter every resolution or decision concerning the payment of money; and to record the vote of each commissioner on any question submitted to the board, if required by any member present." The records kept by the clerk of the board do not show a formal resolution directing the execution of the bonds The record of the meetings of March 3, 1896, and of April 6, 1896, read as follows:

"Commissioners met Tuesday March 3, 1896, according to adjournment for the purpose of issuing bonds to the W. N. & N. Railroad and other business.

"Present: D. J. Sanders, Chairman, A. N. Sanderlin, John Gurganus, G. D. Mattocks, G. H. Simmons.

"Whereas, suits have been brought against the commissioners of Onslow county by the Wilmington, Onslow and East Carolina Railroad Company (now the Wilmington, Newberne and Norfolk Railway Company) and by the Wilmington, Newberne and Norfolk Railway Company to compel the issue of sixty thousand dollars of bonds of said county in payment of the subscription by said county to said railroad company, in pursuance of an election held January 24, 1888, and in accordance with the provisions of the act of 1885, (page 439, chapter 233) and the amendments thereto, which said suits are pending in the superior court of Lenoir county, N. C.

"Whereas, compromise of said suits has been effected whereby the county of Onslow by surrendering its claim to any of the capital stock in said railroad company, such stock being regarded as of little or no value, will save to the taxpayers of said county a large sum of money, viz., twenty thousand dollars principal in bonds and interest thereon.

"Now, therefore, it is ordered by the board of commissioners of Onslow county, that the following adjustment and compromise of said suits, as heretofore agreed upon by the parties thereto, be accepted and spread upon the records of the board of commissioners as a final settlement of said suit, viz.:

"First. The railroad company shall surrender its claim to twenty thousand dollars of bonds heretofore voted. It shall surrender all back interest claimed to be due on all such bonds. It shall pay all the cost of said suits not heretofore adjudged against the defendants, and all the cost of printing the bonds to be issued, except the sum of twenty-five dollars.

"Second. The county commissioners shall issue to the Wilmington. Newberne and Norfolk Railway Company, the successor of the aforesaid Wilmington, Onslow and East Carolina Railroad Company, forty thousand dollars in coupon bonds as follows: forty bonds of five hundred dollars each and twenty bonds of one thousand dollars each, to be executed according to law, to bear interest at six per cent., payable annually, principal and interest, payable in lawful money of the United States, said bonds to mature in forty years from January 1, 1896, with option to the county to redeem any or all of said bonds at the end of ten years; and the county shall surrender all claim to any of

the capital stock of the said railroad company, and shall pay twenty-five dollars towards the expense of engraving or printing said bonds, which bonds shall be ordered by the said railroad company and presented to the board of county commissioners to be properly executed.

"Ordered, that the Wilmington, Newberne & Norfolk R. R. Company be allowed $25 for amount agreed to be paid by county on printing bonds, etc. Ordered that M. D. W. Stevenson be allowed $265, to be made in three vouchers, two for $100 each and one for $65 for fees in R. R. case. Ordered that E. Gilman be allowed $235 on vouchers as follows, one for $125, two vouchers $55 each, fees for R. R. case. Ordered that F. Thompson be allowed $200 for services as attorney in railroad suit. Ordered that the receipt of Col. A. M. Waddell for the W. N. & N. Railroad be accepted, and the clerk record the same and file the original.

"Commissioners met first Monday in April, it being the 6th day.

"Present: D. J. Sanderlin, Chairman, G. D. Mattocks, G. H. Simmons, A. N. Sanderlin, John Gurganus.

"Ordered that J. F. Cox be allowed $2.50 for signing county railroad bonds March 3, 1896."

The parol evidence is to the effect that after the board had convened for the purpose of executing these bonds, and in the board room, the chairman, the clerk of the board, and the county treasurer signed the bonds, and the county treasurer alone signed the coupons. Who impressed the seal on the bonds and when it was done does not appear. All five of the members of the board were present during at least a part of the time required for the signing, and the board was in session during all of the time. A careful reading of the evidence has satisfied us that the execution of the bonds was done in the presence of at least a majority of the board, with the full approval of the entire board, and that such execution was intended to be the act of the board. It cannot be asserted that there was a formal resolution put and carried to the effect that the board execute the bonds in the manner above stated, but what was done was, we think, equivalent thereto.

Speaking of private corporations, Prof. Page says:

"The board of directors, acting at lawful meetings, is the chief agency for directing and controlling the business of the corporation. The acts of such board at a lawful meeting bind the corporation, though no formal resolution to make the contract in question is adopted. The fact that no written record of the proceedings of the board of directors is kept does not prevent their conduct from binding the corporation." 2 Page, Contracts, § 979.

In 4 Thompson on Corporations, § 4624, in speaking of corporate contracts executed by the president of the company, it is said:

"* * * If the person dealing with the corporation is driven to make proof of the authority of its president to act for it and bind it in the particular transaction, then there is a principle that this proof need not be made in the form of a resolution of the board of directors, duly entered upon the records of the corporation, conferring the authority upon the president; but that the act of the directors may be shown by an oral vote, and may be otherwise proved by parol, and often, equally well, by circumstantial evidence."

And again (5 Thompson on Corporations, § 6175) it is said:

"On principles elsewhere considered, an authorization by the directors to the ministerial officers of the corporation, to execute even so important an instrument as a mortgage of its properties, need not be shown by any formal

resolution of their board; but the presence of the corporate seal upon the instrument, with the signatures of the proper officers, generally the president and secretary, is presumptive evidence that the proper precedent authority had been given. If such officers execute the instrument with the knowledge and concurrence of the directors, or with their subsequent and long-continued acquiescence, it will be regarded as the act of the corporation, although there was no precedent authority by a formal resolution or vote."

In 17 Am. & Eng. Ency. (1st Ed.) p. 86, it is said:

"It is not necessary that all the doings of a board of directors should be entered upon their records, but the corporation will be bound by any verbal order or direction in which a majority of such directors concur in relation to any business deputed to them."

In 21 Am. & Eng. Ency. (2d Ed.) p. 50, it is said:

"It is essential to the validity of municipal bonds that they be signed by or with the authority of the officers designated by the statutes. * * * In the absence of any statutory direction, municipal bonds may be signed by any officer of the municipality whom its governing boards designate therefor."

See, also, Montgomery v. Township (C. C.) 43 Fed. 363.

As to the propriety of receiving parol testimony to show the facts concerning the execution of the bonds, see 1 Dillon, Municip. Corps. (4th Ed.), § 300 (237); Bank v. Dandridge, 12 Wheat. 64, 6 L. Ed. 552; Bridgford v. City (C. C.) 16 Fed. 910; Allis v. Jones (C. C.) 45 Fed. 148; Rondot v. Rogers Township, 99 Fed. 202, 210, 39 C. C. A. 462.

The validity of the election held under the act of 1885 has been decided in the suit the railroad company instituted against the county commissioners, reported in 116 N. C. 563, 21 S. E. 205. The objection that delivery of the bonds was made by the board of county commissioners, and not by the board of trustees, as directed by the statute above mentioned, seems to us without merit. We regard the provision as merely directory, and therefore of such nature that disregard thereof could not have the effect of invalidating the bonds. Again, we think this provision was made solely for the benefit of the railroad company. As we read the statute, the intent was that the county commissioners should execute all of the bonds, and put them in escrow, so to speak, in the hands of the trustees, to be by the latter delivered from time to time as the work of construction advanced. The refusal of the commissioners to execute the bonds, and the delay caused by the resulting litigation, made the use of the method provided by the statute unnecessary. The railroad company therefore waived, as it had the right to do, the provision in question, and elected to receive the bonds accepted in compromise directly from the county commissioners. The fact that the bonds issued provide for annual payments of interest, while the act of 1885 specified semi-annual interest payments, seems to us of no moment. This provision was made for the benefit of the railroad company. If the company was willing to and did waive the benefit thereof, and accepted bonds providing for only annual interest payments, such fact cannot invalidate the bonds; and such contention is not made. With the argument that this departure from the terms of the act of 1885 prevents appellee from claiming the rights of an innocent holder for value we need not concern ourselves.

It is urged upon us by the learned counsel for appellants that the bonds here are invalid because the statute under which these bonds were issued authorized the issue of bonds only in payment for stock of the railroad company. We find it unnecessary to here consider the question of estoppel relied on by counsel for appellee.

The result of the election and the ruling of the Supreme Court of North Carolina in the suit of Railroad Company v. Com'rs, 116 N. C. 563, 21 S. E. 205, above referred to, made it incumbent on the county commissioners to subscribe to the stock of the railroad company to the extent of $60,000, and to issue a like amount of county bonds in payment of such subscription. At the time of the compromise between the railroad company and the county commissioners the stock was valueless. There is not a suggestion of fraud or wrong, or even of error of judgment, on the part of the commissioners in agreeing to issue only $40,000 of bonds, and to relinquish all claim to the worthless stock. Express authority to thus act is not given in the statute of 1885. But we think, nevertheless, that the board had authority so to act. The powers of a county, to be exercised by its board of county commissioners (section 703, Code), are, inter alia: (1) To sue and be sued in the name of the board of commissioners. (2) To make such contracts, and to purchase and hold such personal property, as may be necessary to the exercise of its powers. (3) To make such orders for the disposition or use of its property as the interest of its inhabitants require. Code, § 704. The statutes were enacted in 1868 and re-enacted as sections of the Code in 1883. Certainly the act of 1885 was passed and is to be considered with reference to these sections of the Code. If the commissioners had subscribed for $60,000 of the railroad company's stock, and had issued an equal amount of bonds therefor, we apprehend that no one would question the right of the commissioners thereafter, acting in good faith and in the "interest of the inhabitants" of the county, to exchange the valueless stock for $20,000 of the bonds, surrender the stock, and destroy such bonds. Such power is undoubtedly given by the Code sections above quoted, and is not affected by anything in the act of 1885; and, as the method pursued by the commissioners is the exact equivalent of the course which they might have followed, it seems clear that no valid objection can be founded on such acts. Again, the power to sue and to defend suits carries with it, by necessary implication, the power to make bona fide compromise adjustments of such suits. 1 Dill. Mun. Corp. (4th Ed.) § 477 (398), and notes; 15 Am. & Eng. Ency. (1st Ed.) p. 1050, and notes. The compromise agreement here was not only entirely free from fraud, but, as the stock was valueless, it was beneficial to the interests of the county.

It follows from what has been said in regard to the constitutionality of the act of 1885 and the amendments thereto that we find it unnecessary to consider the contention that authority to issue the bonds in question can be found in sections 1996, 1998, and 1999 of the Code.

That the trial court had jurisdiction of the case at bar on the equity side seems clear. The remedy of complainant below at law was not

adequate or complete. Moreover, the fund in the hands of the county treasurer arose from taxes levied and collected for the payment of the January 1, 1904, coupons. Under the allegations made in the bill and under the facts in evidence, this fund is impressed with a trust in behalf of the appellee and the other owners of the coupons. Coler v. Board (C. C.) 89 Fed. 257, 260; McKee v. Lamon, 159 U. S. 317, 322, 16 Sup. Ct. 11, 40 L. Ed. 165.

In conclusion, it should be stated that we find what appears to us to be an inadvertent error in the decree of November 11, 1905, in a respect not assigned as error. The complainant is the owner of the 1904 coupons, of only 19 of the 20 $1,000 bonds, and of only 30 of the 40 $500 bonds. The decree orders the county treasurer to put into the hands of the receiver the entire proceeds of the tax levied to pay the 1904 coupons. We doubt if the court below had authority to require the surrender of such part of the fund as does not belong to the appellee. This decree, as we construe it, also requires the county treasurer to pay to the receiver a sufficient sum to cover interest on the amount at least due appellee since January 1, 1904. That appellee has a right to recover a judgment for interest is not here questioned; but, if the treasurer is to pay the interest on appellee's coupons out of a fund sufficient only to pay the principal of all of the 1904 coupons, it is evident that an injustice may be done the holders of the remaining coupons of that year. We are, of course, not now called upon to express an opinion as to the proper method to be pursued by appellee to secure payment of interest on the sum which should have been paid to him on January 1, 1904. While, under rule 11 of the court (90 Fed. cxlvi, 31 C. C. A. cxlvi), we can notice this apparent error and direct a modification of the decree, we do not think it necessary to do so. This feature of the decree was not assigned as error, and counsel for appellants on the argument advised us that all that was wanted was an adjudication of the validity or invalidity of the bonds. The lower court can if it seems proper to it modify the decree in the respects mentioned. Under the circumstances here, we do not deem it necessary to direct such modification. We are therefore of opinion to affirm and remand the cause for such further proceedings as may be proper.

Affirmed.

HOLLISTER et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 16, 1906.)

No. 2,253.

1. INDIANS—CRIMES—STATUTES.

Where, on scire facias on a forfeited recognizance, the record did not disclose that the accused was an Indian or that he stole the property charged from another Indian, he was not subject to Act Cong. March 3, 1885, § 9 (23 Stat. 362, c. 341), declaring that all Indians committing certain designated offenses against the person or property of another Indian within or without the territory of an Indian reservation shall be subject to the laws of the territory relating to such crimes, and

shall be tried in the same courts and be subject to the same penalties as are all other persons charged with the commission of such crimes.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indians, § 66.]

2. SAME—FEDERAL COURTS—JURISDICTION—STATUTES.

Act Cong. Feb. 2, 1903, c. 351, 32 Stat. 793 [U. S. Comp. St. Supp. 1905, p. 719], conferring jurisdiction on the federal District Courts of the District of South Dakota to try prosecutions for larceny committed by any person on any Indian reservation within the state, was within the power of Congress as an instrumentality employed in the discharge of a national duty to the Indians.

3. SAME—STATES—JURISDICTION—RELINQUISHMENT—CONSENT OF PEOPLE.

South Dakota Const. art. 26, declares that all Indian lands within the state shall remain under the absolute jurisdiction and control of Congress until the Indian title thereto shall be extinguished by the United States, and that jurisdiction be ceded to the United States over the military reservations and shall be irrevocable without the consent of the United States, and also the people of South Dakota "expressed in their legislative assembly." By Act Cong. Feb. 8, 1887 (24 Stat. 389, c. 119); large bodies of lands embraced within the several reservations within South Dakota, permanent improvements erected thereon, and stock and personal property derived from the government became exempt from state taxation, and the state by Sess. Laws S. D. 1901, p. 132, c. 106, relinquished to the United States exclusive jurisdiction to arrest, prosecute, and punish all persons commiting offenses denounced by Congress on any Indian reservation within the state. *Held*, that such acts were sufficient to evidence the assent of the people of South Dakota to Act Cong. Feb. 2, 1903, c. 351, 32 Stat. 793 [U. S. Comp. St. Supp. 1905, p. 719], conferring jurisdiction on federal courts to try certain offenses committed on any Indian reservation in such state.

4. SAME—PUNISHMENT—STATUTES.

Act Cong. Feb. 2, 1903, c. 351, 32 Stat. 793 [U. S. Comp. St. Supp. 1905, p. 719], providing for the punishment of certain offenses committed on any Indian reservation in South Dakota, and declaring that persons committing such offenses shall be subject to the same penalties and punishments as "are" all other persons convicted of such crimes under the laws of the state of South Dakota, fixed the punishment for the offenses as provided by the laws of South Dakota at the time the act was passed, and was not objectionable as delegating to the state authority to fix the punishment in the future for such federal offenses.

5. COURTS—RULES OF DECISION—FEDERAL COURTS.

On the question whether a writ of scire facias on a forfeited recognizance is the commencement of a new action or a mere continuation of another original proceeding, the decisions of the Supreme Court of the United States are conclusive on the federal, Circuit, and District courts.

6. BAIL—SCIRE FACIAS—NATURE OF WRIT—SUFFICIENCY.

A scire facias on a forfeited recognizance takes the place of the declaration in an original suit, and its sufficiency must be determined by its averments alone, apart from the record on which the writ issues.

7. SAME—EVIDENCE.

In a proceeding by scire facias on a forfeited recognizance, the record on which the writ issued is admissible in evidence to establish plaintiff's cause of action.

8. JURY—TRIAL BY JURY—RIGHT—FEDERAL COURTS—SCIRE FACIAS.

Under Const. U. S. Amend. 7, guarantying the right to trial by jury in controversies exceeding $20 in value, and Rev. St. U. S. § 566 [U. S. Comp. St. 1901, p. 461], declaring that a trial of issues of fact in the District Courts in all cases, except cases in equity and cases of admiralty and maritime jurisdiction and except as otherwise provided in proceedings in bankruptcy, shall be by jury, defendants in a proceed-

ing by scire facias on a forfeited recognizance in a federal District Court in which the United States sought to recover $1,000 were entitled to a trial by jury of issues of fact tendered unless such right was waived.

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

9. BAIL—SCIRE FACIAS—WRIT—ALLEGATIONS—SUFFICIENCY.

Where a scire facias on a forfeited recognizance alleged that W., as principal, and defendants, as sureties, entered into a recognizance on a given date before the trial court, binding themselves to pay the United States $1,000 if the principal should fail to appear in that court at a term and time specified to answer a charge of the United States exhibited against him, and that he failed to so appear and after such failure a default and forfeiture were duly adjudged by the court, it was not demurrable for failure to allege the nature of the charge against W., that the same was pending against him at the time the recognizance was forfeited, and that the recognizance was made a matter of record, etc.

10. SAME—BREACH OF RECOGNIZANCE.

Act Cong. Nov. 3, 1903 (28 St. 5, c. 10), declared that the state of South Dakota should constitute one judicial district only, but for the purpose of holding terms of the District Court the district was divided into four divisions, and required court to be held at Aberdeen for the Northern Division, at Sioux Falls for the Southern, at Pierre for the Central, and at Deadwood for the Western, Division. Section 3 declared that the terms of the Circuit and District Courts of the United States for the state of South Dakota should be held at Sioux Falls on the first Tuesday in April and the third Tuesday in October, at Aberdeen on the first Tuesday of May and the third Tuesday of November. *Held*, that such court was the same court, whether held in one division or the other, so that where a recognizance bound accused to appear at the next term of the court to be held at Sioux Falls on Tuesday, October 18, 1904, and from time to time and term to term, etc., thereafter, and he was subsequently ordered to appear for trial at the November, 1904, term, to be held in Aberdeen, his failure there to appear constituted a breach of his recognizance.

11. SAME—PLEADING—VARIANCE—MATERIALITY.

In scire facias on a forfeited recognizance, the writ declared that defendants appeared before United States District Court and entered into the recognizance in question on July 6, 1904, and that the recognizance was conditioned that the principal should appear before "our District Court of the United States, at the next term of United States District Court to be held in the federal building at Sioux Falls, South Dakota, to wit, on Tuesday, October 18, 1904." The recognizance offered in evidence bore date as having been approved and filed July 6, 1904, but the notary before whom the sureties acknowledged the same certified that they appeared before him on "July 6, 1894," and the recognizance was conditioned that the said principal should be and appear at the next term of court of United States, to be holden at Sioux Falls, S. D., in and for the judicial district of South Dakota. *Held*, that such variances were not material, the first being a mere clerical error of the notary, and the second being insufficient to create any uncertainty as to the court in which the principal was required to appear.

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

Joe Kirby and S. H. Wright, for plaintiffs in error.

William G. Porter (James D. Elliott, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was a writ of scire facias issued by the District Court of the United States for the District of South Dakota against Frank Waugh, as principal, W. C. Hollister and Thomas Scanlan, as sureties, upon a forfeited recognizance for $1,000 given to secure Waugh's appearance at the next term of that court to answer a criminal charge preferred against him, consisting of the larceny of two mares committed on the Rosebud Indian reservation. Waugh not being found, service of the writ was made against the sureties only, and they are now the only parties defendant.

The record does not disclose that Waugh was an Indian or that he stole the property of an Indian. He was, therefore, not subject to the provisions of section 9 of the act of March 3, 1885 (chapter 341, 23 Stat. 362), and was not indicted under that act. By Act Feb. 2, 1903, c. 351, 32 Stat. 793 [U S. Comp. St. Supp. 1905, p. 719], under which he was indicted, Congress undertook to confer jurisdiction upon the Circuit and District Courts of the District of South Dakota to try cases, among others, of larceny committed by any person upon any Indian reservation of that state. It is urged at the outset that Congress did not possess power to confer such jurisdiction upon the national courts, certainly without the consent of the state in which the reservation affected might be located.

Upon the adoption of the general policy disclosed by the act of February 8, 1887 (chapter 119, 24 Stat. 389), looking towards the cessation of tribal relations, division of the lands in severalty among the Indians, establishment of homes for them, and bestowal of the rights of citizenship upon them, a serious and important trust devolved upon the United States. This has been expressed by the Supreme Court in various ways, such as "these Indians are yet the wards of the nation, in a condition of pupilage or dependency, and have not been discharged from that condition. * * * It is a part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship." U. S. v. Rickert, 188 U. S. 432, 437, 23 Sup. Ct. 478, 480, 47 L. Ed. 532. "The recognized relation between the government and the Indians is that of a superior and an inferior, whereby the latter is placed under the care and protection of the former." Matter of Heff, 197 U. S. 488, 498, 25 Sup. Ct. 506, 507, 49 L. Ed. 848. The obligation cast upon the legislative and executive departments of the government to administer upon and guard the tribal property and determine when and on what conditions it should be vested absolutely in the individual Indian, as declared in Cherokee Nation v. Hitchcock, 187 U. S. 294, 23 Sup. Ct. 115, 47 L. Ed. 183; Lone Wolf v. Hitchcock, 187 U. S. 553, 23 Sup. Ct. 216, 47 L. Ed. 299; Stephens v. Cherokee Nation, 174 U. S. 445, 19 Sup. Ct. 722, 43 L. Ed. 1041, discloses the appropriateness and wisdom of the policy of reserving to the United States courts criminal jurisdiction over certain offenses specified in the act of February 2, 1903. It was a reasonable thing, in line with the paternal duty imposed upon the nation, to make a demonstration to its wards in the vicinity of their abode of the benefits and advantages of a well-governed community.

If it was the duty of the nation to care for them as its wards and develop them into a condition of civilized life and merited citizenship, power to adopt all reasonable methods to that end, of course, existed. As said in United States v. Rickert, supra, and U. S. v. Kagama, 118 U. S. 375, 384, 6 Sup. Ct. 1109, 30 L. Ed. 228, from the considerations just alluded to "there arises the duty of protection, and with it the power."

The assumption of jurisdiction found in the act of February 2, 1903, comes fairly within the power of Congress as an instrumentality employed in the discharge of the national duty toward the Indians. Utah & N. Ry. v. Fisher, 116 U. S. 28, 6 Sup. Ct. 246, 29 L. Ed. 542. In our opinion, too, that jurisdiction was assumed with the assent of the people of South Dakota. The last section of the last-mentioned act recites that it was passed pursuant to a cession of jurisdiction by that state. The state, by the act of February 14, 1901 (Sess. Laws S. D. 1901, p. 132, c. 106), relinquished to the United States exclusive jurisdiction to arrest, prosecute, and punish all persons who might commit upon any Indian reservation in the state for any offenses which might be denounced by Congress. This cannot be said to be an arbitrary relinquishment of power inconsistent with the sovereignty of a state. It was made at a time when, as a result of the adoption of the policy announced in the act of February 8, 1887, large bodies of land embraced in the several reservations within the confines of South Dakota, permanent improvements erected thereon, and stock and personal property derived from the government and used in connection therewith became exempt from taxation for support of the state government (U. S. v. Rickert, supra), and at a time when tribal reservations under the act of 1887 were fast being disintegrated by allotments of lands in severalty to Indians and the opening of the balance to general settlement. The act of February 2, 1903, ex vi termini, became inoperative so far as any particular reservation was concerned upon the extinguishment of the Indian title. Bates v. Clark, 95 U. S. 204, 208, 24 L. Ed. 471, Buster v. Wright, 135 Fed. 947, 952, 68 C. C. A. 505, and common knowledge tells us that the Indian title is being rapidly extinguished, and that we may reasonably expect in the near future such progress in that direction as to leave few, if any, Indian reservations in existence. Accordingly the ceding of jurisdiction by the state of South Dakota may well be considered a mere temporary expedient, relieving the state for the time being from burdens which, for want of power to impose taxes upon property of Indians, had become heavy and difficult to bear, and as a permissible and worthy co-operation with the national government in the discharge of its duties and obligations towards the Indians. For the reasons just suggested, the relinquishment of limited jurisdiction such as is involved in this case comes fairly within the general legislative power of the state.

Instances of relinquishment and acceptance of criminal jurisdiction by state Legislatures and the national Congress, respectively, over forts, arsenals, public buildings, and other property of the United States situated within the states, are common, and their legality has

never, so far as we know, been questioned. Obvious considerations of public policy and convenience which have prompted such legislation apply, in our opinion, with equal force to the relinquishment and acceptance of jurisdiction temporarily over Indian reservations. The method of relinquishing such jurisdiction by act of the Legislature of a state and the acceptance thereof by the Congress of the United States, has been without objection recognized as effectual and lawful. Peters v. Malin (C. C.) 111 Fed. 244; In re Lelah-Puc-Ka-Chee (D. C.) 98 Fed. 429. But, if it be true that such legislation by a state needs authorization by the people, we are of opinion that the Legislature of South Dakota was by fair intendment of language employed, authorized by the Constitution of the state to relinquish jurisdiction to the United States, even of a more permanent character than what was done by the act of February 2, 1903.

Pursuant to the requirements of the enabling act of Congress, the people of South Dakota in the adoption of their Constitution in 1889 agreed, among other things, by article 26, that all Indian lands should remain under the absolute jurisdiction and control of Congress until the Indian title thereto should be extinguished by the United States, and that jurisdiction should be ceded to the United States over the military reservations of Ft. Mead, Ft. Randall, and Ft. Sully. And as part of that article it was ordained that the same should be irrevocable without the consent of the United States, and also the people of South Dakota "expressed by their legislative assembly." The provisions of article 22 of the Constitution made them also irrevocable without like consent of the people "expressed by their legislative assembly." These provisions of the Constitution received a practical construction in the Political Code adopted by the Legislature soon after the organization of the state government, in which the sovereignty and jurisdiction of the state are made subject to "such limitations and qualifications of jurisdiction as have been or may hereafter be ceded by law to the United States," and in which jurisdiction is ceded over other lands acquired by the United States for public buildings and public works, as long as such lands shall remain the property of the United States. Revised Code of South Dakota, 1903, Political Code, p. 3. We are of opinion that tested by the methods prescribed by the Constitution for securing the consent of the people in kindred matters above referred to their consent to the cession of criminal jurisdiction over Indian reservations is sufficiently expressed by the act of their Legislature in question.

Objection is made to that act because it adopts the punishment for the crime of larceny as provided by the state of South Dakota. This kind of legislation first found expression in Act March 3, 1825 (chapter 65, 4 Stat. 115), and subsequently in Act July 7, 1898, c. 576, 30 Stat. 717 [U. S. Comp. St. 1901, p. 3652]. In U. S. v. Paul, 6 Pet. 141, 8 L. Ed. 348, the Supreme Court had under consideration the third section of the act of 1825, which reads:

"That if any offense shall be committed in any of the places aforesaid [referring to forts and other public places the sites of which had been ceded to the United States] the punishment of which offense is not specially provided for by any law of the United States, such offense shall, upon a con-

viction in any court of the United States having cognizance thereof, be liable to and receive the same punishment as the laws of the state in which such fort, etc., is situated, provide for the like offenses when committed within the body of any county of such state."

That court, by Chief Justice Marshall, held that that section adopted the punishment provided for by state statutes in effect at the time when the act of Congress was passed, and must be so limited. That decision has been accepted as the law from that day to this. The act of February 2, 1903, supra, is not inconsistent with the rule so announced. It employs the present tense in referring to the punishments provided by the laws of South Dakota, which it adopts. The language is:

"Shall be subject to the same penalties and punishments as are all other persons convicted of either of said crimes under the laws of the state of South Dakota."

It does not purport to delegate to the state of South Dakota authority at any time in the future to fix, ad libitum, the punishment of federal offenses. This it could not do. Congress seems to have been willing to adopt the punishment as fixed in 1903 by the laws of South Dakota for the crime of larceny, and such adoption was, in our opinion, competent legislation. U. S. v. Paul, supra; U. S. v. Barnaby (C. C.) 51 Fed. 20; U. S. v. Barney, 5 Blatchf. 294, Fed. Cas. No. 14,524.

A writ of scire facias on a forfeited recognizance is a judicial writ founded upon and to be proved by the record of the court taking it. Decisions of state courts are numerous and conflicting as to whether it is the commencement of a civil action or a continuation of some other original proceeding, whether it performs the function of a writ only or those of a writ and declaration, and whether the defendant may plead to the writ or whether the plea goes to the record on which it is founded. But, as the decisions of the Supreme Court of the United States are clear and controlling on these questions, the long list of state cases to which our attention is called need not be considered for the purpose of extracting a rule for our government. In Winder v. Caldwell, 14 How. 434, 14 L. Ed. 487, it is said:

"A scire facias is a judicial writ used to enforce the execution of some matter of record on which it is usually founded; but though a judicial writ, or writ of execution, it is so far an original that the defendant may plead to it. As it discloses the facts on which it is founded, and requires an answer from the defendant, it is in the nature of a declaration, and the plea is properly to the writ."

In United States v. Payne, 147 U. S. 687, 13 Sup. Ct. 442, 37 L. Ed. 332, it is said:

"While a scire facias to revive a judgment is merely a continuation of the original suit, a scire facias upon a recognizance * * * is as much an original cause as an action of debt upon a recognizance, or a bill in equity to annul a patent"—citing Winder v. Caldwell and Stone v. U. S., 2 Wall 525, 17 L. Ed. 765.

In Hunt v. United States, 166 U. S. 424, 17 Sup. Ct. 609, 41 L. Ed. 1063, it is held that notwithstanding the fact that the writ of scire

facias upon a recognizance to answer to a criminal charge is a case "arising under the criminal laws," within the meaning of the act of March 3, 1891 (chapter 517, 26 Stat. 828), relating to the appellate jurisdiction of the Circuit Courts of Appeal, it is nevertheless a civil action. In Browne v. Chavez, 181 U. S. 68, 21 Sup. Ct. 514, 45 L. Ed. 752, it is held that a scire facias is an "action" within the meaning of statutes of limitations, barring "all actions founded upon any judgment," and it is there reiterated that the "averments in the writ are equivalent to a petition or declaration." See, also, to the same effect, Owens v. Henry, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837. The Supreme Court of Michigan in the case of McRoberts v. Lyon, 79 Mich. 33, 44 N. W. 163, relying upon and citing in support Winder v. Caldwell, announces the doctrine that the writ stands for the declaration at common law and presents the plaintiff's whole case.

From the principles announced in the foregoing authorities certain conclusions inevitably follow: First. The record upon which the writ issues is not a part of the declaration. It is the evidence upon which plaintiff must rely to prove the case, and the legal sufficiency of the declaration must be determined, as in ordinary cases of pleading, from a consideration of its averments. Second. Under the provisions of the seventh amendment to the Constitution, guarantying the right of trial by jury in controversies exceeding in value the sum of $20, and the provisions of section 566 of the Revised Statutes [U. S. Comp. St. 1901, p. 461], that "a trial of issues of fact in the District Courts in all causes except cases in equity and cases of admiralty and maritime jurisdiction and except as otherwise provided in proceedings in bankruptcy, shall be by jury," the defendants were entitled to a trial by jury if any issue of fact was tendered by them, unless they duly waived such right.

The defendants demurred to the declaration on the ground that it failed to state facts sufficient to constitute a cause of action. It stated, in substance, that Waugh, as principal, and the defendants, as sureties, entered into a recognizance on a given date before the court below, binding themselves to pay to the United States $1,000 if the principal should fail to appear in that court at a term and time specified "to answer a charge of the United States exhibited against him;" that he failed to so appear, and that after such failure a default and forfeiture were duly adjudged by the court. Nothing is here lacking to show that defendants incurred a liability to the United States under the strict terms of their contract as pleaded. It is true the ultimate facts on which the right of recovery is predicated are alone pleaded. There is no waste of words in narration of evidential facts. In these respects the declaration conforms strictly to a very necessary and desirable rule of pleading. It may be that the pleader should, for defendants' information, have been required to state some extraneous facts disclosing the nature of the charge against Waugh—how he became subject to the jurisdiction of the court, whether the charge was pending against him at the time of the forfeiture of the recognizance, when the recognizance was filed in the court below, and other such evidential facts—but whether so or not, the absence of such facts

from the declaration does not, in our opinion, render it obnoxious to a demurrer. If the information suggested had been necessary for defendants' use in preparing for a trial, it doubtless could have been obtained by some special demurrer or motion to make the declaration definite and certain, or motion for a bill of particulars.

There is no doubt of the proposition contended for by defendants' counsel that there must have been some criminal charge exhibited against Waugh; that the same must have been pending against him at the time of the forfeiture of the recognizance; that the recognizance must have been made matter of record, etc.; but all such matters are evidential in their character. The record when offered to prove the case must disclose them or the case fails; but to hold that any of them must be averred in detail in the declaration is to hold that plaintiff must plead his evidence, instead of the ultimate facts on which recovery is based. We think the declaration was sufficient as against the general demurrer.

The defendants' answer contains a denial that they made, executed, or delivered the bail bond or undertaking described in the scire facias, and at the opening of the case defendants objected to its trial by the court without a jury. This objection being overruled, defendants properly saved their exception. We think, in consideration of what has already been said concerning the nature of the proceeding by scire facias, and especially in the light of the observation of Mr. Justice Brown in United States v. Payne, supra, to the effect that scire facias upon a recognizance is as much an original cause as an action of debt upon a recognizance, that the learned trial judge erred in overruling defendants' objection to a trial without a jury. An issue of fact was properly tendered by them. In the case of Hunt v. United States, supra, which was a scire facias on a forfeited recognizance, the Supreme Court deemed the question of a right of trial by jury so pertinent as to specially call attention to the fact that a jury had been waived in writing. It may be that the denial interposed was intended to relate to some legal feature of the record which, when offered, would present only a question of law, but we are not sufficiently sure of this from the record before us to sustain the position taken by the learned trial judge on the pleadings as they stood at the time the objection was made.

It is next contended that there was no breach of the recognizance stated in the declaration. The recognizance required Waugh to appear before the court "at the next term * * * to be held in the court room in the federal building at Sioux Falls, South Dakota, to wit, on Tuesday, October 18, 1904, and from time to time at said term and all subsequent terms of said court when required by the order of said court * * * to answer," etc. It is averred that on October 18, 1904, the case was duly called for trial, both sides appearing, when it was ordered by the court to be set down for trial at the November term, 1904, of the court to be held at Aberdeen, S. D., and that Waugh appear at that time and place for trial. It is averred that Waugh failed to appear at Aberdeen according to the order made, and that as a result thereof the recognizance was forfeited. The con-

tention is that the failure to appear at Aberdeen constituted no breach of defendants' undertaking. Is this correct? By the provisions of the act of November 3, 1903 (chapter 10, 28 Stat. 5), the state of South Dakota, which before that time had constituted one judicial district, with the United States courts held only at the capital (Act Feb. 22, 1889, c. 180, 25 Stat. 676, 682), was declared to constitute one judicial district only, but "for the purpose of holding terms of the District Court" the district was divided into four divisions, the Northern, Southern, Central, and Western. The act required the courts to be held at Aberdeen for the Northern Division, at Sioux Falls for the Southern, at Pierre for the Central, and at Deadwood for the Western, Division. By section 3, Act Nov. 3, 1903, c. 10, 28 Stat. 5, it was provided:

"That the terms of the Circuit and District Courts of the United States in and for the state of South Dakota shall be as follows: At Sioux Falls on the first Tuesday in April and the third Tuesday in October * * * at Aberdeen on the first Tuesday of May and the third Tuesday of November."

No other legislation affecting the terms or sessions or character of the United States courts in South Dakota has been called to our attention or discovered by us in our investigation.

From the foregoing statutes it appears that South Dakota constituted one judicial district only, and that the sessions of the courts for that district were not all held at one place, but at four different places. Whether at Aberdeen, Sioux Falls, Pierre, or Deadwood, the court was one and the same, and the times and places fixed by law for different sessions in any place were successive terms of one and the same court.

Accordingly we are of opinion that the recognizance in question binding Waugh to appear at the next term of court to be held at Sioux Falls and from time to time at said term, and all subsequent terms of said court whenever ordered so to do, bound him to appear, not only at Sioux Falls during the term held there, but at Aberdeen during any subsequent term as and when ordered by the court so to do, and that Waugh's failure to appear pursuant to the order of the court made upon him at Sioux Falls constituted a breach of the condition of the recognizance for which the defendants, as sureties, are liable.

Certain variances between the pleadings and proof are claimed by defendants to be fatal. The declaration declares that the defendants appeared before the United States District Court and entered into the recognizance in question on July 6, 1904. The recognizance offered in evidence bears on its face the approval of Judge Carland, the judge of the United States District Court for the District of South Dakota, and the filing mark as follows: "Filed July 6th, 1904, Oliver S. Pendar, Clerk." For some unexplained reason, the sureties went before a notary public of the state of South Dakota and acknowledged the execution by them of the instrument bearing their signatures. In certifying to that fact the notary says they appeared before him July 6, 1894. The declaration declares that the condition of the recognizance was that Waugh should appear before *"our District Court of*

*the United States * * * at the next term of United States District Court to be held in the courtroom in the federal building at Sioux Falls, South Dakota,* to wit, on Tuesday, October 18, 1904." In proof of that allegation, the recognizance, approved and filed, as already stated, was offered in evidence, and the condition thereof reads as follows: "If the said Frank Waugh * * * shall be and appear at the next term *of court of the United States to be holden at Sioux Falls, South Dakota,* in and for the Judicial District of South Dakota, * * *" then the obligation shall be void. These were immaterial variations. The first was the result of an obvious clerical error made by a notary public who had no duty to perform in the matter of approving the recognizance. The second leaves no uncertainty whatsoever as to when or before what court the principal was required to appear, or that he was required to appear before the very court described in the declaration.

The objections to the evidence because of variations were without merit, and were properly overruled. We have disposed of this case without adverting to some of the assignments of error found in the record, but the conclusions reached on the main questions discussed involve all minor ones found in the assignments of error, and render unnecessary a particular reference to them.

For the error committed by the trial court in denying to defendants a jury trial, and for that reason alone, the judgment is reversed, and the cause remanded for a new trial.

ARKWRIGHT MILLS v. AULTMAN & TAYLOR MACHINERY CO.

(Circuit Court of Appeals, First Circuit. January 26, 1906.)

No. 605.

1. SALES—ACTION FOR BREACH OF WARRANTY OF BOILERS—EFFECT OF DELAY IN MAKING TEST.

Plaintiff purchased boilers from defendant under a warranty as to their evaporating capacity, as shown by a test to be made by a person named in the contract. *Held*, that in view of plaintiff's right at its election to retain the boilers in any event, and to recover damages in case they did not comply with the warranty, it was not bound to have the test made at once, but that such test was within a reasonable time and in compliance with the contract, if made while the boilers were in such condition that they could be fairly tested.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 794.]

2. SAME—CONSTRUCTION OF WARRANTY.

Under a warranty of the capacity of a battery of boilers sold, under stated conditions, which designated a certain expert to make the test, if two kinds of tests were made in practice, one a guaranty test to determine maximum efficiency, and the other a working or commercial test to determine practical efficiency, and the contract contained no provision as to which should be made, the parties must be supposed to have intended to leave that matter to the determination of the expert, in view of the terms of the contract and warranty.

3. SAME—QUESTIONS FOR JURY.

In an action to recover damages for breach of a warranty of boilers sold, whether a test was made in accordance with the terms of the war-

ranty, and whether, if not, the test actually made was accepted by the parties as a sufficient test under the contract, *held*, under the evidence, to have been questions for the jury, as well as the final question whether the test made showed a compliance with the warranty.

4. CONTRACTS—CONSTRUCTION—ACTION FOR BREACH.

By a contract for a sale of boilers by defendant to plaintiff, defendant was required to furnish plans and specifications for the setting, and to direct and supervise such erection and setting up in a proper and skillful manner. Defendant furnished the plans and specifications and a superintendent to direct and supervise the work, and plaintiff employed a third person to furnish the materials and labor. By direction of defendant's superintendent, certain tying of the brickwork called for by the specifications was omitted, as a result of which the setting was defective and caused damage to plaintiff. *Held* that, in the absence of proof that plaintiff knew of and acquiesced in the variance, the same was chargeable to the default of defendant to furnish proper and skillful superintendence, and that under the evidence the question of such acquiescence was one for the jury.

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

See 128 Fed. 195.

James M. Morton, Jr. (Jennings, Morton & Brayton, on the brief), for plaintiff in error.

Marquis F. Dickinson and Walter Bates Farr, for defendant in error.

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

BROWN, District Judge. This writ of error is for review of the ruling of the Circuit Court that the plaintiff was not entitled to go to the jury on the first, second, and third counts of the plaintiff's declaration, and for review of certain rulings on questions of evidence.

The contract made May 19, 1897, concerning the sale of boilers, contained the following warranty:

"We furthermore guaranty that these boilers will show an evaporation of 10½ lbs. of water from and at 212° per lb. of dry Pocahontas coal, 1 inch draft, Prof. George H. Barrus to make the test."

The burden was upon the Arkwright Mills, as plaintiff suing upon this warranty, to prove that the required test was made by Prof. Barrus, and that under such test the boilers did not show the required evaporation.

It was in proof that the boilers were set during the fall and winter of 1897–1898, and that steam was put on them in February or March, 1898. The plaintiff offered evidence that a test was made by Prof. Barrus, the engineer named in the warranty, April 12 to 15, 1899. The Circuit Court was of the opinion that this test was too late, and also that the test proved was not such a test as was called for by the contract.

The Circuit Court was of the opinion that the law required the plaintiff, if it desired to act upon the warranty, to act promptly, and to call Mr. Barrus down to make a test as soon as it reasonably could be done; and, if the boilers did not answer the test, to notify the de-

fendant promptly, and let the defendant take out the boilers while they were worth something for some other purpose. In fact, the rulings of the Circuit Court upon the question of reasonable promptness seem to be based entirely upon the consideration that, if the boilers did not fulfill the requirements, the defendant should be given an opportunity to take them out while in good condition and practically new. In deciding, however, whether this test was made within a reasonable time, it should be borne in mind that the purchaser of the boilers had an option, upon a breach of the warranty, to return the boilers, or to retain them, and to claim as damages the difference between the value of the boilers actually received and the value of the boilers contracted for. It was obvious in this case that the plaintiff had elected to retain the boilers, and to seek compensation in damages for breach of warranty. Upon this view, the test would be made in a reasonable time, provided the boilers were then in such a condition that they could be fairly tested.

Our attention has been called to no evidence in the case having a tendency to show that a test under the warranty could not have been made as fairly in April, 1899, as a year earlier. In fact, the plaintiff produced evidence, which was not contradicted, to the effect that a battery of boilers a year old, if kept in good condition, ought to run a little better than it would right after it was set up. It is very clear, we think, that it should not have been ruled, as a matter of law, that a test was not made within a reasonable time. Furthermore, there was evidence tending to show a request made by the plaintiff for a test under the contract, and compliance by the defendant with this request. There was also evidence that a test of the boilers was made, and was paid for equally by plaintiff and defendant.

That a test was agreed upon in the warranty, to be made by a certain person, that complaints were made as to the efficiency of the boilers, that a test was requested, that the expert named in the warranty did make an elaborate test costing $300, that the expense of this was borne equally by both parties, was, in our opinion, substantial evidence that the test required in the warranty, or, at least, a test which was regarded by the parties as a test under the warranty, had been made.

Prof. Barrus, defendant's witness, testified that he made a certain test, saying:

"The test which I made there was a commercial test to determine the evaporative efficiency of these boilers under commercial conditions, by which I mean ordinary working conditions. My report states the evaporative efficiency of these boilers under ordinary working conditions."

An elaborate report in writing was made by Barrus, dated May 19, 1899, copies of which were sent both to the plaintiff and defendant. In this report, under the head of "Results," is this statement:

"45. Equiv. evap'n per lb. of dry coal from and at 212°, not including economizer, lbs., Apr. 14, 9.497."

Concerning this entry, Barrus testified:

"The statement that the boiler evaporated 9.497 pounds of water from and at 212 degrees per pound of dry coal was a statement of fact which I deter-

mined. It was a test. I did determine the working efficiency; that is, the efficiency of the boilers under working conditions, under ordinary working conditions."

The plaintiff also introduced the evidence of Charles H. Bartlett, a consulting engineer, that the test described in the Barrus report was a proper test under the guaranty, except as to draft, and that the boilers used about one-tenth more fuel by reason of their evaporating only 9½ pounds of water than they would have used if they had evaporated 10½ pounds of water. Evidence was offered showing that the draft was proper.

It is contended by the defendant that the test made by Barrus was not a test under the warranty. In support of this contention, it argues that the object of the test, as stated in the report, was: First, to determine the general economy of the plaintiff's plant under its usual working conditions; and, second, to ascertain what loss of steam or fuel, if any, was going on, and how to remedy it and thereby reduce the fuel consumption. There was also evidence for the defendant tending to show that Barrus was not informed of the terms of the warranty, and was not requested to make a test under the warranty.

Barrus himself distinguished between kinds of tests of the efficiency of a boiler; one being a working or commercial test, which he made, and the other an efficiency or guaranty test, which he says he did not make. He testifies that the test that he made did not conform to the recognized rules of engineers in making a guaranty test. Mr. Barrus said:

"My position is that by tuning the boilers up, by having an expert fireman, and by running them and giving them every advantage, they might be made to evaporate more water than is shown there. I should want, for a guaranty test, an expert fireman."

It is contended by the defendant that, as a matter of law, the warranty is to be interpreted as calling for an efficiency test or guaranty test, as distinguished from a test of working conditions. There is evidence, however, for the plaintiff, that at the time the test was made there was no distinction recognized in engineering practice between commercial tests and guaranty tests.

Ordinarily, a business contract is to be construed in view of the business relations of the parties; but it is quite possible that, in a business contract, the parties may require a guaranty of maximum efficiency in order to secure a safe margin, and that a test of maximum efficiency under the best possible conditions may be agreed to by those who require for practical use a less degree of efficiency. If, however, there are two kinds of tests, we think that it cannot be said, as a matter of law, that the warranty in question calls for either kind in preference to the other.

We think, however, that, where a warranty of this character designates a certain expert to make the test, the conditions of the test ordinarily are to be determined by the expert, and that making the test includes judgment as to proper methods. If, as a matter of fact, there is a distinction between the conditions of commercial and guaranty tests, it is a part of the expert's duty to create the conditions suitable to the

form of test which he adopts. Upon the failure of the parties to plainly designate which of two kinds of tests the expert is to adopt, we think the contract may be fairly construed as leaving it to the expert to make the determination. In this view, we think it essential that the expert should be informed of the terms of the guaranty in order that he may apply his knowledge to the creation of the desired conditions.

If, however, as was testified, there is no distinction between an efficiency test and a commercial test, then we do not see that the question of the expert's knowledge of the terms of the guaranty would be material. It is only upon the supposition that there are in use different modes of conducting a test, and that the mode of conducting a test is a matter of expert knowledge, that it is material that the plaintiff should prove that the expert was informed of the terms of the guaranty. If there was evidence sufficient to go to the jury that the expert was, in fact, informed of the terms of the guaranty, it was open to the plaintiff to argue that the test actually made was selected by him as a suitable and proper test. What are the proofs upon this point?

There is no evidence that the plaintiff communicated the terms of the warranty to Barrus. There is evidence that the defendant's agent agreed to see Barrus and make necessary arrangements with him for the test. A report of the test was furnished to the defendant and to the plaintiff. It describes the test, states the efficiency of the boilers in terms approximating those of the warranty, except that it omits the statement that the draft was one inch. There was evidence that the draft was one inch.

We are of the opinion that it was a question of fact for the jury, whether, in fact, Prof. Barrus was sufficiently informed of the terms of the guaranty. There was a probability that a person named to make a test, and who did go and make an expensive test, the cost of which was divided between the parties, was instructed as to what to do. The test itself is fully described, and is said by the plaintiff's expert to be such a test as was proper under the warranty. There is some similarity between the language of the warranty and of the report. The warranty provides that the boilers "will show an evaporation of 10½ lbs. of water from and at 212° per lb. of dry Pocahontas coal." The results stated are, "Equiv. evap'n per lb. of dry coal from and at 212°, * * * April 14, 9.497."

We think that the plaintiff may well have argued to the jury that the parties under their own practical construction of the warranty treated the test as one made under the contract, and that the defense based upon a distinction between a commercial test and an efficiency test was an afterthought devised to avoid the effect of the test. The improbability that a test was made and paid for without informing the expert what was wanted, the conformity of what he did with what, in the opinion of another expert, he should have done under the warranty, and the use of language in the report closely approximating that in the warranty, we think were matters for the jury on the question whether, in fact, the expert had knowledge of the terms of

the warranty, and exercised his judgment as to the conditions of the test. Unless the expert was to make a choice between two kinds of tests, his knowledge of what results either of the parties desired to show could not have assisted him. In fact, if a purely disinterested judgment was sought, it is quite likely that a more accurate result would be reached by requesting the expert to determine the evaporative efficiency of the boilers rather than by asking him whether the evaporative efficiency of the boilers was a certain amount.

We are of the opinion that the plaintiff was entitled to go to the jury on the first count of the declaration.

It was further contended by the plaintiff that, even if the test proved was not in exact conformity with the warranty, it was nevertheless accepted as such test by the defendant. The Circuit Court was of the opinion that, while there were striking probabilities in favor of the plaintiff upon this proposition, those probabilities were explainable on other theories, and that there was not sufficient evidence to go to the jury.

We are of the opinion, however, that there was evidence that the report made by Barrus was regarded and accepted by the defendant as a report made in conformity with the agreement contained in the original warranty. The learned judge erred, we think, in himself balancing the probabilities on this issue, instead of allowing the jury to do so; and we think that a jury would be warranted in taking a view of the probabilities different from that of the learned judge.

Upon the question of breach of warranty, we are of the opinion that the plaintiff was entitled to go to the jury on the question whether the exact test called for by the warranty had been made.

We are also of the opinion that the plaintiff was entitled to an instruction that, if the jury should find that the exact test had not been made, they should determine whether or not the test actually made was accepted by the parties as a sufficient test under the contract.

Our most serious doubt upon this warranty arises, however, not upon the question whether a test was made, or whether the test which was made was accepted by the defendant as the test called for, but upon the question whether the plaintiff had sufficiently proved that the test made did not show the warranted efficiency. This doubt arises upon the report of Prof. Barrus. While it is quite true that this report shows an evaporation of only 9.497, it also contains "certain conclusions as to the economy of the plant as based on the test of April 14, 1899," and the expression, "and I attribute the observed deficiency, not to the boiler itself, but to inefficient firing." This raises a doubt whether the plaintiff's own proofs were sufficient to show that the test developed the fact that the boilers would not show an evaporation of 10½ pounds. But the ruling of the court as to the sufficiency of the evidence was based upon the whole of the evidence submitted by both plaintiff and defendant, and we are of the opinion that the oral evidence of Prof. Barrus, in addition to the report offered in evidence, together with the evidence of plaintiff's expert, gave to the plaintiff the right to go to the jury upon the question whether or not the test did show the required evaporation.

The third count relates to the brickwork surrounding the boilers. By the original contract, the brickwork was to be provided by Thayer & Co. (defendant's agents), and, concerning its erection, it was agreed:

"Full drawings and directions for erecting to be furnished, and services of a man to superintend erection, board and traveling expenses to be paid by Thayer & Co., who is also to furnish and perform all other labor."

It was stipulated that:

"By agreement between the plaintiff and defendant, said contract was subsequently modified so that the plaintiff undertook to furnish the labor and materials for the erection and setting up of said boilers, and the defendant agreed to direct and supervise said erection and setting up in a proper and skillful manner."

It was agreed that the defendant sent Mr. Park to direct and supervise the work on its behalf. It appeared that in accordance with the specifications, drawings and directions were furnished, which showed that the bricks were to be tied. The plaintiff introduced evidence tending to show that the tying, in pursuance of the directions of Mr. Park, was omitted, by reason whereof the brickwork fell, to the plaintiff's damage. Evidence was offered tending to show that the omission of the ties was improper, and that the omission of the ties was a breach of the defendant's duty to direct and supervise said erection and setting up in a skillful manner.

We cannot agree with the plaintiff's contention that upon the record it appears that the clause concerning the furnishing of drawings and directions was superseded by the oral contract. While the contract was subsequently modified, it does not appear that the defendant was relieved from the duty of furnishing drawings and directions, or that the following of plans becomes immaterial.

It is contended by the defendant that, as a matter of law, the superintendent, Park, had no authority to waive the requirements of the plans, which showed tying. This contention, however, is of no consequence, unless it should appear that the plaintiff agreed with Park to omit the tying.

We are of the opinion that it was the duty of Park, in superintending the erection, to follow the plans, and that the evidence that Park failed to see that the bricks were tied tended to show a breach of the original agreement to furnish services of a man to superintend erection, as well as of the modified agreement of the defendant to direct and supervise said erection and setting up in a proper and skillful manner. We cannot agree to the contention that the lack of authority of Park to depart from the plans would relieve the defendant from liability in case Park should fail to follow the plans. This, we think, might be a failure to direct and supervise said erection and setting up in a proper and skillful manner.

The most important point for the defendant on this issue is the contention of the defendant that the departure from the plans was made with full knowledge of the plaintiff, and without objection. The Circuit Court was of the opinion that the plaintiff itself permitted Mr. Park's orders to omit the ties to be carried out. The learned judge

was also of the opinion that Mr. Sears, who was to furnish labor and materials, stood for the plaintiff corporation, and that Mr. Park stood for the defendant corporation. Our attention, however, has been called to no evidence that Mr. Sears, who had been employed to do the brickwork, had been given any authority by the plaintiff corporation to act for it in waiving the contract.

The positions of Mr. Park, whose duty it was to supervise, which included the duty of seeing that the plans were followed, and of Mr. Sears, who was employed to do the brickwork, were quite different. We cannot assume that it was the duty of Mr. Sears to make an independent examination of the drawings and specifications. Sears testified that he himself and his men had nothing to do with the method in which the boilers were set, and that, without knowing anything about the circumstances, he thought the ties ought to be put in, but that he told his men to do as Mr. Park said. The only evidence which we find in the pages of the record referred to on the defendant's brief, tending to show a voluntary submission by the plaintiff to the departure from the plans, is the following: That Sears' foreman, Vibberts, spoke to Sears about the improper way in which the brickwork was being done, and said, "Park says do it that way." "I said, 'We take our orders from Mr. Park. I will go and speak to Mr. Bodge about it.' After my talk with Bodge, I told him (Vibberts) to go ahead, and he said no more—to do it as Park told him to." Here was evidence tending to show the communication to Mr. Bodge, the treasurer, of the fact that the plans were departed from.

There is no evidence, however, showing at what portion of the progress of the work this was done, and we do not think that as matter of law this evidence conclusively proved the assent of the corporation to a variation of the plans. The plaintiff made out a prima facie case, and offered sufficient evidence to go to the jury on the issue of failure to properly supervise. To meet this evidence, the defendant argues that the departure from the plans was authorized by the plaintiff corporation. The authority of Sears, or that he was in any sense a representative of the corporation in the matter, was not proved. The mere fact that at some time during the progress of the work Sears had an indefinite talk with Bodge, and thereafter told his foreman to go ahead, is not sufficient to authorize a ruling that, as matter of law, there had been a waiver of the specifications, or an assent to improper work. Mr. Bodge testified, on the other hand, that he did not look at the plans, did not see the bricks tied in place, and that he did not know anything about it. Mr. Park testified that the brickwork was tied in the way called for by the plans, that no ties were omitted, and that it was properly and sufficiently done; and his testimony is inconsistent with the theory that he in any way relied upon a waiver by Mr. Bodge, or even by Mr. Sears, in departing from the plans.

The twentieth assignment of error relates to the exclusion of the following question:

"When there is a superintendent of construction or a superintendent of erection, as distinguished from the man who furnishes the labor and materials, whose business is it, under the practice of engineers, to see that the plans are followed?"

We are of the opinion that this question was rightly excluded, upon the ground that the question of the construction of this contract was for the court, and was not a question for an expert.

The twenty-first assignment of error relates to the exclusion of a letter of Thayer & Co., the defendant's agent, to the defendant, dated September 13, 1900. The plaintiff's brief does not present the question of the correctness of the rulings of the Circuit Court upon the offer of this proof at the trial, but argues that the letter was admissible for various purposes which appear to us different from those for which it was offered. The question whether the letter was admissible for any purpose is not raised by an exception to a ruling excluding it when offered for a particular purpose.

The twenty-second assignment of error is obviously without merit. It was clearly permissible to show the instructions given to Barrus concerning the test.

We think that, in instructing the jury that the plaintiff was not entitled to recover on either of the first three counts of the declaration, the Circuit Court was in error, and that the plaintiff was entitled to go to the jury on each of said counts.

The judgment of the Circuit Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion; and the plaintiff in error recovers costs in this court.

LOW FOON YIN v. UNITED STATES IMMIGRATION COM'R et al.

(Circuit Court of Appeals, Ninth Circuit. May 14, 1906.)

No. 1,256.

1. ALIENS—CHINESE—CERTIFICATE OF RESIDENCE—FAILURE TO OBTAIN—DEPORTATION—JURISDICTION.

A United States commissioner has jurisdiction to hear and determine a charge against a Chinese person of being unlawfully within the country without a certificate of residence, though Act Cong. May 5, 1892, c. 60, § 6, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320], providing for the issuance of such certificates, declares that one not obtaining a certificate within a specified time shall be adjudged unlawfully within the country, and shall be arrested and taken before a United States "judge," etc.

[Ed. Notes.—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.]

2. SAME—DEPORTATION PROCEEDINGS—CHARACTER.

A proceeding for the deportation of a Chinese laborer not having a certificate entitling him to residence required by Chinese Exclusion Act (Act Cong. May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], as amended by Act Nov. 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322] and Act April 29, 1902, c. 641, 32 Stat. 176 [U. S. Comp. St. Supp. 1905, p. 295]), is not a criminal proceeding, and hence it is competent for the government to swear such Chinese person as a witness against himself.

3. SAME—STATUTES—VALIDITY.

Chinese Exclusion Act, May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], in so far as it places the burden of proof of the right of a Chinese person without a certificate to remain in the United States on him, is valid.

4. SAME—NATIONALITY—EVIDENCE.

In proceedings for the deportation of an alleged Chinese person, the fact that he was a native of China, coupled with his personal appearance, indicating by his dress, physiognomy and queue that he was a Chinaman, was sufficient to justify a finding to that effect in the absence of evidence to the contrary.

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

Marshall B. Woodworth, for appellant.

Robert T. Devlin, U. S. Atty., for appellees.

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

ROSS, Circuit Judge. The record shows that on the 21st day of April, 1905, one J. B. McChesney, one of the government's Chinese inspectors, filed a verified complaint before E. H. Heacock, a United States commissioner for the Northern District of California, at San Francisco, charging "that one Low Foon Yin is a Chinese manual laborer, and is now within the limits of the Northern District of California, aforesaid, without the certificate of registration required by the act of Congress entitled 'an act to prohibit the coming of Chinese persons into the United States,' approved May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], and the act amendatory thereof, approved November 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322], and the act of Congress approved April 29, 1902, c. 641, 32 Stat. 176 [U. S. Comp. St. Supp. 1905, p. 295]," and praying that a warrant for the arrest of the said Low Foon Yin be issued and that he be arrested and brought before the said commissioner, and upon a hearing being had that he be duly adjudged to be illegally within the United States, and that the proper order for his deportation be made and entered. Upon that complaint a warrant of arrest was issued by the commissioner and executed by the marshal by the arrest and production of Low Foon Yin before the commissioner, when the following proceedings were had:

Mr. Woodworth (attorney for the defendant to the proceeding): I object to the commissioner proceeding with this hearing on the ground that the government has presented no proofs or evidence to show that the defendant is unlawfully in the United States, and I object to the defendant being examined at this time by the commissioner and compelled to testify against himself, and to any questions being propounded to him with reference to the charge herein.

The Commissioner: The objection respecting jurisdiction is overruled pro forma. I also overrule the further objections; the appearance of the defendant; his dress; his physiognomy; his queue, and everything about him—denotes that he is a Chinese. In regard to testifying against himself, I overrule the objection of counsel upon the ground that the courts have held it is not a criminal case, and therefore the rule invoked does not apply.

Mr. Woodworth: Note an exception.

Low Foon Yin, the defendant, sworn:

The Commissioner: Q. Where were you born?

Mr. Woodworth: I repeat the objection already urged, to wit: I object to the commissioner proceeding with this hearing on the ground that he had not jurisdiction of this matter; and further on the ground that the government has presented no proofs or evidence to show that the defendant is unlawfully within the United States; and I object to the defendant being examined at this time by the commissioner and compelled to testify against himself, and to any questions being propounded to him with reference to the charge herein contained.

The Commissioner: I make the same ruling.

Mr. Woodworth: Note an exception.

A. In China.

The Commissioner: Q. When did you first come to the United States? A. Last year.

The Commissioner: Q. Where from, China? A. From China.

The Commissioner: Q. What has been your avocation or business, laborer? A. Laborer.

The Commissioner: I have no further questions.

Mr. Woodworth: I move to strike out all the testimony of the witness on the ground previously stated.

The Commissioner: I deny the motion.

Mr. Woodworth: Note an exception.

Mr. McKinley: That is the case for the government.

Mr. Woodworth: I desire at this time again to raise the question of the jurisdiction of the commissioner in this case.

The Commissioner: I overrule the objection pro forma.

Mr. Woodworth: We take an exception.

The Commissioner: Do you submit the case?

Mr. Woodworth: Yes, upon the objections already made.

The Commissioner: I order the defendant deported.

Mr. Woodworth: Note an exception. I propose to take an appeal for the purpose of raising the question of jurisdiction, and ask for a stay of 10 days within which to prepare an appeal.

The Commissioner: Granted.

The appeal to the District Court resulted in an affirmance of the order of deportation. The jurisdictional question having been decided adversely to the contention on the part of the defendant by this court in the case of Fong Mey Yuk v. United States, 113 Fed. 898, 51 C. C. A. 528, the single question presented to us is whether or not, in a deportation proceeding, a defendant can be compelled against his will to testify against himself, and ordered deported upon no other evidence than his own statements thus obtained from him. If, as contended on behalf of the appellant, and as was held by Judge Wing in the case of United States v. Hung Chang (D. C.) 126 Fed. 400, the proceeding is a criminal one, the point would, of course, be good. But it has been decided by many of the federal courts, including the Supreme Court of the United States, that such a proceeding is not a criminal one. It is true that the act of Congress of May 5, 1892, known as the "Geary Act" (St. 1891, p. 25), contained a criminal feature in that by its fourth section it was provided "that any such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States, shall be imprisoned at hard labor for a period of not exceeding one year, and thereafter removed from the United States as hereinbefore provided;" that is to say, as provided by the second section of that act. But the provision in respect to the imprisonment of such Chinese person at

hard labor was declared unconstitutional and void by the Supreme Court in the case of Wong Wing v. United States, 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140, and by the United States District Court for the Sounthern District of California in the preceding case of United States v. Wong Dep Ken (D. C.) 57 Fed. 206. It is also true that in the Geary act Congress used the words "convicted" and "adjudged" in connection with the finding of the person proceeded against unlawfully in this country, and directing his deportation. But the mere use of such words, instead of others more appropriate, does not convert a proceeding of a political nature into one that is criminal. United States v. Hing Quong Chow (C. C.) 53 Fed. 233. "Deportation," said the Supreme Court in the case of Fong Yue Ting v. United States, 149 U. S. 698–709, 13 Sup. Ct. 1016, 1020, 37 L. Ed. 905, "is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken." Section 1 of the Act of May 5, 1892, continued in force for a period of 10 years from that date all laws then in force, prohibiting and regulating the coming into this country of Chinese persons, and persons of Chinese descent, and provided, among other things "that any Chinese person or person of Chinese descent, when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China, unless he or they shall make it appear to the justice, judge, or commissioner before whom he or they are tried, that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country; provided, that in any case where such other country, of which such Chinese person shall claim to be a citizen or subject, shall demand any tax as a condition of the removal of such person to that country, he or she shall be removed to China," and (section 3, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320]) "that any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended, shall be adjudged to be unlawfully within the United States, unless such person shall establish by affirmative proof to the satisfaction of such justice, judge or commissioner his lawful right to remain in the United States."

Section 6 of the act of May 5, 1892, c. 60, 27 Stat. 25, as amended by the act of November 3, 1893, c. 14, § 1, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1320], is as follows:

"'Sec. 6. And it shall be the duty of all Chinese laborers within the limits of the United States who were entitled to remain in the United States before the passage of the act to which this is an amendment to apply to the collector of internal revenue of their respective districts within six months after the passage of this act for a certificate of residence; and any Chinese laborer within the limits of the United States, who shall neglect, fail, or refuse to comply with the provisions of this act and the act to which this is an amendment, or who, after the expiration of said six months, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested by any United States customs official, Collector

of Internal Revenue, or his deputies, United States Marshal or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States, as provided in this act and in the act to which this is an amendment, unless he shall establish clearly to the satisfaction of said judge that by reason of accident, sickness, or other unavoidable cause he has been unable to procure his certificate, and to the satisfaction of said United States judge, and by at least one credible witness other than Chinese, that he was a resident of the United States on the fifth of May, eighteen hundred and ninety-two; and if, upon the hearing, it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost. Should it appear that said Chinaman had procured a certificate which has been lost or destroyed, he shall be detained and judgment suspended a reasonable time to enable him to procure a duplicate from the officer granting it, and in such cases the cost of said arrest and trial shall be in the discretion of the court; and any Chinese person, other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right, may apply for and receive the same without charge; and that no proceedings for a violation of the provisions of said section six of said act of May fifth, eighteen hundred and ninety-two, as originally enacted, shall hereafter be instituted, and that all proceedings for said violation now pending are hereby discontinued': Provided, that no Chinese person heretofore convicted in any court of the states or territories or of the United States of a felony shall be permitted to register under the provisions of this act; but all such persons who are now subject to deportation for failure or refusal to comply with the act to which this is an amendment shall be deported from the United States as in said act and in this act provided, upon any appropriate proceedings now pending or which may be hereafter instituted."

In the course of its opinion in the case of Fong Yue Ting v. United States, supra, the court said:

"For the reasons stated in the earlier part of this opinion, Congress, under the power to exclude or expel aliens, might have directed any Chinese laborer found in the United States without a certificate of residence, to be removed out of the country by executive officers, without judicial trial or examination, just as it might have authorized such officers absolutely to prevent his entrance into the country. But Congress has not undertaken to do this.

"The effect of the provisions of section 6 of the act of 1892 is that, if a Chinese laborer, after the opportunity afforded him to obtain a certificate of residence within a year, at a convenient place, and without cost, is found without such a certificate, he shall be so far presumed to be not entitled to remain within the United States, that an officer of the customs, or a Collector of Internal Revenue, or a Marshal, or a deputy of either, may arrest him, not with a view to imprisonment or punishment, or to his immediate deportation without further inquiry, but in order to take him before a judge, for the purpose of a judicial hearing and determination of the only facts which, under the act of Congress, can have a material bearing upon the question whether he shall be sent out of the country, or be permitted to remain.

"The powers and duties of the executive officers named being ordinarily limited to their own districts, the reasonable inference is that they must take him before a judge within the same judicial district; and such was the course pursued in the cases before us.

"The designation of the judge, in general terms, as 'a United States judge,' is an apt and sufficient description of a judge of a court of the United States, and is equivalent to or synonymous with the designation, in other statutes, of the judges authorized to issue writs of habeas corpus, or warrants to arrest persons accused of crime. Rev. St. §§ 752, 1014 [U. S. Comp. St. 1901, pp. 592, 716].

"When, in the form prescribed by law, the executive officer, acting in behalf of the United States, brings the Chinese laborer before the judge, in

order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case—a complainant, a defendant, and a judge—actor, reus, et judex. 3 Bl. Com. 25; Osborn v. Bank of United States, 9 Wheat. (U. S.) 738, 819, 6 L. Ed. 204. No formal complaint or pleadings are required, and the want of them does not affect the authority of the judge or the validity of the statute.

"If no evidence is offered by the Chinaman, the judge makes the order of deportation as upon a default. If he produces competent evidence to explain the fact of his not having a certificate, it must be considered by the judge; and if he thereupon appears to be entitled to a certificate, it is to be granted to him. If he proves that the collector of internal revenue has unlawfully refused to give him a certificate, he proves an 'unavoidable cause.' within the meaning of the act, for not procuring one. If he proves that he had procured a certificate which has been lost or destroyed, he is to be allowed a reasonable time to procure a duplicate thereof.

"The provision which puts the burden of proof upon him of rebutting the presumption arising from his having no certificate, as well as the requirement of proof, 'by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act,' is within the acknowledged power of every Legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government. Ogden v. Saunders, 12 Wheat. (U. S.) 213, 262, 349, 6 L. Ed. 606; Pillow v. Roberts, 13 How. (U. S.) 472, 476, 14 L. Ed. 228; Cliquot's Champagne, 3 Wall. (U. S.) 114, 143, 18 L. Ed. 116; Ex parte Fisk, 113 U. S. 713, 721, 5 Sup. Ct. 724, 28 L. Ed. 1117; Holmes v. Hunt, 122 Mass. 505, 516–519, 23 Am. Rep. 381. The competency of all witnesses, without regard to their color, to testify in the courts of the United States, rests on acts of Congress, which Congress may at its discretion modify or repeal. Rev. St. §§ 858, 1977 [U. S. Comp. St. 1901, pp. 659, 1259]. The reason for requiring a Chinese alien, claiming the privilege of remaining in the United States, to prove the fact of his residence here at the time of the passage of the act 'by at least one credible white witness,' may have been the experience of Congress, as mentioned by Mr. Justice Field, in Chae Chan Ping's Case, that the enforcement of former acts, under which the testimony of Chinese persons was admitted to prove similar facts, 'was attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath.' Chae Chan Ping v. United States, 130 U. S. 598, 9 Sup. Ct. 623, 32 L. Ed. 1068. And this requirement, not allowing such a fact to be proved solely by the testimony of aliens in a like situation, or of the same race, is quite analogous to the provision, which has existed for 77 years in the naturalization laws, by which aliens applying for naturalization must prove their residence within the limits and under the jurisdiction of the United States, for five years next preceding, 'by the oath or affirmation of citizens of the United States.' Acts March 22, 1816, c. 32, § 2, 3 Stat. 259; May 24, 1828, c. 116, § 2, 4 Stat. 310; Rev. St. § 2165, cl. 6 [U. S. Comp. St. 1901, p. 1330]; 2 Kent, Com. 65.

"The proceeding before a United States judge, as provided for in section 6 of the act of 1892, is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, had determined that his continuing to reside here shall depend."

The validity of the provision of the act of May 5, 1892, placing the burden of proof of his lawful right to remain in the United States

on the Chinese person or person of Chinese descent charged with being unlawfully in this country, has been sustained not only by the Supreme Court, but also by the Circuit and District Courts. Li Sing v. United States, 180 U. S. 486, 21 Sup. Ct. 449, 45 L. Ed. 634; In re Sing Lee (D. C.) 54 Fed. 334; United States v. Wong Dep Ken (D. C.) 57 Fed. 206.

In the latter case, in speaking of that provision of the act of May 5, 1892, it was said:

"No one questions the power of Congress to prohibit the coming into this country of any class of foreigners deemed prejudicial to the interests of our people. Against the coming into the country of Chinese laborers, Congress has been legislating for years. The reason for such legislation is an old story, and need not be repeated. But, notwithstanding the enactments upon the subject, the laws have been evaded in many ways. By false testimony and concocted evidence the courts have been imposed upon in cases almost without number, and by sea and land the prohibited class in large numbers have been smuggled into the country in one way or another. To prevent all of this, and give effect to its laws upon the subject, as far as possible, Congress deemed it wise by the provision in question to put the burden of proof of his lawful right to remain in the United States on the Chinese person or person of Chinese descent charged with being unlawfully within their borders. To those not residents of and not familiar with the Pacific slope, and not so much subject to the evils intended to be guarded against by the exclusion acts, 'the lines laid down for their enforcement may,' as appropriately and well said by Judge Severens in the case of Sing Lee (D. C.) 54 Fed. 334, 'seem hard; and because such summary dealings with the rights of persons are out of the common order to which we are accustomed, and are liable to produce injustice in many cases on account of their summary expedition and the presumption against the prisoners, they may seem severe; but, if the power resides in Congress to enact such provisions, the discretion whether it will do so rests in the law-making power, and the courts must presume it was exercised upon sufficient reasons.' In respect to the provision of the Geary act putting the burden of proof on those coming within the class thus interdicted, I agree with Judge Severens in the case cited, that there is not only nothing in it violative of the provisions of the Constitution of the United States, but, for the reasons given by him, and in view of the circumstances already referred to and of others that may be suggested, that the provision in question is not unreasonable. He says:

"The person brought before the commissioner is one of a class which, by the terms of the statute, is obnoxious to its operation. That must appear before the general jurisdiction can be exercised, and since, generally, that class is interdicted, he can only escape the common lot upon its appearing that he is not within the general condemnation. The means of showing this are presumably in his own control. It would be extremely inconvenient, and probably in most cases impracticable, for the government to bring proof of the negative fact that the respondent is not within the exemption. Such circumstances are the basis of the rule of evidence which devolves the burden on the party who presumably has the best means of proving the fact; but, whatever the rule which by the common law would be applicable to trials, it cannot be affirmed that in such conditions the Legislature cannot prescribe such a rule of evidence.'"

We see no merit in the suggestion that there was nothing to show to the commissioner that the appellant was a Chinese person or person of Chinese descent. He himself testified that he was born in China, and first came to the United States the previous year from China, and that he was a laborer. Certainly the fact that he was a native of China, coupled with his personal appearance, indicating by his

dress, physiognomy, and queue, that he was a Chinaman, was sufficient to justify a finding to that effect, in the absence of any showing to the contrary.

The judgment is affirmed.

RIDGE AVE. BANK v. STUDHEIM.

(Circuit Court of Appeals, Third Circuit. June 6, 1906.)

No. 6.

1. BANKRUPTCY—ACTION TO RECOVER PREFERENCE—QUESTION FOR JURY.
   In an action by the trustee of a bankrupt to recover a payment as a preference, where it is shown that the bankrupt was insolvent when the payment was made, and the circumstances were such as would be likely to excite a suspicion of such insolvency at least on the part of the creditor, the question whether he had reasonable ground to believe that a preference was intended is one for the jury.

2. SAME—PREFERENCE TO BANK—PAYMENT BY CHECK.
   A bank is not relieved from liability to refund as a preference a payment received on notes from a bankrupt while insolvent, under such circumstances that it had reasonable grounds to believe that a preference was intended, by the fact that the payment was made by a check on the debtor's deposit in the same bank, which, if it had remained until the debtor's bankruptcy, the bank might have retained as a set-off.

3. SAME—EVIDENCE OF INSOLVENCY—ORDER OF REFEREE.
   Upon the question of the insolvency of a bankrupt at the time an alleged preference was given, where it is shown that the bankrupt's assets had not changed thereafter, an order of the referee confirming a sale of such assets is admissible as evidence of their value; its weight being for the jury.

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

Frank Savidge, for plaintiff in error.

E. Clinton Rhoads, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and CROSS, District Judge.

CROSS, District Judge. This suit was brought in the District Court of the United States for the Eastern District of Pennsylvania by the trustee in bankruptcy of the Kensington Leather Company, under section 60 (b) of the bankrupt act of July 1, 1898 (chapter 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), to recover of the plaintiff in error an alleged preference, as defined by section 60 (a) of the above act. Judgment was entered in the court below upon the verdict of a jury for $1,414.20, besides costs. The bankrupt was incorporated in the month of September, 1903, but did not commence active business until the following December. Its chief asset was a secret process for the manufacture of leather, which process was subsequently proved to have little or no value. On or about the 24th day of that month it borrowed from the Ridge Avenue Bank, the plaintiff in error, the sum of $3,000, and gave therefor its three months' note, secured by individual

indorsements. This note matured on the 23d of March, 1904. Payment of the same was then demanded, but the bank was told that the maker had no money to pay it, but that it had leather on hand which it wanted to sell. Contrary to the bank's custom, the note was thereupon renewed, without any payment on account, for a further period of three months. In the meantime, and prior to the maturity of the renewed note, the account of the bankrupt, kept with the plaintiff in error, was inactive and unsatisfactory to the bank, for the reason that no deposits of any consequence were made. Before the renewal note matured, and on the 2d day of June, 1904, an officer of the leather company called at the bank, and while there was reminded by the cashier that the note had been renewed once, and that the bank would insist on a satisfactory settlement of it. At that time the bankrupt had $650 on deposit with the bank, and of that amount the representative of the leather company offered to pay $500 on account of the note. He was told that such payment would not be satisfactory, whereupon he informed the cashier that the company had some damaged leather on hand which it had been unable to sell, and asked the cashier if he could not sell it. A bill of sale for this leather was thereupon made to the cashier of the bank, and it was subsequently sold by him for $820 to a leather dealer who was a customer of the bank. The leather was paid for by the customer's note, and credited on the bankrupt's note. The total payments made on account of the note in cash and by the sale of the leather amounted to $1,320, and were made some time before the maturity of the note. When the note matured, the latter part of June, a new note for one month was given for $1,680, being the balance remaining due on the note of March 23, 1904. On the 9th day of July, 1904, a petition in involuntary bankruptcy was filed against the Kensington Leather Company, and it was adjudicated a bankrupt in the month of August following. Subsequently this suit was brought by the trustee to recover of the Ridge Avenue Bank said sum of $1,320, upon the grounds above referred to. A part only of the facts brought out in the testimony at the trial have been given, but sufficient to show the general situation of affairs between the plaintiff in error and the bankrupt at the time when the alleged preference was given.

Five assignments of error have been filed by the plaintiff in error, the first three of which, however, while appropriate to a motion for a new trial, cannot be considered here, and, indeed, were not insisted upon at the argument. Of the two argued and relied upon, the first relates to the refusal of the trial judge to give binding instructions to the jury in favor of the defendant. It is claimed under this assignment that the facts were insufficient to warrant the judge in leaving to the jury the question of whether or not the Ridge Avenue Bank, at the time it accepted the payment of $1,320, had reasonable cause to believe that it was intended thereby to give it a preference. The case is undoubtedly near the border line separating cases where there is evidence sufficient to warrant a jury in finding a preference and those where there is not sufficient evidence to warrant such finding, and it is quite possible that another jury might have found the facts in this case differently; but the question for our determination is not whether reasonable cause that a

preference was intended existed, but whether there was any evidence of such reasonable cause as justified its submission to the jury. The ordinary rule that what would be the conduct of a prudent person under given circumstances is a question for the jury has some application in this case, and what would be reasonable cause to an ordinarily intelligent business man to believe that a preference was intended is a question with which a jury is supposed to be especially competent to deal. As a matter of fact, the evidence conclusively shows that the bankrupt was insolvent at the time the preference was made, and it could hardly be denied that the payment of the $1,320 was made under circumstances likely to excite suspicion of the bankrupt's insolvency. This alone, however, would be insufficient to charge the bank with accepting a preference. It must have had reasonable cause to believe at the time the payment was made that it was accepting a preference. The question of whether it did or not was a question of fact, and was properly submitted to the jury, and, inasmuch as there was evidence which in our opinion justified its submission, the finding of the jury cannot be reviewed upon writ of error.

But it is claimed on behalf of the bank that the $500 paid on account of its note from the bankrupt's deposit in the bank cannot in any event be considered a preference, or recovered back in this action, and that to this extent, at least, the judgment is erroneous. The position taken by the counsel of the bank is thus stated:

"The balance of a regular bank account is a debt due to the bankrupt from the bank, and, in the absence of collusion, the bank need not surrender such balance, but may set it off against notes of the bankrupt held by the bank"—citing section 68 (a) of the bankruptcy act. (30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]).

The mere reading of this statement, however, shows its inapplicability to the case at bar. This is not the case of a deposit remaining to the credit of a bankrupt's estate at the time of the filing of the petition in bankruptcy, and which, under certain circumstances, and in the absence of collusion, might be the subject of set-off, but is rather that of a transfer to a bank of a portion of the bankrupt's estate by the bankrupt's own act prior to the bankruptcy, and which was accepted by the bank in partial payment of an unmatured claim, and concerning which transaction a jury has said that the bank had reasonable cause to believe at the time the payment was made that it was accepting a preference. It seems wholly unnecessary to add anything further upon this point. Under the circumstances disclosed, we are satisfied that the judge could not have done otherwise than submit the question to the jury. We conclude, therefore, that this assignment of error must fail.

The only other assignment remaining for consideration relates to the admission in evidence of an order of a referee confirming a sale of the bankrupt's property, which was made by a receiver in August, 1904. It was claimed on the argument that this order was hearsay evidence, and should not have been admitted. We think the order being one made by an officer of the court in the same bankruptcy proceeding as that in which the trial took place was competent evidence. Its value was for the consideration of the jury. Evidence had already

been given showing that the assets of the bankrupt had not varied from the time when the alleged preferential payment was made to the time when the assets were sold by the receiver. The evidence of what they brought at the bankruptcy sale was certainly not of the highest probative force, but it was, perhaps, the best evidence at hand. The trial judge, in the exercise of a proper discretion, admitted it for what it was worth, and in doing so committed no error. Furthermore, the disparity between the price realized at the sale ($967.50) and the liabilities of the bankrupt ($8,551.71) was so great as to permit no other inference to be drawn than that the bankrupt was insolvent at the time of the alleged preference. We find no merit, therefore, in this exception.

The result is that the judgment below is affirmed.

OW YANG DEAN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 14, 1906.)

No. 1,280.

1. ALIENS—CHINESE—DEPORTATION.

Defendant, in 1890, became a member of two Chinese mercantile firms in California; his name appearing on the partnership books as a partner and so continued up to the time of the commencement of deportation proceedings. From 1890 to 1900 he engaged in no manual labor, but devoted his entire time to his mercantile interests, until he purchased an interest in a shrimp company in March, 1900, after which from March till August he devoted a portion of his time to keeping books for that concern, but did manual labor, such as picking shrimps and delivering them to customers. The shrimp business was absorbed by another company in which he was interested until May, 1902, when he sold the interest in the purchasing company and returned to China, he having devoted his entire time after the sale and before his return to the mercantile business of the firms of which he was a member. *Held*, that by engaging in manual labor while in the shrimp business he did not lose his right to remain in the United States under Exclusion Act, May 5, 1892, c. 60, § 6, 27 Stat. 25, as amended by Act Cong. Nov. 3, 1893, c. 14, § 1, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1321], providing for the exclusion of non registered Chinese on their ceasing to be merchants and engaging in manual labor.

[Ed. Notes.—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.]

2. SAME—LABORER—WHAT CONSTITUTES.

Where a Chinese merchant for a year prior to his return to China did no manual labor except that for a short time he assisted in pickling shrimps and going in wagons to deliver them to customers in connection with the business of a shrimp company, in which he was a partner, such work did not amount to the doing of manual labor not necessary in the conduct of his business within Exclusion Act, May 5, 1892, c. 60, § 6, 27 Stat. 25, as amended by Act Cong. Nov. 3, 1893, c 14, § 1, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1321], depriving him of the right to reenter the United States on his return.

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

The appellant, a Chinese, appeals from an order and judgment of the District Court affirming the order and judgment of deportation made by the

United States Commissioner upon a complaint charging him with being a Chinese manual laborer within the limits of the Northern District of California without the requisite certificate of residence. The appellant came to the United States in the year 1881 and resided in the state of California from that date until July 8, 1902, when he departed from the United States for China, taking with him an affidavit and certificate of identification wherein he deposed that he was a merchant, and a member of the firm of Sang Wo Sang & Co., engaged in buying and selling retail and wholesale groceries at 613 Jackson street, San Francisco. On July 2, 1904 he returned to the port of San Francisco, and, upon presentation of his affidavit and certificate to the Commissioner of Immigration at that port, he was permitted to land and enter the United States as a merchant. On the proceeding for deportation the United States Commissioner found that during the 12 months immediately preceding his departure from the United States, the appellant was engaged in the performance of manual labor other than such as was necessary in the conduct of his business as a merchant, to wit, in picking, shelling, and delivering shrimps and cracking crabs, and that he unlawfully entered the United States, and is not lawfully entitled to be and remain therein. The evidence is undisputed that about the year 1890 the appellant became a member of the Chinese mercantile firm of Hung Tai & Co. in Walnut Grove, Cal., and of the firm of Sang Wo Sang & Co., retail and wholesale grocers at 613 Jackson street, San Francisco, and that his name appeared upon the partnership books of such firms as a partner therein; that his interest in and his relation to the said firms has continued to the present time; that during all the years of his connection with said firms and up to March, 1900, he engaged in the performance of no manual labor of any kind, but devoted his entire time to the management of his mercantile interests, and that in March, 1900, he purchased an interest in the San Pablo Bay Shrimp Company, a copartnership engaged in picking, buying, and selling shrimps and crabs. During the period between that time and August 1, 1900, it is not disputed that while he devoted a portion of his time to keeping the books of the firm, he did manual labor other than such as was necessary to conduct his business as a merchant, such as picking shrimps and going with the wagons to deliver shrimps to customers. On August 1, 1900, a combination under the name of the Union Shrimp Company was made between the San Pablo Bay Shrimp Company and a rival company, and the appellant became a partner in the new company. Both the San Pablo Bay Shrimp Company and the Union Shrimp Company were engaged in buying and selling shrimps and crabs at fixed places of business in San Francisco.

George A. McGowan, for appellant.

Robert T. Devlin, Benjamin L. McKinley, and Lyman I. Mowry, for the United States.

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

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

As to the occupation of the appellant during the year immediately prior to his departure for China, the evidence is that from July 8, 1901 to September 1, 1901, he was at the store of Sang Wo Sang & Co., attending to his duties in that firm. He testified that from September 1, 1901 to May 1, 1902, he spent a little more than half of his time with the Union Shrimp Company, and the remainder of that time with Sang Wo Sang & Co.; that while with the Union Shrimp Company, he devoted his time to keeping the books, taking telephone orders, receiving and sampling shrimps, and delivering by hand an

occasional order, and doing some collecting. It is not disputed that on May 1, 1902, he sold out his interest in the Union Shrimp Company and from that time until he departed for China on July 8, 1902, he was not engaged in the shrimp business, had nothing to do therewith, and gave his time entirely to the mercantile business of Sang Wo Sang & Co. In Tom Hong v. United States, 193 U. S. 517, 24 Sup. Ct. 517, 48 L. Ed. 772, it was held that Chinese persons who are in this country prior to May 5, 1902, and thereafter carried on mercantile business under a corporate title, although the business was not conducted in their individual names, and who had books of account and articles of partnership, were merchants within the meaning of section 6, Act May 5, 1892, c. 60, 27 Stat. 25, as amended by Act Nov. 3, 1893, c. 14, § 1, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1321], and were not required to register under the terms of that act, nor were they subject to deportation upon their subsequently ceasing to be merchants and engaging in manual labor. That decision affirms the doctrine of a line of federal cases. United States v. Sing Lee, (D. C.) 71 Fed. 680; United States v. Yong Yew, (D. C.) 83 Fed. 832, 838; United States v. Leo Won Tong (D. C.) 132 Fed. 190; In re Yew Bing Hi, (D. C.) 128 Fed. 319; United States v. Louie Juen, (D. C.) 128 Fed. 522. Under the authority of these decisions the appellant was not subject to deportation at any time while he was in the United States prior to his departure for China. By engaging in manual labor he had not lost his right to be and remain in the United States. What was his right on returning to the United States?

The act of November 3, 1893, provides as follows:

"Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than Chinese, the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States and that during such year he was not engaged in the performance of any manual labor except such as was necessary in the conduct of his business as such merchant, and in default of such proof, shall be refused landing."

The appellant complied with this requirement of the statute. The Commissioners of Immigration were satisfied with the proof and permitted him to land. The appellant contends that their adjudication of his status as a merchant, and of his right to land is conclusive, and that he is not subject to deportation on a showing made before another tribunal that the fact was otherwise than as found by said commissioners. We do not find it necessary to pass upon that question in the present case. The testimony of several witnesses was taken to show that during the year prior to his departure from the United States the appellant was actively engaged in picking shrimps, picking crabs, and delivering goods. We are not impressed with either the candor or the credibility of the greater part of such testimony. The record shows that there was a conspiracy of persons, the identity of whom is not established, but probably persons connected with the Union Shrimp Company, to secure the deportation of the appellant. When he returned to the port of San Francisco and while his application for permission to land was under consideration, anonymous let-

ters were sent to the Commissioner of Immigration, alleging that the appellant had been a laborer before his departure from the United States, and nearly two months after he had been permitted to land, another anonymous communication was sent, giving the names of several witnesses who would testify to the fact that he did such manual labor. The witnesses named in that communication did, with one exception, appear and testify against him. One of them admitted that he supposed that the cause of the proceedings for the deportation of the appellant was the fact that since his return he had solicited trade for the San Mateo Fish Company. But accepting the finding of the United States Commissioner, who saw the witnesses and had a better opportunity to judge of their credibility than have we, that during the 12 months prior to his departure from the United States the appellant was engaged in the performance of manual labor in picking, shelling, and delivering shrimps, and cracking crabs, we think the fair deduction from the testimony is, and the Commissioner did not find to the contrary, that such was not the principal occupation of the appellant, but that the most of the time he was engaged in keeping the books of the Union Shrimp Company, and in conducting the business of Sang Wo Sang & Co., and that occasionally he picked shrimps after they were brought to the store, and delivered a rush order of goods to customers, and, perhaps, now and then cracked and picked crabs at the store in connection with the business of the Union Shrimp Company in buying and selling goods of that nature.

The decision of the United States Commissioner involved a mixed question of fact and law. The Commissioner was of the opinion, as shown by his ruling on the evidence, that if in fact the appellant at any time did the things above mentioned, he performed manual labor not necessary in the conduct of his business as a merchant. The Commissioner of Immigration may have been of the opinion so far as the record shows, that such labor was necessary in the conduct of the appellant's business as a merchant. We are led to inquire, therefore, what is the meaning of the statute, and what manual labor may be said to be necessary in the conduct of the appellant's business? In the ordinary business of a merchant no manual labor whatever is necessary. The statute contemplates that a Chinese merchant may do manual labor. The restriction is that it shall be such labor as is necessary in the conduct of his business as a merchant. The statute should receive a reasonable construction. If the appellant was permitted to engage in manual labor in connection with his business, we see no reason for holding that the work which he did, as fairly established by the evidence, was not such work as was necessary. It clearly was not his principal occupation. In Lai Moy v. United States, 66 Fed. 955, 14 C. C. A. 283, this court held that a Chinese person, who, during half of his time is engaged in cutting and sewing garments for sale by a firm of which he is a member, is engaged in manual labor not necessary in the conduct of his business, and is not a merchant within the meaning of the statute. But in the United States v. Sun (D. C.) 76 Fed. 450, it was held that a Chinese member of a trading firm, who lives at the store with other members of the firm

and does housework for them, and in spare time packs goods for shipment, is a merchant, and not a laborer. In re Chu Poy (D. C.) 81 Fed. 826, it was held that a Chinaman engaged as a clerk in an established mercantile business, and who does no further manual labor than that which is required to conduct the business of buying and selling merchandise at a fixed place of business, is in every proper sense a merchant, and not a laborer.

We think that the work which the appellant did during the year before his departure for China, as shown by the record and as found by the Commissioner, so far as his finding advises us, was such as was permissible, and does not render him subject to deportation.

The judgment is reversed, and deportation is denied.

LINDBLOM et al. v. FALLETT.

(Circuit Court of Appeals, Ninth Circuit. May 14, 1906.)

No. 1,194.

1. EVIDENCE—WRITTEN CONTRACT—CONTRADICTION BY PAROL.

Defendants, who were the owners of four mining claims on Anvil creek, known as "Discovery," "No. 1 Above," "No. 6 Above," and "No. 1 Below," employed plaintiff to develop the "Anvil Creek Property," belonging to defendants; the contract reciting that plaintiff should receive as compensation 7 per cent. of the net output of two claims "No. 6 Above" and "Discovery," and that the agreement should continue until "said claims" were worked out. *Held*, that such contract was ambiguous as to whether it included all four claims or only the two referred to, and hence the admission of parol evidence to show that the "Anvil Creek Property" contemplated was the two specified claims, and that a subsequent oral agreement was made as to the other property, was properly allowed.

2. TRIAL—INSTRUCTIONS—ASSUMPTION OF FACTS.

In an action for breach of an alleged oral contract to develop certain mining claims after the termination of a written contract, an instruction that plaintiff claimed damages for breach "of an alleged oral contract" entered into, according to the complaint on or about June 15, 1899, and according to the evidence at a later date, was not objectionable as assuming that the oral contract was in fact made.

3. SAME—EXCEPTIONS—SCOPE.

Where an instruction is excepted to as a whole, the exception will not be sustained, if a portion of the instruction is correct.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 694.]

4. CONTRACTS—BREACH—ACTION—INSTRUCTION.

Where, in an action for breach of an alleged oral contract for the development of certain mines, defendants relied wholly on a written contract as covering the work in question and a written release of liability on such written contract, and the court elsewhere charged that the affirmative of the issues was on the plaintiff to prove the material allegations of his complaint and reply, and was on the defendants to establish the matters alleged in their affirmative defense, an instruction that the burden was on plaintiff to show that the written contract did not include the work sued for, and that the burden was on him to establish the oral contracts, but that the burden was on the defendants to show that the written contract was the only contract made between the

parties, and that the release was executed as, and was in fact, a release of all claims under such contract, was not erroneous.

In Error to the District Court of the United States for the Second Division of the District of Alaska.

The plaintiffs in error were copartners engaged in mining in the Nome Mining District of Alaska and owned four claims on Anvil creek known as "Discovery," "No. 1 Above," "No. 6 Above," and "No. 1 Below." On May 2, 1899, they entered into a contract in writing with the defendant in error as follows: "Know all men by these presents: That we, Erik O. Lindblom, John Brynteson and Jafet Lindeberg, parties of the first part, and Julius Fallett, party of the second part, do hereby agree that said party of the second part, shall give his undivided attention and labor to the parties of the first part in the development of their Anvil Creek property and as remuneration to said party of the second part, said parties of the first part de hereby agree that they will give said party of the second part seven (7) per centum of the net output of claims No. 6 Above and Discovery Claim on Anvil creek. This agreement shall hold good until said claims are worked out and if sold prior to that time the same per centum of the selling price is to be paid to said party of the second part. Entered into this second day of May, one thousand eight hundred and ninety-nine, at Anvil City, Alaska." On July 20, 1899, the defendant in error executed to the plaintiffs in error the following release: "Anvil City, Alaska, July 20th, 1899. Know all men by these presents: That I, Julius Fallett, of Anvil City, Alaska, for the consideration of the sum of twelve hundred ($1,200.00) dollars paid by the Cape Nome Pioneer Mining Company, do hereby release the said Cape Nome Mining Company from the terms and consideration of a certain contract made by said company to myself by which I was to receive seven (7) per cent. of the net proceeds from Discovery Claim and No. 6 Above on Anvil creek, reference is hereby made to said contract which is recorded in the office of the mining recorder for the Cape Nome Mining District, Alaska, and this is intended as a receipt in full for all money due me from said company up to date." The defendant in error, on October 5, 1903, brought the present action alleging that on or about June 15, 1899, the plaintiffs in error entered into a verbal contract with him whereby he was to take charge of and prospect upon and develop said Claim No. 1 below Discovery during the year 1899, for which he was to receive 7 per centum of the net amount of gold and gold dust extracted from said claim during that year, and that the plaintiffs in error had refused to permit him to carry out said contract to his damage in the sum of $7,000. The plaintiffs in error answered denying said verbal contract and alleged that by the terms of the aforesaid written contract the defendant in error was to do development work on their four claims on Anvil creek, and that the written release was an acquittal of all claim and demand on account of work done on all of said claims. On the trial of the cause the defendant in error introduced testimony to show that the work which was to be done under the written contract was to be confined to the two claims specified therein, and that on or about the third or fourth of July, Lindblom, one of the plaintiffs in error, engaged him to do development work on Claim No. 1 Below, for which he was to receive the same percentage as was given for work on Claim No. 6 Above and Discovery.

J. C. Campbell, W. H. Metson, and Thomas H. Breeze, for plaintiffs in error.

W. Lair Hill, for defendant in error.

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

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

That the verbal contract as to Claim No. 1 Below was made is well sustained by the testimony, not only of the defendant in error, but by that of other witnesses, and in fact it is not denied by any of the plaintiffs in error. Lindblom and Lindeberg both testified, not that no such contract was made, but that they did not remember it, and the other plaintiff in error was not called as a witness. The testimony shows, moreover, that, after the execution of the release, Lindblom and Lindeberg acknowledged their liability to the defendant in error on the contract for work on No. 1 Below and at different dates thereafter promised to settle with him, and that it was not until three years thereafter that Lindblom denied liability to the defendant in error, which he did by saying that he had been advised not to settle with him. The work of developing claims was a work in which the defendant in error was evidently skilled. It is not denied that on the day on which his alleged oral agreement was made he went to Claim No. 1 Below with seven or eight men, opened it up, and soon thereafter discovered a rich pay streak. This discovery caused trouble between him and the plaintiffs in error. The latter objected to his devoting his time to Claim No. 1 Below, and desired him to work on No. 6 Above and Discovery. Their differences led to the execution of the release. Immediately after the execution of that instrument, the defendant in error, according to his testimony, and his testimony is corroborated, proceeded to work on Claim No. 1 Below in pursuance of his oral contract, but the plaintiffs in error refused to permit him to work there.

It is contended that the trial court erred in admitting evidence of the verbal contract and in refusing to instruct the jury to return a verdict for the plaintiffs in error. It is argued that the written contract by its terms included work by the defendant in error on all four of the claims, and that to admit parol evidence of the verbal contract was to contradict the written contract and was error. We do not think so. In the first place the written contract is not free from ambiguity. It is true that it provided that the defendant in error should give his undivided attention and labor in the development of the "Anvil Creek property" of the plaintiffs in error, but it goes on to specify that he was to receive as compensation 7 per centum of the net output of two claims, No. 6 Above and Discovery, and it provides that the agreement shall hold until "said claims" are worked out. It does not necessarily follow from the terms of this contract, as we read it, that the work was to be done on four claims, and we think it was not error to admit evidence to show that the Anvil Creek property contemplated in the agreement was the two specified claims which are named therein. Again, this construction of the agreement is borne out by the contemporaneous acts of the parties. Their understanding of the agreement is shown by testimony, which leaves no doubt that two months after the execution of the written agreement the oral agreement was entered into in regard to work on Claim No. 1 Below. To admit such parol testimony was not to vary the terms of the written contract, but was to explain its ambiguity and to show what prop-

erty was meant in the designation in the written agreement of the Anvil Creek property.

It is contended that the court erred in charging the jury as follows:

"The plaintiff claims damages for breach of an alleged oral contract entered into, according to the complaint, on or about June 15, 1899, and according to the evidence at a later date."

It is objected to this instruction that it assumes that the oral contract was in fact entered into. But the court was careful to designate the contract as an "alleged oral contract," and the reference to the evidence was not for the purpose of saying that the contract was established by the evidence, but for the purpose of directing the attention of the jury to the fact that the contract, as testified to by the parties, was not shown to have been made on the 15th of June, as alleged in the complaint, but at a later date.

Error is assigned to the following instruction:

"It is incumbent upon the plaintiff, therefore, in this case, to show that the oral contract in regard to No. 1 Below was made as alleged in his complaint and the breach thereof by the defendants, and that this contract was separate from and independent of the written contract in regard to No. 6 and Discovery Claims, and that at the time the written contract was made, it was made with reference only to Discovery and No. 6. On the other hand, in order to defeat this claim of the plaintiff, the defendants must show that the written contract was the only contract made between the parties, and that the release was executed as and was in fact a release of all claims under that contract."

This instruction was excepted to as a whole. There can be no question that the first portion of it was proper, and that the exception therefore to the whole of it was not well taken. Nor are we convinced that the latter portion of the instruction was erroneous. The plaintiffs in error, in their defense to the action, relied wholly upon the written contract and the written release. What the court said to the jury by the instruction was, in substance, that the burden was upon the plaintiff to show that the written agreement did not include work on Claim No. 1 Below, and that the burden was on him to establish the oral contract. And the court charged the jury that, notwithstanding such proof of the verbal contract, and there was no contradiction of the evidence offered to sustain it, in order to defeat the claim of the plaintiff so supported by the evidence, the defendants must show that the written contract was the only one. Elsewhere in the charge the court properly instructed the jury as to the burden of proof, as follows:

"You are instructed that in this case the affirmative of the issues is upon the plaintiff to prove the material allegations of his complaint and reply. On the other hand, the affirmative of the issues is upon the defendants to establish the matters and things alleged in their affirmative defense."

We find no ground for reversing the judgment of the court below. The judgment is affirmed.

NORFOLK & W. RY. CO. v. GRAHAM.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1906.)

No. 640.

1. BANKRUPTCY—ACTION BY TRUSTEE—RIGHT OF SET-OFF.
The provision of Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444], limiting the time for proving claims to one year has reference to the bankruptcy proceedings alone, and, if the claim of a creditor, who is also a debtor, of the estate is one provable in its nature, the fact that he has not proved it within the year does not affect his right to plead it as a set-off or counterclaim in an action by the trustee to recover his indebtedness to the estate as a claim "provable against the estate" within the meaning of section 68b, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450.]

2. CONTRACTS—CONSTRUCTION.
A provision of a contract with a railroad company for construction work giving the company authority to pay the claims of laborers and workmen employed by the contractor and to deduct the amount from that due him under the contract does not create an obligation on its part to pay such claims which can be enforced by the contractor's trustee in bankruptcy.

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

John H. Holt (Holt & Duncan and Jos. I. Doran, on the brief), for plaintiff in error.

Herbert Fitzpatrick (Samuel L. Adams, on the brief), for defendant in error.

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

McDOWELL, District Judge. The following is an excerpt from the opinion of the trial court:

"This was a suit in assumpsit instituted by John T. Graham, trustee of the estate of O. M. Page, a bankrupt, against the Norfolk & Western Railway Company, for the recovery of certain moneys alleged to be due to said estate under a contract entered into between said Page and said railway company for the construction of a certain portion of its roadbed in West Virginia. The defendant pleaded nonassumpsit and also filed a notice of recoupment under the West Virginia statute, under which it sought to prove damages growing out of the contract or transaction upon which the suit was brought, to an amount equal to the demand against it.

"The parties by mutual consent waived a jury and submitted all matters of law and fact to the judgment of the court upon an agreed statement of all facts, from which statement it appears that O. M. Page entered into a written contract on the 11th day of August, 1902, with the defendant, by which he agreed to construct for it, at certain prices therein named, sections 21 to 25 inclusive, of the Naugatuck Branch of the Ohio extension of its railroad. That, by the terms of the said contract, on or about the 15th day of each calendar month estimates of the work done by Page during the preceding month were to be made, and an advance payment of eighty-five per cent. (85%) thereof made to him, the remaining fifteen per cent. (15%) to be retained by the railway company as a compensation for or on account of any damages which might be certified by its engineer to have been sustained from any failure of the said Page to perform said contract. That Page performed work and furnished materials under said contract until the latter part of August, 1903,

during the whole of which time his total work amounted, according to the terms of the contract, to thirty thousand seven hundred and fifty dollars and eleven cents ($30,750.11), all of which was paid him, excepting $4,612.52 of retained percentages, and $3,428.25 worth of work estimated to have been done in the month of August, making a total still in the hands of the railway company, retained percentages and August estimate, amounting to $8,040.77. That the retained percentages for the month of May, 1903, amounted to $1,070.53; for the month of June, $570.66; for the month of July, $651.13, and for the month of August, $604.99; all of which percentages are embraced in the sum total retained percentages of $4,612.52 above named, and are separated into months only for the purpose of showing what these percentages amounted to for the four months next preceding the adjudication of Page as a bankrupt. That Page broke his contract and abandoned his work on or about the 28th or 29th day of August, 1903, and the railway company, through its engineer construction work, branch lines, and in accordance with the terms of said contract, immediately declared in writing the same to be terminated and forfeited, which writing was filed with the railway company, a copy thereof mailed to Page's last known address, and another copy, as provided in the contract, posted at the front door of his office upon his work, on September 1, 1903. That a petition in bankruptcy was filed against Page on the 1st day of September, 1903, and he duly adjudged a bankrupt on the 10th day of said month. John T. Graham was chosen as trustee in bankruptcy by the creditors, and, by an order of the bankrupt court, was authorized and directed to institute this suit.

"It was further agreed that Page was insolvent at the time of his adjudication as a bankrupt, and that he was at that time indebted to laborers who had performed work for him upon the sections agreed to be constructed by him during the three months next preceding such adjudication, in amounts aggregating five thousand dollars ($5,000.00), but exceeding in no individual case the sum of three hundred dollars ($300.00), all of whose claims were proven in the bankrupt court, in accordance with the provisions of the act of Congress. It was further agreed that, after Page had abandoned his work and the railway company had declared his contract forfeited and at an end, it immediately advertised for bids in the customary way for the completion of the work that had been left unfinished by him. Many contractors made bids thereon, but, after the exercise of due care and diligence in the premises upon the part of the railway company, one John T. McKinney was declared to be the lowest and best bidder, and the contract for the completion of the abandoned work of O. M. Page was given to the said McKinney. The new contractor entered upon his work and prosecuted the same with diligence, and under the reasonable supervision of the railway company, to completion; but, in consequence [as it was agreed] of the condition in which Page left the work that had been abandoned by him, the railway company was compelled to pay unto McKinney $11,112.80 more than it would have been required to pay to Page upon the completion of said work had he performed the same at the prices and in accordance with the terms agreed upon by him.

"The defenses of the railway company were two: (1) That, under the plea of non-assumpsit, and by the very terms of the contract itself, it did not owe Page anything; because it had a right to keep not only the retained percentages of $4,612.52, but the August estimate of $3,428.25, as well; the title thereto never having vested in Page, in consequence of his agreement that no money was to become due or payable to him or demandable by him until after the whole work had been completed in a satisfactory manner and certified by the engineer of the railway company, which had not been done. (2) That, even if said retained percentages and August estimate should be held to be a debt due from the railway company to Page, still nothing would be recoverable against the railway company in consequence of its right to recoup, to the extent thereof, or offset against the same, the damages occasioned to it by the very breach by Page of the contract sued upon."

The declaration consisted of the common counts in assumpsit and several special counts founded on the contract. It does not appear whether or not the railway company knew of the bankruptcy proceed-

ings prior to the institution of this action. The trial court ruled in favor of the railway as to the fifteen per cent. retained from the various monthly estimates. But, being of opinion that defense as to the 85 per cent. of the August estimate could only be made by way of counterclaim, and that section 57n, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3,444], barred such counterclaim, the judgment below was as to this item adverse to the railway company. The opinion as to the effect of the bankrupt act reads as follows:

"The only other feature necessary to be considered is as to the applicability of the notice of recoupment filed with the plea of nonassumpsit. As the estate of Page, here represented by the trustee, is that of a bankrupt, the question as to the availability of this notice is solvable only under the provisions of the bankruptcy act, and under those provisions I must hold that it is ineffectual. It is provided by Act July 1, 1898, c. 541, § 68b, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], that a set-off or counter claim shall not be allowed in favor of any debtor of the bankrupt which is not made provable against the estate. This account for damages for failure to complete the bankrupt's contract is not so provable, because of lapse of time, and therefore cannot now be set off. It is not the character of the demand which precludes the right to set it off, but the failure to prove it in the proceeding in bankruptcy. Thus unliquidated claims may be set off against liquidated claims, provided they are provable in bankruptcy, and this, as I apprehend, requires that they be presented and proved before the referee. See section 63b, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447] and the discussion thereof in Collier on Bankruptcy (5th Ed.) p. 488; Brandenburg on Bank (3d Ed.) § 1005; Loveland on Bank (2d Ed.) p. 282.

"Had the railway company chosen to liquidate and prove its claim it would seem that it would have been entitled to set it off against the debt due to the estate; but, not having proved its claim within the time limited, or taken steps to have it allowed in the bankruptcy proceedings, it cannot now be pleaded as a virtual set-off in this proceeding.

"Let judgment be entered for $3,428.25, with interest thereon from September 15, 1903."

As the railway company alone has filed assignments and sued out writ of error, we shall deal only with the propositions decided adversely to it. In view of the conclusion we have reached it is unnecessary that we set out the reasons which lead us to think unsound the contention made in behalf of the railway company to the effect that the contract gave the company the right to retain the 85 per cent. of the August, 1903, estimate as liquidated damages. We agree with the trial court that the right of the company to defeat the claim of the trustee could only be asserted by way of counterclaim. We must therefore now consider the question raised under the bankrupt act.

Section 57n, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3,444], is a new provision, appearing for the first time in the act of 1898. The argument relied on by defendant in error may be briefly expressed as follows: The counterclaim of the railway company, while provable in its nature, was not proved in the bankruptcy proceeding within the time allowed by section 57n, and it was therefore when asserted in the court below not a provable counterclaim such as can be set off. So far as we have been able to discover there is no reported case which can be relied upon as a precedent for the view taken by the court below, and none that has more than a tendency to support the opposite view. As the trial court read section 57n, it is a statute of limitations applicable to the counterclaim of a debtor sued in an independent plenary action

brought by the trustee in bankruptcy. We cannot so construe this provision. Section 57 as a whole relates merely to the proof and allowance of claims against the bankrupt in the bankruptcy proceeding. The purpose of 57n is to speed the conclusion of that proceeding. One who is the debtor and the creditor of the bankrupt, whose claim against exceeds his debt to the bankrupt, must prove his claim in the bankruptcy proceeding within the time limit fixed by 57n, in order to share in the distribution of the estate. In re Muskoka Co. (D. C.) 127 Fed. 886. But we find no warrant for holding that his failure to thus prove it is a bar to the use of such claim in diminution of or to defeat the claim of the trustee when asserted in an independent action. If this clause of the act has the effect given it by the trial court, it is as effective when relied on against the counterclaim of one who has never heard of the bankruptcy proceeding, as it is when relied on against the counterclaim of one who has had full knowledge of such proceeding. And it is as effective in case the trustee brings his action after the expiration of the time limit fixed by section 57n, as in case he brings such action while there is yet time for the defendant to prove his counterclaim in the bankruptcy proceeding.

If in the case at bar the railway company had no knowledge of the bankruptcy proceeding until this action was brought, section 57n, as construed by the trial court, has the effect of depriving the company of a valuable right without an opportunity to be heard. The fact that no exception is made in behalf of one who first learns of the institution of the bankruptcy proceeding after the time fixed by this clause seems to us sufficient of itself for denying the clause effect in an independent action. But let it be assumed that in the case at bar the company knew of the bankruptcy proceeding in ample time, and failed to prove its claim for the excess of its damages over the value of the unpaid for work, simply because it regarded the claim as worthless. Under this assumption, the discharge in bankruptcy, when granted, will bar the claim for the excess as a liability against Page (In re Hilton [D. C.] 104 Fed. 981); and the failure of the railway company to prove its claim deprives it of any possible right to share as a creditor in the distribution of the bankrupt estate (In re Shaffer [D. C.] 104 Fed. 982). But we think it cannot be true that such failure to prove the claim to the excess in the bankruptcy proceeding leaves the company in the position of a mere debtor. Statutes of limitation are strictly construed. But even if the rule of construction were otherwise, the language of the clause in question and its context seem to us to plainly limit its effect to proceedings in bankruptcy. In enacting the bankrupt act Congress could have had no reason for requiring a debtor creditor, whose claim against exceeds his debt to the bankrupt, to prove the excess and insist upon his rights as a creditor of the estate. And hence there was no reason for penalizing such failure by imposing a limitation upon the right of a person thus situated who does not wish to prove and claim the excess. The full purpose of section 57n seems to us to be subserved when it is held that the limitation applies merely to claims sought to be asserted in the bankruptcy proceeding.

We think the true solution of the question before us is that the counterclaim which may be set off in an independent action brought by the trustee is (subject to the restrictions of section 68b, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]) one that is provable in its nature, and need not necessarily be one that has been, or may yet be, proved in the bankruptcy proceeding. Section 20 of the bankrupt act of 1867 provided:

"That in all cases of mutual debts or mutual credits between the parties the account shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid; but no set-off shall be allowed of a claim in its nature not provable against the estate. * * *"

Section 68 of the present act reads, so far as now material:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid. A set-off or counter-claim shall not be allowed in favor of any debtor of the bankrupt which is not provable against the estate."

In Morgan v. Wordell, 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33–41, Mr. Justice Holmes, said:

"The present statute leaves out the words 'in its nature,' but we can have no doubt that it was intended to convey the same idea as the longer phrase in the last preceding act, from which in all probability its words were derived. 'Provable' means provable in its nature at the time when the set-off is claimed, not provable in the pending bankruptcy proceedings."

It may be true that Page's liability to the company was at the time of the filing of the petition and at the date of the adjudication contingent. But before this liability was asserted as a counterclaim it had become fixed and certain in amount. It was certainly provable in nature when it was asserted in the court below. The contention of defendant in error based on the theory that the railway company is securing a preference seems to us without merit. If a counterclaim is provable in its nature, and if it was not acquired as forbidden by section 68b, we find nothing in the bankrupt act to prevent its use under the circumstances existing here.

We have not overlooked the contention of defendant in error to the effect that the contract creates an obligation on the part of the railway company to pay the labor claims. The paragraph relied upon reads as follows:

"In all cases of nonpayment by the said contractor of any sum or sums of money due the laborers or other workmen for work performed under this agreement, the said railway company is hereby authorized to pay such laborers or workmen the amounts due and owing to them by the said contractor; and if any action or proceeding at law or in equity shall be instituted by virtue of any law or statute now in force, or hereafter enacted, for labor and wages on said work, the said railway company may pay all damages, wages, recoveries, costs, expenses, and counsel fees arising therefrom and deduct the same, and also whatever amounts may be paid for wages as beforementioned, from any money due or to grow due to the said contractor; and the said railway company may from time to time retain such reasonable sums as it may deem necessary for its protection in this behalf; and the said contractor shall forthwith pay to the railway company the amount of any deficiency arising from such payment for laborers or other workmen, and from time to time retain

such reasonable sums as it may deem it necessary for its protection in this behalf; and the said contractor shall pay the deficiency arising therefrom upon demand."

We can read this paragraph only as giving to the company a right to pay such claims; not as obliging it to pay them. What rights the labor creditors may have, or may have had, against the railway company under the West Virginia labor lien law we do not know. Nothing in this record touches upon this question, and the existence or nonexistence of any such right can have no bearing upon the solution of the questions here presented for review.

We are of the opinion that the learned trial court erred in rendering judgment against the railway company, and the judgment below must be reversed, and the cause remanded.

Reversed.

UNITED STATES v. PIERSON et al.

(Circuit Court of Appeals, Eighth Circuit. April 23, 1906.)

No. 2,099.

1. EVIDENCE—UNITED STATES OFFICERS—ACCOUNTING—TREASURY DEPARTMENT—PROCEEDINGS—CERTIFIED TRANSCRIPT—ADMISSIBILITY.

Where, in an action on the bond of a United States Indian agent, a transcript of the books and proceedings of the Treasury Department, certified and authenticated by the Register of the Treasury, as required by Rev. St. § 886 [U. S. Comp. St. 1901, p. 670], was offered in evidence, it was immaterial that it was not certified by the Secretary or the Assistant Secretary of the Treasury, as required by amendatory act March 2, 1895, c. 177, § 10, 28 Stat. 809 [U. S. Comp. St. 1901, p. 671], enacted after the transcript was filed as a part of the record, and in force at the time of the trial, but providing expressly that it related to certificates "thereafter made."

2. INDIANS—AGENTS—ACTION ON BONDS—EVIDENCE.

Rev. St. § 886 [U. S. Comp. St. 1901, p. 670] declares that, when suit is brought in any case of delinquency of a revenue officer or any person accountable for public money, a transcript from the books and proceedings of the Treasury Department, certified by the register and authenticated under the seal of the department, shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment and award execution accordingly. *Held* that, in the absence of countervailing evidence in an action on the bond of an Indian agent, the introduction of a duly certified transcript of the books and proceedings of the Treasury Department established a prima facie case in favor of the government entitling it to judgment.

3. UNITED STATES—OFFICERS—CREDITS—ACTIONS—BURDEN OF PROOF.

1 U. S. Comp. St. 1901, p. 695, § 951, provides that, in suits between the United States and individuals, no claim for a credit shall be admitted on trial, but such as shall appear to have been presented to the accounting officers of the treasury for their examination, and by them disallowed in whole or in part, unless it shall be proved to the satisfaction of the court that the defendant is in possession of the vouchers not before in his power to procure, and that he is prevented from exhibiting a claim for such credit at the treasury by absence from the United States or some unavoidable accident. *Held*, that a public officer, in order to obtain credits in his accounts for the United States, must claim such credits, ask their allowance, and, if rejected, the burden is on him to establish the same.

4. INDIANS—ACTION ON AGENT'S BOND—TRANSCRIPT FROM TREASURY BOOKS—PROCEEDINGS.
In an action on a bond of a United States Indian agent, a transcript from the books and proceedings of the Treasury Department is not conclusive of the claims of the government; the court being authorized to allow disallowed items on facts either appearing on the face of the transcript or established by extraneous evidence.

5. EVIDENCE—OFFICIAL RECORDS—TRANSCRIPT—CONTENTS.
In an action on an Indian agent's bond, a transcript of the books and proceedings of the Treasury Department was admissible, though it contained some items of credit or debit concerning which it was not competent evidence.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1291.]

6. SAME—RULINGS OF TREASURY DEPARTMENT—GROUNDS.
Where, in an action on the bond of an Indian agent, the transcript of the books and proceedings in the Treasury Department contained a debit and credit statement of the account and a showing of the items in dispute, it was not objectionable because it also contains explanatory memoranda showing the grounds of the rulings of the accounting officers concerning the items rejected, and, in some instances, the evidence on which they relied.

7. INDIANS—INDIAN AGENT—RECEIPT OF MONEY—EVIDENCE.
In an action on the bond of a United States Indian agent, a transcript of the books and proceedings of the Treasury Department is not evidence of the receipt by such agent of moneys that did not come to his hands through the ordinary channels of the department.

8. SAME—FUNDS—DISTRIBUTION.
Where, because the members of one of two bands of Indians had committed certain depredations, the federal authorities withheld from them the greater portion of the annuity to which they would otherwise have been entitled, and the Indian agent was instructed to disburse to each member of the offending band $1.93, and to each member of the other band $11.20, such agent had no authority to divide all of the money equally between the members of both bands, because of their threatening attitude, with the consent of the members of the unoffending band, and his act in so doing rendered him and his sureties liable as for a diversion of the funds.

9. SAME—PENALTIES—LIABILITY OF SURETY.
Act Cong. March 1, 1883, § 8 (22 Stat. 451), provides that any officer, who knowingly presents any voucher, account, or claim for approval or payment or to secure credit in any account with the United States relating to any matter pertaining to the Indian service, which contains any material misrepresentation of the fact, shall not be entitled to any part of the voucher, account, or claim. *Held*, that such section was in the nature of a penalty and was unenforceable against sureties of an Indian agent on a bond conditioned to secure his faithful disbursement of all public moneys and to honestly account without fraud or delay for all public funds and property.

Hook, C. J., dissenting in part.

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

This was an action upon the bond of Elisha W. Davis as Indian agent, conditioned that he carefully discharge the duties of such office and faithfully disburse all public moneys and honestly account without fraud or delay for the same and for all public funds and property coming into his hands. Although named as a defendant, Davis died before the action was commenced, and it proceeded against his sureties. At the conclusion of the evidence for the gov-

ernment the District Court directed the jury to find a verdict for the defendants. This writ of error is to review the judgment rendered upon the verdict so returned.

Earl M. Cranston (George P. Steele, on the brief), for the United States.

Edmund F. Richardson (Horace N. Hawkins, on the brief), for defendants in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. The question lying at the threshold of the case is as to the admissibility in evidence, on behalf of the government, of a transcript from the books and proceedings of the Treasury Department, which was certified and authenticated as required by section 886 of the Revised Statutes [U. S. Comp. St. 1901, p. 670]. That section, so far as it need be quoted, provides:

"When suit is brought in any case of delinquency of a revenue officer or any person accountable for public money a transcript from the books and proceedings of the Treasury Department, certified by the register and authenticated under the seal of the department * * * shall be admitted as evidence and the court trying the cause shall be authorized to grant judgment and award execution accordingly. * * *"

This was the law in 1888, when the certificate to the transcript was made, and also in 1892, when the transcript was filed in the cause as a bill of particulars by way of supplement to the original complaint. But by the act of March 2, 1895, c. 177, § 10, 28 Stat. 809 [U. S. Comp. St. 1901, p. 671], it was provided that thereafter such certificates should be made by the Secretary or an Assistant Secretary of the Treasury instead of the Register; and this amendatory act was in force in 1903, when the transcript was offered in evidence at the trial. Various objections were made by the defendants to the admission of the transcript, and among them was one directed to the certification because it was not in accordance with the law then in force. The court sustained the objections generally, except so far as the transcript was from the books and proceedings of the Treasury Department to which extent it was admitted in evidence. The ruling took this form because it was claimed that there was much extraneous matter in the document offered. It appears therefore that the specific objection on account of the certificate was overruled. This was right. The certificate when made was made by the proper officer. The amendatory act of 1895, by its express terms related to certificates thereafter made, and it was not intended to destroy the effect of one previously made as required by law and attached to a transcript which had been filed and had become a part of the record in a pending cause.

After the admission of the transcript, so far as it related to the books and proceedings of the department, the attorney for the government offered additional evidence to establish its case as to each disputed item in the account, but as he proceeded the court eliminated the items until at the end it excluded in effect, though not in terms, the entire transcript and directed a verdict for the defendants. This

was error. The transcript itself was sufficient proof, in the absence of countervailing evidence, to entitle the government to a verdict upon many of the items in controversy.

The effect of transcripts from the books and proceedings of the Treasury Department, certified in accordance with the act of Congress, as evidence in actions against officers accountable for public moneys and their sureties has been recognized many times. Such a transcript is not, as counsel for the defendants seem to contend, proof of such a low order that it may be disregarded by the court. A transcript, when in proper form, properly certified, and admitted in evidence, makes a prima facie case for the government, and, although the statute says "that the court trying the cause shall be authorized to grant judgment and award execution accordingly," it is not meant that whether the court shall do so or not is left in any degree to its discretion. If the prima facie case made by the transcript is not overthrown, it is error to refuse to grant judgment. The case is then like any other in which a plaintiff has made a prima facie showing. Moses v. United States, 166 U. S. 571, 597, 17 Sup. Ct. 682, 41 L. Ed. 1119; United States v. Dumas, 149 U. S. 278, 285, 13 Sup. Ct. 872, 37 L. Ed. 734; United States v. Stone, 106 U. S. 525, 530, 27 L. Ed. 163; Soule v. United States, 100 U. S. 8, 11, 25 L. Ed. 536; United States v. Gaussen, 19 Wall. 198, 22 L. Ed. 41; Watkins v. United States, 9 Wall. 759, 19 L. Ed. 820; Bruce v. United States, 17 How. 437, 15 L. Ed. 129; United States v. Jones, 8 Pet. 375, 8 L. Ed. 979; Smith v. United States, 5 Pet. 292, 8 L. Ed. 130; United States v. Eggleston, 4 Sawy. 199, 25 Fed. Cas. No. 15,027.

Section 886 of the Revised Statutes, providing for the use in evidence of transcripts from the books and proceedings of the Treasury Department, was drawn from the first two sections of the act of March 3, 1797, entitled "An act to provide more effectually for the settlement of accounts between the United States and receivers of public money." 1 Stat. 512. The fourth section of this act is a part of the same machinery. It provides:

"That in suits between the United States and individuals, no claim for a credit shall be admitted, upon trial, but such as shall appear to have been presented to the accounting officers of the treasury, for their examination, and by them disallowed, in whole or in part, unless it should be proved, to the satisfaction of the court, that the defendant is, at the time of trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury, by absence from the United States, or some unavoidable accident."

These provisions still remain embodied in the law (1 U. S. Comp. St. 1901, § 951, p. 695), and, as applied to cases like the one before us, their plain meaning is that, when public funds have come into the hands of a public officer, he can only acquit himself of responsibility therefor in the manner prescribed, and that his accounts with the government cannot be settled and adjusted upon the mere presumption of a due performance of his official duty. He must claim his credits and ask for their allowance, and when, so claimed, they are rejected by the accounting officers of the Treasury, a transcript from the books and proceedings of the department showing that fact is prima facie

evidence against him. The burden is then upon him, and if he does not discharge it judgment must go against him. Watkins v. United States, 9 Wall. 759, 19 L. Ed. 820. These rules are necessary for the proper and efficient discharge of the public business, and they have been constantly enforced for more than a century.

But a transcript from the books and proceedings of the Treasury Department is not conclusive of the claims of the government. Items of credit to the officer whose accounts are in question which have been rejected by the accounting officers may be allowed by the court trying the case, and the grounds for such allowance may appear upon the face of the transcript itself, or they may be established by extraneous evidence. A transcript offered in evidence is not to be excluded merely because there appear therein some items of credit or debit concerning which it is not competent evidence. United States v. Hodge, 13 Howe, 478, 483, 14 L. Ed. 231.

Again, to be admissible the transcript should not be a mere statement of resultant balances. Both sides of the account, debit and credit, should be given, and it is proper to include therein a showing of the differences or items in dispute. Moses v. United States, 166 U. S. 571, 599, 17 Sup. Ct. 682, 41 L. Ed. 1119; United States v. Gaussen, 19 Wall. 198, 22 L. Ed. 41; Hoyt v. United States, 10 How. 109, 133, 13 L. Ed. 348. The transcript which appears in the record before us answers to these requirements, and it compares favorably with the one set out in the statement preceding the opinion in United States v. Gaussen, supra, and which met the approval of the Supreme Court. One feature of it, however, requires special mention: As part of the statement of differences there appears in much detail an account of the grounds of the rulings of the accounting officers in rejecting the various items in dispute and in some instances the evidence upon which they relied. While this may be unnecessary the defendants are not prejudiced thereby, for it does not add to the evidential force or effect of the action of the accounting officers in rejecting the items. If all of this explanatory memoranda were eliminated from the transcript, there would still be left the statement of the account, of the differences in dispute, and the fact of the adverse rulings of the accounting officers. And a transcript showing these alone would still be prima facie evidence in favor of the government. Indeed the explanatory statements to which the defendants object are of advantage to them, in that they definitely advise them of what they have to meet and also enable them to present to the court the question of law, whether, admitting the facts recited to be true, the rejection of the items by the accounting officers was justified. They may also furnish evidence for the defendants that the items to which they relate have been duly presented and disallowed and are therefore proper subjects for investigation by the court. United States v. Patrick, 20 C. C. A. 11, 73 Fed. 800.

The transcript is not proper evidence of the receipt, by an officer, of moneys that did not come to his hands through the ordinary channels of the department. Bruce v. United States, 17 How. 437, 440, 15 L. Ed. 129; United States v. Hodge, 13 How. 478, 483, 14 L. Ed.

231; Hoyt v. United States, 10 How. 109, 132, 13 L. Ed. 348, 576; United States v. Jones, 8 Pet. 376, 8 L. Ed. 979; United States v. Buford, 3 Pet. 12, 29, 7 L. Ed. 585. Should no other evidence than the transcript be produced by the government, this rule will require the exclusion of the debit for moneys alleged to have been received by the Indian agent for pasturage and not admitted or included in his own accounts, as well as such other of the disputed items as are similarly circumstanced.

There was sent to the Indian agent a sum of money for distribution as an annuity among two different bands of Ute Indians. The duty thus imposed upon him was one with which it was proper to charge him. It was within the general scope of his office and germane to the other duties pertaining to it. National Surety Co. v. United States, 63 C. C. A. 512, 129 Fed. 70. The members of one of these bands of Indians had committed certain depredations, and for that reason the authorities at Washington withheld from them the greater portion of the annuity to which they would otherwise have been entitled. Under the instructions he received the Indian agent should have given to each member of the offending band $1.93, and to each member of the other band $11.20. But, owing to the threatening attitude of the Indians discriminated against, the agent divided all of the money equally between the members of the two bands, took vouchers showing that he had complied with his instructions, and submitted them with his reports. The Indians who were thus deprived of a portion of the annuity belonging to them consented to what was done, but their consent was ineffectual for any purpose whatever. Some of them were minors, and all of them were wards of the government. When the Indian agent received the funds for disbursement the duty devolved upon him to disburse them in accordance with the law, and the rules, regulations, and instructions of the department. He was wholly without power to exercise his own discretion or to act upon his own judgment as to the propriety of a different plan of distribution. It was not competent for him to modify the course which the department had prescribed, and he and his sureties became liable for the diversion of the funds from the designated recipients.

One other matter requires notice. By section 8 of the act of March 1, 1883 (22 Stat. 451), it is provided that any officer who knowingly presents any voucher, account, or claim for approval or payment or to secure credit in any account with the United States relating to any matter pertaining to the Indian service, which contains any material misrepresentation of fact, shall not be entitled to payment or credit for any part of the voucher, account, or claim. This provision is renewed by section 8 of the act of July 4, 1884, c. 180, 23 Stat. 97 [U. S. Comp. St. 1901, p. 1420]. Under this authority various items in the account of the Indian agent were wholly disallowed by the accounting officers, although they contained in part actual disbursements for which he would have been entitled to credit had there been no misrepresentation. And the question now arising is whether the rejection of the entire items is binding upon the defendant sureties, or

whether they are entitled to credit for those parts thereof which represent actual legal disbursements. The writer of this opinion is of the view that, even though the disallowance of an entire item upon the ground specified in the statute be considered in the light of a penalty for misrepresentation of fact, nevertheless it operates as well against the sureties as against their principal—that no discrimination can be made between them in the measure of recovery. The condition of the bond which they executed was that their principal should "faithfully disburse all public moneys and honestly account without fraud or delay for the same and all public funds and property," and one of the legal consequences of a default in this condition was prescribed by a pre-existing statute. Macintosh v. Likens, 25 Iowa, 555; Pelzer v. Steadman, 22 S. C. 279; Gilbert v. Isham, 16 Conn. 525; Eastin v. School Directors, 40 La. Ann. 705, 4 South. 880; Breeding v. Jordan, 115 Iowa, 566, 88 N. W. 1090.

The majority of the court, however, are of the opinion that a forfeiture of the lawful portion of an item because of misrepresentation as to the remainder, being purely by way of a penalty, cannot be enforced against the sureties (Salomon v. People, 89 Ill. App. 374, affirmed 191 Ill. 290, 61 N. E. 83); and such therefore is the rule that must be applied. Under this rule, for example, the sureties will be entitled to credit for that portion of the $6,569.75 which the agent paid to the right Indians, but to no credit for that portion of this sum which he paid to the wrong Indians. The foregoing principles we think cover the entire case in a general way, and dispense with the necessity of a minute consideration of the various items in controversy.

The judgment of the District Court is reversed, and the cause remanded for a new trial.

ATLANTIC TRUST CO. v. CHAPMAN et al.

(Circuit Court of Appeals, Ninth Circuit. May 14, 1906.)

No. 1,142.

1. EQUITY—INTERLOCUTORY PROCEEDING—SUBMISSION ON PLEADINGS.

Where the petition of a receiver to require the complainant in the suit to pay the costs and expenses of the receivership, which exceeded the proceeds of the property when sold, was submitted upon complainant's answer thereto, as upon bill and answer, complainant is entitled to the benefit of all denials of matters alleged in the petition and of all matters of defense properly pleaded.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 711.]

2. RECEIVERS—COST OF RECEIVERSHIP—LIABILITY OF COMPLAINANT.

The trustee in a mortgage given by a corporation to secure its bonds which, instead of exercising the power of sale given it by the mortgage, institutes a foreclosure suit and obtains the appointment of a receiver for the property of the corporation may be adjudged liable for the costs and expenses of the receivership where they exceed the amount realized from the property, and it is not relieved from such liability, by the fact that it was not notified of such claim until final settlement of the receiver's accounts nor is the receiver required to make bondholders who intervened in the suit parties defendant to his petition against the complainant.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, § 400.]

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

J. J. Scrivner, for appellant.

E. C. Chapman and Stanley W. Dexter, in pro. per.

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

GILBERT, Circuit Judge. This case was before this court before on appeal from a decree sustaining the demurrer of the appellant, the Atlantic Trust Company to the petition of E. C. Chapman, receiver, for an order requiring the trust company to pay the costs and expenses of the receivership. Chapman v. Atlantic Trust Co. et al., 119 Fed. 257, 56 C. C. A. 61. This court adjudged that the demurrer should have been overruled, and held that where the costs and expenses of the management of mortgaged property by a receiver in a suit, which costs and expenses were authorized by the court, exceed the proceeds of the property when sold, together with its earnings, and the court has expressly retained jurisdiction over the subject-matter and the parties until the final settlement of the receiver's accounts, it has power on such settlement to render a judgment for the deficiency against the complainant at whose instance the receiver was appointed and continued and the expenses incurred. The cause was remanded to the Circuit Court for further proceedings. The trust company then filed its answer to the receiver's petition. Thereupon the matter was submitted to the Circuit Court as upon bill and answer. Upon consideration thereof the court entered a decree adjudging that the trust company pay to the receiver the costs and expenses in accordance with the prayer of his petition. From that decree the present appeal is taken.

Upon submission of the cause as upon bill and answer, the trust company was entitled to the benefit of all denials in the answer of the matters set forth in the petition, and all matters properly pleaded in the answer; and the question at issue was what was a proper judgment upon the facts presented by the petition and not denied in the answer together with the facts properly pleaded in the answer. Reynolds v. Crawfordsville Bank, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733; Banks v. Manchester, 128 U. S. 244, 9 Sup. Ct. 36, 32 L. Ed. 425. The appellant contends that upon the case now presented the equities are with it, and that certain allegations of the petition which stood admitted upon the record when the case was formerly before this court are now eliminated by reason of denials in the answer, such as the allegation that the expenses were incurred on the motion or request of the appellant, that the receiver acted upon its assurances as to the sufficiency of the property to pay the foreclosure expenses, that the foreclosure was irregular and collusive, and that the acts of the appellant contributed to the delay of the suit and its disastrous result. The appellant urges that the receiver himself was the person best acquainted with the situation at all times, and that he should have given warning that future expenses might result in

a deficit upon a sale; that so far as the final disaster was due to human mistakes it was due to the mistakes of the receiver and his employés, and particularly to his selection of an engineer at the instance of others; and that the delays which prolonged the receivership until the break down of the dam were due to matters beyond the appellant's control, such as interventions in the suit by outside parties and the litigation resulting therefrom. The answer sets up reasons, some by way of argument, others by statement of facts, why the appellant should not be held liable for the expenses of the receivership. It does not deny any of the material facts alleged in the petition. It alleges as matter of defense that the Canal & Irrigation Company was a quasi public corporation, and that all the expenses were incurred by the receiver as the officer and hand of the court, not as the agent of the appellant nor for its benefit, but for the benefit of all concerned including the public. It alleges, and this is one of the principal defenses relied on, that the appellant is a corporation enjoying high credit in commercial communities throughout the United States, and that had it been known or understood by persons taking the receiver's certificates that it was personally liable upon them, the certificates would have been readily subscribed at a low rate of interest instead of being placed with difficulty at the high rate of 10 per centum per annum. We do not see how this defense can avail the appellant to avoid its liability. It was bound to know the law and to know the nature of the obligation which it assumed in asking the court to appoint the receiver to manage the property. It must be presumed to have had notice of the progress of the case, the difficulties of the receivership, the expenses thereof, and the issuance of receiver's certificates, together with the difficulty of disposing of the same. If its credit in the commercial world would have been of aid in disposing of the receiver's certificates at a lower rate of interest, it had the opportunity to use its credit for that purpose. It brought the foreclosure suit at the request of bondholders, it is true, but it was not bound to resort to the court or to ask for the appointment of a receiver. The trust deed gave it the option to sell at public auction the entire property in case of default in the payment of interest.

The appellant relies on the defense of laches as against its liability for the costs incurred by the receiver. It has not specified the laches in pleading that defense in its answer, but it argues that the facts show that it was kept in unsuspecting quiet until the time had expired when it could either bid upon the foreclosure sale or redeem from that sale, or appeal from the foreclosure decree, and that had there been any claim that it would be held responsible for the deficit caused by the receiver's management of the property, there can be no doubt that it would have protected itself by bidding at the sale up to the full amount of the deficit, whereby it would have had the property to exploit or sell. This argument is based upon the assumption, unsupported by anything discoverable in the record, that the property on the foreclosure sale sold for less than its full value. We are not warranted in assuming that it sold for less. If it did, was it not the duty of the trust company, protecting the bondholders, to see that it

did sell for its full value or to redeem in case it did not? Its duty to itself to avoid payment of receiver's expenses was no greater than its obligation to its cestuis que trustent to protect their interests in the foreclosure sale. We can discover no ground for imputing laches to the receiver. It was not among his duties to advise the appellant of his understanding of its legal liability to him. It was its duty to know it.

It is contended that the bondholders should have been made parties to the receiver's petition, and the proceedings thereunder, and that they should bear their due proportion of the expenses with the bondholders at whose particular instance the suit was brought, and whom the appellant represented in the foreclosure suit, that this contention is especially sustainable as to the intervening bondholders who did become parties to the foreclosure proceedings, and that thereby they became cocomplainants, and assumed their proportion of the costs and expenses of the litigation. Some of the intervening bondholders appeared in the double capacity of creditors of the corporation and holders of its bonds. The record shows, however, that they were compelled to intervene as bondholders, for the reason that the appellant, whose duty it was to represent and protect all the bondholders, refused to represent the interveners, and attacked and assailed the validity of their bonds. It is true that the interveners were allowed costs, but their costs have not been paid, nor are such costs included in the sums adjudged to be paid to the receiver. In the proceeding to adjust the receiver's account and to fix liability for the payment of the amount due him, it may be that all bondholders might, upon their own application, have been admitted as parties, and perhaps it would have been within the discretion of the trial court to order that they be made parties upon a plea of the appellant suggesting nonjoinder of parties. They were not necessary parties, however. To have brought them in would have been to inject into the case a controversy between the trustee and its cestuis que trustent in which the receiver had no interest. The case was one primarily between the receiver and the appellant. Its determination was not affected by the fact that the latter acted in a representative capacity in incurring the liability, the bondholders being represented by him, and interested only consequentially. Kerrison, Assignee, v. Stewart, 93 U. S. 155, 23 L. Ed. 843. The appellant may have the right to demand reimbursement from the bondholders for the expenses of the receivership; but that is a question which is not before us. When the appellant took this appeal, it served a citation upon certain of the bondholders who were not parties to the proceedings, and one of them, Stanley W. Dexter, as holder of the majority of the bonds, appeared in person in this court and presented his brief. We may consider his appearance as that of amicus curiæ. We find no ground for saying that the Circuit Court erred in dealing with the case as one between the appellant and the receiver or in adjudging that the former pay the expenses of the receivership.

The decree is affirmed.

TOMLINSON v. BANK OF LEXINGTON.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1906.)

No. 622.

1. BANKRUPTCY—PREFERENCES—MUTUAL ACCOUNTS BETWEEN BANK AND DEPOSITOR.

Where a manufacturing company for some two years before its bankruptcy had an agreement with the bank in which it kept its account subject to check by which it was allowed to overdraw in payment of current expenses subsequent deposits to be applied to payment of such overdrafts, deposits so made in the usual course of business and applied in payment of previous overdrafts, made in payment of its pay rolls, freight on material received, and other necessary expenses, do not constitute preferences which the bank must surrender before proving an indebtedness on notes against the bankrupt estate although the company was insolvent when the deposits were made the bank having the right of set-off in respect to the overdraft and the deposits under Bankr. Act 1898, c. 541, § 68a, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450.]

2. SAME—AGREEMENT TO GIVE SECURITY.

Where a bank allowed a customer to overdraw on the express agreement that the customer should assign good accounts for collection to pay the overdraft the subsequent assignment of the accounts, although the customer was insolvent, did not constitute the giving of a preference.

Appeal from the District Court of the United States for the Western District of North Carolina, at Greensboro.

David H. Blair, for appellant.

Emery E. Raper, for appellee.

Before PRITCHARD, Circuit Judge, and PURNELL, and WADDILL, District Judges.

PURNELL, District Judge. The Bank of Lexington filed proof of debt due it from Thomasville Manufacturing Company, bankrupt, with the referee in bankruptcy. Said debt amounted to $13,100, due upon six indorsed notes. Proof was filed and claim allowed November 9, 1904. At a meeting of creditors and without objection, S. H. Tomlinson, trustee of the bankrupt, filed his petition before the referee, alleging that the Bank of Lexington had received certain preferences from the bankrupt, and asked that the proof of debt of the bank be reconsidered and rejected, unless the alleged preferences were surrendered. The Bank of Lexington filed an answer to the petition, denying the receipt of any preference. The allegations of preference material to this appeal is that the Bank of Lexington received two preferences: (1) By the payment of an overdraft due on the bank account of the bankrupt of $2,241.31. (2) On account of the payment of a certain check for $330.30 drawn by Thomasville Manufacturing Company "to the order of cash for Sears, Roebuck & Co.," and paid by the bank. The referee dismissed the petition and refused the prayer thereof, and upon exceptions filed, the cause was certified to the District Judge, who, after hearing argument, confirmed the report both as to findings of fact and conclusions of law.

The Thomasville Manufacturing Company did its banking business with the Bank of Lexington, and after the adjudication of bank-

ruptcy against the Thomasville Manufacturing Company it had a balance to its credit in bank of $67.99, which the trustee received.

The referee finds:

"The relation existing between the two concerns was a banking relation, the bankrupt having kept its account with the said bank, the same being a mutual running account, the bank receiving deposits from the company, paying its check when presented, and at times allowing the said account to become overdrawn and applying the next succeeding deposit in the discharge of the said overdrafts, not only in the regular and due course of banking business as usually conducted, but on a distinct understanding and agreement to that effect." In the course of such dealings, on the 31st day of August, 1904, there was an overdraft of $377.14, and the same was increased from time to time during the succeeding month of September, till on the 25th day of said month it amounted to the sum of $2,241.31, the same consisting of various sums advanced for the payment of payrolls of the company, freight on material shipped for manufacture, the concern being engaged in the manufacture of furniture. In addition to advancements for necessary expenses such as above, the checks of the company were also honored by the bank in the payment of pressing accounts due various creditors over the country for material used in the business, and at such times when the deposits of the company were quite small, and not near large enough to cover amounts called for in its checks. Still said overdraft was made under the agreement which had continued for almost two years between the two institutions, that the deposits when made could be applied to existing overdrafts. In other words, the referee finds that by the agreement with the bank as to overdrafts, it was largely able to conduct its business as a manufacturer without the necessity of making a direct loan at bank for any small amount which it might need in the general run of its business. Not only was there a distinct agreement as to the formation and method of payment of overdrafts, but Mr. Montcastle testifies that the particular overdraft, the payment of which is herein insisted on as a preference which the bank should surrender, was made under and because of the promise of the company to deposit the proceeds of certain good accounts held by the company to the payment of the overdraft.

Item 2, $330 arose out of the account above referred to as assigned. Bankrupt sold a bill of goods to Sears, Roebuck & Co., for $1,951.22, and at the time of sale agreed to wrap in burlaps before shipping, and on failure to so wrap to allow a rebate of 15 cents on each chiffonier shipped. The goods were shipped not wrapped in burlaps, and the bill made out against the purchaser for the whole amount without deducting for burlaps, and transferred to the Bank of Lexington, as above stated for the face value less usual discount. Afterwards, the Thomasville Manufacturing Company drew the check for the amount in question on the Bank of Lexington, payable to cash and sent it to Sears, Roebuck & Co., to pay the rebate. When the account was assigned it was represented to it by the Thomasville Manufacturing Company that the whole amount was due.

The appeal really presents but two questions, though in the record there are five exceptions, viz., was this a preference; and, second, as insisted on by appellant, was there any agreement by the bankrupt, at the time the overdraft was permitted, to assign specific accounts to the bank, and if so, what accounts. Were the accounts assigned the same accounts that were agreed to be assigned, and when, and what effect would such an agreement have? What constitutes a preference under circumstances very similar to those here involved, when the

dealings are between a banking institution and one of its customers, seems to have been so fully discussed and settled by the Supreme Court in N. Y. County Natl. Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, that we content ourselves with an extended quotation from the opinion as decisive of the case at bar. Like the case at bar, that was a proceeding to compel a bank to refund what was claimed to be a preference, made by one of its customers. The Circuit Court of Appeal's decision in Re Stege, 116 Fed. 342, 54 C. C. A. 116, was reversed. Case there was $40,000 due on notes held by the bank and an overdraft. Within the prohibited time the bankrupt made deposits, which, or a part of which, after balancing the overdraft the bank credited on one of the notes. The trustee insisting the bank should refund before being permitted to prove its debt. In the opinion, the court, speaking through Justice Day, who delivered the opinion, says at page 146 of 192 U. S., p. 201 of 24 Sup. Ct. (48 L. Ed. 380):

"We are to interpret statutes, not to make them. Unless other sections of the law are controlling, or in order to give a harmonious construction to the whole act, a different interpretation is required, it would seem clear that the parties stood in the relation defined in section 68a, with the right to set off mutual debts, the creditor being allowed to prove but the balance of the debt. Section 68a of the bankruptcy act of 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], is almost a literal reproduction of section 20 of the act of 1867 (chapter 176, 14 Stat. 526). So far as we have been able to discover the holdings were uniform under that act that set-off should be allowed as between a bank and a depositor becoming bankrupt. In re Petrie, 7 N. B. R. 332, Fed. Cas. No. 11,040; Blair v. Allen, 3 Dill. 101, Fed. Cas. No. 1483; Scammon v. Kimball, 92 U. S. 362, 23 L. Ed. 483. In Traders' Bank v. Campbell, 14 Wall. 87, 20 L. Ed. 832, the right of a set-off was not relied upon, but a deposit was seized on a judgment which was a preference.

"But it is urged that under section 60a (30 Stat. 562 [U. S. Comp. St. 1901, p. 3446]) this transaction amounts to giving a preference to the bank, by enabling it to receive a greater percentage of its debts than other creditors of the same class. A transfer is defined in section 1 of the act to include the sale and every other and different method of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security. While these sections are not to be narrowly construed so as to defeat their purpose, no more can they be enlarged by judicial construction to include transactions not within the scope and purpose of the act. This section 1 read with sections 60a and 57g (30 Stat. 562, 560 [U. S. Comp. St. 1901, pp. 3443, 3445]), requires the surrender of preferences having the effect of transfers of property 'as payment, pledge, mortgage, gift, or security which operate to diminish the estate of the bankrupt and prefer one creditor over another.' The law requires the surrender of such preferences given to the creditor within the time limited in the act before he can prove his claim. These transfers of property, amounting to preferences, contemplate the parting with the bankrupt's property for the benefit of the creditor and the consequent diminution of the bankrupt's estate. It is such transactions, operating to defeat the purposes of the act, which under its terms are preferences. As we have seen, a deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for when he parts with the money he creates at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift or security. It is true that it creates a debt, which, if the creditor may set it off under section 68 amounts to permitting a creditor of that class to ob-

tain more from the bankrupt's estate than creditors who are not in the same situation, and do not hold any debts of the bankrupt subject to set-off. But this does not, in our opinion, operate to enlarge the scope of the statute defining preferences so as to prevent set-off in cases coming within the terms of section 68a. If this argument were to prevail, it would in cases of insolvency defeat the right of set-off recognized and enforced in the law, as every creditor of the bankrupt holding a claim against the estate subject to reduction to the full amount of a debt due the bankrupt receives a preference in the fact that to the extent of the set-off he is paid in full.

"It is insisted that this court in the case of Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, held a payment of money to be a transfer of property within the terms of the bankrupt act, and when made by an insolvent within four months of the filing of the petition in bankruptcy, to amount to a preference, and that case is claimed to be decisive of this. In the Pirie Case, the turning question was whether the payment of the money was a transfer within the meaning of the law, and it was held that it was. There the payment of the money within the time named in the bankrupt law was a parting with so much of the bankrupt's estate, for which he received no obligation of the debtor but a credit for the amount on his debt. This was held to be a transfer of property within the meaning of the law. It is not necessary to depart from the ruling made in that case, that such payment was within the operation of the law, while a deposit of money upon an open account subject to check, not amounting to a payment but creating an obligation upon the part of the bank to repay upon the order of the depositor, would not be. Of the case of Pirie v. Chicago Title & Trust Co., it was said in Jaquith v. Alden, 189 U. S. 78, 82, 23 Sup. Ct. 649, 650 (47 L. Ed. 717): 'The judgment below was affirmed by this court, and it was held that a payment of money was a transfer of property, and when made on an antecedent debt by an insolvent was a preference within section 60a, although the creditor was ignorant of the insolvency and had no reasonable cause to believe that a preference was intended. The estate of the insolvent, as it existed at the date of the insolvency, was diminished by the payment, and the creditor who received it was enabled to obtain a greater percentage of his debt than any other of the creditors of the same class.' In other words, the Pirie Case, under the facts stated, shows a transfer of property to be applied upon the debt, made at the time of insolvency of the debtor, creating a preference under the terms of the bankrupt law. That case turned upon entirely different facts, and is not decisive of the one now before us. It is true, as we have seen, that in a sense the bank is permitted to obtain a greater percentage of its claim against the bankrupt than other creditors of the same class, but this indirect result is not brought about by the transfer of property within the meaning of the law. There is nothing in the findings to show fraud or collusion between the bankrupt and the bank with a view to create a preferential transfer of the bankrupt's property to the bank, and in the absence of such showing we cannot regard the deposit as having other effect than to create a debt to the bankrupt and not a diminution of his estate."

The bankrupt in the case at bar was struggling for existence—it was in financial straits, had made propositions of composition or settlement with its creditors and the bank in a legitimate way was extending a helping hand, agreed on a basis for extending credit, allowing overdrafts. There was a large amount, $13,100, due on notes endorsed by officers of the bank, which, if the manufacturing company could succeed, the bank could realize from the assets of the bankrupt; if not, the debt would be lost or at least much reduced. If such assistance on the part of banking institutions are to be condemned, held to be preferences in case of bankruptcy, many of the manufacturing and other institutions would suffer, especially in their early days of struggle, before they had attained a standing on a

foundation strong enough to enable them to resist the financial storm arising from an inability to sell their product or realize on accounts, bills of lading or other current assets. In short it would close to them all the avenues of commerce and compel them to do a C. O. D. business on a very small scale, virtually putting them out of business as soon as it is proved they cannot meet their liabilities, are insolvent as defined in the bankrupt act. Congress did not intend nor did it in fact ever enact a law to effect this purpose. Though it is said by the referee and confirmed by the District Court that every element of a preference was proved, we are constrained to the opinion that both of these learned judicial officers had the mental reservation that the important element of an intention to give or to receive a preference was absent and not an inference to this effect could be drawn from the facts. Both held there was no preference and so adjudge. The check sent Sears, Roebuck & Co., was in no wise a preference, was not even given to the bank and was payable to cash and sent to Sears, Roebuck & Co., to correct an error. There is no pretense that this firm had any information tending to show they knew or had reason to suspect the manufacturing company was insolvent or intended to give them a preference or that they asked or intended to receive one. This payment was to the Chicago firm, not the bank. True it was a credit on the account assigned to the bank, but, in all lights, it was an act of equity. The transfer, too, was made as found by the referee, not only in the regular and due course of business, but on a distinct understanding and agreement to that effect. It should be borne in mind none of these overdrafts or the proceeds of assigned accounts were credited on the bank debt of $13,100, evidenced by notes endorsed by Montcastle and Ward, officers of the bank, but were credited on the overdrafts permitted under the express agreement; "a fair exchange of values," as expressed in Cook v. Tullis, 18 Wall. 332, 21 L. Ed. 933, "which may be made at any time even if one of the parties is insolvent." The objection that no specific accounts were mentioned in the agreement is without force. Those accounts may not have been in the shape of bills collectible at that time, not due or negotiable, in fieri. A contract made for the goods when manufactured but the finished product not in esse, hence the account could not have been specified, pointed out, or named. It is not necessary to hold the agreement was a valid lien, under any lien law, but it was an equitable pledge of "good accounts" on the faith of which the bank parted with funds—possibly not its own but on deposit, which it might rightfully use in banking and discounting commercial paper, as is customary with such institutions. It was a risk it assumed, but no greater risk, as it appeared to the officers, who endorsed for the manufacturing company almost to the last moment, than is taken by such institutions almost every day. Until the October inventory they believed the company solvent (they were officers also of the company), and previous inventories had shown it was solvent. Nor should the fact be overlooked, as found by the referee, that the overdraft, consisting of various sums advanced, were for the necessary expenses of the company, the payment of pay rolls, freight, on

material shipped for manufacture, pressing accounts, some of which would support a lien and many would be prior or preferred claims under the bankrupt act. And said overdraft was under an agreement which had continued for "almost two years," and the overdraft was permitted under the agreement before referred to.

Our conclusion, therefore, is that the bank has not received a preference such as should be refunded before being permitted to prove its debt, and the decree of the referee as confirmed by the District Court should be affirmed.

Affirmed.

STANDARD OIL CO. v. PARRISH.

(Circuit Court of Appeals, Seventh Circuit. April 10, 1906.)

No. 1,213.

1. NEGLIGENCE—SALE OF DANGEROUS ARTICLE—LIABILITY FOR INJURY TO THIRD PERSONS.

A retailer of illuminating oil must be held to contemplate that it will be used in the ordinary and usual lamps in the households of purchasers, and where the oil sold is not of the quality called for, but is unfit and dangerous for such purpose, the seller is liable for an injury resulting from such ordinary use to a member of the purchaser's family.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 25.

Liabilities of venders of injurious substances for injuries to persons other than immediate vendees, see note to Standard Oil Co. v. Murray, 57 C. C. A. 5.]

2. SAME—ACTION—EVIDENCE AS TO EXPLOSION OF LAMP.

Plaintiff's intestate, a child 10 years old, was alone in a room, when her clothing took fire and she was fatally burned. The pieces of a kerosene lamp which had stood upon a table were found upon the floor, within a circle about three feet in diameter, and the carpet within such circle and the tablecloth were in flames. Such pieces and the burner were introduced in evidence. It was also shown that the oil with which the lamp was filled contained a dangerous admixture of gasoline. *Held* that, the physical exhibits not being brought up, the reviewing court cannot say that there was a failure of evidence to support a finding that the death of the child was caused by the explosion of the lamp due to the dangerous character of the oil.

3. EVIDENCE—COMPETENCY—METHOD OF CONDUCTING BUSINESS.

Where the evidence was conflicting upon the issue whether or not kerosene oil sold by defendant contained a dangerous proportion of gasoline, evidence to show a general custom on the part of defendant's employés to use the same buckets indiscriminately in drawing kerosene and gasoline was competent and properly admitted.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 248, 251.]

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

At Decatur, Ill., on March 7, 1904, the deceased, a child 10 years old, was burned so severely that within a few days she died. The declaration was in three counts. The first charged that defendant (plaintiff in error) negligently sold to William A. Parrish, father of Jessie, for illuminating purposes five gallons of coal oil which was below the standard of ignition at

150° Fahrenheit. fixed by chapter 104 of the Illinois Revised Statutes of 1881, whereby the oil exploded a lamp in Parrish's home, with the fatal result. The second, in addition to these facts, alleged that defendant sold the oil without having it officially inspected, as required by sections 3 and 4 of chapter 104. That defendant sold to Parrish oil which was not reasonably safe for use in lamps was the basis of the third. The trial resulted in a verdict and judgment for plaintiff. The assignments of error present these questions: Was care owing by defendant to deceased? Did the evidence, without conflict, establish that Parrish was contributorily negligent in using dangerous oil? If so, was his negligence imputable to deceased? Was there evidence sufficient to warrant the jury in finding that defendant's sale of dangerous oil was the proximate cause of the injury? Was error committed in permitting plaintiff's witnesses to answer certain questions?

C. C. Le Forgee, for plaintiff in error.

Isaac A. Buckingham, for defendant in error.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge, delivered the opinion.

1. Parrish asked for illuminating oil of the standard quality. Defendant sold him oil which contained gasoline to such an extent that the mixture was liable to explode the ordinary lamp. Invoking the general rule that a manufacturer or vender is not liable to persons who have no contractual relations with him, defendant contends that for its negligent act it was answerable only to Parrish, the purchaser. But defendant was supplying the oil for illumination, and must have contemplated that it would be burned in the ordinary and usual lamps in the households of the purchasers. Further, the case comes, not under the general rule, but under the well-established exception that one must not knowingly send out an instrumentality which is imminently dangerous without notice of its nature and qualities. Wellington v. Oil Co., 104 Mass. 64; Huset v. J. I. Case Threshing Machine Co., 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303, and cases there collated.

2. The record falls so far short from establishing affirmatively and without conflict any negligence on Parrish's part, that the jury were justified by ample evidence in finding that prior to the accident Parrish was not chargeable with actual or constructive notice of the dangerous nature of what he bought for standard illuminating oil; so the question of imputed negligence is not involved.

3. Between February 22d, when the oil was purchased, and March 7th, when the accident occurred, the lamp in which this oil was burned flickered and spluttered. Parrish and his wife thought the burner was at fault. After cleaning the old burner was found unavailing, two new ones were bought during the interval. The last one was procured on the day of the accident. It had no air vent, but the record fails to show that it was not a standard burner, current on the market. Deceased was alone in the kitchen. No witness establishes directly either that the lamp exploded, or that it was overturned from the table and broken by the fall. No witness testifies to the sound of an explosion or of a crash upon the floor. The only witness in position to testify as to either sound was a 16 year old sister, who was in an adjoining room. She did not recall either sound, but was

startled from her studies by her mother's scream that Jessie was in flames. Testimony of witnesses who were first in the kitchen after it was afire establishes that the room was smoky; that the carpet at the side of the table was aflame in a spot about three feet in diameter; that the tablecloth at that side was burning; that there was no fire in other parts of the room; and that the fragments of a glass lamp were in and about the circle of burning carpet. Defendant argues most earnestly that, from the fact of the dangerous mixture in the lamp and from the circumstances at and immediately after the time of the fire, the jury were not warranted in finding that the mixture exploded the lamp. Were we otherwise constrained to this view, the bill of exceptions presents a matter occurring at the trial which makes it impossible to say that the jury and the judge who heard the case and overruled the motion for a new trial were in error. The various burners and the fragments of the glass lamp were introduced in evidence, and submitted to the inspection of the court and jury. Defendant's argument that an explosion would be evidenced by the dispersion of glass and flaming oil to all parts of the room may be overborne by the physical exhibits which are not before us, and which may establish that an explosion is a tenable and reasonable inference of fact. The force of the confined vapor from the dangerous mixture would be uniform in all directions. Uniform dispersion implies uniform resistance. If in the upper part of the lamp bowl, above the surface of the oil, the weakest spot was found, the effects testified to by the witnesses may have been the natural result of an explosion, a result that was probable by reason of the dangerous contents of the lamp.

4. On the exceptions to the court's rulings in permitting certain questions to be answered, an argument is built up that error was committed in allowing particular instances of similar negligence to go to the jury. But the record does not fit the argument. Plaintiff introduced evidence to prove that the oil remaining in his can was in the same condition after the accident as at the time of the purchase. Tests subsequent to the accident established that the oil contained a dangerous proportion of gasoline. Defendant introduced evidence to show that the oil sold to Parrish was pure. Plaintiff's contention would be strengthened by proof of a general custom or method on the part of defendant's employés which would account for the admixture of gasoline. That such proof was given in anticipation of the defense was not erroneous. The questions objected to were of the following character: "Tell the jury what their method was in the yard there as to drawing oil?" Counsel for defendant: "We object, unless it relates to the drawing of the oil in controversy." The question did not call for prior specific acts of negligence. Defendant did not object to proof of the method employed in the yard, and the answers, showing an indiscriminate use of the same buckets in drawing oil and gasoline, were responsive to the inquiry in regard to the custom at the Decatur yard.

The judgment is affirmed.

MILLER et al. v. WALKER PATENT PIVOTED BIN CO.

(Circuit Court of Appeals, Third Circuit. May 16, 1906.)

No. 10.

PATENTS—ANTICIPATION—TILTING BINS.

The Bacon patent, No. 447,532, for a tilting bin, is void for anticipation.

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

H. E. Everding, for appellants.

E. H. Hunter, for appellee.

Before DALLAS and GRAY, Circuit Judges, and LANNING, District Judge.

GRAY, Circuit Judge. This is an appeal from the decree of the Circuit Court, for the Eastern District of Pennsylvania. The appellants here, as assignees of letters patent No. 447,532, dated March 3, 1891, granted to Byron R. Bacon and Thomas R. Sully, for an improvement in tilting or counterbalanced store bins, filed their bill, alleging infringement and asking for an injunction against the appellees, the Walker Patent Pivoted Bin Company, as defendant. The court below made no decision upon the question of validity, in view of the prior patents set up by defendant, but based its decision wholly upon the ground, that if Bacon's patent disclosed invention at all, it was invalid, by reason of anticipation in the invention by Edwin J. Walker, president of the defendant company. Claims on patents for improvements in tilting or counterbalanced store bins have now been litigated in three suits in the court below, and have been considered on appeal by this court in a case in which the parties now before us were litigants, and the opinion of the court below was affirmed. Miller v. Walker Patent Pivoted Bin Co. (C. C. A.) 139 Fed. 134. In the present case, the defendants in the suit last mentioned are the complainants, and the complainants in that suit the defendants. All of the three suits referred to, including the one now before us, were heard and decided by the same judge (Archbald). In the case involved in the present appeal, the learned judge has for the third time fully considered the art to which the patent in suit belongs, and fully covered in his opinion all the points raised by way of defense by the appellants.

No useful purpose would be subserved by a separate opinion, and we content ourselves with referring to and adopting the opinion of the court below, as reported. Miller & England v. Walker Patent Pivoted Bin Co. (C. C.) 138 Fed. 919.

The decree of the court below is affirmed.

EASTMAN KODAK CO. v. ANTHONY & SCOVIL CO.

(Circuit Court of Appeals, Second Circuit. April 4, 1906.)

No. 154.

PATENTS—INVENTION—PHOTOGRAPHIC FILM.

The Turner patent, No. 539,713, for a photographic film roll, 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 New York.

For opinion below, see 139 Fed. 36.

M. B. Phillipp, for appellant.

Edmund Wetmore and E. C. Davidson, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. The careful and exhaustive consideration of the prior art, and of the subject-matter of the patent in suit, by the court below, dispenses with the necessity of any further discussion of the question of patentable novelty. The sole changes from what was shown in the prior art consisted in the substitution of a continuous film for separate films, and in placing indicating marks on the opaque material instead of on the film itself. The first change was evidently due to the fact that the continuous gelatine film which is, apparently, the chief cause for the great advance in the art, first came upon the market in 1889 or 1890. If such a continuous film had been available when Capt. Barr described his separate sheets mounted with intervals between on a continuous strip of black calico, we cannot doubt that he would have utilized it instead of the separate sheets which were the only available material in the state of the art as it existed in 1855. There can be no invention in placing the indicating marks on the opaque material instead of on the film, because, in view of the prior art showing strips of film marked so as to show registration, the adoption of the new construction of a film provided with an opaque backing necessitated placing the numbers on the backing which was superimposed on the film, and therefore was the only exposed surface upon which the numbers could be placed.

We therefore concur in the reasoning and conclusions of the court below as stated in its opinion, and the decree appealed from is affirmed, with costs, upon said opinion.

STAR BALL RETAINER CO. v. KLAHN.

(Circuit Court, D. New Jersey. April 30, 1906.)

1. EQUITY—DEMURRER.
It is not the purpose of a demurrer in equity to raise issues of fact, and, in passing upon one, facts alleged therein must be disregarded, and the allegations of the bill taken as true.
[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 494.]

2. PATENTS—INTERFERENCE SUIT—DEMURRER.
An interference suit brought under the provisions of Rev. St. § 4918 [U. S. Comp. St. 1901, p. 3394], in which the issues depend to some extent on the construction and scope of the claims of the earlier patent in view of the prior art, will not be determined on demurrer.
[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 536.
Demurrer for lack of novelty and invention in patent infringement suits, see note to Caldwell v. Powell, 19 C. C. A. 595.]

In Equity. On demurrer to bill.

Julian C. Dowell and Osgood H. Dowell, for complainant.
Baxter Morton, for defendant.

CROSS, District Judge. The defendant has filed a general demurrer to the bill of complaint in this cause. The demurrer, however, partakes more of the nature of an answer than of a demurrer. It is what is sometimes called a "speaking demurrer." A demurrer in equity, as at law, admits all the facts which are properly pleaded. The purpose of a demurrer is not to set out facts, but to test the law arising upon the facts stated in the bill. Questions which cannot be thus raised must be set out affirmatively either by plea or answer. These propositions are so well settled that a citation of authorities seems wholly unnecessary. See, however, Stewart v. Masterson, 131 U. S. 151, 9 Sup. Ct. 682, 33 L. Ed. 114. Disregarding, therefore, matters of fact set up in the demurrer in denial of the averments in the bill, and accepting, as I must at this time, the statements of the bill as true, I feel constrained to overrule the demurrer. But, were it otherwise, I still think the questions raised could not fairly and justly be settled upon demurrer. The questions intended to be raised by the demurrer may and will depend to some extent upon the construction put upon the claims of the complainant's patent; whether these are to be construed narrowly or broadly will depend upon the prior art, which is not now disclosed; furthermore, expert testimony may be required to aid in solving the question. Thompson-Houston Electric Co. v. Western Electric Co., 72 Fed. 530, 19 C. C. A. 1; Drainage Construction Co. v. Englewood Sewer Co. (C. C.) 67 Fed. 141; Roe v. Blodgett (C. C.) 87 Fed. 868; Indurated Fibre Industries Co. v. Grace (C. C.) 52 Fed. 124, 129. It would be extremely hazardous, if not impossible, to adjudicate the rights of the respective parties upon the demurrer. I am convinced that the case will have to go to final hearing.

The demurrer is overruled, with costs, with leave to the defendant to answer within 30 days.

SHERIDAN v. CITY OF NEW YORK.

(District Court, S. D. New York. March 13, 1906.)

1. MUNICIPAL CORPORATIONS—CONTRACTS—POWER OF DOCK MASTER TO BIND CITY OF NEW YORK.

Under Ash's Greater New York Charter (2d Ed.) § 419, which provides that "no expenditure for work or supplies involving an amount for which no contract is required shall be made except the necessity therefor be certified to by the appropriate borough president or the head of the appropriate department, and the expenditure has been duly authorized and appropriated" a dock master unless duly authorized by the department of docks and ferries has no power to bind the city to pay for work done by his direction.

2. SAME—UNAUTHORIZED CONTRACT BY AGENT.

Persons dealing with a municipal corporation through its agent are bound to know the extent of the agent's authority and the corporation cannot be subjected to liability on a contract which he was not authorized to make.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 581, 684, 879.]

In Admiralty.

Martin A. Ryan, for libellant.

John J. Delany and E. Crosby Kindleberger, for respondent.

ADAMS, District Judge. This action was brought by Theresa A. S. Sheridan against the city of New York to recover for the transportation of 662 cart loads of dirt dumped into the libellant's scows at the foot of Ninety-Sixth street, North river, and carried thence by her to a dump of the libellant in the city between October 1, 1899, and April 30, 1901. It is alleged that the usual and customary charge for such services was 40 cents per each cart load and that the sum due the libellant is $264.80. The answer admits that between the stated times, certain carts marked "Department of Docks and Ferries" did the alleged dumping for which 40 cents per load was a fair and reasonable price. It was stipulated on the trial that the carts which carried the dirt were hired by the city from Thomas Kelly at $3.50 per day; Kelly to furnish the drivers, and the carts were to be under the direction and control of the city. It was also admitted that the dock master in the immediate charge of the performance of the work of cleaning up the marginal street in the vicinity of Ninety-Ninth street and the North river, directed the drivers of said carts to deliver the dirt at the dump of the libellant. The answer also admits that the libellant presented bills for the work to the city and the city returned the same, suggesting to the libellant to proceed against the owner of the carts; that the libellant thereupon brought an action in this court, which was dismissed, on the ground that no cause of action against Kelly was proved. The city now, however, defends on the ground that the dock master exceeded his authority in ordering the carts to libellant's dump; also on the ground that the contract was void because certain provisions of the charter of the city were not complied with.

The testimony shows that the libellant never had any contract with the city excepting such as might arise from the acts of the dock master as stated above and the question is, did the dock master have authority to bind the city for work done under his orders.

It is contended by the libellant that the question is not raised by the pleadings. It, however, appears in the answer, after various denials, as follows:

"Seventh. Further answering the matters set forth in the libel herein, the respondent, the city of New York, upon information and belief alleges that the carts in question marked 'Department of Docks and Ferries' were not owned by the city of New York, but were hired from one Thomas Kelly, and that during the times mentioned they were employed in cleaning up the marginal street in the vicinity of Ninety-ninth street and the North river. That in the performance of this work the carting of considerable dirt was required, and that the dock masters in immediate charge of the performance of this work, without authority directed the drivers of said carts to dump said dirt at the dump of the libellant herein, instead of at the dumps of the department of street cleaning, as they were instructed to do. That the department of docks and ferries directed the dock masters to deliver to the drivers of each cart a ticket, which should be presented by such driver at a dump of the department of street cleaning of the city when each load of dirt was dumped. That such tickets were delivered by the drivers of the carts in question to the libellant's agents, at her dump at ninety-sixth street as aforesaid, and that libellant knew or should have known that such dumping at her dump was unauthorized by the department of docks and ferries."

The ticket in question read as follows:

"Department of Docks and Ferries.

One Load Dirt.

At Street Cleaning Dep't Dump.

This ticket only good when presented by drivers of carts marked 'Department of Docks and Ferries.'"

The provision of the statute with reference to the contracting of debts by the city appears in Greater New York Charter (2d Ed.) p. 263, § 419, by Ash, and is as follows:

"No expenditure for work or supplies involving an amount for which no contract is required shall be made, except the necessity therefor be certified to by the appropriate borough president or the head of the appropriate department, and the expenditure has been duly authorized and appropriated."

The libellant testified that she did not know what was required to be done in order to effect a valid contract with the city and her agent, in charge of this work, said there was nothing done directly with the head of the department. It appears that the dock masters, who were in immediate charge of cleaning up the docks in the vicinity of Ninety-Ninth street, had no authority from the head of the department to make any contracts of this kind.

It is a case where the equities were with the libellant, but to hold a municipal corporation liable, it must appear that some one authorized to bind it was instrumental in making the contract. Here it was made with a dock master, whose duties were not in the direction of making contracts for the city. Their functions are defined by the rules and regulations prescribed by the commissioner of docks, put in evidence by the libellant, and reference is made by her to section 6, which provides:

"Sec. 6. Dock masters shall prevent any accumulation of material upon the piers, wharves, bulkheads and reclaimed land in their respective districts; and whenever any pier, wharf, bulkhead or reclaimed land in the city of New York shall be encumbered or obstructed in its free use by any vessel, merchandise or material in transit or otherwise, or by any structure, encumbrance or obstruction not authorized or permitted by the commissioner of docks, the dock master of the district in which such encumbrance or obstruction shall exist is authorized to require the owner, agent, consignee, or person occupying or in charge of such to remove the same without delay. Upon receiving said order, the owner, agent, consignee, or person in charge of the vessel, merchandise, material, structure, encumbrance or obstruction, as the case may be, in reference to which said order or direction was given, shall comply with the same without delay, and in default thereof, the dock master may employ such assistance as may be necessary to carry into effect his order or decision by the removal of such vessel, merchandise, material, structure, encumbrance or obstruction, in respect to which the order was given. All expenses actually and necessarily incurred in effecting such removal, and for storage of merchandise or material thus removed, shall be paid by the owner, agent, consignee or person in charge, and the amount thereof shall be a lien upon the same, in favor of the city of New York."

It is urged that under this section a dock master has the right to employ whatever aid or help which may be necessary to remove obstructions from the dock, or dock lands, making it a case where the dock master had authority to negotiate terms for removing obstructions and having the same charged to the city. Assuming that the dock master had authority to negotiate the terms, it is quite a different thing when the question of authority to charge the work to the city is concerned. The latter was a matter for the consideration of the head of the department, and it does not in any way appear here that such authority was delegated to the dock master.

Many authorities establish the proposition that persons dealing with municipal corporations are required to know the extent of the authority of the agent with whom they deal. One of the latest is Stone v. Bank of Commerce, 174 U. S. 412, 19 Sup. Ct. 747, 43 L. Ed. 1028, where it was said (page 424 of 174 U. S., page 752 of 19 Sup. Ct., 43 L. Ed. 1028):

"Parties dealing with a municipal corporation are bound to know the extent of the powers lawfully confided to the officers with whom they are dealing in behalf of such corporation, and they must guide their conduct accordingly. Murphy v. Louisville, 72 Ky. 189."

The strict enforcement of a rule of this kind, often works a hardship, as it does in this case; but municipal corporations should not be subject to liability for debts contracted by unauthorized agents.

The libel will be dismissed.

THE EDWIN TERRY.

THE WILLIAM E. CLEARY.

(District Court, S. D. New York. April 27, 1906.)

TOWAGE—SINKING OF TOW BY ICE—NEGLIGENCE OF TUGS.

In the making up of a tow, the duty rests upon the tug to see that it is properly made up, and that proper lines are used, and, where a tow consisting of a number of vessels was being made up in the Hudson

river at a time when there were dangerous floes of ice being carried down by the ebb tide, the allowing of one of the tows to project beyond the others, and to swing out because of the absence of breast lines, in consequence of which she was struck by the ice, and after being beached by the tugs sank, was through the fault of the tugs, for which they are liable.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Towage, §§ 15, 21.]

In Admiralty.

James J. Macklin, for libellants.
Amos Van Etten, for claimant.

ADAMS, District Judge. This action was brought by the New York & New Jersey Transportation Company, owner of the barge Walter T. Lewis and Alexander Wilson, the master thereof, to recover from the tugs Edwin Terry and William E. Cleary, the damages sustained, through that barge being sunk by ice, with the personal effects of the master and his wife, in the Hudson River, near Edgewater, New Jersey, on the 30th day of January, 1905. The Lewis, laden with coal, was taken in tow by the Terry, in a flotilla of boats astern, to be delivered at South 3d Street, Brooklyn, and while the tow was being made up, near the starting place, was cut into by ice and received injuries from which she subsequently sank. Before sinking she was taken out of the tow by the Cleary and placed on the beach and received there additional injuries. The tide was ebb.

It appears that large quantities of ice were floating in the river, some of it broken up into small pieces and some of it in dangerous floes. The Lewis was lying in a protected position at Edgewater and taken therefrom in company with other boats, to make up the Terry's tow. At about 9:30 o'clock in the morning, the Terry was lying a short distance from the ends of the wharves, headed up stream, and receiving in her flotilla, which she held by a hawser, the boats as they were brought to her by two helpers, one of which was the Cleary. The Terry had three boats in her hawser tier, two in the next, of which the Lewis was the port boat, and one in the third tier. The Lewis was about two feet wider than the boat ahead of her and projected about that distance outside of and to the port of the head boat. In addition to the projection, she was swinging with the action of the current, it is alleged, through the absence of breast lines. Her port side being thus exposed, she received on her port bow the impact of one of the floes, which broke a hole in her. She was then taken out of the tow and beached by the Cleary a short distance away. At that time, a piece of the ice which did the injury remained in the hole it had made and she did not leak to any great extent but the ice subsequently came out, permitting an unobstructed entrance of water, and she received further injuries while on the beach.

It is alleged that the Terry was in fault: (1) in placing the Lewis in a position in the tow where she would be struck by ice; (2) in making up the tow at an improper time when the ice was moving in large fields rapidly down the river and (3) in not protecting the

boat from the ice. The Cleary was charged with fault in assuring the owners that the tug could and would protect and save the boat from further harm after beaching her; (2) in that those in charge of the tug were not sufficiently conversant with the work of keeping the boat pumped out; (3) that it was the duty of the tug in undertaking to prevent additional damage, to provide other tugs or apparatus for that purpose, well knowing that on the next tide she would be further exposed, and (4) in not placing the boat in a protected position.

The testimony shows that the Lewis was a substantial boat, well adapted, if well protected, to be navigated in the ice that usually prevails in the winter time in New York Harbor but not having a stem suitable to withstand heavy ice in a strong tide. None of the other boats in the tow received any injury on this occasion and it is probable that the Lewis would have escaped, if it had not been for her exposure on the port side, outside of the line of the preceding boat. It was there that she received the original injury and it was doubtless due to such exposure, which resulted from the greater width of the Lewis and her swinging of several feet on account of the absence of breast lines. When the tow was made up, the Lewis was lying behind the preceding boat in the same manner as she was when the ice came. After she was in the tow, the master of the Terry, seeing the swinging, called out to the master of the Lewis to get out breast lines. The latter said he did not hear such order but the preponderance of the testimony shows that it was given so that he could hear it. He says, however, that his boat was not in a position to use breast lines, as the boat on his starboard side was much smaller in size, so that they did not lie together in a favorable position to make such lines fast so as to be of advantage. There is no doubt that there was some justification for this excuse, but, in any event, the absence of breast lines was not the sole cause for the injury, as the projection from the size of the Lewis rendered her subject to such an accident, and it is probable it would have happened without the absence of the breast lines. Her exposed position was certainly a contributing cause, and there can scarcely be any question that the tugs were responsible for that. If, however, the injury can be regarded as due to the absence of breast lines, still the tugs would be liable, because it was their duty to have the tow properly made up, which included the use of proper lines.

The succeeding injuries resulted from the first and the liability therefor follows.

Decree for the libellants, with an order of reference.

THE GOLDEN ROD.

THE HAROLD J. McCARTY.

(District Court, S. D. New York. April 18, 1906.)

1. COLLISION—EAST RIVER—RULE REQUIRING VESSELS TO KEEP AT DISTANCE FROM PIERS.

The rule requiring vessels passing up or down the East river to keep away from the ends of the piers cannot be invoked in a suit for collision by a vessel which was also transgressing it.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 185.]

2. SAME—VESSELS MEETING—TAKING UNNECESSARY RISK.

A schooner in tow of a tug was passing down East river near the Manhattan piers with another tug with a car float also passing down a short distance outside when a water boat coming out from a slip ahead of them in attempting to pass up between the two tows came into collision with the schooner and was injured. *Held*, on the evidence that the schooner was not chargeable with any fault, but that the collision was due to the fault of the water boat in attempting to pass through the narrow space between the tows when she could safely have passed across their bows to the outside or remained in the slip until they had passed.

In Admiralty. Suit for collision.

Peter S. Carter, for libellant.
James J. Macklin, for the Golden Rod.
Wing, Putnam & Burlingham, for the Harold J. McCarty.

ADAMS, District Judge. This action was brought by Alexander Wilson, owner of the steam water boat Caledonia, against the steam-tug Golden Rod and the schooner Harold J. McCarty, to recover the damages sustained through a collision with the schooner in tow of the said tug on a hawser of about 50 fathoms in length, on the 27th day of January, 1904, about 3 o'clock in the afternoon. The collision happened off about pier 13, a short distance, about 150 or 200 feet, outside of the general line of the end of the piers. It occurred shortly below pier 14, which extends considerably, 100 feet or more, beyond pier 13 and the other piers in the vicinity. The Caledonia was proceeding up the East River from pier 9. The tug and schooner were proceeding down the river, the schooner being bound to sea. She had some sail set to obtain the aid of a favoring wind from the northward. They had at first been on the Brooklyn side of the river but crossed over in the vicinity of the Brooklyn Bridge to avoid some ice in the eastern part of the river below the bridge. Outside of the tow was the tug Long Island, with a car float in tow on her port side, bound from Long Island City to Jersey City.

The principal fault urged against the tug is that she kept too close to the Manhattan shore. It is true that she was nearer than the law ordinarily permits but such fact does not appear to have been a contributing fault to the collision. When the Caledonia came out from pier 9, instead of crossing the Long Island's bow and seeking a course outside of the tows, she turned in between them and sought to find an avenue there. She claims that there was a distance of from 300

to 500 feet between the tows, so that she had plenty of room to pursue such a course, but that is very doubtful. The evidence satisfies me that there was much less, but however that may be, the Caledonia was also navigating without regard to the rule requiring vessels bound up or down the river, to keep away from the ends of the piers. It was held in The Clara and The Reliance, 55 Fed. 1021, 1023, 5 C. C. A. 390, and elsewhere, in considering an alleged fault of the same character, that the fault was a remote one and not a proximate cause of the disaster. It certainly can not be invoked where the injured vessel was also transgressing the rule.

It is urged against the schooner that instead of following the tug, she sheered out from the Manhattan shore the whole length of her hawser and thus collided with the Caledonia. The credible testimony does not sustain the claim. It appears that the schooner was following the Golden Rod without much deviation from the former's course and sheered no more than might reasonably have been expected.

The real cause of the collision seems to have been the improper navigation of the Caledonia in attempting to pass between the tows. She would probably have encountered ice outside of the float and, if fearful of collision therewith, should have waited until the tows had passed before attempting to go up the river. Instead of pursuing that safe course, she turned in between the tows, when there was only navigable space there of from 60 to 80 feet, and in doing so, it is alleged, first struck the Long Island and then bounded off and ran into the schooner, by which contact she received the damages for which she claims recovery. The Long Island claims that she saw her coming and ported her own helm to avoid collision but did not succeed. Whether the fact is that the Caledonia first struck the Long Island and then collided with the schooner, or that the initial collision was with the latter, it is not necessary to determine, as in taking the course between the vessels she assumed an unnecessary risk and ventured into danger which could have been easily avoided. Even if the collision was caused by a sheer of the schooner, the evidence does not satisfy me that there was any more than was unavoidable. Not having taken the safe course which was open to her, the water boat must bear the consequences.

Libel dismissed.

EVANS v. NEW YORK & P. S. S. CO., Limited, et al.

(District Court, S. D. New York. February 24, 1906.)

ADMIRALTY—JURISDICTION—MARITIME CONTRACTS.

Where a storage contract is incidental to the transportation of the goods stored by water, as where they were stored by the carrier for delivery to the consignee, it is maritime, and a court of admiralty has jurisdiction of an action for its breach by nondelivery to the consignee.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Admiralty, §§ 136, 163.]

In Admiralty. On exceptions to libel.

Beard & Paret, for exceptions.

Frank E. Bradley and Convers & Kirlin (John W. Ingram, advocate), opposed.

ADAMS, District Judge. A libel was filed herein alleging that the New York & Pacific Steamship Company was the owner of the steamship Capac and engaged in operating her and that William Beard and J. Robinson Beard, were engaged in the business of receiving and storing goods under the trade name of Beards Erie Basin Stores. It is further alleged that on or about the 5th day of April, 1905, the steamship company, as a common carrier, received and undertook to transport by the steamship Capac from the port of Mollendo to the port of New York and deliver to the libellant some 56 bales of rubber; that upon the arrival of the steamship in the port of New York, the libellant presented the bill of lading and demanded the delivery of the rubber but the steamship company replied that, acting under the bill of lading, it had delivered the rubber to the Beards Stores; that such a delivery was not a proper, sufficient and lawful delivery and they are still liable to deliver the rubber to the libellant; that the libellant, however, demanded the rubber from said stores and received 37 of the bales but they refused to deliver the remaining 20 bales, claiming they had not been delivered by the steamship; that both the defendants have refused the 20 bales or their value to the libellant although duly demanded, to his damages $1,574.71 with interest. The bill of lading of the steamship is, by amendment, made a part of the libel and provides for the delivery of the rubber to the libellants or assigns.

Exceptions were duly filed on behalf of the Beards: (1) in that the libel does not set forth a cause of action within the jurisdiction of the court as an action for damages for non-delivery of goods by a warehouseman is not maritime; (2) that the libel does not state facts sufficient to show that the Beards made any contract in the premises or were guilty of any negligence; (3) that the libel misjoins parties who cannot rightfully be joined in such a suit; (4) that the libel is insufficient because it does not aver what interest, if any, the libellant, as consignee, had in the rubber, and (5) does not allege what, if any were the terms of the agreement between the libellant and these respondents.

A determination of the question of jurisdiction will dispose of the whole matter.

It is urged by the libellant that the bill of lading contract being maritime, it is maritime throughout.

It may be correctly said that no pure case of storage, even on the water, can be regarded as maritime in its character, but where the storage is an incident of transportation, its maritime, as stated in The Pulaski (D. C.) 33 Fed. 383, and the jurisdiction follows. Judge, now Mr. Justice, Brown there said (page 384):

"If the storage were a mere incident to the transportation, as, for instance, if the wheat were taken on board with the understanding that the vessel

should sail as soon as a tug or consort should be procured, or as soon as the ice should leave the harbor, I should have no doubt that the vessel would be liable for any damage received by the cargo by reason of improper storage while awaiting departure. In such case, the storage being a mere incident of the transportation, the whole contract would be adjudged to be maritime, and a suit would lie in the admiralty for any damage occasioned after the cargo was received on board."

And in The Mary Washington, 16 Fed. Cas. 1006, goods were injured while in a warehouse awaiting delivery after transportation. It was there held that there was jurisdiction in admiralty to recover the damages incident to the injury.

The case at bar seems to be of a maritime character as the delivery was to be completed through the exceptants and to fall within the ruling in The Electron (D. C.) 48 Fed. 689, where it was said (page 690):

"The contract in this case, being for supplies, is a maritime contract, within the ordinary jurisdiction of the admiralty courts. Upon such a contract and all its incidents, the rights and remedies of the parties are reciprocal. The contract being maritime, the admiralty, says Curtis, J., in Church v. Shelton, 2 Curt. 271, 274, Fed. Cas. No. 2,714, 'will proceed to enquire into all its breaches, and all the damages suffered thereby, however peculiar they may be, and whatever issues they involve.'"

See, also, Gow v. William W. Brauer S. S. Co. (D. C.) 113 Fed. 672, 675, and Graham v. Oregon R. & Nav. Co. (D. C.) 134 Fed. 454, 462.

The exceptions are overruled.

HERRMANN v. UNITED STATES. LEON RHEIMS CO. v. SAME. SAKS & CO. v. SAME.

(Circuit Court, S. D. New York. February 17, 1906.)

Nos. 3,752, 3,753, 3,970.

CUSTOMS DUTIES—CLASSIFICATION—BEAVER STRIPS.

So-called "beaver strips," which are in the form of rectangular strips or bands of various sizes, consisting of rabbit fur and woolen cloth, used in the making of hats, the fur being the component material of chief value, are dutiable as a manufacture of fur, under paragraph 450 of the tariff act of July 24, 1897 (chapter 11, § 1, Schedule N, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678]), and not under paragraph 370, c. 11, § 1, Schedule K, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1667], as articles of wearing apparel composed wholly or in part of wool, nor under paragraph 432, c. 11, § 1, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675], as hats or bonnets or forms therefor composed in chief value of fur.

On Application for Review of Decision of the Board of United States General Appraisers.

Comstock & Washburn (Albert H. Washburn, of counsel), for the importers.

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

HAZEL, District Judge. The objection that the importer offered no testimony before the Board of General Appraisers being waived,

I think that the evidence shows a sufficient identification of the merchandise specified in the invoices. The importation covers similar goods to those passed upon by Judge Townsend in Herrmann v. U. S., Rheims v. U. S., and Sullivan v. U. S. (C. C.) 141 Fed. 486, decision reported in T. D. 26,598, and upon the authority of that case, which appears to have been acquiesced in by the Treasury Department (see T. D. 26,523), the decision of the Board of General Appraisers is reversed. The articles are fur, of which fur is the component of chief value, and is dutiable under paragraph 450 of the act of July 24, 1897 (chapter 11, § 1, Schedule N., 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678]). This decision applies to Herrmann, Rheims, and Saks against the United States (three cases), appeals from the decision of the Board.

So ordered.

GOODRICH v. FERRIS et al.

(Circuit Court, N. D. California. May 21, 1906.)

No. 13,592.

1. WILLS—VALIDITY OF PROVISIONS—CONCLUSIVENESS OF DECREE OF PROBATE COURT—JURISDICTION OF EQUITY.

A court of equity is without jurisdiction of a suit to set aside a decree of a superior court of California, entered after due notice given as required by statute, distributing the estate of a testator in accordance with his will, which had been duly probated, and to have the will declared invalid, unless under extraordinary circumstances where fraud or a breach of trust extrinsic to the proceedings is shown; and such a case is not made merely by an allegation that complainant, who was not an heir, but claims an interest in the estate through his deceased wife, was told by the executor after her death that she had no interest in the estate, which statement was true under the terms of the will, previously probated without objection, which gave her a life interest only.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 917.]

2. JUDGMENTS—CONCLUSIVENESS—PROBATE DECREE—DISTRIBUTING ESTATE.

A decree of a superior court of California in probate, distributing the estate of a testator made after the notice prescribed by statute, is conclusive upon all interested parties, unless set aside in direct proceedings for review.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1303.]

3. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—DISTRIBUTION OF DECEDENT'S ESTATE—NOTICE.

A proceeding to secure a distribution of the estate of a decedent is essentially one in rem in which the parties interested may be bound by constructive notice, the reasonableness of which must be determined with reference to the requirements of ordinary cases; and notice given by posting notices 10 days before the hearing is not unreasonably short, and constitutes due process of law as against all parties without regard to their place of residence.

In Equity. On demurrer to amended bill.

Johnson & Johnson (James A. Louttit, Henry Arden, and Monroe & Cornwall, of counsel), for complainant.

Henry Ach, William Thomas, and J. W. Dorsey (Fred L. Berry, of counsel), for defendants.

MORROW, Circuit Judge. This is a suit in equity, brought by the complainant, a citizen of the state of New York, against the defendants, citizens of the state of California, for the purpose of obtaining a decree adjudging that a final decree of distribution entered and recorded in the superior court of the city and county of San Francisco, state of California, in the matter of the estate of Thomas H. Williams, deceased, on January 5, 1897, is fraudulent and of no force and effect against the complainant, and that the defendants be decreed to be trustees for the complainant of that part of the real estate of Thomas H. Williams, deceased, which complainant claims he is entitled to receive as heir at law of his deceased wife, who, it is alleged, was an heir of Thomas H. Williams, deceased. The court is also asked to appoint a receiver of the said property, to take and hold the same, and to collect the rents and profits thereof during the pendency of this suit, and upon the final decree to make such disposition of the property as in and by the decree directed, and that an accounting be had, under the direction of the court, of the real estate which came into the hands of the defendants under said decree of distribution and the rents and profits thereof; that upon said accounting it be ascertained what portion of said real estate and of the rents and profits thereof the complainant is entitled to receive from the defendants and each of them; and that, as to such portion, they and each of them be ordered and decreed severally to convey and transfer to the complainant such part so found due from each of them, or the value thereof. The bill of complaint was filed May 19, 1904, and an amended bill January 16, 1905.

The questions submitted to the court for determination arise upon a demurrer to the bill of complaint as amended. A brief statement of the facts of the case, as they appear in the bill of complaint and the amended bill, will disclose the matters in controversy. Thomas H. Williams, a resident of the city and county of San Francisco, and a citizen of the state of California, died on the 28th day of February, 1886, seised and possessed of a large amount of real property situated in the state of California. This real property was subsequently appraised at the value of $1,459,445.08 and certain personal property at the value of $6,355. At the time of his death, Thomas H. Williams left no wife surviving him, and his only heirs at law were his children and lawful issue mentioned in the bill of complaint. The children were Sherrod, Thomas H., Jr., Mary Bryant, Percy. and Bryant. At the time of the death of Thomas H. Williams, his daughter Mary Bryant was the wife of Frank S. Johnson, by whom she had issue of the marriage with him, one son, the defendant, Frank Hansford Johnson, who at the time of the filing of the bill of complaint was about 18 years of age. Mary was divorced from Frank S. Johnson December 29, 1888, and on March 11, 1889, Frank S. Johnson was appointed guardian of Frank Hansford Johnson. On December 7, 1889, Mary married the complainant, and on October 3, 1893, Mary died. Percy married Bessie L. Trahern August 1, 1888. A child was born to Percy and Bessie November 12, 1889. This child died on February 16, 1890. Percy died October 3, 1890, leaving

no issue. It is alleged in the amended bill of complaint, upon information and belief, that the defendant Thomas H. Williams, Jr., has acquired all the right, title, and interest of the said Bessie in and to the estate of the said Percy, which comprises all of the interest of the latter in the estate of said Thomas H. Williams, deceased. Sherrod died August 2, 1888, leaving no wife or issue. Bryant died May 2, 1893, unmarried and without lawful issue. Thomas H. Williams left two papers purporting, respectively, to be his last will and testament and codicil thereto. Copies of the will and codicil are attached to the bill of complaint. The will and codicil were admitted to probate in the superior court of the city and county of San Francisco, probate division, on the 6th day of April, 1886, and letters testamentary issued by the court to George E. Williams, a brother of the decedent, and the executor and trustee named in the will, who thereupon qualified as such executor and took possession of the estate of Thomas H. Williams, deceased, as such executor and as testamentary trustee under said will, and entered upon the execution of said trust and carried on the business in which said Thomas H. Williams was engaged at the time of his death, and continued so to do until the 5th day of January, 1897, when a decree of distribution was entered in the superior court.

The will of Thomas H. Williams contained the following provisions, among others, relating to the distribution of the estate:

"Item 4. When the term of three years after my death, shall have elapsed, unless the executor, herein named, shall for good cause extend it for two years, or in case there be another executor, three of my children, or representatives shall by writing, extend it for two years, distribution of my estate, shall be made, as herein directed."

"Item 8. I hereby appoint my brother George E. Williams, executor of this will, and that no bonds, or security, be required of him, for the execution of the trust, or discharge of the office.

"Item 9. That no confusion may arise, in reference to title to any property of my estate, I hereby devise that all of the property of which I die the owner, or which may in any way become part of my estate, vest absolutely in my executor herein appointed, and his successor, successors in office. That the title thereto be held by him, or his said successor, or successors in office, until by death of my said several children the property set aside for each be vested in their respective heirs, as herein provided, said executor, or his successor, or successors, to hold said property, and every part thereof, in trust for the uses and purposes in this will mentioned, and for the use and benefit of my children as herein provided.

"Item 10. To the executor, herein appointed, I give, and grant, the following powers, and authority: (1) To carry on all business, in which I was engaged, at the time of my death. (2) To borrow money for the use of such business, or the benefit of my estate. (3) To bargain, sell and convey, any portion, or part, of the property of my estate, without any order of court, or other proceeding, and to execute all mortgages, or conveyances, necessary, or deemed proper, by him. (4) To sell and convey, any part, or parcel, of property, set aside, for any one of my children, after distribution, as herein provided for, that he may reinvest the proceeds, for the distributee. In that case, his conveyance to be valid, may only recite, that he sells, for reinvestment, and when he reinvests, it will be only necessary, to show by the conveyance, for whose ultimate benefit, the property is taken. It will be understood, that the term 'conveyance,' as here used, implies transfers of property, real, personal, or mixed. It being understood further, that no action of any court, or consent of any person be necessary to execute these powers,

having entire confidence, that he will act for the benefit of my children. I request of said executor to have all income of my estate, or sales of property, invested in property, or government securities, or in notes, bonds, or mortgages, for which property has been sold, at the time of distribution; except the fifty thousand ($50,000) dollars, absolutely given Percy, which may be given in money, or property as desired."

"Item 12. In the event my brother, executes this will, I direct that the court, having jurisdiction, make him a fair, and liberal allowance, for all services, without reference to statutory, or other fees. In case of another appointment, I direct that the compensation of the executor, so appointed, be fixed before, and at the time of appointment, and that he be paid accordingly, and not otherwise. Will also direct, that the appointment of one of my sons, may not be objectionable, and in conveyance of property, in which he may be distributee, his personal assent may be expressed in the same instrument.

"Item 13. This will is lengthy, but I hope it clearly expresses my purposes thus:

"That with the exception of fifty thousand ($50,000) dollars, the property of my estate, is to be 'set aside' in and for the benefit of my children, Thomas H., Jr.; Mary Bryant; and Percy; and Bryant, at the time of distribution, in the proportions of two hundred thousand ($200,000) dollars to Mary, and one hundred thousand ($100,000) dollars to each of the others, with division between Mary, Tom, and Percy, of the remainder of the estate. That each of said children is to have the net income of the estate 'set aside' for them respectively. That the legal title is to be, and remain in an executor, of the whole estate and each part thereof, until death inflicts her blows. That when a child dies, the estate 'set aside,' for him, or her, vests absolutely in his or her heirs as herein provided, except in case of Bryant as hereinbefore mentioned, leaving the title, in remainder, in the executor, until each of the children, herein named, be dead."

It is alleged that, under the laws of the state of California, and especially under sections 715, 716, 749, and 771 of the Civil Code of California, the trust attempted to be created in and by said will was at the time of its creation, and ever since has been, void; that the absolute power of alienation of the property of said Thomas H. Williams included in said attempted trust was by said will, and by the terms of the trust thereby attempted to be created, suspended for the term of three years, and not for a period measured by the continuance of lives in being; and that, as to the property included in said attempted trust, the said Thomas H. Williams died intestate, and that at his death the said property passed to and vested in his heirs at law in the proportions mentioned in the bill of complaint.

In the final decree of distribution, entered in the superior court on January 5, 1897, it was recited that Mary Bryant Williams, named in the last will and testament of the decedent, was a daughter of the said testator, and that during her lifetime she was married to Frank S. Johnson, and thereafter, and subsequent to the admission to probate of the last will and testament of the said decedent, the said Mary Bryant Johnson died, leaving as her sole surviving issue Frank Hansford Johnson; that Percy Williams, Bryant Williams, and Sherrod Williams, sons of the testator, since the publication and admission to probate of the last will and testament of the decedent, had died without issue; and that Thomas H. Williams, Jr., and Frank Hansford Johnson, were the residuary and sole devisees and legatees of the said testator. It was further recited that George E. Williams

the executor named in the last will and testament, was a brother of the decedent, and that it was provided in the will that, in the event he executed the duties of an executor, the court having jurisdiction should make him a fair and liberal allowance for all services, without reference to statutory or other fees; and it appearing to the satisfaction of the court that the executor had rendered great, extraordinary, and valuable services to said estate, and had performed all the labors thereof, the court, in view of the provision of the will, allowed him the sum of $100,000 as compensation for his services, in addition to all sums theretofore paid on account of said services; and, it appearing from the account on file that there was no money on hand with which to pay said sum, the court made said allowance a specific charge and lien upon certain real estate described in the decree and distributed to Thomas H. Williams, Jr.

It is alleged in the bill of complaint that in the proceedings and at the final hearing in the superior court, which resulted in the decree of distribution of the estate of Thomas H. Williams on the 5th day of January, 1897, the only parties to such proceedings were Thomas H. Williams, Jr., Frank Hansford Johnson, a minor, by his guardian, Frank S. Johnson, and George E. Williams, the executor, and that they consented to the decree. On December 17, 1899, George E. Williams died, leaving his surviving wife, Jennie R. Williams, and their daughter, Georgia E. Williams, his heirs at law. Thereafter such proceedings were had in the superior court of the city and county of San Francisco that the defendant John W. Ferris was appointed trustee of the estate of Thomas H. Williams, deceased, in the place and in the stead of George E. Williams, deceased. The bill of complainant charges that in all the proceedings in the superior court the existence of complainant and his interest in the estate was fraudulently concealed from the court; that he had no notice or knowledge of any of the proceedings taken for the distribution of the estate, or of the action or decree of the court thereon; and that, in said proceedings for said final decree of distribution, no day was ever given to the complainant, and that his first knowledge thereof was in November, 1903.

It is further alleged that the complainant has not been in the state of California at any time since the death of his wife, except for a few days immediately after her death, in 1893, when he brought the remains to San Francisco for interment; that while in San Francisco the said George E. Williams declared to the complainant that his wife had no interest in the estate of her deceased father or property of any kind or character whatever, and that she left no estate; that at the time of the death of complainant's wife she was indebted to a firm of jewelers in the city of New York to the amount of several thousand dollars, and the creditors demanded payment of such indebtedness from the complainant; that when in San Francisco complainant informed George E. Williams of that fact and inquired of him whether the said wife of complainant had left any property or estate available for the payment of said demand, and the said George E. Williams assured complainant and represented, stated, and declared to him

that she had left no property or estate whatever, and complainant believed and relied upon the representations, declarations, and statements of said George E. Williams, and was induced thereby to forbear any further inquiry relating to the property or estate of his deceased wife, and, being so induced, he did thereafter abstain from any such inquiry, and he knew nothing at all of the fact that he was entitled to any property as heir at law of his deceased wife, or under the will of Thomas H. Williams, deceased, until the month of November, 1903.

In the amended bill of complaint it is alleged that said George E. Williams was by profession an attorney at law of many years practice and of great experience, and for a number of years he was a judge of the superior court of the state of California; that complainant is not a lawyer, never was, and knew nothing of the laws of California; that complainant knew nothing about the will of Thomas H. Williams, deceased, was not familiar with its terms, and was not aware of the nature or extent of the provisions it made for his wife. All he knew was that his wife during their married life was receiving money from her father's estate in California. How much she was thus receiving, and had received, complainant did not know, and during all their married life they lived in New York City, where complainant has resided for 20 years last past.

It is further alleged in the original complaint that complainant was entitled to reasonable and sufficient notice of the proceedings in the superior court of the city and county of San Francisco upon the filing of the petition for distribution of the estate; that the orders were obtained by the defendants, Thomas H. Williams, Jr., Frank Hansford Johnson, through his guardian, and George E. Williams, purporting to fix the date for the hearing of said petitions and directing notices thereof to be given by posting of the same in three public places in said city and county of San Francisco, to wit, one at the public morgue, one in the place where said court was held, and one at the United States Court building; that said posting was by said order directed to be made 10 days before the day fixed for the hearing of said petition for distribution; that the said period of 10 days was an insufficient time for the plaintiff, who resided in the city of New York, to have by any possibility obtained knowledge of said notice and to have prepared for the hearing of said proceedings for distribution; that said notice, and the proceedings in pursuance thereof, were not and did not constitute due process of law, within the meaning of section 1 of article 14 of the Constitution of the United States; and that complainant never had his day in court in said proceedings for distribution, and that the same were and are void. And complainant alleges that, by reason of the proceedings had and taken by the defendants in the matter of the distribution of said estate, complainant has been deprived of his interest in said property of said decedent without due process of law, within the meaning of said section 1 of article 14 of the Constitution of the United States.

The will of Thomas H. Williams is dated the 29th day of October, 1885, and the codicil the 23d day of January, 1886. The will gave

to the daughter the testator's household furniture and pictures, and, to be set aside absolutely for her benefit, in property or money realized from sales of property, $200,000; then, after distributing $350,000 to three of his remaining four children, and providing for the investment of $1,000 each for the benefit of a niece, Mary Thomas, and his grandson Frank Hansford Johnson, the will provided that the remainder of the estate should be set aside in equal shares for his daughter Mary Bryant and his two sons, Thomas H., Jr., and Percy. Item 6 of the will provides as follows:

"Item 6. The first fifty thousand ($50,000) dollars, given to Percy, is intended to vest in him absolutely. But the remainder of the estate, is only intended for the use and benefit of the children, during their respective lives, with remainder in fee to those herein named. If my daughter dies, leaving two children, or more, or one child, and the children, or child of another, then the estate set aside for her benefit, shall vest in said child, or children, or grandchildren per stirpes—as the case may be. If she leaves one child, or the child, or children of one child, then said estate shall vest one-half in said child, or said grandchild, or children, and the other half in Thomas H. Jr."

At the time this will was executed, and at the time of the death of the testator, Mary Bryant was the wife of Frank S. Johnson. Mary Bryant was divorced from Frank S. Johnson December 29, 1888, and was married to the complainant December 7, 1889. She died October 3, 1893, and under the terms of the will Frank Hansford Johnson and Thomas H. Williams, Jr., were the only heirs to her interest in her father's estate.

The purpose of the bill of complaint is now reasonably clear in such detail as is material to the questions before the court. The purpose of the bill is to secure a decree of his court declaring the will of Thomas H. Williams, deceased, invalid and void by reason of certain of its provisions providing a trust for the administration of the estate which it is claimed attempted to suspend the power of alienation for a period of time longer than during the continuance of lives of persons in being at the creation of the limitation or condition; that the said Thomas H. Williams therefore died intestate, and that his estate descended to his heirs under the law of the state; that complainant's wife was such an heir, and under the law she inherited from her deceased father's estate and also from her deceased brothers' estates, and that the complainant was an heir to his deceased wife's estate; that in the probate proceedings in the superior court of the state, with respect to the estate of Thomas H. Williams, deceased, the existence of the complainant and his interest in that estate was fraudulently concealed from the court, and that the decree of distribution entered in the superior court was fraudulent and void as against complainant; that the notices of the hearing in the superior court upon the petitions for distribution of the estate were insufficient, in point of time, to give the complainant knowledge of such hearing; that the notices and the proceedings in pursuance thereof did not constitute due process of law, and deprived the complainant of his interest in said estate without due process of law, contrary to section 1 of article 14 of the Constitution of the United States.

The demurrers of the several defendants raise the question, among others, whether, upon the facts stated, a court of equity in this state can decree the relief prayed for in the bill of complaint. The first inquiry, therefore, relates to the nature and character of the jurisdiction of the superior court of the state in probate proceedings. In the case of Broderick's Will, 21 Wall. 503, 22 L. Ed. 599, the inquiry resulted in the Supreme Court defining certain limitations to which a court of equity is subject in dealing with the proceedings of a probate court. A suit in equity had been brought in this court by the alleged heirs of Senator Broderick, to set aside the probate of his will, to have the same declared a forgery, and to recover the assets of Broderick's estate, much of which consisted of real property. The defendants were the executors and several hundred persons who were in possession of portions of the real estate, claiming ownership thereof as purchasers at sales made by the executors. The estate had been administered upon, and distribution had been fully made before the institution of the suit. It was contended by the defendants that a court of equity had no jurisdiction of the subject-matter of the suit; the same being vested exclusively in the probate court of the city and county of San Francisco. In sustaining this objection, the court said:

"As to the first point, it is undoubtedly the general rule, established both in England and this country, that a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof. The case of Kerrick v. Bransby, decided by the House of Lords in 1727, is considered as having definitely settled the question. Whatever may have been the original ground of this rule (perhaps something in the peculiar constitution of the English courts), the most satisfactory ground for its continued prevalence is that the constitution of a succession to a deceased person's estate partakes, in some degree, of the nature of a proceeding in rem, in which all persons in the world who have any interest are deemed parties, and are concluded as upon res judicata by the decision of the court having jurisdiction. The public interest requires that the estates of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership; and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with least chance of injustice and fraud, and that the result attained should be firm and perpetual. The courts invested with this jurisdiction should have ample powers, both of process and investigation, and sufficient opportunity should be given to check and revise proceedings tainted with mistake, fraud, or illegality. These objects are generally accomplished by the constitution and powers which are given to the probate courts, and the modes provided for reviewing their proceedings. And one of the principal reasons assigned by the equity courts for not entertaining bills on questions of probate is that the probate courts themselves have all the powers and machinery necessary to give full and adequate relief. * * * The English authorities were fully discussed by Lord Lyndhurst in Allen v. McPherson, and by him and Lords Cottenham, Brougham, Langdale, and Campbell in the same case on appeal in the House of Lords. In that case a codicil was revoked by a subsequent one, in consequence of false and fraudulent representations on the part of the person to be benefited by the change, prejudicing the testator against the person injured thereby. A bill was filed praying that the executor might be declared trustee for the first legatee to the extent of the legacies revoked. The bill was demurred to and dismissed, and the whole discussion turned upon the question whether or not the ecclesiastical court had jurisdiction to inquire of the matters

of fraud alleged, and, the court being of opinion that it had jurisdiction, the decree was affirmed. The court came to the conclusion that the ecclesiastical court had power to refuse probate of the revoking codicil, and, indeed, had had the question before it; but after investigating the facts had granted the probate. 'If,' said Lord Lyndhurst, 'an error has been committed in this or any other respect, which I am very far from supposing, that would not be a ground for coming to a court of equity. The matter should have been set right upon appeal. But the present is an attempt to review the decision of the Court of Probate, not by the judicial committee of the Privy Council, the proper tribunal for that purpose, but by the court of chancery. I think this cannot be done. It was formerly, indeed, considered that fraud in obtaining a will might be investigated and redressed in a court of equity; but that doctrine has long since been overruled.' Lord Lyndhurst also reviewed the cases in which a legatee or executor had been declared trustee for other persons, and came to the conclusion that they had been either questions of construction, or cases in which the party had been named a trustee, or had engaged to take as such, or in which the Court of Probate could afford no adequate or proper remedy. The effect of his reasoning was that, where a remedy is within the power of the ecclesiastical court, either by granting or refusing probate of the whole will or codicil, or of any portion thereof, a court of equity will not interfere. And this was the view of a majority of the law lords on that occasion; Lords Brougham and Campbell agreeing with Lord Lyndhurst."

The case of Broderick's Will arose under the judicial system provided by the old Constitution of the state of California, wherein the probate court was an inferior court. Under the present Constitution, and the laws passed in pursuance of its provisions, jurisdiction of all matters of probate is vested in the superior court, a court of original general jurisdiction in all cases in law and equity (section 5, art. 6, Const. 1879, and section 76, Code Civ. Proc.), and the reasons for holding that the probate proceedings in the superior court are not open to review by a court of equity are even greater now than they were with respect to proceedings in the former probate court.

In Toland v. Earl, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100, the Supreme Court of the state, referring to some of its former decisions, calls attention to this difference between the old and new systems, and holds that cases for the construction of wills and of trusts thereunder arising under former Constitution, which vested all equity jurisdiction in the district courts and established separate probate courts, were inapplicable to the judicial system established under the new Constitution, which vests both equity and probate jurisdiction in the superior court, and that one judge of the superior court, sitting in equity, could not instruct another sitting in probate. The action in the case was brought by the administrator with the will annexed, for the purpose of having the probate court instructed as to what distribution should be made of the estate under the will. The superior court had entertained jurisdiction of the case, but the Supreme Court reversed the judgment and directed the superior court to dismiss the action. In the opinion, written by Mr. Justice Temple, he says:

"The Legislature has provided a special proceeding for the administration of the estates of deceased persons, whether testate or intestate. For the conduct of this special proceeding a minute code has been provided, through which every purpose for which resort was formerly had to courts of equity is attained. * * * If a legacy falls due, or a partial distribution

of an intestate estate should be made, the probate court can order the personal representative to make the payment or distribution. This will also be done upon notice, and, the proceeding being in rem, when such notice is given the whole world is brought in. Surely, this must be exclusive of a suit in equity in which the parties are necessarily limited. The same is true as to the settlement of the accounts of the administrator or executor. Elaborate provision is made to force the executor or administrator to account, and in this accounting the creditors, and distributees are interested. In an insolvent estate it is a necessary preliminary to the marshaling of the assets for payment of creditors, and it is always a necessary preliminary to a final distribution. This settlement made after the prescribed notice is conclusive upon all interested parties. But the most conclusive reason, to my mind, why this jurisdiction must be held to be exclusive is that, under our probate system, all deraignment of title to the property of deceased persons is through the decree of distribution entered as the final act in the administration of an estate, whether testate or intestate. No one will contend that this decree can be made by any other court or in any other proceeding. It constitutes not only the law of personalty, but also the law of real estate. In other jurisdictions this decree is also held to be conclusive. But generally it concerns only personal property, and the power to make it does not involve the power to construe trusts in land created by the will. Here the probate court not only may, but should, and often must, construe the trusts created by the will. After the decree is made the will practically drops out of existence. The law of the estate is the decree and not the will, and, as I have said, all deraignments of title are through it. Goad v. Montgomery, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145. The proceeding differs much from the systems of administration where the personal property goes to the personal representative and the land to the heir. Here the relation of the probate court to the executor or administrator is much more analogous to the relation of a court to its receiver. And here, too, the entire probate proceeding from the grant of administration, or the probate of a will, is calculated to give notice to the heirs of a decedent, and special notice is required to be given of the time when distribution will be made, where all interested parties can be heard. The distribution is declared to be conclusive upon the whole world."

But the case of Sohler v. Sohler, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98, is cited by the complainant in support of the claim that the defendants have been guilty of such fraud as would authorize a court of equity to decree that they hold the distributed estate as trustees for the complainant to the extent of his interest therein. The action in that case was brought to set aside the decree of distribution entered in the estate of Sohler deceased, or so much of it as distributed one-eighth of the estate to one Reuss, who was fraudulently and falsely made one of the distributees upon the representation to the court by the widow, who was the executrix of the will, that he was a son of the decedent. The will of the decedent left all the property to the widow, and the children were pretermitted heirs. In the probate proceedings the court held that the widow was entitled to only a one-half interest in the estate of the decedent, and that the children were entitled to equal parts of the other half. When the estate was ready for distribution, the executrix in her petition set forth the names of the minor children of the decedent, and included Reuss as one of them. The fact was that Reuss was not a son of the decedent, but was a son of the executrix, and these two—mother and son—connived and conspired together to mislead and deceive the court into making its decree so that one-eighth of the property of the estate was distrib-

uted to Reuss in fraud of the rights of the minor children of the testator, for whom the executrix was the natural guardian.

It was urged, against the sufficiency of the complaint setting up these facts, that it was the exclusive province of the court in probate to determine heirship and decree distribution, and that the complaint went no further than to charge intrinsic fraud, in that Reuss succeeded by false and perjured evidence in obtaining a favorable decision upon a matter essential to the proceeding, and one in which the court was bound to exercise its judgment, and, notwithstanding that the decision was obtained by such evidence, this fact afforded no ground for relief in equity. "If this were all the complaint discloses," said the Supreme Court, "the respondent's contention would be undoubtedly sound, for it is the general rule that intrinsic fraud, fraud by which a decree or judgment is obtained by false evidence upon issues within the case, is not such fraud as equity will relieve against; the theory being that the losing litigant has had his day in court, and that while it must always remain a misfortune that private causes shall be lost by foresworn testimony, yet stronger than this consideration is that which declares it to be the policy of the law to make an end of litigation, and in the nature of things there never could be a final judgment if every judgment was open to avoidance upon the charge that fraudulent evidence had been introduced in its procurement. Therefore, it is the general rule that extrinsic fraud only will form the basis of such relief as is here sought; extrinsic fraud consisting in the failure to give legal notice to the adversary, the prevention of him or his witnesses from attending the trial, and the like. But, when we come to scan the allegations of this complaint, it will be discovered that there is more alleged than the mere procurement of this decree by false evidence. The executrix of the estate was not alone the trustee of all of the heirs of the estate and of all the parties in interest thereto and thereunder. She was the mother of these minor plaintiffs, had their actual custody and control, and, as their natural guardian, was chargeable with all the high duties pertaining to that relationship. As executrix merely, it might be argued that she was a disinterested party, having no concern whatsoever in the question of heirship or right of distribution, standing indifferent between the parties, and interested only in carrying into effect the determination of the court upon these questions. But, as the mother and natural guardian of these plaintiffs, her position was a very different one. She was under most solemn obligation to protect the legal rights of her infant and dependent offspring. She was under like obligation to disclose to the court, on their behalf and in their interest, all knowledge which she possessed, and she was under the same obligation to see that their legal claims to the estate were properly presented before the court in probate, and with peculiar force did this duty press upon her, in view of the fact that during all of this time she was executrix of, and administered upon, the estate through which her children were to derive their property. Such being her position, it was charged that in violation of this duty, and of the rights of her minor children, she connived with her adult son—not an heir to the estate of the de-

ceased—to procure for him a distributive portion of that estate, and that the conspiracy was carried to a successful termination. Here certainly is a charge of concealment upon the part of the guardian, when she should have spoken in the interest of her wards, and collusion upon the part of the guardian with another not in interest in the estate, to the end that that other might despoil the wards of their rightful inheritance. It cannot to this be answered that the probate proceeding upon distribution was not an adversary proceeding. It becomes adversary in every case where there are conflicting claims, and where there be not the most perfect understanding and harmony between the claimants. The moment heirship was set up by the false claimant, Reuss, that moment between him and the rightful heirs an adversary proceeding was at issue, and from that moment it became the duty of the guardian of these minor heirs to see that the fullest presentation of their claims was put before the court. This, by conspiracy with her codefendant, it is asserted she did not do, and it is clear that her fraud in pushing on behalf of Reuss his false claim to heirship and distribution, and in concealing the truth from her own minor children, the rightful heirs, and in leaving them in ignorance that they were thus to be deprived of their patrimony, was fraud extrinsic to the case, which prevented their being properly represented at the hearing, or from being represented at all."

The court concluded that the complaint presented a case for equitable relief, and that, if the superior court found the facts to be as alleged, it would be its duty to decree that Reuss held the title to the property he had obtained from the estate, as trustee of the minor children, and that the court should compel Reuss to make conveyance and transfer to them such property, or, if a conveyance of specific property could not be had, then to hold him accountable to the complainants for the value thereof. The court refers to the allegations of the complaint as peculiar and somewhat remarkable, and so indeed they are, and, as stated, they certainly call for the interposition of a court of equity, but the allegations of the complaint under consideration in this case, do not present a parallel state of facts. The executor in this case had no such relation to the complainant as the executrix had to the complainants in that case. The complainant in this case was not a minor, and the executor was not his guardian, and, what is equally important, the complainant is not an heir of Thomas H. Williams, deceased, the distribution of whose estate is made the subject of attack in the bill of complaint. These distinguishing characteristics deprive the Sohler Case of its weight as an authority for this court in the present case.

In the Estate of Davis, 136 Cal. 590, 69 Pac. 412, one Laura E. Tracy, claiming to be the heir of Jacob Z. Davis, commenced an action in the superior court in which the probate proceedings of the estate had been conducted and the estate distributed. The complainant was not a party to such proceedings, and she alleged in her complaint, or petition, that at the time Davis died, October 28, 1896, she was living in a foreign country and had no notice of his death or the proceedings connected with the probate of his will; that she did not know that

he lived in San Francisco until after the 15th of September, 1899; that about said date she discovered that decedent was in truth and in fact a brother of her father; that thereafter, and upon May 1, 1900, she became cognizant of the fraud practiced upon her in the forgery of the will and the securing of its probate. The will was admitted to probate August 17, 1898, and the complaint or petition was filed September 7, 1900. The fraud upon which relief was sought was stated to be that the will was a forgery conceived and executed by the legatees thereunder and certain other conspirators; that it was probated upon perjured testimony, and the jury which was impaneled to pass upon certain charges of forgery and conspiracy by contestants other than the complainant, at the time the will was offered for probate, was corrupted, and thereby caused to render a verdict against contestants and in favor of the validity of the document. To this complaint or petition a demurrer was interposed and sustained, and, on appeal to the Supreme Court, it was contended by the attorney representing one interest that the proceeding was brought in the probate court to set aside the probate of the will by reason of the wrongs and frauds alleged in the petition. The attorney for the other interests contended that the proceeding had not been brought in a court of probate, but that it was a proceeding in a court of equity seeking to establish a trust and charge the legatees under the will of Davis as trustees of the estate for the benefit of the complainant. The court considered the proceedings in both aspects and determined that the petition involved the probate jurisdiction of the superior court, and that the petitioner was not entitled to relief. What the court said upon this subject is applicable to the present case:

"A proceeding relating to the probate of a will is essentially one in rem, and a statute providing for a constructive notice by publication or posting gives notice to the world. Crall v. Poso Irrigation Dist., 87 Cal. 147, 26 Pac. 797. Viewing this matter in the light of constitutional law, it is not necessary that there should be a personal notice served upon any one. And conceding that portion of the statute relating to personal service of notice discriminative against known heirs not residents of the state, and even further conceding, for present purposes alone, that such discrimination renders the statute unconstitutional as violative of the fourteenth amendment, still such concessions only affect the question of personal notice, and the law as to constructive notice still remains upon the statute books entirely valid and effective, and by that notice this petitioner was notified of the hearing of the probate of the will in common with all other interested parties.

"It is next asserted that the statute providing for constructive notice is unconstitutional, in this, that the 10 days herein provided is too short to serve as constructive notice to the world, and that, the period of time being so short, therefore the statute is unreasonable and consequently void. As before suggested, the proceeding as to the probate of a will is essentially one in rem, and in the very nature of things the state is allowed a wide latitude in determining the character of the constructive notice to be given to the world in a proceeding where it has absolute possession of the res. It would be an exceptional case where a court would declare a statute void, as depriving a party of his property without due process of law; the proceeding being strictly in rem, and the res within the state, upon the ground that the constructive notice prescribed by the statute was unreasonably short. It would seem that very few cases of that kind could be found in the books. Certainly this is not one of them. Public policy

demands that a will shall have a speedy probate, and the Legislature, recognizing that fact, has given the heir, by express enactment, one year after that probate has been decreed within which time he may attack the will. His rights are in no way concluded by the decree of probate. He has an entire year thereafter in which to attack the will, and he may attack it upon the same grounds and for the same reasons that he could attack it prior to its probate. Even the measure of evidence demanded of him for a successful attack is no different in the two cases."

With respect to the claim that the petition or complaint was a proceeding in a court of equity seeking to establish a trust, the court refers to Sohler v. Sohler, supra, as the latest expression of the court bearing upon the power of equity to deal with a decree of distribution, but the court says, "That case, upon its facts, is an exceptional one," and then refers to the case of Mulcahey v. Dow, 131 Cal. 73, 63 Pac. 158, as dealing generally with the question. In other words, the court refers to this last case as declaring the law upon the subject. Turning to that case, we find it is similar, in its general features, to the complaint under consideration. The facts were these: Arthur Waters died intestate in the city of San Francisco, leaving a wife here and a sister and nephews in other states. Administration was had upon his estate, and in due time, and after due notice, a decree of distribution was entered, which found that the wife, Elizabeth, was the only heir of her husband, and all his estate was therefore distributed to her. Subsequently she died, and the defendants in the case were her successors in interest. The plaintiffs in the case were a sister and a nephew and niece of the decedent, claiming to be his heirs at law, and asserting that the wife, Elizabeth, under the decree of distribution held their respective shares of property as an involuntary trustee. The plaintiffs were nonsuited in the superior court. On appeal to the Supreme Court the question was as to the sufficiency of the evidence to support the judgment. The court held, in substance, that a proceeding for the distribution of the estate of a deceased person is a proceeding in rem, and the decree of distribution binds all who have constructive notice thereof, and if not appealed from is conclusive as to the whole world, upon all questions of heirship; that where heirs are omitted from a decree of distribution, to enforce an involuntary trust against the distributees on the ground of fraud, if there is no showing of extrinsic or collateral fraud and no satisfactory showing of the existence of any fraud, the action cannot be maintained, and that the failure of the widow of the decedent to whom the estate was distributed to inform the relatives of her husband living in another state of the death of her husband is immaterial upon a charge of fraud; that no legal duty devolved upon her to furnish them with that information.

The case of Lynch v. Rooney, 112 Cal. 279, 44 Pac. 565, was similar to the last case, except that the ground there relied upon for equitable relief was not fraud, but mistake, and it was held that the decree of distribution was final and conclusive upon all questions of heirship. The court said:

"It is insisted that the interveners, in asking this relief, are not attacking the decree of distribution, but are asking relief thereunder. Many cases are cited to support this contention, but they fall short of the mark,

and present no question similar to the one here involved. The court in hearing the petition for distribution of the estate of Bryan Lynch, deceased, upon legal and proper notice to the entire world, took evidence as to who were the heirs of his estate, entitled to take the same, and thereupon made a finding of fact that Catherine Clark was a sister and the only heir, and, as a conclusion of law, held that said Catherine Clark was entitled to the entire estate. That decree has never been modified, nor even assailed, and, as far as any collateral attack is concerned, it must stand forever as binding and conclusive upon the question of heirship. Whatever counsel may say as recognizing the validity of the decree, and claiming under it, is not strictly true, for that decree declares as a fact that Catherine Clark is the only heir of Bryan Lynch; and, to give the interveners the relief here sought, that finding must be first set aside as untrue, and that cannot be done in this action. If such a thing could be done, the stability of judgments and decrees would be a thing of the past. Decrees of distribution would be as unstable as the sands, for omitted heirs from such decrees would be seeking to have involuntary trusts declared thereon at most inopportune times, and in direct opposition to the law as declared by section 1908 of the Code of Civil Procedure pertaining to the conclusiveness and finality of judgments and decrees."

The allegation of fraud or mistake attributed to Judge Williams in telling the complainant in 1893 that his wife had no interest in the estate of her deceased father, or property of any kind or character, and that she had left no property or estate whatever, does not alter the situation in the least. What Judge Williams said was at most merely the expression of an opinion. It was not the statement of a fact, and there was no confidential or fiduciary relation existing between Judge Williams and the complainant that justified the complainant in reposing confidence in the statement. Whether the wife of the complainant left any property from her father's estate, in which the complainant had an inheritable interest, would still be a matter of opinion if at this time no decree of distribution of the estate had been entered. But there was no extrinsic or collateral fraud in the statement of Judge Williams, in whatever light it may be viewed. If it has any bearing upon any question before the court, it must be as evidence that the complainant had notice that proceedings with respect to the estate of Thomas H. Williams were pending in court, and that it was his duty to make inquiry and ascertain what rights his late wife had in her father's estate, if he desired to assert a claim as heir to her estate or for the benefit of her estate.

The next question relates to the notice of the hearing in the superior court upon the petition for the settlement of the account of the executor and for distribution of the estate. The complainant contends that as to him the notice did not amount to due process of law. The provisions of the Code of Civil Procedure with respect to the notice to be given in proceedings for the settlements of accounts of executors or administrators, and for the final distribution of estates, are as follows:

"Sec. 1633. When any account is rendered for settlement, the court, or a judge thereof, must appoint a day for the settlement thereof; the clerk must thereupon give notice thereof by causing the notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account. The court, or a judge thereof, may order such further notice to be given as may be proper.

"Sec. 1634. If the account mentioned in the preceding section be for a final settlement, and a petition for the final distribution of the estate be filed with said account, the notice of the settlement must state those facts, which notice must be given by posting or publication, as the court may direct, and for such time as may be ordered. On the settlement of said account, distribution and partition of the estate to all entitled thereto may be immediately had, without further notice or proceedings."

Notice was given in accordance with the requirements of these sections. But it is contended that the notice was not sufficient to afford the complainant the protection guarantied to him by the Constitution, and the case of Roller v. Holly, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520, is cited as supporting complainant's contention. That action was brought in a district court of Texas upon a promissory note to recover a personal judgment and for the foreclosure of a vendor's lien upon a tract of land in that state for the purchase of which the note sued upon was given in part payment. The defendant, residing in Virginia, was served with process in that state, requiring him to appear and answer the suit in Texas within five days. It was held that such notice was not a reasonable one and was not due process of law, but the action, although classified by the court under the statute as in rem, was inter parties. The law in such a case is clearly not applicable to the present controversy, where the proceeding was with respect to the final account and distribution of an estate, a subject-matter over which the court had exclusive jurisdiction. "A proceeding to secure a decree of distribution is essentially a proceeding in the nature of one in rem. It has none of the characteristics of a proceeding in personam." Mulcahey v. Dow, 131 Cal. 73, 77, 63 Pac. 158.

In William Hill Co. v. Lawler, 116 Cal. 359, 48 Pac. 323, the Supreme Court, in stating the effect of the constructive notice in such proceedings, says:

"By giving the notice directed by the statute, the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their right to any portion of the estate, and every person who may assert any right or interest therein is required to present his claim to the court for its determination. Whether he appear and present his claim, or fail to appear, the action of the court is equally conclusive upon him, 'subject only to be reversed, set aside, or modified on appeal.' The decree is as binding upon him, if he fail to appear and present his claim, as if his claim after presentation had been disallowed by the court."

If in such proceeding the entire world is called before the court, and to enable the court to enter a valid decree the entire world must have reasonable notice, it will necessarily follow that the notice that will bind all parties must be of such nature as could reach the most distant possible party interested in the estate. To state the proposition is to show its absurdity. It would be impracticable, and, moreover, under such a rule no decree would carry with it any presumption of validity, but rather, on the contrary, invite the presumption that it was invalid. "Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest

in persons or things must be charged with knowledge of their status and condition and of the vicissitude to which they are subject. This is the foundation of all judicial proceedings in rem." Case of Broderick's Will, 21 Wall. 503, 519, 22 L. Ed. 599.

In Bellingham Bay, etc., Co. v. New Whatcom, 172 U. S. 314, 318, 19 Sup. Ct. 205, 43 L. Ed. 460, the Supreme Court of the United States was called upon to determine whether a notice of 10 days of a reassessment for street improvements was sufficient under the constitutional guaranty of due process of law. The court said:

"It may be that the authority of the Legislature to prescribe the length of notice is not absolute and beyond review, but it is certain that only in a clear case will a notice authorized by the Legislature be set aside as wholly ineffectual on account of the shortness of the time. * * * But how many days can the courts fix as a minimum? How much time can be adjudged necessary as a matter of law for preparing and filing objections? How many and intricate and difficult are the questions involved? Regard must always be had to the probable necessities of ordinary cases. No hardship to a particular individual can invalidate a general rule."

It was accordingly held that 10 days' time did not appear to be unreasonably short for presenting objections to the assessment. The same rule, applied to the present case, determines that 10 days' notice of the settlement of a final account and the distribution of an estate is not unreasonably short in ordinary cases, and the exceptional case does not change the general rule.

My opinion is that the bill of complaint does not present a case for the equitable jurisdiction of this court, and the demurrer will have to be sustained on that ground. It follows that, upon the facts stated, the bill of complaint cannot be amended to confer jurisdiction.

The bill will be dismissed.

Ex parte LISK.

(District Court, E. D. Virginia. April 7, 1906.)

1. ARMY AND NAVY—ENLISTMENT—MINORS.

Rev. St. § 1418, as amended by Act Cong. March 3, 1899, c. 413, § 16, 30 Stat. 1008 [U. S. Comp. St. 1901, p. 1007], provides that boys between 14 and 18 years of age may be enlisted to serve in the navy until they arrive at the age of 21, while other persons may be enlisted for a term not exceeding four years. Section 1419 [U. S. Comp. St. 1901, p. 1007] declares that persons between 14 and 18 shall not be enlisted without the consent of their parents or guardians, and section 1420 [U. S. Comp. St. 1901, p. 1008] declares that no minor under the age of 14 shall be enlisted. *Held*, that a boy between 14 and 18 could not be enlisted under any circumstances without the consent of his parents or guardian.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Army and Navy, §§ 45–50.]

2. SAME—OFFENSES—FRAUDULENT ENLISTMENT—COURT-MARTIAL.

Rev. St. § 1624, art. 22 [U. S. Comp. St. 1901, p. 1112], declares that all offenses committed by persons "belonging to the navy," not specified in the foregoing articles, shall be punishable as a court-martial shall direct; and Act March 3, 1893, c. 212, 27 Stat. 716 [U. S. Comp. St. 1901, p. 1006], provides for punishment for false enlistment in the navy by court-martial. *Held*, that where an infant not eligible to enlistment in the navy enlisted

without the consent of his parents or guardian, he was not "a person belonging to the navy," and was not punishable as for fraudulent enlistment under such act.

3. HABEAS CORPUS—POSSESSION OF MINOR—OFFENSES.

In a habeas corpus proceeding to recover possession of a minor under 18 years of age, who had enlisted in the navy without the consent of his parents or guardian, it was no answer to the writ that the naval authorities were entitled to retain the custody of the minor for the purpose of having him tried by a naval court-martial for fraudulent enlistment.

Barron & Shackleford, for petitioner.

L. L. Lewis, U. S. Atty., and Robert H. Talley, Asst. U. S. Atty.

WADDILL, District Judge. This is a petition of Jeremiah Lisk, Jr., for a writ of habeas corpus, setting forth that his son Edward Upton Lisk, a youth under the age of 18 years, enlisted in the United States navy, without the consent of his parent and guardian, and is now unlawfully restrained of his liberty by Albert C. Dillingham, Commander United States Navy, on the United States receiving ship Franklin, lying in the waters of the Elizabeth river, in the Eastern district of Virginia; and praying that his said son be discharged by the court from such custody. The petition was duly sworn to by the father; and the respondent in his return, sets up the enlistment of said Edward Upton Lisk on the 10th day of February, 1906, under the assumed name of Edward Smith (Smith being the maiden name of his mother), upon representing himself as of the age of 19 years and 7 months; that the said Edward Upton Lisk, alias Edward Smith, is held under and by virtue of such enlistment, which was a fraudulent enlistment, assuming the facts set forth in the petition to be true. Upon the return of this writ, no evidence was offered by the government, and the evidence adduced by the petitioner established that the said Edward Smith was Edward Upton Lisk, and the son of the petitioner; that he was under the age of 18 years at the time he entered the navy, and was so entered without the knowledge or consent of his parents. These being the undisputed facts of the case, the government insisted that the said Lisk should not be released upon habeas corpus, but held for court-martial under the laws, rules, and regulations governing fraudulent enlistment in the navy. This presents for the consideration of the court, the meaning of section 1418, Rev. St., as amended by act of Congress of March 3, 1899, c. 413, § 16, 30 Stat. 1008 [U. S. Comp. St. 1901, p. 1007] and sections 1419 and 1420 of the Revised Statutes of the United States [U. S. Comp. St. 1901, pp. 1007, 1008] respecting the eligibility of persons to enter the navy, which are as follows:

"Sec. 1418. Boys between the ages of fourteen and eighteen years may be enlisted to serve in the navy until they shall arrive at the age of twenty-one years; other persons may be enlisted to serve for a period not exceeding five years [under amendment above referred to, four years], unless sooner discharged by direction of the President.

"Sec. 1419. Minors between the ages of fourteen and eighteen years shall not be enlisted for the naval service without the consent of their parents or guardians.

"Sec. 1420. No minor under the age of fourteen years, no insane or intoxi-

cated person, and no deserter from the naval or military service of the United States shall be enlisted in the naval service."

And, also, article 22 of section 1624 of the Revised Statutes [U. S. Comp. St. 1901, p. 1112]:

"Art. 22. All offenses committed by persons belonging to the navy which are not specified in the foregoing articles shall be punishable as a court-martial may direct."

And the act of Congress of March 3, 1893, c. 212, 27 Stat. 716 [U. S. Comp. St. 1901, p. 1006], so far as it provides for punishment for false enlistment in the navy by court-martial, which is as follows:

"And fraudulent enlistment, and the receipt of any pay or allowance thereunder, is hereby declared an offense against naval discipline, and made punishable by general court-martial, under article 22 of the articles for the goverment of the navy; but this provision shall not take effect until sixty [60] days after the passage of this act."

The first three sections above referred to, have recently been under review by the Circuit Court of Appeals of this circuit, in the Case of Thomas, Commanding Officer, v. Joseph Winne, father of Chester A. Winne, 122 Fed. 395, 58 C. C. A. 613, in which it was held, reversing the rule in existence, theretofore, based upon an early decision of Mr. Justice Blatchford in Re McLave, Fed. Cas. No. 8,876, that the age limit for enlistment without the consent of parents or guardians was 18 years instead of 21 years of age. Under the law as settled by that decision, certainly in the courts of this district, boys between the ages of 14 and 18 can only be enlisted in the navy with the consent of their parents or guardians. This would seem to be the clear meaning of the section referred to. Section 1420 in terms provides that no minor under the age of 14 years, shall be enlisted, etc.; and section 1418, that boys between the ages of 14 and 18 may be enlisted to serve in the navy until they arrive at the age of 21 years; while other persons may be enlisted for a term not exceeding four years; and section 1419 in express terms prescribes that minors between the ages of 14 and 18 years shall not be enlisted without the consent of their parents or guardians.

The said Edward Upton Lisk being under the age of 18 years, was therefore not eligible to enlistment in the navy, without the consent of his parent or guardian; and having confessedly entered without such consent, he must be held to be unlawfully enlisted, and improperly in the navy. This leaves for determination, the meaning of the sections above quoted respecting trials by court-martial of persons belonging to the navy; what effect is to be given to them; and whether they apply to this case.

No authority has been offered by the government in support of its contention that these sections apply to the case of a minor unlawfully enlisted in the naval service; and after a careful consideration of the same, the conclusion reached by the court is that they do not apply, and should not serve to cause the detention of said Edward Upton Lisk for trial by court-martial, under the law and the rules and regulations aforesaid. Section 1624 in terms provides for the punishment of an offense committed by a person "belonging to the navy"; and

while it is true the act of Congress of March 3, 1893, c. 212, 27 Stat. 716 [U. S. Comp. St. 1901, p. 1006], provides that a fraudulent enlistment, and the receipt of any pay or allowance thereunder, is an offense against naval discipline, and punishable by general court-martial under article 22 of section 1624 aforesaid; still, an infant not eligible to enlistment in the navy, but who enters therein without the consent of his parents or guardian, cannot be said to be a person "belonging to the navy"; nor can such infant be said to be a person liable for what may be declared by naval rules and regulations, to be an offense against naval discipline. This proceeding is instituted by the father of a child, praying at the hands of the courts of the country, the benefit of the prerogative writ of habeas corpus, for the release of his infant son alleged to be unlawfully detained, and his return to him; and it will not answer for those confessedly in unlawful custody of the child, to respond that he placed himself under their control; and hence that they have the right to hold him as against his father. Such an answer would in effect be a denial of all right in the father to the possession of the child. Nor can the naval authorities hold him with a view of having him tried by a naval court-martial for fraudulent enlistment, when the real issue involved is his legal right to enter the navy, and whether he is lawfully therein or not. This result seems clear and inevitable to the court, and makes operative all the legislation of Congress on the subject. To sustain the government's contention would be to give effect alone to portions of the legislation of Congress respecting offenses committed by persons seeking to fraudulently enlist in the navy, and indirectly by such interpretation cause the latter act to repeal those fixing the age limit for enlistment therein; and, moreover, would result in the suspension of the writ of habeas corpus in time of peace, and place the government in the position of colluding with boys under 18 years of age, to enable them to avoid parental care, custody, and control; none of which things Congress ever intended to bring about.

It follows from what has been said, that the infant, Edward Upton Lisk, alias Edward Smith, will be discharged from the custody of the said Dillingham, captain of the United States receiving ship Franklin.

McKINNON v. RYNKIEVICZ.

(Circuit Court, E. D. Pennsylvania. May 17, 1906.)

No. 42.

JUDGMENT—MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO—PENNSYLVANIA STATUTE.

Pa. Act April 22, 1905 (P. L. 286), which provides that whenever upon the trial of any issue a point requesting binding instructions has been reserved or declined, the party presenting the point may move to have all of the evidence taken duly certified and filed, and for judgment non obstante veredicto upon the record, does not apply to a case in which the jury disagreed.

At Law. On motion for judgment non obstante veredicto.

C. E. Morgan, 3d, for plaintiff.

Crawford & Loughlin, for defendant.

HOLLAND, District Judge. This case was tried before a jury in this court on April 23, 1906. The jury disagreed and were discharged. At the close of the testimony the plaintiff presented to the court, among other points, the following: "Upon all the evidence in the case your verdict must be for the plaintiff." This point was refused by the court, and in accordance with the act of the commonwealth of Pennsylvania, passed the 22d day of April, 1905 (P. L. p. 286), plaintiff moved the court, within the time allowed, to have all the evidence taken upon the trial duly certified and filed, and for judgment non obstante veredicto upon the whole record. The act referred to is as follows:

"Be it enacted, etc., that whenever, upon the trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may, within the time prescribed for moving for a new trial, or within such other or further time as the court shall allow, move the court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment non obstante veredicto upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the court in that regard."

Notwithstanding the fact that there was no verdict rendered in this case because of the disagreement of the jury, the plaintiff contends that the act applies and authorizes the court to give judgment in his favor, because, as he contends, there was no evidence of a defense against the plaintiff's recovery to submit to the jury; and, this being so, the plaintiff was entitled to binding instructions directing the jury to find in his favor, and that under the act the court is empowered to make an order after the disagreement of the jury to effect the same result. In the first place, we are not convinced of the first proposition that there was no evidence to submit to the jury; but, upon the other hand, we still think that the court's view of that matter was entirely right, and it was a question for the jury to determine whether or not the defense set up had been proven; but even if we are wrong in this, the court is clearly of the opinion that the Pennsylvania act does not authorize the court to give judgment for the plaintiff after disagreement by the jury. Before the court can render a judgment non obstante veredicto upon the whole record, there must be a verdict rendered by a jury in the case, and, until this is done, the act does not authorize the court to give judgment for either party to the suit.

Motion for judgment refused.

HOOKS v. ALDRIDGE.

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

No. 1,524.

1. BANKRUPTCY—ACTS OF BANKRUPTCY—APPOINTMENT OF RECEIVER FOR CORPORATION.

The president of a corporation instituted a suit against it in a state court, the purpose of which was to have it wound up. The petition alleged that it was largely indebted to plaintiff and to others, that it was unable to meet its liabilities or to carry on its business, and was in "imminent danger of insolvency," and, in general, that it was in a failing condition. A statement was made that its assets slightly exceeded its liabilities, and the appointment of a receiver was prayed for and granted. By an amended petition it was alleged that the property of the company when the suit was begun was insufficient to pay the indebtedness to plaintiff. *Held*, that the facts warranted a finding by a referee in bankruptcy that the receiver was appointed because of the insolvency of the company, and constituted an act of bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 3 (4), 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 683].

2. SAME—DUTY OF RECEIVER TO SURRENDER PROPERTY TO TRUSTEE.

When a corporation is adjudged a bankrupt on the ground, among others, that a receiver was put in charge of its property by a state court because of its insolvency, such receiver is not entitled to retain possession of and administer its property, but the same should be surrendered to the trustee in bankruptcy.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 237.]

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of Texas.

Stuart R. Smith (Smith, Crawford & Sonfield, on the brief), for petitioner.

Eugene Easterling (Greers & Nall, on the brief), for respondent.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. The questions involved in this case relate to a conflict of jurisdiction between the District Court of the Fifty-Eighth Judicial District of Texas, hereafter called the "State Court," and the United States District Court for the Eastern District of Texas, hereafter called the "Bankruptcy Court." The controversy is between J. B. Hooks, as receiver, appointed by the state court, and W. H. Aldridge, as trustee, appointed by the bankruptcy court, as to the right to the possession of the property of the Turner & Nabers Lumber Company, hereafter called the "Lumber Company," a corporation engaged in the manufacture and sale of lumber. The litigation was begun in the state court on October 1, 1903, by W. H. Turner, who filed his petition against the lumber company. It was alleged in the petition that the stock of the lumber company consisted of $50,000, divided into 500 shares of $100 each, and that the plaintiff was the owner of 150 shares, of the par value of $15,500. The petitioner alleged that the defendant company was indebted to him in the sum of $5,633.51 for money advanced to the defendant, and that this sum was due and owing the petitioner. It

was also alleged that the plaintiff was the owner and holder of the first mortgage 10 year 6 per cent. gold bonds of the defendant to the amount of $20,000, dated August 14, 1903, and maturing August 13, 1913, bearing interest at 6 per cent. per annum; the bonds being secured by a deed of trust executed by the defendant on all of its property of every kind. It was also alleged that the petitioner was liable as the indorser of the paper of the defendant company to the amount of $7,500, which petitioner would have to pay. The petition contained elaborate averments of the financial embarrassment of the lumber company, that it owed a large number of past-due accounts to creditors, who were insisting on payment, and that the company was unable to pay, and that the creditors were about to institute, and were threatening to institute, suits for the payment of the same, and were about to file a large number of separate suits and proceedings against the lumber company, and that its board of directors could not further carry on and prosecute its business. In relation to the solvency of the lumber company, the following averments were made: "The defendant corporation is now in imminent danger of insolvency, that its assets amounted to approximately $80,000, and that its liabilities amounted to approximately $78,000," and that the corporation is and will be unable to realize from its assets a sufficient sum of money to meet said liabilities as they mature. Subsequently, on July 23, 1904, these averments as to solvency were amended by the addition or substitution of the following statement:

"And plaintiff further shows that said property [referring to all the property of the corporation] is of insufficient value, and was at the time of the filing of this suit, to secure and pay the costs of this proceeding and plaintiff's said debt."

It was alleged, further, that the plaintiff, as a stockholder and for the benefit of all the stockholders of the corporation, was entitled to have the business of the "corporation wound up, and the value of its assets realized and applied, first, to the payment of the creditors as their priority appeared, and thereafter to the stockholders." The petition concluded with a prayer for the appointment of a receiver for the lumber company of and for all its property wherever situated, and that the court should enter an order granting the usual power to wind up and liquidate the said business, and there was also a prayer for judgment for the indebtedness in favor of the petitioner, and that the lien of the plaintiff be established and foreclosed. On the same day (October 1, 1903) the state court made an order appointing J. B. Hooks receiver, as prayed for. The order authorized Hooks to take possession of all of the defendant company's property, and to continue the operation of the saw mills and other business of the defendant company for the purpose of placing the property and estates of the defendant in a marketable condition. It further ordered that all persons having debts against the corporation should intervene in the suit for the establishment and collection thereof, and creditors were enjoined from proceeding otherwise. The court in its decree did not state the grounds on which the appointment of the

receiver was made. On the next day Hooks gave bond and qualified as receiver. On October 5, 1903, four days after the beginning of the suit in the state court, three of the creditors of the lumber company filed a petition in involuntary bankruptcy in the bankruptcy court, praying that the lumber company be adjudged a bankrupt. The acts of bankruptcy alleged were: (1) That within four months preceding the filing of the petition, J. B. Hooks, a receiver, was appointed by the state court, and put in charge of the lumber company's property under the laws of the state of Texas, because of insolvency; and (2) that said lumber company within four months preceding the filing of the petition, while insolvent, committed a further act of bankruptcy, in that it transferred a portion of its property to one or more of its creditors, with intent to prefer such creditors over its other creditors. On May 26, 1904, the lumber company was adjudged a bankrupt, and on July 6, 1904, W. H. Aldridge was appointed trustee of the estate and effects of said bankrupt. On July 23, 1904, W. H. Turner filed in the state court his amended petition, restating his ownership of the $20,000 in bonds and the execution of the deed of trust, and alleging that, prior to the filing of the suit, the corporation had violated the conditions and obligations contained in the bond and in the deed of trust given to secure the same, and prayed a foreclosure of his lien and a continuance of the receivership pending the same. In this amended petition he alleged the appointment of Aldridge as trustee in bankruptcy, and that Aldridge was asserting some claim by virtue of his trusteeship to the property, and prayed that Aldridge, as such trustee, be made a party defendant, and that his rights to the property, if any, be adjudicated. Aldridge had notice of this amended petition September 20, 1904. On August 16, 1904, Aldridge, as trustee in bankruptcy, filed a motion in the suit in the state court asserting his claim to the possession of the property in the hands of Hooks as receiver, and praying for an order requiring the receiver to turn the property over to him as trustee. This motion was duly heard by the state court, which entered a judgment overruling the same. The motion of Aldridge as trustee in bankruptcy having been overruled by the state court, he, on October 3, 1904, filed with the referee in bankruptcy an application for an order to Hooks, receiver in the state court, to show cause why he should not be required to turn over the property of the lumber company to him as trustee. Upon a hearing the referee entered an order requiring Hooks, as receiver in the state court, to turn over the property to Aldridge, as trustee in bankruptcy. The referee based his order on a finding of facts practically as heretofore stated, and that the receiver in the state court for the lumber company "was appointed because of its insolvency." Hooks thereupon filed a petition in the bankruptcy court to review the order of the referee in bankruptcy, and on April 20, 1905, the bankruptcy court sustained the finding of the referee, and affirmed and repeated his order requiring Hooks to turn over the property of the lumber company held by him as receiver in the state court to Aldridge, trustee in bankruptcy. The case is brought to this court by a petition filed here by Hooks as

receiver, seeking to reverse and annul the order of the bankruptcy court requiring him to surrender the property to Aldridge, as trustee.

The question first demanding attention is the character and purpose of the suit in which the state court appointed Hooks receiver. The contention of the receiver is that it was essentially a suit to foreclose the deed of trust and to collect the $20,000 of bonds issued by the lumber company. We cannot accept that construction of the petition. It was filed by Turner, the president of the company, and alleged that he was a stockholder, and its leading purpose was to wind up the corporation. It sought a sale and distribution of all its assets. Its clear purpose was, not only to secure the payment of the debts due to the petitioner, but to have all other debts of the company adjusted and settled. The decree appointing the receiver pointed to that purpose. It is true that the amended petition, filed after the bankruptcy proceedings were begun, sought to narrow the issues to the foreclosure of the deed of trust, but that was sought on an averment that all of the lumber company's property was not sufficient to pay the petitioner's debt and costs.

One of the questions controverted at the bar is whether or not the receiver was appointed by the state court because of the insolvency of the lumber company. The materiality of this question will be seen later. A person or corporation is deemed insolvent whenever the aggregate of his or its property, exclusive of property fraudulently concealed or transferred, shall not, at a fair valuation, be sufficient in amount to pay his or its debts. Bankr. Act July 1, 1898, c. 541, § 1, subd. 15, 30 Stat. 544, 545 [U. S. Comp. St. 1901, p. 3421]. The original petition seeking the appointment of the receiver did not specifically allege insolvency. Inability on the part of the corporation to pay its debts or to carry on its business was alleged. In every line of the petition it appears that the corporation was a failing concern, and it is averred that it is "now in imminent danger of insolvency." The petition contained, however, the averment that the corporation's assets amount to "approximately $80,000," and its liabilities amount to "approximately $78,000," and this averment is now relied on by the receiver to show that he was not appointed on account of the insolvency of the corporation. But later an amended petition was filed, which alleged that the corporation's property "is of insufficient value, and was at the time of filing this suit, to secure and pay the costs of this proceeding and plaintiff's said debt." The plaintiff's entire debt, including the bonds and the account, amounted to $25,633.51. The entire indebtedness being approximately $78,000, according to this averment the indebtedness exceeded the assets by $52,366.49. We cannot, therefore, avoid the conclusion that the petition and the amended petition filed in the state court in the suit in which the receiver was appointed show the insolvency of the lumber company. It is true that the decree appointing the receiver does not recite that the appointment was because of the insolvency of the corporation, but, construing the decree in the light of the entire record from the state court, we conclude, in the absence of all other evidence on the subject, that the insolvency of the company was at

least one of the causes or grounds upon which the court acted in making the appointment. But if this conclusion could not be reached by an examination of the record from the state court, as that record does not show affirmatively that the appointment was made on other grounds, we would be bound by the finding of facts by the referee in bankruptcy, on which the order of the court of bankruptcy is based. The referee found that "because of insolvency" the receiver was appointed. One of the grounds on which the court of bankruptcy adjudged the lumber company a bankrupt was that the state court had, because of the insolvency of the company, appointed Hooks receiver of the company's property, and placed him in charge of it.

Section 3, subd. 4, Bankr. Act 1898 [U. S. Comp. St. 1901, p. 3423], made it an act of bankruptcy for a person or corporation to make a general assignment for the benefit of his or its creditors. The amendment of 1903 added to this subdivision two other grounds or acts of bankruptcy:

"Or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States." Act Feb. 5, 1903, c. 487, 32 U. S. Stat. 797, § 2 [U. S. Comp. St. Supp. 1905, p. 683].

We have before us a record showing that a state court, because of insolvency, appointed a receiver for a corporation and placed him in possession of its property, and that thereupon, and on that ground, among others, the court of bankruptcy adjudged the corporation a bankrupt, pursuant to the amendment we have quoted. In enacting these additional grounds of involuntary bankruptcy, it could not have been the intention of Congress that the receiver of the state court, appointed "because of the insolvency" of the corporation, should continue to hold possession of the property and to administer and settle the estate. The Supreme Court observed in a recent case that "the operation of the bankruptcy laws of the United States cannot be defeated by insolvent corporations applying to be wound up under state statutes" (In re Watts & Sachs, 190 U. S. 1, 27, 23 Sup. Ct. 718, 47 L. Ed. 933); nor can they be defeated by the appointment of receivers, because of insolvency, at the suits of their officers, stockholders, or creditors.

The bankruptcy court pursued the practice that we heretofore approved in directing the trustee to apply to the state court for an order on its receiver to surrender the possession of the property. Carling v. Seymour Lumber Co., 113 Fed. 483, 51 C. C. A. 1.

It is the duty of both the federal and state courts to observe every precaution to avoid unseemly conflict of jurisdiction. It is for this reason, on principles of comity, that the application is made in the first instance, in a case like this, to the state court for directions to its receiver to surrender the property. The laws of the United States are equally binding on both federal and state courts, and it cannot be taken for granted that either will fail to be governed by them. But when a state court refuses to direct a surrender of the property, and the federal court to which application is then made is of opinion that it should be surrendered, what is to be done? In such cases it is

said that, under the rules of comity, the possession of the property by the state court should not be interfered with without its consent; that the decision of the state court not to surrender the property is controlling till it is reversed; that parties objecting to it should reserve the federal question, and obtain relief by appeal or writ of error, and finally by application to the United States Supreme Court if necessary. It is true that relief from an erroneous ruling on a federal question of even the highest state court could be finally corrected in that way, and in the meantime that process of injunction might be used to restrain the parties from a distribution of the assets in the state court (Rev. St. U. S. § 720 [U. S. Comp. St. 1901, p. 581]) till the final decision was obtained in the Supreme Court. On the other hand, we must not forget that the proceeding suggested would result in great delay, and that the jurisdiction and authority of the bankruptcy court is paramount, the bankruptcy law superseding all state insolvency laws; that its purpose to obtain a speedy and equal distribution of the bankrupt's assets will be defeated if the supremacy of the federal court's orders be not promptly recognized and enforced.

While it is unquestionable that the federal courts are the final arbiters to settle questions arising under the bankruptcy laws, there are questions relating to comity and procedure, in the event of conflict of opinion between the state courts and the bankruptcy courts as to the possession of the bankrupt's assets, which remain unsettled by decision of the Supreme Court. Whether the bankruptcy court should make such orders as will preserve the estate, and await the final result of the litigation in the state court, or should act on its own opinion of the want of jurisdiction of the state court, and enforce its order to secure the possession of the property, is one of the questions left unsettled, so far as we are advised, by a decision of the Supreme Court. At a proper time the federal courts, of course, may decree the enforcement of the supremacy of the Constitution and laws of the United States, for it is an "incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it." Ex parte Siebold, 100 U. S. 371, 395, 25 L. Ed. 717. But it is, without doubt, the duty of both the state and federal courts to exercise the greatest caution to avoid this necessity where it is possible. The orders of the state court and of the federal court in this case are in conflict, and, if each court was attempting to enforce its own order as to the possession of the property, it would lead to a resort to physical force on the part of the executive officers of the respective courts.

The condition of the record, so far as we have stated it, raises grave and difficult questions, which we find it unnecessary to decide, on account of subsequent proceedings in the state court and in the bankruptcy court.

We have ascertained by calling for additional records that by agreement of the parties, approved by the state court and the bankruptcy court, the property involved is to be sold by both the receiver and the trustee, and the proceeds placed in bank to await the decision of

this court as to who is entitled to the custody and control of the property. The following is an excerpt from the order of the state court, made since the petition for review was filed in this court:

"In the event it shall be finally adjudicated that the receiver is entitled to the custody and control of the property of the Turner & Nabers Lumber Company, the said receiver is to take in charge the said money so deposited. In the event it shall be finally adjudicated that the trustee in bankruptcy of the estate of the Turner & Nabers Lumber Company is entitled to the custody and control of the property of the Turner & Nabers Lumber Company, the receiver is hereby authorized to turn over the said funds to the said trustee in bankruptcy."

The referee in bankruptcy, on January 18, 1906, since the petition for review was filed herein, made an order ratifying the agreement between the receiver and the trustee, an excerpt of which is as follows:

"That the agreement between said trustee and the receiver of the state court with respect to the status of the funds arising from said sale be, and the same is hereby, approved, and said trustee, in connection with the receiver of the state court, shall deposit said funds in the bank to be agreed upon, to await the decision of the question as to the right to the possession of said property; and should it be decreed that the receiver of the state court is entitled to the property of the estate, the trustee shall relinquish his possession to the fund arising from the sale of the property."

We commend the course taken by the parties in making this agreement, and fully approve the action of the courts confirming the agreement by their orders.

In view of the fact that the record before us shows that the receiver in the state court was appointed "because of the insolvency" of the lumber company, and that the company was duly adjudicated a bankrupt on that account and on other grounds, we are of opinion that the estate should be administered in the court of bankruptcy; and for that purpose the assets should be placed in the possession of the trustee in bankruptcy. This may be done pursuant to the agreement of the parties and the order of the state court, which we have quoted.

The petition to revise and review is dismissed; the costs of the proceeding in the lower court and in this court to be paid out of the funds of the bankrupt's estate.

AMERICAN BONDING & TRUST CO. et al. v. GIBSON COUNTY.

(Circuit Court of Appeals, Sixth Circuit. June 20, 1906.)

No. 1,457.

1. ACTION—PREMATURE COMMENCEMENT—ACCRUAL OF CAUSE OF ACTION PENDING SUIT.

A plaintiff's right to recover depends upon his right at the inception of the suit, and the nonexistence of a cause of action when the suit was begun is a fatal defect, which cannot be cured by the accrual of a cause of action pending suit.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Action, §§ 718–723.]

2. SAME.

Where a judgment against a building contractor and his surety was reversed because of the failure of the plaintiff to allege or prove that its claim had been audited and certified by the architect, which, under the terms of the contract, was essential to give a right of action, or that such certificate had been wrongfully refused, the action could not be sustained upon an amendment of the declaration showing that such certificate was procured after the reversal, but without alleging that it had previously been refused.

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

Quinton Rankin, for plaintiffs in error.
A. W. Biggs, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This was an action brought by Gibson county upon a building contract against George D. Winston as principal and the American Bonding Company as surety. At a former term of this court a judgment in favor of the plaintiff was reversed, and a new trial awarded. The nature of the suit and the ground of reversal appear in the opinion of this court. 127 Fed. 671, 62 C. C. A. 397. Upon a second trial the plaintiff again recovered judgment, and the defendants have sued out a second writ of error.

The plaintiff in error, George W. Winston, in copartnership with one Huggins, and under the firm name of Huggins & Winston, contracted to furnish the material and construct a courthouse according to plans and specifications. The American Bonding & Surety Company became their surety. The contract was in writing. The questions now involved arise under the fifth article, which was as follows:

"Article 5. Should the contractors at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect, or failure being certified by the architect, the owner shall be at liberty, after three days' written notice to the contractors, to provide any such labor or materials, and to deduct the cost thereof from any money then due, or thereafter to become due, to the contractors under this contract; and if the architect shall certify that such refusal, neglect, or failure is sufficient ground for such action, the owners shall also be at liberty to terminate the employment of the contractors for the said work, and to enter upon the premises, and to take possession for the purpose of completing the work comprehended under this contract of all materials, tools, and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and, in case of such discontinuance of the employment of the contractors, he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expenses incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractors, but if such expense shall exceed such unpaid balance, the contractors shall pay the difference to the owner. The expense incurred by the owner, as herein provided, either for furnishing the materials or for finishing the work, and for any damage incurred through such default, shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties."

The contract price of the building was to be paid in six installments as the work progressed, and a final payment of $9,581 when the work was completed. The evidence tended to show that the contractors did all of the work except that covered by the final payment, and that they had been paid the installment payments substantially as they were earned. There was evidence of delay and neglect in the later stages, and on August 2, 1900, the architect, in accordance with the article above set out, certified that the contractors were refusing and neglecting to prosecute the work as they were bound to do, and that their breach of the agreement was such as to terminate their employment, and to authorize the county to enter upon the premises and employ other persons to complete the work, etc. Upon due notice the county took possession, and caused the building to be finished as provided by the agreement. Thereupon this suit was brought to recover the cost of so completing the building over the final payment due under the contract, and damages arising from the default of the contractors.

Upon the former trial it was neither alleged nor proved that the cost and damages sustained by the plaintiff in finishing the building had been audited and certified by the architect as provided by the provision of the contract above set out. Neither was there any evidence tending to show that the architect had illegally refused to audit and certify upon request. In many ways the defendants made this objection and saved exception. For this error we reversed the judgment, and directed a new trial.

The opinion of this court as officially reported shows that the judgment of this court was based upon two points: (1) That the right of action which inured to the plaintiff was one for the damages provided by the contract resulting from a violation of its provisions, and none other. (2) That the contract provided the manner in which the cost and damages incident to the default of the contractors and the completion of the building by the owner should be determined, and that no right of action for such cost and damage accrued until the claim had been duly audited and certified by the architect, or a certificate wrongly denied upon request. It was therefore open to the plaintiff to amend its declaration, if such was the fact, by averring that before suit commenced it had caused its expenses and damages growing out of the default of the contractors to be audited and certified as provided by the contract, or that the architect had illegally refused to so audit and certify, though requested so to do. This the county did not do, but so amended its declaration as to show that since the reversal of the former judgment it had caused its claim to be audited and certified without averring or showing that the architect had before suit brought fraudulently refused to audit and certify same.

The plain meaning of that part of article 5 of the agreement applicable to the facts of this case was that the contractors and their surety should only be liable for the expense of finishing the building, and for the damages provided for delay due to the default of the contractor when such cost and damage over and above the contract price should be audited and certified by the architect. Until that was done, no right of action under the fifth clause of the contract accrued, and

this construction of the contract was the law of the case from which the court below was not authorized to depart.

Plaintiff's suit was prematurely brought, and no amendment declaring upon a cause of action which did not exist when the suit was commenced would cure such a defect. If no cause of action existed when the suit was started, there was nothing to amend, and when this fact appeared, and objection was made, the suit should have been dismissed without prejudice to an action upon the cause of action which did accrue when the architect audited the claim. It was not a case of a cause of action defectively stated. Such a defect is amendable. Neither was it a case of a new cause of action brought in by amendment, which existed when the suit was brought. It was an effort to declare and recover upon a cause of action which arose pending the suit.

Plaintiff's right to any recovery depended upon its right at the inception of the suit, and the nonexistence of a cause of action when the suit was started is a fatal defect, which cannot be cured by the accrual of a cause pending suit. De Mattos v. Jordan (Wash. Dec. 6, 1898) 55 Pac. 118; Hollingsworth v. Flint, 101 U. S. 591, 596, 25 L. Ed. 1028; Wadley v. Jones, 55 Ga. 329; Moon v. Johnson, 14 S. C. 434; Linn v. Scott, 3 Tex. 67; Wetherell v. Evarts, 17 Vt. 219; Jennings v. Zerr, 48 Mo. App. 528; Turner v. Pierce, 31 Wis. 342; Bell v. Bullion, 2 Yerg. (Tenn.) 479; Carter v. Turner, 2 Head (Tenn.) 52; Robinson v. Grubb, 8 Baxt. (Tenn.) 19; Pigue v. Young, 85 Tenn. 263, 1 S. W. 889; Blevins v. Alexander, 4 Sneed (Tenn.) 588. In Bell v. Bullion, cited above, it was held that prematurity of suit was ground for arrest of judgment when the fact appeared upon the record. In Carter v. Turner, cited above, it was held to be matter in abatement or demurrer according as the fact appeared or not upon the record. To the same effect are Hovey v. Sebring, 24 Mich. 232, 9 Am. Rep. 122; Weirnwick v. Bender, 33 Mo. 80; Storm v. Livingston, 6 Johns. (N. Y.) 45; Dean v. Metropolitan R. Co., 119 N. Y. 540, 23 N. E. 1054; Scott v. Fowler, 14 Ark. 427; Barnes v. Gibbs, 31 N. J. L. 317, 86 Am. Dec. 210. When prematurity appears, the suit should be dismissed without prejudice to the right to institute a suit upon the cause of action when mature. 16 Ency. Pl. & Pr. p. 875; Loomis v. Donovan, 17 Ind. 198; Durgee v. Turner, 20 Mo. App. 34; Green v. De Moss, 10 Humph. (Tenn.) 371, 377.

That plaintiff had no right of action outside of the contract under the facts of this case we expressly decided upon the former hearing. The only reason advanced upon the former trial for not producing the architect's certificate was that the contractor had abandoned the contract, and that plaintiff might therefore sue for and recover the damages resulting from such abandonment. Touching this we said:

"The distinction sought to be drawn by the plaintiff, that the suit is not one on the contract, but one for damages on account of the abandonment of the contract, does not appeal to us. This is not a case like Fuller Company v. Doyle (C. C.) 87 Fed. 687, where the contractor, without doing any substantial work, abandoned the contract, but a case where the contractor, having done all the work except that covered by the last payment, had his employment terminated under article 5, through strict compliance with its provisions. The damages sought to be recovered here are not damages outside the contract, but damages under the contract, resulting from a violation of its provisions."

What we then decided is the law of this case, and there was no substantial difference between the case as presented then and now. The court therefore erred in instructing a verdict for the plaintiff. The proper instruction would have been to find for the defendants upon the ground of the prematurity of the plaintiff's action. Elder v. Rourke, 27 Or. 363, 41 Pac. 6; Burt v. Wilcox Co., 41 Ohio St. 204, and Green v. De Moss, cited above.

We forego all consideration of the question of the contractual limitation contained in the contract with the Surety Company. No such question can be considered, in view of the premature character of the plaintiff's suit.

Reverse, and remand for new trial, in accordance with opinion of this court.

CANADA-ATLANTIC & PLANT S. S. CO., Limited, v. FLANDERS.

(Circuit Court of Appeals, First Circuit. May 23, 1906.)

No. 637.

1. TRIAL—OFFER OF PROOF—DOCUMENTARY EVIDENCE.
   A general offer of documentary evidence, without any statement of its purpose, is insufficient under the practice in the federal courts as the basis for an exception to a ruling excluding the offered evidence.

2. CORPORATIONS—POWERS OF COMMITTEE—ABSENCE OF MEMBER.
   The absence of one member of an executive committee of three elected by the board of directors of a corporation under authority from the stockholders does not necessarily render invalid a contract made by the committee appointing an agent for the corporation whose powers and duties were only of an ordinary character, and, also, were expressly limited to such as should be given him by the board of directors.

3. SAME.
   Quere, as to what powers may lawfully be vested in a so-called executive committee.

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

William M. Richardson, for plaintiff in error.

George W. Anderson (Edward H. Ruby, on the brief), for defendant in error.

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

PUTNAM, Circuit Judge. This suit was brought for breach of the following alleged contract:

"Memorandum of agreement made in duplicate, and entered into this 28th day of April, in the year of our Lord, one thousand nine hundred and four:

"Between the Canada-Atlantic & Plant Steamship Company, Limited, a body corporate, incorporated by special act of the Parliament of the Dominion of Canada, hereinafter called the company of the first part, and J. A. Flanders, of Boston, in the county of Suffolk, and commonwealth of Massachusetts, general agent, of the other part.

"Whereby it is agreed as follows:

"(1) The said J. A. Flanders shall be the general agent of the company, and as such general agent shall do and perform the duties and exercise the

powers which from time to time may be assigned to or vested in him by the directors of the company.

"(2) The said J. A. Flanders shall hold said office subject as hereinafter provided, for the term of five years from the 1st day of May, 1904.

"(3) The said J. A. Flanders, unless prevented by ill health, shall during the said term devote the whole of his time, attention, and ability to the business of the company, provided, however, that he, the said J. A. Flanders, may act as agent for various steamship lines, it being expressly understood and agreed between the parties hereto that all commissions and wharfages received by him as said agent, shall be paid over by him to the company, and shall become the revenue of the company. The said J. A. Flanders shall obey the orders from time to time of the board of directors, and in all respects conform to and comply with the directions and regulations given and made by the board of directors, and shall well and faithfully serve the company, and shall use his utmost ability to promote the interests thereof.

"(4) There shall be paid to the said J. A. Flanders as general agent salary as follows: The sum of three thousand ($3,000) dollars per annum.

"(5) The said salary shall commence on the 1st day of May next, and shall be paid upon the first business day of each and every month.

"(6) The said J. A. Flanders shall be at liberty to resign the office at any time by giving the company three calendar months' notice of his desire so to do.

"(7) During the continuance of this agreement, while filling the position of general agent under this agreement, the office of general agent shall be situate at Boston, in the county of Suffolk.

"In witness whereof Alfred S. Hayes, president of the said Canada-Atlantic and Plant Steamship Company, Limited, has hereunto set his hand and affixed the corporate seal of the said company, and the said J. A. Flanders has hereunto set his hand and seal the day and year first written above.

"J. A. Flanders. [Seal.]

"Canada-Atlantic & Plant Steamship Company, Ltd.,

"Alfred S. Hayes, President. [Seal.]

"Signed, sealed, and delivered in presence of

"F. B. Monson."

The declaration alleged that the defendant corporation, on the 1st day of December, 1904, refused to allow the plaintiff to continue his duties under this contract or pay him his compensation therefor, and has ever since refused so to do. The verdict was for the plaintiff, and thereupon the defendant sued out this writ of error. The contract is claimed to have been authorized by its executive committee, according to the following minutes:

"Meeting of the executive committee of the Canada-Atlantic & Plant Steamship Company, Limited, held April 28, 1904, at 12 o'clock noon, at 935 Tremont Building, Boston.

"Present, George E. Gale and Alfred S. Hayes. Alfred S. Hayes in the chair.

"Upon motion it was unanimously voted that the president be authorized to make with J. A. Flanders, general agent of the company, at Boston, an agreement in writing for the period of five years at a salary of three thousand ($3,000) dollars per year, beginning with 1st day of May, 1904, and terminating on the last day of April, 1909."

This committee was appointed by virtue of one of the by-laws of the corporation, enacted by the corporation itself; that is, by its shareholders, as follows:

"The directors shall annually appoint from among themselves two directors, who, with the president, shall form an executive committee, and said committee shall have full powers of the board of directors when said board is not in session."

At the time the meeting of the executive committee was held, and the contract in suit was made, the committee consisted of Alfred S. Hayes, who was president, George E. Gale, who was a director, and Alonzo W. Perry, who was another director. Alonzo W. Perry at that time held practically all the stock of the corporation, and controlled its meetings; and it was within his power to seat and unseat the board of directors. He was also treasurer. He was absent on a visit to Japan from January, 1904, to May, 1904. He returned at the latter date, and at some time thereafter discovered the existence of the contract with the plaintiff; but, so far as brought to our attention, there was no official action in contravention of the contract until the meeting of the directors held on August 10, 1904, when the following votes were passed:

"On motion of Mr. H. McInnes, seconded by Mr. W. H. Fulton, it was resolved that all acts and resolutions passed by Messrs. Hayes and Gale as an executive committee, as per minutes submitted, said executive committee meetings' minutes dated April 28th, June 6th, and June 24th, be rescinded, and the attempted confirmation of the same by the directors, at meetings held July 2d and 4th, be also rescinded.

"On motion, duly seconded, it was resolved that notice be transmitted to Mr. Flanders, notifying him of the rescinding of the contract made with him at the meeting of the executive committee April 28th."

It is to be noticed that these votes did not declare the proceedings of the executive committee illegal or void, but merely rescinded them without giving a reason therefor. A distinction was made in the votes between the proceedings in the executive committee and the action of the directors at sundry meetings in July, because in connection with the latter the word "attempted" is used.

Quite simultaneously, if not simultaneously, with the contract with the plaintiff and the action of the executive committee in reference thereto, and in the absence of Mr. Perry, an increase of the stock of the corporation was made. Prior to that the outstanding stock was 4,000 shares, practically all of which, as we have said, were held by Mr. Perry. The new stock was 4,500 shares, all of which was issued to parties other than Mr. Perry, thus apparently taking the control out of his hands. The corporation, it should be observed, was created by virtue of the laws of the Dominion of Canada. Subsequently, on judicial proceedings in the courts of Nova Scotia, which were initiated in the name of Mr. Perry and the defendant corporation, a decree was entered on May 15, 1905, adjudging the issue of the new stock illegal. Mr. Flanders, the plaintiff in this case, was made one of the parties defendant in that proceeding.

At some time subsequent to the return of Mr. Perry from Japan, Mr. Perry was elected president of the corporation, and on November 9, 1904, he wrote the plaintiff the following letter:

"Nov. 9, 1904.

"J. A. Flanders, Agt., Boston, Mass.—Dear Sir: On the 10th day of August I had a conversation with you in regard to the position which you now occupy, and I told you that I had two other parties in view, and that the salary, if you remained after October 1st, would be the same as you received a year ago, viz., eighteen hundred dollars ($1,800) per annum. You told me not to engage either of the parties whom I had for the position, I supposed by that that you

fully intended to stay at that price. During my absence you declined to accept a check for $150, on the 1st day of November for your October salary, and took money which was due the company and appropriated it to your own use. I cannot overlook what I consider, not only a breach of honesty, but also a disregard of business principles, and that there may be no misunderstanding between you and me in the future, I respectfully notify you that your services will not be required after Dec. 1st. If you desire to discontinue your duties previous to that time, I will pay you your salary to that date.

"Yours truly, A. W. Perry, President."

It will be observed that this letter does not claim that the contract with the plaintiff was void for want of authority to make it, but it rests on the ground that the plaintiff had been guilty of a breach of honesty and of disregard of business principles. The meaning of this is apparent from the fact that, in defense to this suit, the main issue raised by the corporation was that Flanders had joined in the illegal issue of the new stock, and that the contract sued on was the price of his joinder, so that the whole transaction was fraudulent. That issue was tried to the jury, but, under rulings which authorized the jury to distinguish between the transactions with reference to the issue of new stock and the contract in suit, the jury must have found that they were disconnected, and that the present contract was valid notwithstanding that defense.

The other point taken in defense was that the proceedings of the executive committee were invalid on account of the absence of Mr. Perry, on the ground that the presence of every member of the committee was necessary in order to give effect to its transactions. This proposition, however, so far as the record is concerned, was a novel one, made first after the plaintiff was discharged. At any rate, the record does not show that at any time prior to the discharge of the plaintiff any claim was made with reference to the question of a quorum of the executive committee of the character now before us.

Before coming to the major proposition involved, we will notice some minor ones which are easily disposed of. The defendant claims that the president, then Mr. Hayes, had no implied authority to bind the corporation by the contract of April 28th, and no express authority therefor. As the case rests so far as we are concerned on the action of the executive committee, we are unable to perceive the materiality of these propositions. There was offered in evidence by the defendant a letter from Mr. Perry as president to the plaintiff, of December 2, 1904. The court refused to admit this letter, and exceptions were taken. This letter refers to the contract, and makes no claim that it was originally illegal for any want of power in the executive committee; but it repeats that it was given as a reward for the plaintiff's part in the conspiracy in regard to the issue of the new stock. We are unable to see that the letter has any probative force; and, so far as we can discover, its admission was properly refused. It is also claimed that the court should have directed a verdict for the defendant; but it is so clear that, if the rulings which we are to consider were correct, the case was one peculiarly for the jury that we are not obliged to give this objection any particular consideration.

On the question of fraudulent conspiracy on the part of the plain-

tiff the defendant offered to put in evidence the judicial proceedings at Nova Scotia. This offer was made in the following manner, as shown by the record:

"The defendant offered in evidence the entire record, pleadings, affidavit, memorandum of court's decision, and interlocutory decree, of the proceedings in the Supreme Court of Nova Scotia, relative to application for a preliminary injunction to restrain the transfer and disposition of the 4,500 shares of stock, a copy whereof is hereto annexed and marked Exhibit B. On the plaintiff's objection the court declined to admit the same in evidence, and the defendant duly excepted."

Of course, so broad an offer as this, without any statement of the reasons or purposes connected therewith, is insufficient according to the rules of practice in the federal courts to lay the basis of an exception. We understand, however, that the defendant's claim is that the record was admissible as conclusive evidence of bad faith in the particulars to which we have referred. The claim that Flanders was guilty of bad faith in connection with the issue of new stock was, of course, a link in the claim that the contract sued on was part of a conspiracy as maintained by the defendant; but our attention has not been called to any portion of the record of the judicial proceedings in Nova Scotia showing that such bad faith on the part of Flanders was made an issue. We find nothing in the judgment to that effect. It is admitted that the court adjudged that the new stock was illegal; but, in the absence of something more specific brought to the attention of the trial court and to ourselves, we are not called on to investigate the question whether its judgment was an estoppel on the matters in issue here, or even bore on them. On the whole, it is enough to say that, according to the rules of practice of the federal courts to which we have referred, there is nothing here which we can consider.

We believe this leaves only one question for our determination, and that apparently is the substantial one on the record before us. The assignment of errors alleges several matters in reference to the proceedings of the executive committee as to which the only point now relied on is as follows: that two members of the executive committee had no power or authority to make, or to authorize the president to execute, the contract declared on, and that in the absence of the third member, the remaining two had no authority in that respect. In disposing of this question, we do not wish to have it understood that we are committed to the legality of the constitution of an executive committee in which should be vested all the powers of the board of directors of a corporation. Respectable authors seem to be divided on that proposition. Thompson on Corporations, § 8481; 2 Cook on Stockholders (5th Ed.) § 2715. The Supreme Court, in Union Pacific R. Co. v. Chicago & Rock Island, 163 U. S. 564, 597, 16 Sup. Ct. 1173, 41 L. Ed. 265, seems to give affirmative support where it uses the following language:

"Thus the stockholders authorized the board of directors to delegate the power to the executive committee to do any and all acts which the board itself was authorized to do. The executive committee derived its authority from the stockholders through the board of directors."

On the other hand, the better rule seems to be that given in Charlestown Boot & Shoe Company v. Dunsmore, 60 N. H. 85, where it was held that not even the stockholders could delegate all the powers of the board of directors as constituted by law. However, this question is not urged on us; and probably it could not be in this particular case, because the contract with Flanders, in view especially of the careful limitations by virtue of which his powers were to be such as might be assigned to him from time to time by the directors, and were always to be exercised in obedience to them, and also in view of the apparent magnitude of the operations of the corporation, was of such an ordinary character that its negotiation and execution were apparently within the usual powers which might be given to any committee of the directors. Therefore, the only point brought before us is the fact of the absence from the meeting of the executive committee of Mr. Perry, and the question arising therefrom whether two of the committee constituted a quorum.

It is apparent from what we have already said that the defendant corporation slept on this question so long that it is hardly open; but there can be no doubt that, with reference to any authorization of a personal character to two or more persons, especially in connection with trusts under wills and other formal instruments, the general rule applies as stated by section 42 of Story on Agency, that an act is not valid unless all to whom it is committed concur. The same rule applies at common law with reference to an arbitration consisting of two or more persons, although not so under the international law. On the other hand, all the authorities establish beyond question that unless there are some special circumstances committees recognized by the law, under whatever name constituted, performing public duties, may act if a majority is present. Many authorities and the almost universal practice bring boards of directors of business corporations, and committees of such boards when authorized by the by-laws, within the rule applicable to committees in public affairs; so that, in cases like this at bar, no court would now be justified in holding that the business of a corporation is to be obstructed by reason of an absence like that of Mr. Perry, or of sickness or other contingencies of that character. This distinction between the acts of merely two or more private individuals and the acts of boards and committees as such was set out by Mr. Justice Blodgett in Burleigh v. Ford, 61 N. H. 360, 361, and is made in Thompson on Corporations, vol. 3, § 3910. We have no doubt it exists; so that, whatever hesitation we might have, either as to the limits of the authority of any executive committee whatever or as to the power of a majority of any committee in matters of fundamental importance to a corporation, we are of the opinion that this proposition of the plaintiff in error cannot be maintained so far as this particular contract is concerned.

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

ALLEN v. ÆTNA LIFE INS. CO.

(Circuit Court of Appeals, Third Circuit. May 18, 1906.)

No. 5.

1. GARNISHMENT—RIGHTS OBTAINED BY PLAINTIFF.
The service of a garnishment order does not operate as an assignment, legal or equitable, of a debt due from the garnishee to the defendant, nor establish between the plaintiff and the garnishee the relation of creditor and debtor, but simply gives to the plaintiff the statutory right to collect from the garnishee a debt due from the garnishee to the defendant not exceeding that due from the defendant to the plaintiff, and in default of voluntary payment by the garnishee the right to have execution therefor.
[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Garnishment, § 216.]

2. INSURANCE—EMPLOYER'S LIABILITY POLICY—CONSTRUCTION—GARNISHMENT.
By an employer's liability policy the insurer agreed "to indemnify" the assured "against loss from common law or statutory liability for damages on account of bodily injuries" to employés. After providing for notice to the insurer of any injury or claim, and that in case of suit all papers should be forwarded, it required the insurer to defend or settle the claim or to pay to the assured the amount of the indemnity provided. It further provided that "no action shall lie against the company * * * unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment." *Held*, that the company's undertaking to defend or settle a claim did not render it liable for a judgment rendered thereon, but that, its liability being only to idemnify the assured against loss, no valid claim existed against it until the judgment should be paid by the assured, and it could not therefore be held liable to the plaintiff in the judgment as garnishee.
[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1298.]

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

For opinion below, see 137 Fed. 136.

Latimer P. Smith, Walter C. Douglas, Jr., and Francis Fisher Kane, for plaintiff in error.

Robert W. Archbald, Jr., and Simpson & Brown, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and LANNING, District Judge.

LANNING, District Judge. On December 13, 1902, the Ætna Life Insurance Company issued to Gilman & McNeil, a corporation, a policy of insurance, by which it agreed "to indemnify" that corporation, for one year from the date of the policy, subject to certain "general agreements" contained in the policy, "against loss from common law or statutory liability for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered within the period of this policy by any employé or employés of the assured," etc. On February 27, 1903, within the term covered by the policy, Allen, the plaintiff in error, then employed by the Gilman & McNeil Company, the assured, received bodily injuries, for which he subsequently obtained judgment against

the assured. After the date of his accident and before commencing his suit, the assured was placed in the hands of a receiver, and after obtaining his judgment he caused an attachment execution to be issued against the assured, as defendant, and the insurer, as garnishee, which was returned nihil habet as to the defendant and "served" as to the garnishee. On this proceeding the circuit court gave judgment for the garnishee, and the writ of error brings that judgment before us for review. There is a general rule in garnishment proceedings that the plaintiff in the suit acquires no greater rights against the garnishee than the defendant himself possesses. A few exceptions to the rule exist, one of which is in a case where the defendant has fraudulently transferred property to the garnishee, but in the present case the general rule is applicable. The service of a garnishment order does not operate as an assignment, legal or equitable, of a debt due from the garnishee to the defendant, nor establish as between the plaintiff and the garnishee the relation of creditor and debtor. It simply gives to the plaintiff the statutory right to collect from the garnishee a debt due from the garnishee to the defendant, not in excess of the amount due from the defendant to the plaintiff, and, in default of voluntary payment by the garnishee, the right to have execution therefor. Rolling Mill Co. v. Ore & Steel Co., 152 U. S. 596, 619, 14 Sup. Ct. 710, 38 L. Ed. 565; Drake on Attachment (6th Ed.) § 458; The Olivia A. Carrigan (C. C.) 7 Fed. 507. If, then, the assured, or its receiver, has no present right of action against the insurer the judgment of the circuit court must be affirmed.

The counsel for the insurer contend that the policy of insurance is a contract of pure indemnity against actual loss sustained by the assured, and that it is not a contract by which the insurer guarantied the payment of any obligation or liability of the assured. The distinction between a contract to indemnify against loss and one to pay a liability has often been pointed out. Some of the cases on the subject are referred to in the opinion of the learned judge who tried this case in the Circuit Court. See 137 Fed. 136. But the counsel for the plaintiff in error, not denying the reasonableness of this distinction, contend that, in the present case, the policy of insurance is a contract to pay a liability, and not a mere contract of indemnity against loss. This contention is based on the language of the second and third clauses of the "general agreements" of the policy. The legal effect of these clauses can be understood only by reading them in connection with the first and seventh clauses. These four clauses are as follows:

"(1) The assured upon the occurrence of an accident shall give immediate written notice thereof, with the fullest information obtainable at the time, to the home office of the company at Hartford, Conn., or to its duly authorized local agent. He shall give like notice with full particulars of any claim that may be made on account of such accident, and shall at all times render to the company all co-operation and assistance in his power.

"(2) If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, the assured shall immediately forward to the company every summons or other process as soon as the same shall have been served on him, and the company will at its own cost defend against such proceeding in the name and on behalf of the assured, or settle the same, unless it shall elect to pay to the assured the indem-

nity provided for in clause A of special agreements as limited therein. (Clause A limits the indemnity to $5,000.)

"(3) The assured shall not settle any claim except at his or its own cost, nor incur any expense, nor interfere in any negotiation for settlement or in any legal proceeding, without the consent of the company previously given in writing; but he may provide at the time of the accident such immediate surgical relief as is imperative. The assured when requested by the company shall aid in securing information, evidence, and the attendance of witnesses and in effecting settlements and in prosecuting appeals."

"(7) No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within 60 days from the date of such judgment and after trial of the issue. No such action shall lie unless brought within the period within which a claimant might sue the assured for damages unless at the expiry of such period there is such an action pending against the assured, in which case an action may be brought against the company by the assured within 60 days after final judgment has been rendered and satisfied as above. The company does not prejudice by this clause any defenses to such action which it may be entitled to make under this policy."

Sanders v. Frankfort, etc., Ins. Co., 72 N. H. 485, 57 Atl. 655, 101 Am. St. Rep. 688, sustains the position of the plaintiff in error. In that case, which was one in equity, it appears that judgment in an action at law had been obtained by the plaintiff against the assured for personal injuries received while in the employment of the assured; that the insurer had issued a policy similar to the one before us, and had assumed the defense of the action at law until the rendition of the judgment, but took no writ of error and prosecuted no proceedings for review; that the property of the assured had been sold, under execution issued upon the judgment, for $1; and that nothing more had been recovered for the plaintiff. In the equity suit, the plaintiff contended that the policy was a contract, not to indemnify against loss, but to pay a liability; that as the judgment exceeded the amount of the insurance, the insurer was indebted to the assured in the full amount of the insurance; and that a court of equity had the power to require the indebtedness of the insurer to the assured to be applied, pro tanto, to the satisfaction of the indebtedness of the assured to the plaintiff. The Supreme Court of New Hampshire held that by the second clause of the "general agreements" the insurer agreed (1) to defend, (2) to settle, or (3) to pay the assured, and that the second and third of these engagements plainly provided for the performance of the contract of indemnity before the assured had suffered loss by actual payment of the judgment obtained against him. In holding that the obligation "to defend," which is the first of the above mentioned engagements, was not performed merely by contesting the suit until the rendition of judgment, the court said:

"In this case there has been execution, upon which the paper company's property has been sold. That the amount of the sale was nominal is immaterial. The fact discloses the abandonment of defense by the insurance company, their failure to settle the claim, and hence their liability to pay the insured the amount of the indemnity provided, unless it be established that the rendition of the judgment excuses the insurance company from further defense of the proceedings. Further evidence to the contrary is to be found in the provision of the contract" (see the third clause of "general agreements") "that the assured shall not settle any claim except at his own cost, nor interfere

in any negotiation for settlement or in any legal proceeding. The substance of these provisions is that, after notice of the suit to the insurer, unless the company pay him the indemnity, the assured's control over the matter ceases. He cannot settle the claim, nor can he conduct or direct the litigation. If the company settle or defeat the claim, the liability under which he labors is assumed and discharged by the insurer. In every possible event except the defeat of their effort to prevent judgment against the insured, the company agree to perform their contract without the previous payment of anything by the assured. If an exception were intended in this case, it seems probable that it would be plainly stated, or some good reason would be apparent for the different undertaking. None is perceived."

In considering the meaning of the eighth clause of the "general agreements" of the policy in that case (being the same as the seventh clause of the policy in the present case), the court said:

"The purpose of clause 8 was, therefore, to provide for the cases, if any should arise, where the company contended the claim arose from an accident not covered by the policy. It was intended to limit the liability of the company to damages ascertained by due course of judicial procedure in cases where they could not conduct the defense without waiving their claim that they were not liable, and as to which, if not liable, they were under no obligation to incur any expense. Its purpose was to prevent collusion between the plaintiff and the assured."

We have given to the opinion from which we have made the above extracts the very careful consideration demanded by the high authority from which it came, but we cannot concur in it. It seems to us not to give due effect to the language of the policy that the insurer agreed "to indemnify" the assured "against loss from common law or statutory liability for damages on account of bodily injuries," or to the seventh clause that "no action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within 60 days from the date of such judgment and after trial of the issue." By compliance with the first clause of the "general agreements" the insured puts the insurer upon inquiry as to whether the accident is one covered by the policy. By the second clause the assured is required, immediately after the commencement of suit, to forward the summons to the insurer. If the insurer insists that the accident is one not covered by the policy, it is manifestly his duty to give to the assured prompt notice of that fact to the end that the assured may himself take charge of the defense. If no such notice be given, the assured may assume that the insurer will, as required by the second clause, defend the suit, or settle the claim, or pay the indemnity to the assured. But the engagement to defend the suit does not mean that when the insurer has undertaken the defense and judgment has been rendered against the assured, the insurer must either prosecute a writ of error or pay the judgment. It means what a defendant means when he files a plea saying he "comes and defends" the suit, or what is meant when counsel are retained to defend a suit. When an insurer undertakes to defend an action brought against the assured, the real object of the undertaking is, not to defeat a judgment against the assured, which is only incidental to the real object, but to save himself from the obligation of

the policy to reimburse the assured for loss actually sustained by him in paying the judgment. If the insurer deems the plaintiff's cause of action so well founded and the plaintiff's claim for damages so reasonable that it would be unbusinesslike to expend money in a defense, he may, under the provisions of the second clause, pay the claim of the plaintiff directly to him or pay the amount of the indemnity to the assured. But if the insurer, for any reason, prefers to defend the suit, he has the right under the second clause to do so at his own cost; and in such event the assured is required by the third clause not to interfere. We think such a construction of the first, second, and third clauses is in accord with their fair meaning, and that it relieves us from the necessity of giving to the seventh clause the restricted construction adopted in Sanders v. Frankfort, etc., Ins. Co.

We are confirmed in the construction thus given to the policy before us by the opinion in a similar case rendered by the Supreme Court of Massachusetts in Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981. There the court said:

"The real object of this second clause is plain when taken in connection with the third—it is plainly inserted as an additional obligation and privilege for the protection of the insurance company, on the assumption that it is for the pecuniary interest of the company to be given the conduct of and to defend the action which is to fix its liability and the amount to be paid when liable, rather than to leave that matter to be dealt with by the several persons insured, respectively. This does not result in the necessity of writing into clause 2 the qualifying words 'until final judgment,' as the plaintiff contends, for when final judgment is rendered ordinarily all defense is at an end. Nothing remains but a writ of review or a writ of error, and if such a proceeding were necessary it might well be held to be covered by the obligation to defend. But when the defense is ended and, in spite of the defense, judgment is rendered against the insured, there is nothing to do but pay. Making payment of a judgment against the defendant is no part of a covenant to defend the action. Whether the insurance company is bound to pay the judgment depends upon the terms of its agreement to indemnify the assured against loss, and the eighth clause [the same as the seventh clause in the policy before us] in terms provides that no action shall lie for 'any loss under this policy' unless brought by the assured 'to reimburse him for loss actually sustained, and paid by him in satisfaction of a judgment after trial of the issue.' In the case at bar Bell has not paid the judgment recovered by the plaintiff, and therefore has no claim against the insurance company."

As thus construed, the seventh clause is not inconsistent with the second and third clauses. The insurance company had the right to defend the action brought against the Gilman & McNeil Company, and is not estopped by that mere fact to deny its liability. Until the judgment shall have been paid by the Gilman & McNeil Company—or, possibly, by its receiver, concerning which no opinion is expressed—there exists no valid claim against the insurance company. The garnishment proceedings are therefore founded on a false theory. There is nothing due from the insurer to the assured. Consequently, there is nothing that can be the subject of garnishment proceedings as against the insurer. This conclusion renders it unnecessary to consider whether the plaintiff in error is not restricted, in his remedy, to a presentation of his claim to the assured's receiver, and whether, in the event of payment of a percentage of the judgment by the receiver, the receiver

himself would not be entitled to recover from the insurer the amount paid by him under the rule established in Travelers' Ins. Co. v. Moses, 63 N. J. Eq. 260, 49 Atl. 720, 92 Am. St. Rep. 663. Nor is it necessary to consider the point argued in the brief of the plaintiff in error concerning the power of a court of equity to compel payment of a debt by one who has assumed it, and thereby, in equity, become the principal debtor, since this is a suit at law, and not one in equity, and since, by our conclusion, the insurer has not assumed the indebtedness of the assured.

The judgment of the circuit court will be affirmed, with costs.

PITTSBURGH RYS. CO. v. CHAPMAN.

(Circuit Court of Appeals, Third Circuit. May 28, 1906.)

No. 17.

1. STREET RAILROADS—DANGEROUS APPLIANCES—GUY WIRES—RAILROAD CROSSINGS.

   Where a street railway company, maintaining a grade crossing over the tracks of a railroad, failed to elevate its trolley wire on elevating the crossing in order to conform to the grade of the railroad, which resulted in plaintiff, a railroad brakeman, being injured by coming in contact with the trolley or guy wire as he was passing under the same while standing on the top of a freight car, and there was evidence that the wires could have been elevated so as to be out of danger, whether the street car company was guilty of negligence in failing to do so was for the jury.

2. RELEASE—JOINT TORT-FEASORS.

   Where plaintiff, a railroad brakeman, was injured by coming in contact with a trolley or guy wire belonging to a street car company alleged to have been negligently permitted to remain in a dangerously low position over a railroad crossing, and the only act of negligence with which the railroad company could be charged was in omitting to warn plaintiff of the presence of the wire or in itself requiring the street car company to raise it, the railroad company and the street car company were not joint tort-feasors so that the latter was not relieved from liability by a release executed by plaintiff to the railroad company.

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

For opinion below, see 140 Fed. 784.

Wm. A. Challener, for plaintiff in error.

J. O. Petty, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and LANNING, District Judge.

GRAY, Circuit Judge. The defendant in error, John Chapman, hereinafter called the plaintiff, brought this suit in the Circuit Court for the Western District of Pennsylvania, to recover damages for personal injuries sustained through the negligence of the plaintiff in error, the Pittsburgh Railways Company, hereinafter called the defendant.

The plaintiff was a brakeman employed by the Baltimore & Ohio Railroad Company, and suffered the injuries complained of on the 4th day of March, 1903, by coming in contact with the trolley wire of defendant, or the guy wire used for its support, while standing on top of a freight car moving under said wires. The defendant's road crossed the tracks of the Baltimore & Ohio Railroad at an acute angle, so that both the guy wire and the trolley wire were suspended diagonally across the line of said railroad. The plaintiff alleged that the defendant was guilty of negligence, in maintaining said wires at an insufficient height from the tracks of the Baltimore & Ohio Railroad, to clear the heads of those standing, as brakemen are compelled to do, on the tops of cars moving under them. It also alleged negligence, in that no devices, such as tell-tales or whip lashes, were provided by defendant to give notice or warning of the danger.

It was conceded that the construction complained of was dangerous, and there was no allegation of contributory negligence on the part of the plaintiff. It was contended, however, on behalf of the defendant, that its original construction was safe, the trolley and guy wires at the point of crossing the rails of the Baltimore & Ohio Railroad being then more than 20 feet above the same; but that after this original construction of defendant's line across the line of the Baltimore & Ohio Railroad Company, the latter company raised its tracks about two feet, reducing the distance between the wires and its tracks from 20 feet 5 inches to 17 feet 11 inches, the defendant company, of course, being obliged to elevate its track so as to cross at grade; that the defendant was not guilty of any negligence, but that the Baltimore & Ohio Railroad Company was the guilty party, by reason of its having lessened the distance between the tracks and the wires; that if there was any negligence on defendant's part, in permitting the situation thus created to remain, the Baltimore & Ohio Railroad Company was itself also guilty of the same negligence, and was therefore either a joint or concurrent tort feasor with defendant, and that the execution of certain releases by plaintiff to the Baltimore & Ohio Railroad Company, of liability in regard to the accident, as a matter of law, discharged the defendant.

The testimony shows that defendant's railway was laid on a public road, and it does not appear that the Baltimore & Ohio Railroad Company had any right to interefere with the proper use of said railway across its tracks. There was also testimony, tending to show that the defendant company acquiesced in the raising of the tracks at the crossing, without protest or resistance, as there was nothing to show that the latter company was not acting within its rights in the changes made at the crossing. What was before a reasonably safe situation, was made dangerous by this raising of the tracks of the defendant at the crossing, consequent upon the raising of those of the Baltimore & Ohio Railroad at that point, unless the overhead wires were correspondingly raised. There was testimony, and it is not denied, that the defendant company was notified by the Baltimore & Ohio Railroad Company that it was about to make this change in grade. It is not denied that the defendant company, though

it raised its own tracks to correspond with the height to which the railroad company had raised its tracks, made no change in the height of the trolley or guy wires, which diagonally crossed the latter, or that it made no provision or effort to guard against the danger which was thereby obviously created. There is no testimony tending to show that the defendant made any protest to the railroad company, of inability from any cause to raise its wires, but apparently, from the evidence, allowed the situation created by the raising of its tracks to remain, without warning devices or safeguards, and without concern as to the great peril occasioned thereby to those riding on the tops of freight cars at night. At the trial, however, testimony was introduced on behalf of the defendant, to show that after the defendant company had crossed the railroad tracks of the Baltimore & Ohio at grade, its line went under the railway of the Pittsburgh & Lake Erie Railroad, running parallel to land about 70 feet from the said crossing of the Baltimore & Ohio Railroad; that owing to the then recent lowering of the girders carrying the said last-mentioned railroad across the trolley road, the trolley wire had to be depressed at that point, and that on that account it was impracticable to raise it at the crossing of the Baltimore & Ohio Railroad. Its own engineers so testified, though engineers produced by plaintiff testified to the contrary. The case was submitted to the jury, with a reservation as to the effect of certain releases by plaintiff to the Baltimore & Ohio Railroad Company, put in evidence by defendant, and with a charge to which no exception was taken by the defendant.

The verdict of the jury, and the judgment thereon, were in favor of the plaintiff. With the writ of error sued out by the defendant, there are two assignments of error. First, That the court erred in refusing plaintiff's first point, that under all the evidence the verdict must be for the defendant. Second, That the court erred in refusing defendant's motion for judgment, non obstante veredicto, on the question reserved as to the effect of certain releases from the plaintiff to the Baltimore & Ohio Railroad Company, hereinafter more fully referred to, and in ordering the clerk to enter judgment on the verdict for plaintiff.

We think, from the evidence as outlined above, it is apparent that the first exception is without merit. Whether the Baltimore & Ohio Railroad Company was guilty of negligence, or not, there was testimony tending to show a neglect of duty on the part of defendant, under the circumstances, which made the question a proper one for submission to the jury. No one has a right to create or maintain a structure dangerous to those lawfully exposed thereto, without just excuse, and in a case like the present, it was incumbent upon the defendant to show facts or circumstances which would constitute such excuse or justification of its conduct. We may assume that defendant company had a right to cross the tracks of the railroad company, as we may also assume that the railroad company was within its rights in raising the tracks at the crossing, and thus requiring a corresponding elevation of the defendant's tracks at that point, but we cannot say, as defendant practically asked the court below to say, that no duty

was imposed upon defendant, in crossing these tracks, not to expose those lawfully using and operating the trains on the railroad, to so serious a peril as a low trolley wire, safeguarded by no warning devices, and without notice to the railroad company of any supposed inability to raise it.

It would seem that, if there were a legal duty to raise its tracks to the same height as those of the Baltimore & Ohio Railroad, there was the same duty to raise its wires correspondingly, as a part of its structure at the said crossing. If, in the original placement of its line at the crossing, it was the defendant's duty to those lawfully using or employed upon the railroad, to maintain its wires at the safe distance of over 20 feet from its rails, that duty to maintain a safe distance between the two was still imposed upon it when the grade at the crossing had been raised two feet and more. If such a duty was imposed upon the defendant, failure to discharge it was actionable negligence. The concepts imported by the words "duty" and "negligence" are not absolute, but relative to circumstances of time, place or person. Assuming that the defendant had the right to cross the railroad, with its structure of tracks and overhead wires, it was legally bound so to use this right and these appliances, as not to injure those lawfully using or employed upon the railroad at the said crossing. Its duty was such, by relation to the place of the crossing, and to the persons lawfully within any danger, to be occasioned by too low a placement of the wire. So far, the defendant has clearly no right to complain that the question of its negligence raised by these facts and circumstances, were submitted to the jury.

Nor can we say that the excuse given at the trial for not raising these wires, was of such a character as to be conclusive, and render it proper that the court should so instruct the jury, instead of leaving to them the determination, upon all the facts and circumstances testified to. There was evidence in the case sufficient to justify the jury in concluding that it was possible for the defendant, without unreasonable expense or trouble, to have raised its wires so as to remove the peril to employés of the Baltimore & Ohio Railroad Copmany who were required, in the discharge of their duties, to ride on the tops of cars.

But defendant says, even if it were negligent, the Baltimore & Ohio Railroad Company was also negligent, and is therefore a joint or concurrent tort feasor with the defendant, and that certain releases made by the planitiff to the last named company, being releases to a joint tort feasor, have relieved the defendant of liability. These releases were three in number. The evidence shows that the sums of money in them respectively mentioned were paid by the Relief Department of the Baltimore & Ohio Railroad Company, that they were signed more than eight months after the date of the injury to the plaintiff, that the delay in signing them was owing to the reluctance of the plaintiff to make any settlement that might jeopard his right to sue, and that it was only after an understanding with the officers of the Baltimore & Ohio Railroad Company that his right of action against the defendant would not be affected, that he finally consented to receive the

moneys and execute the three releases. Each of the releases was accompanied with an order on the treasurer of the Baltimore & Ohio Railroad Company, for the sum of money therein mentioned, one being for $24, another for $26, and the third for $11. These sums were paid as and for the amounts due monthly from the Relief Department. The releases and orders for the first and second payments were in the same form as the release and order for the last payment. The release and order for the last payment were as follows:

"Baltimore & Ohio Railroad Co., Relief Department.

"No. 27933. Series C. Relay, Md., June 3, 1903.

"Treasurer of Baltimore & Ohio Railroad Co., Baltimore, Md.: Pay to the order of John Chapman Eleven dollars. This amount is in payment of benefits due from the Relief Department for the period May 1 to May 13, 1903, inclusive, on account of accident and is paid and accepted under the Regulations of the Dep't. Payee employed as Bkmn.

"W. R. Barr, Superintendent.

"Certif. No. 208581.

"Countersigned: John P. Hess, Chief Clerk.

"$11.00.

"Endorsed: John Chapman.

"Witness: H. Koonce.

"Release of All Claims for Damages and Receipts for Disablement Allowance.

"Place Pittsburgh, Pa., Date Nov 23, 1903.

"Received this day from the Relief Department of the Baltimore & Ohio Railroad Company, by the hands of Examiner Koonce, the sum of eleven dollars ($11.00), the same being full allowance which, as a member of the said Department, I am entitled to receive from its funds for the period commencing May 4, 1903, and ending May 13, 1903, by reason of injuries received whilst in the discharge of duty in the service of the Baltimore & Ohio Railroad Company at or near Rankin, Pa., on or about March 4, 1903, and in consideration of the receipt by me of said sum, I do hereby release and forever discharge the said company, and all other companies owning or operating its roads, branches or divisions, from all claims or demands for damages, indemnity or other form of compensation I now, or may or can hereafter, have against any of the aforesaid companies by reason of said injuries.

"I declare, on honor, that during the period above stated, I have not been able, by reason of said injuries, to perform my accustomed labor, and have not done work of any kind for pay.

"The undersigned read to the claimant the foregoing Release and then paid to him the said sum and then witnessed his signature.

"H. Koonce.

"[Signed] John Chapman, [Seal]

"Residence, Braddock, Pa."

These releases were admitted in evidence by the court below, but the verdict for plaintiff was taken, as we have seen, subject to the reserved question:

"Whether the release, offered in evidence, to the Baltimore & Ohio Railroad Company, given by the plaintiff, and the payment of the money therein recited to him, took away from the plaintiff the right of action against the defendant company for damages resulting from the injury at Rankin, Pennsylvania, on March 4th, 1903."

After consideration of this reserved question, on a motion made by the defendant for judgment, non obstante veredicto, the court refused the same, giving its reasons for so doing, as follows:

"Neither the pleadings or the evidence averred or showed any joint negligence or joint liabilty of the defendant and the Baltimore & Ohio Railroad Company. The negligence of the defendant averred in the statement and established by the proof was the act of placing its wires an unsafe distance above the railroad tracks. This was a positive act of commission in the doing of which the Baltimore & Ohio Railroad Company had no part. It may be the latter company was also liable to the plaintiff in failing to notify him of the presence of the wire, but such liability, if it existed, is based on different grounds, namely, a negative act of omission by the railroad and not a positive act of commission. It suffices to say that it is not shown the Baltimore & Ohio Railroad Company was liable as a joint tort feasor, and in the absence of such proof, the burden of showing which is on the defendant, a release of the Baltimore & Ohio Railroad Company by the plaintiff did not release the defendant. Thomas v. Railroad Company, 194 Pa. 514, 45 Atl. 344."

In this opinion we concur. No joint tort of the defendant and the Baltimore & Ohio Railroad Company was averred or shown. The negligent act of defendant complained of, was the maintaining of the trolley wire and guy wire at an unsafe distance from its tracks, without any provision for the warning of those within its danger. This constituted the unsafe situation maintained by defendant, and was the act of negligence complained of. In this the Baltimore & Ohio Railroad Company had no participation. The suggestion that it also failed to give warning of the dangerous situation maintained by defendant, was that of an entirely distinct and different act of negligence, if negligence at all. It was therefore not a joint tort feasor with defendant, and on this ground the court below were right in refusing defendant's motion for judgment. The second specification of error therefore fails to be sustained.

The judgment of the court below is hereby affirmed.

INTERNATIONAL MERCANTILE MARINE CO. v. SMITH.

(Circuit Court of Appeals, Third Circuit. May 28, 1906.)

No. 22.

1. SHIPPING—ACTION FOR INJURY OF PASSENGER—INSTRUCTIONS.
   The charge of a trial court as to the degree of care required from a steamship company for the safety of a passenger considered and approved, in an action for the passenger's injury.

2. SHIPPING—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—QUESTIONS FOR JURY.
   Plaintiff, while a passenger on defendant's steamship, complained of the narrowness of his berth, and the steward made a bed for him on a couch, widening it by placing a board under the mattress. This board prevented the insertion of the usual vertical protecting board in front, and during a storm plaintiff was thrown from the couch, owing to the pitching of the vessel, and was injured. *Held*, in an action to recover for such injury, that the questions whether or not defendant was negligent in failing to provide a protecting board, and whether the danger was so obvious that plaintiff was chargeable with contributory negligence, were properly submitted to the jury.

   [Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 551.]

3. EVIDENCE—PERTINENCY—KNOWLEDGE OF PARTY.
On redirect examination of plaintiff as a witness, in an action for personal injury in which the defense of contributory negligence was relied on, a question asking whether plaintiff knew at the time that the conditions out of which the injury arose were dangerous, called for a statement of fact, and not of opinion, and was pertinent and proper.

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

Charles E. Gummere and Henry G. Ward, for plaintiff in error.
A. V. Dawes and John Rellstab, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and LANNING, District Judge.

LANNING, District Judge. The defendant in error, hereinafter called the plaintiff, brought suit against the plaintiff in error, hereinafter called the defendant, to recover damages for personal injuries resulting from the alleged negligence of the defendant. By his declaration the plaintiff, after setting forth the contract by which the defendant agreed to carry him from New York to Antwerp in the defendant's ship Faderland, and to furnish him with proper and reasonably safe sleeping accommodations in a certain stateroom on that ship, avers that:

"The said defendant, not regarding its said promise and agreement, did not furnish plaintiff with proper and reasonably safe sleeping accommodations; but, on the contrary, the said defendant, without advising him of the perils and dangers from the rolling of the ship to which he would be subjected on a couch without its having a protecting board attached to prevent him from being thrown therefrom, made up and furnished plaintiff his berth on a couch without attaching or putting up a protecting board, which were reasonable, usual, and customary means employed, and which was necessary to make said couch reasonably safe for sleeping in, as the said defendant well knew; so that by reason of the negligence, unskillfulness, and carelessness of the defendant, its agents and servants, in not attaching and putting up said protecting board, and in not advising plaintiff of the dangers and perils he was subjected to by not putting up the same, of which perils and dangers plaintiff was wholly unadvised and ignorant, and in furnishing plaintiff with a couch unsafe as aforesaid, the said plaintiff, while sleeping in said couch so made up as aforesaid, without the protecting board, on the 11th day of May, 1904, was thrown from the couch to the floor with great force and violence by the rolling of the ship, by means of which said several premises, both wrists, the right arm and right shoulder of said plaintiff were sprained, and he, the said plaintiff, was then and there in other respects greatly hurt, bruised and wounded," etc.

There was a verdict and judgment for the plaintiff.

The first alleged error that will be considered is based on an exception to the following language in the charge of the trial court:

"The defendant, or its agents, were obliged to exercise the highest degree of care and prudence to see that he (the plaintiff) was transported safely; that is, not that they were insurers of his safety, but the duty was cast upon them to exercise an extraordinarily high degree of care on their part to see that he was not injured."

Many cases might be cited in which the degree of care required of common carrriers of passengers is said to be "the highest practicable

care," "the highest degree of diligence reasonably practicable," "the highest care and best precaution known to practical usage and consistent with the mode of transportation adopted," "the highest degree of care, diligence, and skill known to careful, diligent, and skillful persons engaged in such business," etc. In Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141, Mr. Justice Harlan said:

"The carrier is required, as to passengers, to observe the utmost caution characteristic of very careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill. And this caution and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger."

In 3 Thompson's Law of Negligence, after reviewing many cases, the author, in section 2747, says that a common carrier of passengers "is bound to exercise the highest degree of care to which human skill and foresight can attain, consistent with the carrying on of the business and with the known methods and the present state of the art."

If the language embraced in the exception now under consideration were all that the learned judge used in his charge to the jury concerning the degree of care required of the defendant, it might possibly be deemed too broad. But the charge proceeds as follows:

"The plaintiff has offered evidence going to show that the defendant did not exercise such a degree of care, but that it was negligent, in that it failed to equip his berth with customary appliances and safeguards; that is to say, that it failed in furnishing to the plaintiff appliances that were reasonably fit and proper to prevent the plaintiff from being thrown from his berth and injured by reason of the pitching and rolling of the vessel. It was the duty of the defendant in this respect to use such appliances as are ordinarily used, and as were fit and proper for the purpose of preventing accidents, and, if they failed in that duty, that would constitute negligence on the part of the defendant. 'Negligence,' gentlemen, in genera., is failure to exercise ordinary care, such care as a reasonable man under like circumstances would exercise. Now, did the defendant furnish the plaintiff such a berth, equipped with appliances reasonably necessary to protect him from injury? If the defendant did supply such a berth to the plaintiff, fitted and equipped with safety appliances, as just stated, it complied with the terms of its contract. There is testimony here to show, which is undisputed (although there is a dispute as to how it happened), that a berth was made up for the plaintiff on the settee in the stateroom; but whether it was made up at the request of the plaintiff or of the defendant's servant is disputed. But that there was such a berth made up in the stateroom, and that the plaintiff occupied it for one or two nights, is undisputed, as I remember the testimony. In the matter of testimony, I leave that entirely to you. You must settle what the facts are. If you should find that such a berth was made up for the sleeping accommodation of the plaintiff, on a settee, thus provided, and that it was reasonably fit and safe considering its character, and that it was used by the plaintiff, he cannot recover, unless you should find further that the defendant was not then in the exercise of reasonable care to protect the plaintiff from the danger likely to arise to him in sleeping in an unguarded bed or berth, from the pitching and rolling of the vessel."

The charge on the question concerning the degree of care required of the defendant, taken as a whole, comes clearly within the rule prescribed by the authorities.

The second alleged error is that the trial court should have directed a verdict for the defendant, both on the ground of the want of suf-

ficient evidence of the defendant's negligence, and on the ground of the plaintiff's contributory negligence. The proofs show that, for the first two or three nights after the vessel left New York, the plaintiff slept in a berth provided with a protecting board placed in an upright position along the outer side of the berth. Being a large man, weighing 240 pounds, he informed the steward that his berth was too narrow for him and very uncomfortable. The steward replied that he would make up for him a wider bed on the settee in the same stateroom. This was done. An extra width to the bed thus made was obtained by laying two protecting boards flat on the edge of the settee, under the cushion and the air mattress, in such a way that the boards extended a few inches outside of the edge of the settee, but it was not provided with, and could not be provided with, any protecting board placed in its normal position along the outer side of the bed. The plaintiff says that the second or third night after this provision was made the vessel ran into a storm, and that, in the lurching of the vessel, the air mattress under him rolled backward, and, there being no protecting board in its ordinary position, he was thrown from the settee and injured. He declares he had no knowledge of the manner in which his bed on the settee had been made up, or of the presence or absence of a protecting board, or of the necessity of such a board as a guard against accident. The case shows that a protecting board was used not only with each berth, but ordinarily with each settee when converted into a bed. The reason why a protecting board was not placed in its normal position along the outer side of the settee in this case was because of the absence of grooves in which to fit the protecting board after the settee had been widened in the manner above stated. There is no claim by the defendant that the plaintiff was informed that the widening of the settee would necessarily result in furnishing the plaintiff with a bed any less safe than the berth he had previously occupied. Whether there was negligence on the part of the defendant, and whether the absence of the protecting board created a danger obvious to the plaintiff and one which he assumed when he consented to occupy the settee as his bed, were questions wholly within the domain of fact, and the submission of them to the jury was clearly not erroneous.

The next alleged error, and the last one considered in the defendant's brief, or discussed on the oral argument, is based on the allowance by the trial court of the following question, asked of the plaintiff by his counsel: "Did you know at the time you went to bed on this settee that there was necessity for a protecting board to make it safe for one to sleep in?" The answer was: "No, sir; I did not." The objection to this question was that it called for an expression of opinion by the plaintiff. We do not think so. It called for the statement of a fact bearing on the defense of contributory negligence by the plaintiff, and was asked on redirect examination, after cross-examination on the subject of the absence of the protecting board. There was no error in this respect.

The judgment of the Circuit Court is affirmed, with costs against the defendant.

GLEASON v. SMITH, PERKINS & CO. et al.

(Circuit Court of Appeals, Third Circuit. May 25, 1906.)

No. 24.

1. BANKRUPTCY—AMENDMENT OF PETITION—POWER OF COURT.
Under its general power to permit amendments, a court of bankruptcy may, on seasonable application therefor, permit the amendment of an involuntary petition, correcting the name of the alleged bankrupt.

2. SAME—INVOLUNTARY PROCEEDINGS—EFFECT OF FAILURE TO SERVE SUBPŒNA.
The fact that the subpœna issued for the defendant in involuntary proceedings in bankruptcy was not served before the return day does not terminate the proceedings, but the court has power to grant an alias subpœna.

3. SAME.
A petition in involuntary bankruptcy was filed by creditors, but through an error the first name of the alleged bankrupt was incorrectly stated both in the petition and subpœna. The error was discovered four days later, and application was at once made for leave to amend the petition, which was brought on for hearing on the return of the judge, who was at that time absent from the district; the subpœna having been returned in the meantime without service, through a mistake of the marshal. Two days after the filing of the petition, and after the claims of certain creditors had become preferred, a voluntary petition was filed by counsel for the bankrupt, with notice of the prior proceedings, and that his client was the person intended to be named therein, and on such voluntary petition an adjudication was made by the referee. *Held*, that the court had power thereafter to permit the amendment of the involuntary petition and direct the issuance of an alias summons, and that such proceedings took precedence of those on the voluntary petition, and invalidated the adjudication thereon.

Petition for Revision of Proceedings of the District Court of the United States for the Western District of Pennsylvania.

On September 7, 1905, the respondents filed their petition in involuntary bankruptcy in the United States District Court for the Western District of Pennsylvania, against a person named in the petition as William S. Service. The petition was prepared by Mr. Salisbury, the attorney of the respondents, from information obtained from the respondents, from the accounts presented to him by the respondents, in which the name of the alleged bankrupt was stated as W. S. Service, and from a commercial report concerning the alleged bankrupt made for one of the respondents by R. G. Dun & Co., in which the name was stated as William S. Service. It also appears on behalf of each of the three respondents that their business with the alleged bankrupt had always been conducted with him under the name of W. S. Service, and that the name William S. Service was used in the petition because it was supposed from the information contained in the commercial report that that was the alleged bankrupt's correct name. On the day of filing the petition a subpœna was issued against William S. Service, returnable September 21st. On September 8th the period of four months after the entry of judgment by Minnie S. Gleason against Walter Sherwood Service expired. On September 9th the attorney of Walter Sherwood Service filed in the office of the clerk of the above-mentioned court the petition of Walter Sherwood Service in voluntary bankruptcy, but not until after the clerk had called the attorney's attention to the filing of the petition in involuntary bankruptcy on September 7th, against Wiliam S. Service. The schedule annexed to the petition filed by Walter Sherwood Service mentioned the indebtedness to Minnie S. Gleason, who is the daughter of Walter Sherwood Service, as one entitled to preference. On the day of the filing of the voluntary petition, September 9th, the judge of the District Court being absent from the dis-

trict, the clerk, pursuant to the provision of clause g of section 18 of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429], referred the petition in voluntary bankruptcy to a referee, and telegraphed to Mr. Salisbury as follows: "Voluntary petition in bankruptcy of Walter Sherwood Service filed this morning. Matter referred to referee at Brookville for adjudication, returnable next Monday." On receiving the telegram, Mr. Salisbury was engaged in the trial of a case, and did not observe that the name given in the telegram differed from that used by him in the involuntary petition until September 11th, when another person called his attention to that fact. On September 11th the referee made an order of adjudication in the voluntary proceedings. On September 11th and 12th Mr. Salisbury had prepared and sworn to certain affidavits setting forth, in substance, the facts above stated, and on September 13th he filed them as the ground on which to ask for the amendment of the petition filed by him and of the subpœna issued thereon. The judge did not return to his district until September 16th, and on that day he granted a rule, returnable September 26th, requiring Minnie S. Gleason and another judgment creditor to show cause why the amendments should not be allowed. On September 21st, the return day of the subpœna, it was returned by the marshal indorsed, "By direction of the attorney for petitioning creditors, this writ not served." The attorney had given no such direction; his instruction over the long distance telephone, which was working badly at the time, being misunderstood. On September 25th, one day preceding the return day of the rule to show cause, the counsel for the parties by consent argued the rule, and also a motion by Minnie S. Gleason to dismiss the involuntary proceedings because of failure to serve the subpœna, and also because of the adjudication in the voluntary proceedings. On September 26th the following order was made: "And now, September 26, 1905, this cause came on to be heard on the rule to show cause granted at No. 2,974, on September 16, 1905, and returnable this day, and upon the answer thereto filed by Minnie S. Gleason on September 25, 1905, and on motion of Minnie S. Gleason to quash the subpœna and dismiss the proceedings at No. 2,974, and on the affidavits filed September 25, 1905, in support of said rule to show cause, and it appearing to the court that the involuntary petition against William S. Service was filed in this court on September 7, 1905, at No. 2,974, and that the subpœna in this case has not been served through inadvertence and by reason of a mistake made on the telephone to the clerk of the court, and that in said proceeding No. 2,974 the Christian name of said bankrupt was inadvertently stated to be William S. instead of Walter Sherwood, which is his real name, and it further appearing to court that on September 9, 1905, a voluntary petition in bankruptcy at No. 2,977 was filed by Walter Sherwood Service, and that previous to the filing of said petition in bankruptcy by him the attention of his counsel was drawn to the fact of the filing of the involuntary petition at No. 2,974, and it further appearing to the court that at the time and for several days thereafter the judge of the court was absent from the district, and no motion to amend the proceedings could be allowed by him: Now, therefore, the court being satisfied that the case is one proper for amendment, the rule to show cause granted the 16th of September, 1905, is made absolute, and the petition, subpœna, and all papers in the case are amended so that the defendant's name shall read Walter Sherwood Service instead of William S. Service; and it is further ordered that an alias subpœna, embodying the amendment thus made, together with a copy of this order, be issued and served upon the said Walter Sherwood Service." This order is now before us for review on the petition of Minnie S. Gleason.

Fred. H. Ely and George L. Roberts, for petitioner, Minnie S. Gleason.

David N. Salisbury, for respondents.

Before DALLAS and GRAY, Circuit Judges, and LANNING, District Judge.

LANNING, District Judge (after stating the facts). In clause 10 of section 1 of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419], it is declared that the "commencement of proceedings" in bankruptcy shall mean "the date when the petition was filed"; and in Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, it was held that the filing of a petition in bankruptcy "is a caveat to all the world, and, in effect, an attachment and injunction." We find nothing in the record of this case, the substance of which is contained in the statement preceding this opinion, to take the case out from the operation of the general rule. It is true that the petition filed in the involuntary proceedings was defective, but the defect was discovered within four days after the petition was filed, and procedings for obtaining leave to amend it so as to cure the defect were immediately instituted and brought to a hearing before the District Court at the earliest possible day. The power of the court to grant the amendment is undoubted. In the Bellah Case (D. C.) 116 Fed. 69 (an involuntary case), it was held that general order No. XI (89 Fed. vii, 32 C. C. A. xiv), which relates to amendments of petitions, was not intended to abrogate or restrict the general power of amendment vested in the court. The existence of such power in the court was also recognized in Beach v. Macon Grocery Co., 120 Fed. 736, 57 C. C. A. 150, in the Brett Case (D. C.) 130 Fed. 981, in the White Case (D. C.) 135 Fed. 200, and in the Plymouth Cordage Company Case, 135 Fed. 1000, 68 C. C. A. 434. The Sears Case, 117 Fed. 294, 54 C. C. A. 532, is not an opposing authority. In that case an involuntary petition was filed October 10, 1901, in the Western District of New York. On October 23, 1901, another involuntary petition against the same party was filed in the Southern District of New York. The District Court for the Western District allowed the petition filed there to be amended by inserting in it an act of bankruptcy charged in the petition filed in the Southern District, but being later than the act charged in the petition filed in the Western District. The Circuit Court of Appeals for the Second Circuit held this to be error because of the peculiar provisions of general order No. VI (89 Fed. v, 32 C. C. A. ix), which allowed the earlier petition to be amended "by inserting an allegation of an act of bankruptcy committed at an earlier day than that first alleged, if such earlier act is charged in either of the other petitions." The court said:

"Except for that provision, such an amendment would have been permissible, and its allowance a reasonable exercise of judicial discretion; but the provision, by implication, limits the power of amendment to the single case in which an earlier act of bankruptcy is sought to be incorporated into the petition."

Nor is the objection that by reason of the failure to serve the subpœna before its return day the involuntary proceedings came to an end a valid one. It is the practice of bankruptcy courts to issue alias subpœnas when for any reason it has been impossible to serve the original subpœnas. Furthermore, clause a of section 18 of the bankruptcy act does not require the subpœna to be served within 15 days from the date of its issue, as the petitioner here insists, but that it shall

be made returnable within that time; and clause f of section 59 (30 Stat. 561 [U. S. Comp. St. 1901, p. 3445]), gives to creditors, other than the original petitioners, the right at any time to enter their appearance and join in the petition, and clause g of the same section declares that no voluntary or involuntary petition shall be dismissed for want of prosecution until after notice to the creditors. Manifestly, the mere failure to serve the subpœna within 15 days after its issue did not, and under the law could not, put an end to the proceedings. This was expressly held by the Circuit Court of Appeals of the Second Circuit in the Stein Case, 105 Fed. 749, 45 C. C. A. 29.

Neither do we think there is any merit in the objection that the involuntary proceedings have been invalidated by the adjudication of bankruptcy in the voluntary proceedings. The involuntary proceedings were commenced in good faith. The attorney of Walter Sherwood Service knew of the institution of these proceedings before he filed the petition in voluntary bankruptcy. We cannot escape the conviction that he knew, before he filed the petition in the voluntary proceedings, that the person intended to be described as a bankrupt in the involuntary proceedings was none other than Walter Sherwood Service. He does not deny such knowledge. To give validity to the voluntary proceedings means that Minnie S. Gleason, a daughter of Walter Sherwood Service, shall be a creditor preferred over the three creditors who filed the petition in the involuntary proceedings and over the other general creditors of Walter Sherwood Service. In view of the power of the court to allow amendments, of the prompt application of the creditors in the involuntary proceedings to secure an amendment when their attorney had discovered the error in naming the alleged bankrupt as William S. Service instead of Walter Sherwood Service, and of the knowledge which Walter Sherwood Service's attorney had of the pendency of the involuntary proceedings when he filed the petition in voluntary bankruptcy, we think the proceedings in voluntary bankruptcy cannot stand, and that the District Court had the power to make, and did properly make, the order of September 26, 1905, now under review.

The conclusion therefore is that the order should be affirmed, with costs against the petitioner, Minnie S. Gleason.

In re McCALL, Judge.

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

No. 1,514.

1. APPEAL—TIME—APPLICATION FOR REHEARING—EXTENSION OF TIME.
   The filing of a petition for rehearing of an order confirming a bankrupt's composition suspends the finality of the order sought to be reheard until disposed of, so that the time limit for an appeal therefrom does not begin to run until disposition of the motion for rehearing.

2. SAME—ENTRY OF ORDER.
   The time limit, for review of an order confirming a bankrupt's composition by appeal, begins to run from the entry of the confirmation order

on the records of the court, as provided by Rev. St. § 1008 [U. S. Comp. St. 1901, p. 715.]

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1897–1899.]

3. SAME—TRIAL COURT—RECORDS—TRANSCRIPT—VERITY.

On a writ of error or appeal the transcript of the records of the trial court imports absolute verity, and cannot be contradicted or explained by outside evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2850.]

4. SAME—RECORDS—CONSTRUCTION.

Where an order overruling an application for rehearing of an order confirming a bankrupt's composition was entered on the journal for October 10, 1905, which contained an indorsement by the clerk "Filed Oct. 10th, 1905," and the direction "Enter this order. John E. McCall, Judge. Oct. 16, 1905," it would be presumed that the date October 16th was a clerical mistake, since neither the approval of the form of the order by the judge nor the date of his approval has any proper place on the journal, and hence the time within which an appeal from such order could be taken began to run from October 10th.

Petition for Writ of Mandamus from the District Court of the United States for the Western District of Tennessee.

Blair Pierson, for petitioner.

Thomas M. Scruggs and E. E. Wright, for respondent.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. Petition for a writ of mandamus to compel allowance of an appeal from an order confirming a composition between Hosmer J. Barrett, a bankrupt, and his creditors. The relators are creditors who did not sign the composition.

In Adler v. Hammond, 104 Fed. 862, 44 C. C. A. 229, we held that an order confirming a composition was in substance and effect an order denying a discharge, inasmuch as a composition confirmed operated as a discharge, and that a creditor who had opposed the composition might appeal from its confirmation, by virtue of subsection 3 of section 25 of the bankrupt act. (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]. The applicable part of that section to the question now for consideration provides that "such appeal shall be taken within 10 days after the judgment appealed from has been rendered."

The order of confirmation was made October 3, 1905. The application for an appeal was made October 21, 1905. Judge McCall denied the appeal because not within the time limit, and that is the only question for decision. The transcript shows that on October 5, 1905, the relators filed a written petition praying for a rehearing in the matter of the confirmation of the composition. The effect of such a motion, when filed seasonably, is to suspend the finality of the order or judgment sought to be reheard until disposed of, and the time limit for an appeal or writ of error does not begin to run until it is disposed of. Brockett et al. v. Brockett, 2 How. 238; Aspen Mining Co. v. Billings, 150 U. S. 31–36, 14 Sup. Ct. 4, 37 L. Ed. 986; Northern

Pacific R. R. v. Holmes, 155 U. S. 137, 138, 15 Sup. Ct. 28, 39 L. Ed. 99; Kingman v. Western Manf'g. Co., 170 U. S. 675, 18 Sup. Ct. 786, 42 L. Ed. 1192.

The journal entry showing the disposition made of this application for a rehearing, as found in that part of the transcript made an exhibit to the petition of relators, is in these words and figures:

"In the District Court of the United States for the Western District of Tennessee.

"Monday, October 10, 1905.

"In the Matter of Hosmer J. Barrett, in Bankruptcy.

"This cause came on this day for orders upon the petition of C. L. Byrd & Co. for rehearing, filed herein October 5, 1905, upon consideration whereof it is ordered, adjudged and decred that said petition be and the same is hereby dismissed at the cost of C. L. Byrd & Co., against whom execution will issue. The court finds and adjudges that all of the matters and things set up in said petition to rehear were presented and considered upon the hearing.

"Enter this order. John E. McCall, J. Oct. 16th, 1905.

"Filed October 10, 1905. A. G. Matthews, Clerk."

If, therefore, the application did come on to be heard "on this day," and was then denied, as recited in the entry, and if that entry appears upon the journal of the court for Monday, October 10, 1905, as the record shows, an application for an appeal on October 21st was too late and properly denied. To meet this difficulty relators aver in their petition that in fact this entry was not spread upon the journal of the court until October 21st, although it appears to be a proceeding of October 10th. To contradict this entry they also rely upon an entry at the foot of the order of October 3d, confirming the composition in these words:

"Ordered that court stand adjourned until Oct. 21st. Filed Oct. 3, 1905.

"A. G. Matthews, Clerk."

They also exhibit with their petition a communication taken from the file of the case, and so certified by the clerk, from respondent to his clerk, in these words:

"United States District Court, Western District of Tennessee, at Memphis.

"Lexington, Tenn., Oct. 10, 1905.

"A. G. Matthews, Esq., Memphis, Tenn.—Dear Sir: I enclose you herewith the papers in the case of Hosmer J. Barrett, in bankruptcy which is before me upon petition of C. L. Byrd & Co., to set aside a former order confirming the composition, and to rehear. You will please prepare an order overruling the motion to set aside and rehear, and inform Mr. Blair Pierson of my action in the case.

"Very respectfully, John E. McCall.

"Filed Oct. 10, 1905. A. G. Matthews, Clerk."

Relators further aver that on October 20th their solicitor asked to see Judge McCall's order denying a rehearing, and was shown an order in the terms of the entry upon the journal for October 10th, which contained an indorsement by the clerk "Filed Oct. 10, 1905," and the direction, "Enter this order. John E. McCall, judge. Oct. 16, 1905," and that no entry of this order had been made upon the journal, and that in fact none was made until October 21st. If we are free to

go behind the record entry purporting to be the proceedings of October 10th, and inquire as to when Judge McCall rendered his decision denying a rehearing, it is clearly shown that he denied a rehearing upon October 10th, as recited by the entry upon the records of his court. Upon that day he, in writing, directed an order denying a rehearing, and this communication was marked filed by the clerk as of that date, and upon the same date the clerk drew the simple order denying the application of relators and placed upon it the file mark of the court as an order made and filed October 10th. So if the matter is open for evidence it is probably true that the minutes of the proceedings of the court upon October 10th were not journalized until October 21st.

The time limit for a review by appeal, or writ of error, under section 1008, Rev. St. [U. S. Comp. St. 1901, p. 715], began to run from the time of the "entry of such judgment, decree or order." Under section 11 of the Courts of Appeal Act of 1891 (Act March 3, 1891, c. 517, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552]), the provision is:

"That no appeal or writ of error by 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 order, judgment, or decree sought to be reviewed."

In Silsby v. Foote, 20 How. 290, 15 L. Ed. 822, it seems to have been ruled that the time limit did not begin to run until the decree had been signed by the judge. But in Board of Commerce v. Gorman, 19 Wall. 662, 22 L. Ed. 226, it was held that the date of the entry governs, whether signed or not, when the decree was of simple character and required no "settling" by the judge. In Polleys v. Black River Co., 113 U. S. 81, 5 Sup. Ct. 369, 28 L. Ed. 938, it was ruled that the time limit upon error proceedings begins to run only from the date of the "entry" of the judgment, or decree, or order upon the records of the court. See, also, Marks v. Northern Pacific R. R. Co., 76 Fed. 941, 22 C. C. A. 630, Providence Rubber Co. v. Goodyear, 6 Wall. 153, 18 L. Ed. 762; and Credit Co. v. Arkansas Central R. Co., 128 U. S. 258, 9 Sup. Ct. 107, 32 L. Ed. 448.

The provisions of subsection 3 of section 25, in regard to special class of appeals there allowed, departs from the terms found in the judiciary act of 1787, as carried into section 1008, Rev. St. and as repeated with respect to the time limit on appeals to this court. In the acts referred to the limit began to run from "the entry of the judgment, decree or order." And this, as we have seen, was construed as referring to an entry upon the records of the court. The time limit upon the appeal from a judgment allowing or denying a discharge is 10 days and the language of the provision is "that such appeal shall be taken *within ten days after the judgment appealed from has been rendered.*" The italics are ours.

Statutes which provide that writs of error or appeal shall be taken within a given time from the "rendition" of the judgment or decree have been generally construed as stating the time limit from the date of the decision of the court, and not from the date of its subsequent

entry in the journal, or signing by the judge. See 2 Ency. Pl. & Pr. p. 249 et seq., where the cases are collected. There are, however, some Minnesota cases which hold that a decree or judgment is not "rendered" within the meaning of such statutes until entered. Humphrey v. Havens, 9 Minn. 318 (Gil. 301); Exley v. Berryhill, 36 Minn. 117, 30 N. W. 436, which overrule certain earlier cases holding otherwise. It is, however, unnecessary to decide whether the limitation of 10 days upon such appeal begins from the decision of the matter, or from the entry of the decision upon the records of the court, inasmuch as in any case the application for appeal in this case was made more than 10 days after the order denying a rehearing was "entered," unless the recital of the record can be now contradicted.

It must be conceded that, if a time limit upon such appeals does not begin to run until the actual entry of the judgment appealed from, the actual date of the entry of a judgment would be the date of the entry of the nunc pro tunc order. U. S. v. Gomez, 1 Wall. 690, 17 L. Ed. 677; Rubber Co. v. Goodyear, 6 Wall. 153–156, 18 L. Ed. 762; Credit Co. v. Ark. Central Ry. Co., 128 U. S. 258, 9 Sup. Ct. 107, 32 L. Ed. 448. But the entry denying relators' motion for a rehearing is not a nunc pro tunc order; that is to say, it does not purport to be an order entered upon one day as for an earlier day. The certified record purports to contain an entry made on October 10th, of the proceedings of that day, and the entry so made on October 10th, recites that on that day relator's motion had been heard and denied. The actual fact is, whatever it is worth, that their motion was heard and denied on October 10th. But the contention is that the form of the order for an entry was not approved by the judge until October 16th, and never in fact entered upon the records until October 21st. The order was not one which required any "settling" by the judge. When he denied a rehearing his decision was made. If the time limit for an appeal did not begin to run until it was entered on the records of his court, then the record evidence is that it was entered upon the day of the decision, and this set in motion the time limit upon an appeal.

Upon a writ of error, or appeal, the transcript from the records of the lower court imports absolute verity, and it is not competent to contradict, explain, or extend the recital of the record by evidence dehors the record. 2 Ency. Pl. & Pr. pp. 296, 298, 436; 2 Ency. Pl. & Pr. 434; Evans v. Stettnisch, 149 U. S. 605, 13 Sup. Ct. 931, 37 L. Ed. 866. Every presumption will be indulged in favor of the verity of the record and the regularity of a proceeding which is only collaterally involved, as is the case in a proceeding like this. Thus a stenographer's notes of an oral opinion will not be suffered to contradict the charge or opinion as certified. District of Columbia v. Woodbury, 136 U. S. 450, 10 Sup. Ct. 990, 34 L. Ed. 472. If there are good and bad counts in a general verdict, the presumption is that the sentence was upon the good counts alone, in the absence of record evidence to show otherwise. Claassen v. United States, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966. An objection that the defendants were not actually present in court when sentence was pronounced cannot be heard against a recital in the record that they were present. "If this," said

the court "was not in accordance with the facts, the record must be corrected below, not here." Spies v. Illinois, 123 U. S. 131–182, 8 Sup. Ct. 21, 22, 31 L. Ed. 80. A recital that a case had been heard at a term of court holden within the district in which the suit was pending was held to import verity, and an effort to show otherwise was unavailing. "It must be inferred from the terms of the decree," said Justice Blatchford, "that Judge Benedict was actually holding court for the Southern District, within that district, when the decree was entered. The record discloses no application to set aside the decree, because such was not the fact and it must be conclusively presumed that it was the fact in view of the provisions of sections 591–593 and 600 of the Revised Statutes [U. S. Comp. St. 1901, pp. 480, 481, 483], under which Judge Benedict could have been designated and empowered to hold the District Court for the Southern District." The Alaska (C. C.) 35 Fed. 555, 557.

The indorsement upon the entry of a direction to enter same, signed by Judge McCall, is dated October 16th. This is six days after the entry had been in fact made, and from this we are asked to hold that the entry of the order of dismissal could not have been made earlier than the 16th. But if a journal entry is to import verity, such a dating must be presumed to have been made by mistake. Neither the approval of form of order by Judge McCall, nor the date of his approval, has any proper place upon the journal. The direction is only the clerk's authority for spreading the matter on the journal of the court, and that will be presumed without an entry of the judge's direction. This erroneous dating does not vitiate the record. The presumption is that the date October 16th is a clerical mistake. Being found upon the journal of October 10th, we must so presume. The presumption of the verity of the journal admits of no other conclusion. In O'Dowd v. Russell, 14 Wall. 402, 405, 20 L. Ed. 857, the writ of error bore a date antecedent to the date of the judgment sought to be reviewed. The court held the dating an obvious mistake which did not vitiate the writ. In Glenn v. Liggett, 135 U. S. 533, 10 Sup. Ct. 867, 34 L. Ed. 262, objections to the jurisdiction of the Supreme Court were made because the writ, citation, and bond each bore a date antecedent to the date of the judgment, as shown by the journal entry. The court said:

"Whatever discrepancy appears must be attributed to clerical error; and that the matter is not open to the objection made, that the writ of error was brought, the citation signed, and the bond given before the judgment was entered."

In Miller v. Shea, 150 Mass. 283, 22 N. E. 912, the date of the appeal bond contradicted the recital of the record, which imported that it had been given before the appeal was allowed. The court said:

"If the record does not conform to the facts, application to amend should have been made to the District Court. * * * The record as it stands must be taken to be true, and the fact that the appeal bond bears date as of the 8th day of November cannot be received to contradict the record."

In McArthur v. Schultz, 78 Iowa, 364, 43 N. W. 223, it was held that the certificate of the trial judge could not be used to explain,

contradict, or extend the record upon review. In Buck v. Holt, 74 Iowa, 294, 37 N. W. 377, the question was whether, when a decree recited that it was rendered upon a certain date, it could be contradicted for the purpose of defeating the appeal by the clerk's certificate of the time of the filing with him of the paper upon which the decree was originally written. The court said:

"The decree is a verity, which must stand as recorded until corrected by proper proceedings. * * * The decree itself was rendered on the 23d of August, 1886. This statement cannot be overcome by the certificate of the clerk."

Our conclusion is that the record entry shows that the application for a rehearing was denied on October 10th, and an order then entered so showing. There is no reasonable excuse for any claim that relators were misled, for while they were not entitled to notice of the judge's action, as they are presumed to be in court and cognizant of its proceedings, they were given notice by both the judge and the clerk in ample time to have prayed for an appeal. They did not do so until the 21st, which was after the time limit had expired. If they had wished to get the benefit of the fact, if such it was, that the actual entry of the proceedings purporting to be those of the 10th of October was not made until the 21st, they should have moved for a correction of the record in the court below. This they did not do. Upon the record as it stood the time for an appeal had passed.

The writ must be denied.

MEMPHIS TELEPHONE CO. v. CUMBERLAND TELEPHONE & TELEGRAPH CO.

(Circuit Court of Appeals, Sixth Circuit. June 11, 1906.)

No. 1,458.

LIBEL—ACTION BY CORPORATION—LANGUAGE LIBELOUS PER SE.

A declaration in libel alleged that, after defendant had operated the sole telephone exchange in the city of Memphis for 20 years, plaintiff corporation was organized, and granted a franchise to construct and operate a competing exchange; that when its exchange was two-thirds completed, and after it had secured thousands of subscribers, defendant caused to be published in a newspaper an article entitled "Support the Promoter," which proceeded as follows: "It took the promoters twenty years after the art of telephoning was discovered to undertake the building of an exchange, and then only after trying to float twice its value in bonds and the same in stock. It will not take them twenty minutes to get out if they succeed in unloading this 'wad' of 'securities' on the 'dear public.'" This was followed by an appeal to the public to subscribe for defendant's service. *Held*, that the language of the article, given its natural and reasonable meaning, referred to the promoters of plaintiff, and could not be enlarged by innuendo to apply to the corporation itself; that so taken it was not libelous per se as against plaintiff, and would not support an action without an averment of special damages.

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

W. A. Percy and Caruthers Ewing, for plaintiff in error.
E. E. Wright and T. B. Turley, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This action was brought by the Memphis Telephone Company, the plaintiff, against the Cumberland Telephone & Telegraph Company, the defendant, for a series of alleged libelous publications made in the Commercial Appeal, a Memphis newspaper, from January 11 to May 5, 1902. A demurrer to the declaration was sustained and the suit dismissed, on the ground that the publications were not libelous per se, and no special damages were averred.

The declaration avers that the plaintiff is a corporation organized to construct and operate a telephone exchange in Memphis, and that the defendant had for more than 20 years before the plaintiff began the construction of its telephone exchange owned and operated a telephone exchange in Memphis, claiming and enjoying a monopoly of the telephone business there as the lessee of the American Bell Telephone Company; that the city of Memphis, being dissatisfied with the rates and service of the defendant, in the year 1899 granted to William P. Curtis, and his associates, successors, and assigns, a franchise authorizing the construction and operation of an additional telephone exchange, to operate in competition with that of the defendant, and thereafter the plaintiff was incorporated for the purpose of constructing and operating such an exchange; that the plaintiff, acting under such franchise, proceeded at great expense to construct its exchange, and solicited and received thousands of subscribers to its telephone service; that on January 11, 1902, when its exchange was more than two-thirds completed, the defendant, for the purpose of injuring the plaintiff's business, and of destroying public confidence in the plaintiff and its investment willfully and maliciously caused to be published of and concerning it the following libel, which we print along with the innuendo:

"'Support the Promoter.

"'It took the promoters [meaning plaintiff] twenty years after the art of telephoning was discovered to undertake the building of an exchange, and then only after trying to float twice its value in bonds and the same in stock. It will not take them twenty minutes to get out if they succeed in unloading this "wad" of "securities" on the "dear public." Subscribe for the service of the Cumberland Telephone & Telegraph Company. Telephone Building, Madison street. It has been with you twenty years, and will be with you twenty more.'

"Meaning thereby that this plaintiff and those composing it and its stockholders were and are promoters, and that previous to undertaking the building of its exchange the plaintiff tried to float or sell to the public twice the value of the exchange or plant in stock of the company, and were thereby guilty of efforts to deceive and defraud the public, and, if they could succeed in thus deceiving and defrauding the public, it would, in less time than 20 minutes thereafter, get out and abandon the telephone exchange or plant of plaintiff and the service of the public, and would violate its contract with the city, and would permit its exchange to go to ruin, thus further defrauding the public and deceiving and injuring the subscribers to its business; that its enterprise was not established for a bona fide purpose, but was organized

and constructed for the purpose of deceiving and defrauding the public and the subscribers to its exchange and service, and it was not permanent, but that it was a scheme temporary only, gotten up for the purpose of deceiving and swindling the public, and was a fake enterprise, each and all of which statements were and are willful and maliciously false, defamatory, scandalous. and libelous, and were made and published for the purpose of, and with the intent of, defaming, injuring, and destroying plaintiff's business, good reputation, and standing in the community and the confidence of the public in its enterprise."

The declaration charges 112 additional publications on succeeding days. There are no averments of special damage; the broad claim being made that these publications were all to the plaintiff's damage in the sum of $300,000.

The question is whether the language used was actionable per se, or required to be supported by an averment of special damages. While it may be conceded, as stated by Judge Lowell in McLoughlin v. American Circular Loom Co., 125 Fed. 203, 205, 60 C. C. A. 87, that "an accurate and readily applicable definition of written language libelous per se does not exist," we may, for the purpose of this case, accept as exact enough that given by Judge Wilkes in Fry v. McCord Bros., 95 Tenn. 678, 33 S. W. 568, where, after quoting from Townshend on Slander and Libel (4th Ed.), § 146, and Newell on Defamation (page 181, § 14), to the effect that, in order to constitute language libelous per se it must be "either such as necessarily in fact or by presumption of evidence occasions damage to him of whom or whose affairs it is spoken," he says (page 684):

"We think a statement in substance and effect the same, but in different language, is that words which upon their face and without the aid of extrinsic proof are injurious are libelous per se; but if the injurious character of the words appear, not from their face in their usual and natural signification, but only in consequence of extrinsic circumstances, they are not libelous per se."

In determining whether a publication respecting a corporation is libelous per se or not, it is necessary to bear in mind that the injury to be redressed must be one to its property or business, resulting in pecuniary loss. It has no reputation in a personal sense, in the sense an individual has, and an imputation that certain members of the corporation have been guilty of acts which would injuriously affect their standing in society, or render them liable to criminal prosecution, does not constitute a libel upon the corporation itself. Metropolitan Saloon Omnibus Co. v. Hawkins, 4 H. & N. 90; The Mayor, etc., of Manchester v. Williams, 1 Q. B. (1891) 94.

In the present case it appears from the declaration that the defendant for many years owned and operated the sole telephone exchange in Memphis. In order to provide competition, the city of Memphis granted a franchise to William P. Curtis, his associates, successors, and assigns, to build and operate a new exchange. Accordingly, the plaintiff was incorporated, the building of a new exchange begun, and thousands of subscribers secured. When the exchange was more than two-thirds completed, the publication was made. The publication is headed "Support the Promoter." This ironical expression evidently points to the new company or its promoters, and

is intended to direct attention to what follows, which consists of three statements respecting the promoters of the new company, followed by an appeal for continued patronage by the old.

The three statements are these:

"(1) It took the promoters twenty years after the art of telephoning was discovered to undertake the building of an exchange, (2) and then only after trying to float twice its value in bonds and the same in stocks. (3) It will not take them twenty minutes to get out if they succeed in unloading this 'wad' of 'securities' on the 'dear public.'"

The publication concludes thus:

"Subscribe for the service of the Cumberland Telephone & Telegraph Company, Telephone Building, Madison Street. It has been with you twenty years, and will be with you twenty more."

The innuendo applies the publication to the plaintiff, and ascribes to the language a number of defamatory meanings. The doctrine is well settled that the office of an innuendo is to explain, but not enlarge or change, the sense of the words. Cunningham v. Underwood, 116 Fed., 803, 807, 53 C. C. A. 99; Newell on Defamation (page 619). Notwithstanding the innuendo, the natural meaning of the words must control. It is by ascertaining their natural meaning, and whether when thus taken they necessarily caused damage to the plaintiff, that we may determine whether they were actionable per se or not. While it is for the jury to say whether the language was used in the sense ascribed by the innuendo, this is only after the court has determined that the language will bear such meaning, in other words, that the words complained of can be reasonably construed in the sense placed upon them by the innuendo. Blagg v. Stuart, 10 Q. B., (Ad. & El.) 899; Hunt v. Goodlake, 43 L. J. C. P., 54, 29 L. T. 472; State v. Smily, 37 O. S. 30, 35.

Applying this rule, the court below with difficulty reached the conclusion that the question might be left to the jury as to whether the publication would be understood by the public as referring to the new telephone company, and not merely to its promoters, and placed its decision squarely upon the point that the publication, even as explained by the innuendo, was not libelous as a matter of law. But we are not satisfied that the language, reasonably construed, will bear the meaning ascribed by the innuendo. Applied to the plaintiff, the statements are: First, that it took the plaintiff more than 20 years after the art of telephoning was discovered to undertake the building of an exchange; second, that the plaintiff undertook the building of an exchange only after trying to float twice the value thereof in its own stock and bonds; and, third, that it will not take the plaintiff 20 minutes to get out of business if it succeeds in selling to the public its stock and bonds at the fictitious value indicated.

There was nothing libelous in the first and second statements as so construed, and the third is inconsistent to the point of absurdity. Boiled down, the entire charge is that the plaintiff was trying to sell its stock and bonds at a fictitious value, and, if it succeeded, would retire from business. There is no charge that it was trying to do this by fraudulent means. The first portion of the charge is not libelous, because the company had a right to put its value upon its

stock and bonds. It was not limited either in law or morals to the actual cost of its plant. The value of the stock of a quasi public corporation, such as a telephone company, is not measured by the cost of its plant. It is the use to which the plant is put—its earning capacity—which ultimately determines the value of the stock, and that, in turn, may serve as a guide to taxing officers in fixing the value of the plant. Sanford v. Poe, 37 U. S. App. 378, 395, 69 Fed. 546, 16 C. C. A. 305; Adams Express Co. v. Ohio, 165 U. S. 194, 225, 17 Sup. Ct. 305, 41 L. Ed. 683.

The absurdity of the concluding statement when applied to the plaintiff is apparent. That an organized telephone company, with an exchange practically completed and thousands of subscribers secured, which was trying to place its stock and bonds at a high figure, would instantly retire from business as soon as it should so dispose of them is unbelievable. The selling of its stock and bonds at a high price to the Memphis public would furnish it the very sinews of war needed for a successful fight with its competitor, the old company. With a well filled treasury, and backed by local stockholders and bondholders interested in making their investments good, the natural thing for the company would be to "stay in" and not to "get out."

These considerations satisfy us that the language was intended for the promoters, and that the public would read it in that sense. So read, the assertion was that it took the promoters 20 years after the art of telephoning was discovered to undertake the building of an exchange, that the promoters undertook to build an exchange only after trying to float twice its value in bonds and the same in stock of the new company, and that it would not take the promoters 20 minutes to get out if they should succeed in selling to the public the stock and bonds of the new company at this fictitious value. So understood, the meaning of the publication is logical and consistent. It was directed against the promoters responsible for the new exchange. Promoters usually get their profit in stocks and bonds of the enterprise they organize, which they are desirous of selling to the public. As soon as they "unload," they ordinarily "get out." If there is any imputation in this language, it is limited to the promoters. There is no reflection upon the new company, upon its credit, its stability, or its service. If, for some extrinsic cause not appearing in the publication itself, the language did prove injurious to the plaintiff, this should have been averred, and the resulting special damages alleged and proved.

We think the court was right in sustaining the demurrer, and the judgment is affirmed.

THE MARY N. BOURKE.

(Circuit Court of Appeals, Second Circuit. April 11, 1906. On Rehearing, April 23, 1906.)

No. 132.

1. SHIPPING—ACCOUNT FOR REPAIRS—LAY DAYS FOR USE OF DRY DOCK.
It is the duty of a repairer of a vessel to release her from the dry dock as soon as the repairs are so far along that they can be completed with her afloat, and he will not be allowed a charge for lay days for use of the dock after the time she should have been so released by the use of reasonable dispatch in the work.

2. SAME—SET-OFF—DEMURRAGE FOR DELAY.
Evidence *held* sufficient to entitle the owner of a vessel to a set-off for demurrage against the cost of repairs, because of unnecessary delay in their completion during the busy season of navigation.

[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.]

3. INTEREST—LAW OF PLACE—CONTRACT TO REPAIR VESSEL.
Under a contract for repairing a vessel made in the state where the repairs were to be made, interest on the cost should be computed in accordance with the laws of such state.

Appeals from the District Court of the United States for the Western District of New York.

On appeal and cross-appeal from a decree in admiralty entered by the District Court for the Western District of New York, March 4, 1905, in favor of the libelants for $18,250.35 and interest thereon from the date of the decree. The amount demanded in the libel is $20,255, the balance alleged to be due after the payment of $5,000 on account by the claimants. The answer avers that the sum charged for repairs was unreasonable and alleges a set-off amounting to $2,500 for delay in completing the work. The district court reduced the libelants' claim by striking out various items amounting in the aggregate to $3,318.23. The claimants insist that the amount awarded was exorbitant and should not have exceeded the sum of $10,000, and the libelants insist that the deductions from the full amount claimed by them were unwarranted by the proof. Assignments of error filed by the parties fully present their respective contentions.

The decision below is reported 135 Fed. 895.

George Clinton, for libelants.

T. E. Tarsney and W. G. Fitzpatrick, for claimants.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. The claimants' schooner Mary N. Bourke was seriously damaged by collision and subsequent stranding and on May 17, 1902, was placed in the libelants' dry dock for survey and repair. The survey was made by Alexander Hynd of Cleveland, Ohio, a man of large experience and unquestioned competency. The survey, which was completed May 23, shows on its face that it was made with great care and attention to detail, three or four days being devoted to its preparation and the examination of the vessel, which was then resting on the blocks in the dry dock. The estimate of repairs made by Hynd was $13,405, in which amount was included $1,140, being 10 per

cent., added for contingencies. The estimated value of the schooner in her damaged condition was $3,295. After the repairs were completed and the Bourke was at Tonawanda, N. Y., Hynd and Angus McDougall, who is local surveyor of the Great Lakes Register residing at Buffalo, made an examination for the purpose of determining her value. The claimants offered to show by both these men that at the time of the completion of the repairs the value of the vessel did not exceed the sum of $16,300, which testimony, if allowed, would tend to substantiate the correctness of the survey in which the cost of repairs, plus the value of the vessel in her damaged condition, is stated at approximately the same amount. The court excluded the testimony and though we are inclined to think it was competent from an expert in connection with his previous testimony we do not deem it necessary to complicate the case by a ruling to this effect, as sufficient is shown to warrant a substantially similar conclusion. Of course the estimates of the surveyor are not perfectly accurate. After the vessel was opened up new defects were discovered and some repairs were added which were not in the domain of the survey. But when everything is considered and a fair profit is added it is difficult for us to understand why the actual expense should so greatly exceed the estimated expense, why, in other words, the repairs upon a wreck worth less than $4,000 should have been swelled to the enormous sum of $25,255. The vast discrepancy between the amount charged and the advantage to the claimants leads us to think that, to say the least, the work was not economically done. On the other hand there is no doubt that it was well and skillfully done and except in a comparatively few instances, considering the innumerable items of the account, we find the testimony insufficient to warrant a conclusion that items of material or labor have been grossly overcharged.

We think the district judge was justified by the proof in disallowing the items stated in the opinion and deem it unnecessary to discuss these items further than to say that we concur in his conclusions and are satisfied with his reasoning.

There was no express contract, the basis of the action is quantum meruit, the burden being upon the libelants to prove that the services and materials were reasonably worth the sums charged therefor. We do not see our way clear to make deductions in addition to those made by the district judge except in one particular.

Among the charges made is one of $4,416 for 80 lay days, being $35.20 per day for use of dry dock. The district judge made a deduction of twenty lay days but we think the number should be still further reduced. Notwithstanding the testimony of usage we cannot resist the conclusion that the per diem charge for the use of the dry dock, considering its probable value, was, to say the least, an exceedingly liberal one and should not be extended to cover a single day when it was not necessary for the Bourke to occupy the dock.

The libelants were required to do the work without unnecessary delay and they expressly agreed to do a "quick job." In the letter of May 27 the libelant James Davidson says:

"We are now prepared to rush through any work you may want in good shape. * * * I have also made a personal examination of the Bourke, and find that she came down to the blocks in the dry dock in good shape and find the Bourke in very good condition. Of course you will understand the Bourke will need a new stern post, and also a new rudder, some keel, and also some bottom plank, but the bottom is not nearly so bad as you think, and after this is cleaned up, and after you decide to go ahead with the work we can do a quick job, and also put the Bourke in first class shape so that she will be a good ship for many years to come."

On August 4 libelants wrote as follows:

"Also note that you would like to have the Bourke ready to go with the Schoolcraft (her steamer) about the 18th and we do not think there is any question but what we can have her ready by that time."

Notwithstanding this assurance she was not released from the dry dock until August 23d and was not finished and ready to join her consorts until September 15th. This was not the dispatch which the claimants had a right to expect.

Again it was, we think, the duty of the libelants not only to do the work as rapidly as possible but to release the vessel from the dry dock as soon as she was in condition to float. It is unreasonable to require the claimants to pay $35 per day for use of the dock when work was being done which could as well have been done after the Bourke left the dry dock. If the libelants for their own convenience kept her there unnecessarily the claimants should not be required to foot the bill. After the bottom was completed and properly calked and painted so that the use of the dry dock was no longer necessary there should be no charge for its use. We are not satisfied that this was the case. Taking everything into consideration we are convinced that forty days was ample time in which to complete all the repairs for which the dock might properly have been used. This reduces the libelants' charge for lay days to $2,208.

We are also of the opinion that the Bourke should have been turned over to her owners not later than August 18th. She was one of three vessels towed by the Schoolcraft and, at the most busy period of the season on the great lakes, it can hardly be doubted that she would have earned something during this period. In the very nature of the case the evidence to establish her earnings is problematical, but we think it is sufficient within the rule of The Providence, 98 Fed. 133, 38 C. C. A. 670, and The Cayuga, 14 Wall. 270, 20 L. Ed. 828. A conversative estimate of the Bourke's earnings during the period in question is $350.

It is undisputed that this action is brought upon contracts made in Michigan by citizens of that state and that the contracts were to be performed there. In these circumstances we think the interest should have been allowed at the Michigan rate which was five per centum per annum. Pana v. Bowler, 107 U. S. 529–546, 2 Sup. Ct. 704, 27 L. Ed. 424. Coughlan v. S. C. R. Co., 142 U. S. 101–114, 12 Sup. Ct. 150, 35 L. Ed. 951.

It follows that the decree must be amended by deducting therefrom the sum of $1,454 and the difference in the rate of interest, and as so amended it is affirmed.

The claimants are entitled to the costs of this court.

On Rehearing.

PER CURIAM. In affirming the decree of the court below, in respect to the item for wastage in timber, we did not intend to concur in the reasoning of the district judge placing the allowance upon the theory of an established usage, but were of the opinion that, irrespective of any usage, the proofs authorized the allowance. The language of our opinion warrants no different interpretation.

The motion for rehearing is denied.

WATERS v. DAVIS.

(Circuit Court of Appeals, Sixth Circuit. May 5, 1906.)

No. 1,495.

1. TRIAL—PROVINCE OF JURY—CREDIBILITY OF WITNESS.

The credibility of a witness is for the jury to determine, and if he has given substantial testimony bearing on the issue, to which the jury might in the proper exercise of its function give credit, it is error for the court to direct a verdict in opposition to it, on the ground that the witness is unworthy of belief.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 334, 335, 376-380.]

2. BANKRUPTCY—ACTION BY TRUSTEE TO RECOVER MONEY OF BANKRUPT—PROOF OF OWNERSHIP.

Where money was placed in the hands of defendant on the order of a bankrupt, who is shown to have controlled its possession and disposition, the jury, in an action for its recovery by his trustee, may infer his ownership from the circumstances of the transaction, although there is no positive testimony that he was the owner.

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

W. H. Martin, S. A. Wilkinson, and Hiram W. Currey, for plaintiff in error.

G. J. McSpadden and L. T. M. Canada, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit brought by the trustee in bankruptcy of one Robert Boatright to recover from the defendant, Ralph Davis, the sum of $15,000, alleged to have been the property of Boatright, and to have been delivered to Davis after Boatright's property passed to the trustee.

After the introduction of the evidence offered by the plaintiff, the court directed a verdict for the defendant on the ground that the principal witness for the plaintiff, one Lockman, was not worthy of belief, and that there was no testimony to show that Boatright was the owner of the money in dispute. We are of the opinion that in so doing, the court exercised a function reserved for the jury. There was substantial evidence tending to show that Boatright was the owner of the money, and that it was turned over to Davis, a Memphis lawyer, by his direction, and that Davis, with the exception of a few

hundred dollars, has never accounted for it and still holds it. The testimony tended to show that Boatright, one Williams, and five others, constituted a gang who operated "fake" foot races in Missouri, Arkansas, and other states. They were finally arrested and lodged in jail. Boatright and Williams were released on bond. Boatright fled to Memphis, and Williams remained in Hot Springs. Suits were brought against Boatright, and others, by persons who had been defrauded. In the meantime, Williams arranged with Lockman, who kept a saloon and restaurant in Hot Springs, to take possession of $14,500 in money which was to be handed him by one Hendricks, who had been acting as stakeholder for the gang. Lockman took the money and kept it in his house. Lockman at this time was feeding the members of the gang who were in jail, and Boatright and Williams were evidently endeavoring to obtain bail for them. Several days after this, Davis, a lawyer of Memphis, appeared in Hot Springs. He brought a note from Boatright to Williams, and Williams, upon the strength of this note, directed Lockman to turn the money he had over to Davis, and Lockman did so. Williams told Lockman that Davis was to arrange for bail for the boys in jail, and Lockman was also assured that his bill for feeding the boys would be paid. It appears that Davis did pay Lockman $450, leaving unpaid about $400. Davis also paid Leslie, a lawyer at Hot Springs, $150 on account of his services for the gang, leaving a larger amount unpaid. After the money was turned over to Davis, Davis had a conference with the local lawyers representing the defense with a view of putting up $12,500 as bond for five of the gang held in jail, but finally came to the conclusion that the money, if deposited, would be garnisheed, so he took it back with him to Memphis. In Memphis, Boatright put up at the Franceola Hotel and went under the name of A. J. Alls. Booth, a lawyer in Webb City, Mo., and a friend of Boatright, corresponded with him at Memphis under this name, directing the letters to room 4, Equitable Building, which was Davis' office. Davis also wrote Booth, stating he represented Boatright, and desiring to know the result of certain litigation.

The court below disposed of the evidence by saying that Lockman's manner, as shown in his deposition, impressed the court with the idea that he was not worthy of belief; and, as to the other witnesses, that there was no positive testimony that Boatright was the owner of the money. The case did not rest solely upon Lockman's testimony, but, if it had, we think the court went too far in rejecting that testimony, because he thought the witness unworthy of belief. The credibility of a witness who has given substantial testimony is for the jury. The court may aid the jury by proper instructions in giving due weight to the testimony.

Again, it was not necessary that there be positive testimony establishing Boatright's ownership of the money. The jury had the right to infer from the circumstances in proof that the money belonged to Boatright. There was testimony tending to show that Boatright was the leader of the gang, that this money, by direction of Williams who had remained on the ground, was turned over temporarily to Lockman,

and that Lockman delivered it to Davis by order of Boatright. The jury had the right to infer ownership. The money thus delivered to Davis was never subsequently claimed by Williams, or Hendricks, or any of the gang, or any other person, nor does Davis claim it as his own. It certainly had an owner, and the jury had the right, under the circumstances, to say that Boatright was the owner. He was recognized, by all who had anything to do with the money, as the one who controlled its possession and disposition.

This court has had occasion, in the opinion of Judge Lurton in Mt. Adams, etc., R. R. Co. v. Lowery, 74 Fed. 643, 20 C. C. A. 596, and in that delivered by Judge Severens recently in Minahan v. Grand Trunk Ry. Co. (C. C. A.) 138 Fed. 37, to define, as nearly as may be, the respective provinces of judge and jury in trials by jury, summing up the matter in the latter case, as follows (page 46):

"If there is any substantial evidence bearing upon the issue to which the jury might in the proper exercise of its function give credit, the court cannot rightfully direct the jury to find in opposition to such evidence"—citing cases.

The judgment is reversed, and the case remanded for a new trial.

UNITED STATES v. BENEDICT & WARNER.

(Circuit Court of Appeals, Second Circuit. January 18, 1906.)

No. 56.

CUSTOMS DUTIES — CLASSIFICATION — ROCK-CRYSTAL INTAGLIOS — PRECIOUS STONES.

Rock-crystal intaglios, produced in an expensive manner by engraving, and then painted, are within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 435, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], for "precious stones advanced in condition or value * * * by * * * cutting or other process," regardless of their advancement in value by painting.

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

Appeal from a judgment of the Circuit Court of the United States for the Southern District of New York (135 Fed. 242), reversing a decision of the Board of United States General Appraisers (G. A. 5,402, T. D. 24,614), which sustained the action of the collector.

Charles Duane Baker, Asst. U. S. Atty.

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

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. This merchandise, as found by the Board, consists of certain unset painted intaglios. They are of semispherical rock crystal, polished, the flat surfaces of which have been engraved in designs of animal heads. The intaglio cuttings are painted in living colors. After being mounted, they are used in the nature of ornaments, such as scarf pins, brooches, etc. Duty was assessed

at the rate of 50 per cent. ad valorem thereon as "manufactures of * * * rock crystal * * * not specially provided for," under the provisions of paragraph 115 of the tariff act of July 24, 1897, (chapter 11, § 1, Schedule B, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636]). The importers protested, insiting that the intaglios were dutiable at 10 per cent. ad valorem as "precious stones, advanced in condition or value from their natural state by * * * cutting or other process, and not set," under the provisions of paragraph 435, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676].

It appears from the testimony and the return of the assistant appraiser that while the natural rock crystal itself is not particularly expensive, these completed intaglios unset cost as high as $13 to $15 each, and that this cost is due to the fact that the ornamentation is done with an engraving tool in an expensive manner. They are used for jewelry purposes only. That rock crystals are commercially known as precious stones appears from the decision of this court in Hahn v. United States, 100 Fed. 635, 40 C. C. A. 622. The fact that these unset precious stones have been advanced in value by "being cut and ornamented with various designs in an expensive manner" brings them specifically within the provisions of paragraph 435, regardless of the subsequent advancement in value by painting. They, therefore, were not dutiable as manufactures of rock crystal not specifically provided for under the act.

The decision of the court below is affirmed.

SCOTT et al. v. FISHER KNITTING MACH. CO. et al. SAME v. REGAL TEXTILE CO. et al. SAME v. FISHER KNIT GOODS CO. et al. SAME v. SEAL BACK UNDERWEAR CO. et al.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

Nos. 163–166.

PATENTS—INFRINGEMENT—KNITTING MACHINES.

The Bellis patent, No. 561,559, for a knitting machine capable of producing loops on a ribbed fabric adapted to be fleeced, is one of primary character, covering a meritorious invention, and entitled to a broad construction, and is infringed by the machine of the Fisher patent, No. 656,535.

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

This cause comes here upon appeal from a decree dismissing bill charging infringement of claims 1, 3, 6, and 7 of complainants' patent No. 561,559, granted to David C. Bellis June 9, 1896, for a knitting machine.

For opinion below, see 139 Fed. 137.

Hubert Howson and Charles Howson, for appellants.

Charles Neave and Alfred Wilkinson, for appellees.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The art discussed herein relates to knitted fabrics and the machines by which they are produced. The patent in suit covers a machine for producing a heavy knit material, capable of use in making winter undergarments. Its construction is fully explained in the opinion of the court below. 139 Fed. 137.

The claims in suit are as follows:

"(1) A knitting machine having two sets of needles and cams therefor for producing ribbed fabrics, jacks or loopers, cams and a bed therefor, operated by the driving mechanism of said machine to interlace a supplemental thread with the meshes produced by the said needles, substantially as and for the purposes set forth. * * *"

"(3) A circular knitting machine having two sets of needles, needle-cylinder, cam-cylinder, needle-dial, and cam-dial, together with jacks or loopers operatively mounted in grooves of a jack-bed, fastened to the needle-dial, and cams adapted to operate the said jacks or loopers in conjunction with the said needles, to interlace a supplemental thread with the meshes produced by the said needles, substantially as and for the purposes set forth. * * *"

"(6) A circular knitting machine having two sets of needles and means for operating the same, a system of loopers or jacks operated by cams to interlace a supplemental thread with the meshes produced by the said needles, and means for supplying the said loopers with yarn, substantially as and for the purposes set forth.

"(7) In a circular rib knitting machine the combination of two sets of needles, a cylinder, and a dial therefor, a system of loopers or jacks, guided in slots of the said dial, a bed for said loopers or jacks, and means for operating the said needles and loopers, substantially as and for the purposes set forth."

Bellis was the first to produce "a fleecing ribber" and the new fabric known as "fleece rib." Machines for producing a fleecy inner face on plain knit fabrics had been known for some 13 years prior to the invention of the patent in suit. Ribbed goods had been fleeced by carding the body threads. But plain knit fabrics were inelastic, and carding the body threads weakened the garment. The demand for a fabric which would obviate these objections is indicated by the commercial success of complainants' and defendants' manufactures. That the construction of a machine capable of producing such a fabric was not obvious appears from the 31 prior patents introduced by defendants, no one of which showed a solution of the problem, and from the inability of defendants' experts to construct from the prior art any practical fleecing ribber, or to satisfactorily indicate how the prior structures could be so adapted as to produce a fleece rib, without radical and substantial modifications, involving the exercise of invention, and by the further very significant facts that the Scott patents, Nos. 577,788 and 577,789, for rib knitting machines, applied for prior to the issue of the Bellis patent, proceeded upon a theory, and were constructed upon a plan, radically different from the suggestions furnished by the prior art as testified to by defendants' experts, and that, after the Bellis disclosures, Scott abandoned his former construction, followed Bellis, and finally secured a half interest in the Bellis patent.

The only prior limiting machine material to this discussion is that of the Cooper & Ford, British Patent No. 172, of 1887. But this was a plain nonribbing knitter, provided with loopers, and if the second set of needles be added thereto in order to make a ribbed fabric, it

would not operate as a looper at all. The solution of the problem is not accomplished by the introduction of another set of knitting needles into said Cooper & Ford or the prior Sturgess & Hearth machines, because in each of them, as is admitted by defendants' expert:

"The stretches of supplemental thread which would be exposed on the unribbed fabric would be imbedded and inwrapped within the fabric when made ribbed by the addition of a second set of needles."

Nor is the solution of the problem furthered by the ribbed fabric machines of the prior art. The closest of them (that of Lecaisne, of 1892), which laid an extra thread in the fabric, need not be discussed, because it was not enumerated by defendants' expert in his list of 10 specially pertinent patents, because it is not a looper, and furnishes no suggestion of means for making loops, and because Cooper & Ford in the second patent, chiefly relied on by defendants, abandoned Lecaisne in order to produce a looper. This, therefore, is a case where, so far as concerns machines for making the new fabric, there is no prior art, and, so far as concerns machines for making the old fabrics, they apparently, at most, failed to furnish any suggestion of adaptation to the new purpose, but, as complainants claim, and there is some evidence to support the claim, their construction would tend to lead the inventor away from, rather than toward, the right path for the attainment of the object sought.

The arguments directed to a limitation of the scope of the patent in suit consist, first, in the following criticisms of its language, in connection with that of Bellis' fabric patent, No. 561,559. His object was to construct "a machine which is capable of producing a ribbed knit fabric with backing," described in his patent therefor, consisting of "a two-ply rib knit webbing," or provided with "a backing on the ribbed knit fabric, which may be of a different material from that of which the body of the fabric is composed," to be introduced "while the latter is being produced." The result, the production of a "ribbed knit fabric with backing," was accomplished by means of "jacks or loopers operated to act in conjunction with the needles to interlace a supplemental thread with the meshes composing the body of the ribbed fabric." "But to produce a backing on such fabric while the latter is being produced devices must be provided which bring the backing or supplemental thread from the inside of the machine over the needles at certain and predetermined intervals, so that it may be interlaced with the meshes of the fabric as will be hereinafter more fully described," and the jacks must rise to push the thread "over a needle, to be interlaced with a mesh formed by such needle." There is no statement in the patent that its object was to construct a machine capable of producing loops to be fleeced.

It is admitted that the machine of the patent in suit makes a fabric described in the Bellis fabric patent as one which can be finished in one operation, and that when so finished it is a completed article, with a substantial backing before it is fleeced, while defendants' fabric has only floating loops for its backing, and is not a completed article until it has been fleeced.

It is further admitted that there are substantial differences in the construction and operation of the two machines, and that the construction of defendants' machine follows in certain details the machines of the prior art.

In the light of these facts we are brought to a consideration of the status and scope of the patent in suit and of the single issue in the case—that of infringement. The criticisms upon the language of the patent itself will first be considered.

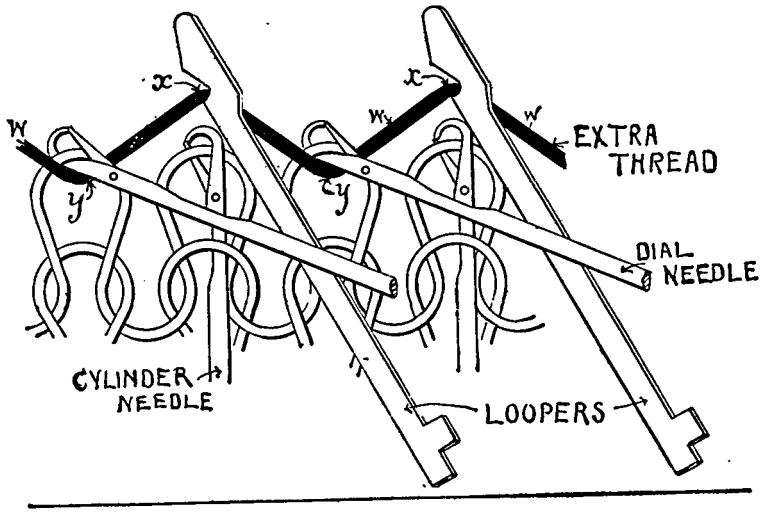
It is objected that there is no reference in the specification to the fact that the object of the invention was to produce a fabric capable of being fleeced. But it is well settled that the patentee is not obliged to state all the objects of his invention, and that he is protected in all the beneficial uses thereof within its scope; and here no statement as to fleecing was necessary, because the patent in suit concerned only a new "improved ribbed knit fabric, * * * produced and finished in one operation" (patent No. 561,558) on the patented machine. Whether it should thereafter be used as thus finished, or subjected to a new operation for fleecing, was immaterial. Furthermore, such a construction for fleecing was old in plain knit goods. There is no evidence that the fabric was ever practically used for any other purpose, and the uncontradicted testimony is that this was the sole purpose to which the invention related.

The references to making the backing of different material are criticised by defendants as referring merely to a double-faced material. But such references might equally well suggest a fabric adapted for fleecing, such as a cotton body with a fleece lining of wool. It is contended that while the stated object of the invention in suit was such that the "extra thread is tightly interlaced with the loops," etc., "* * * whereas Fisher's [defendants'] extra thread is not interlaced, is not secured to the main fabric at all," etc. But the Fisher patent specifically describes means "to engage with an extra thread and secure it on one surface of the fabric, forming floating loops," and explains how said loops are "caught on the inside of the fabric by the loops of the main thread." Whether the defendants' thread is not in fact interlaced will be discussed later.

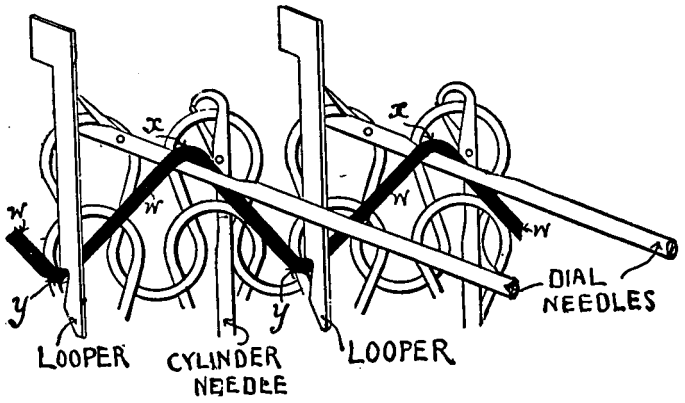
Much stress is laid on the language quoted above which indicates that the supplemental thread must be brought "from the inside of the machine over the needles," etc. But a reference to the specification shows that this statement was made in the course of a description by the patentee of the specific machine illustrated in the drawings, and that such limitation is nowhere else found, except in claim 5, not here in suit, but which covers this specific construction.

But it is argued that, as Bellis insists that however his machine be modified it must be "provided with jacks or similar devices to bring a thread over a needle to be interlaced with a mesh formed by such needle" and as defendants do not thus manipulate their thread, and do not interlace the loop in the body of the fabric, they do not infringe. The differences in the operation of the two machines and in the construction of the loop are fairly shown by the following diagrams and citations from complainants' brief:

COMPLAINANTS' MACHINE



DEFENDANTS' MACHINE



IN EACH MACHINE THE JACKS BRING A "THREAD W OVER A NEEDLE" (AT TOP CREST X) "TO BE INTERLACED WITH A MESH FORMED BY SUCH NEEDLE;"

IN EACH MACHINE THE LOWER OR INNER LOOP Y IS BOTH FORMED AND RETAINED WITHIN THE ANGLE FORMED BY THE TWO SETS OF NEEDLES.

"In the Exhibit Bellis Machine the loopers take the supplemental thread, and push it up against the shanks of the dial needles, lifting the junctions of the loops into the path of the cylinder needles, which rise through them; and thereby two things are done, to wit; (1) to form within the angle of the two sets of needles the loops of supplemental thread which are to constitute the backing in the finished fabric, and (2) 'to bring the thread, w, over a (cylinder) needle to be interlaced with a mesh formed by such needle.' Bellis patent, p. 3, line 80. When later, the old loops of body thread on the cylinder needles are 'cast off,' the parts of the supplemental thread over the cylinder needles are cast off with them, resulting in the interlacing of the supplemental thread with the meshes formed by the cylinder needles, or, as the Fisher patent describes it, the extra thread is secured 'on one surface of the fabric, forming floating loops.'

"In the defendants' machine the loopers take the supplemental thread, and bring it over the shanks of the dial needles, and press it down between those needles, and thereby the same two things above mentioned as in the Bellis machine are done, to wit; (1) to form within the angle of the two sets of needles the loops of supplemental thread which are to constitute the backing in the finished fabric, and (2) 'to bring the thread, w, over a (dial) needle to be interlaced with a mesh formed by such needle.' Bellis patent, p. 3, line 80. When, later, the old loops of body thread on the dial needles are 'cast off,' the parts of the supplemental thread over the dial needles are cast off with them, resulting in the interlacing of the supplemental thread with the meshes formed by the dial needles, or, as the Fisher patent describes it, the extra thread is secured 'on one-surface of the fabric, forming floating loops.'

"In both complainants' and defendants' machines, it is the upper crest of the crinkled supplemental thread (in black in diagram) which is brought over and lies outside the needles, and is afterwards caught into or interlaced with the meshes of the fabric, and in both machines it is the lower or bottom wave of the crinkled supplemental thread which is inside the angle of the two sets of needles, and which afterwards becomes the backing or floating loop in the fabric. In one case the thread is caught into or interlaced with the meshes formed by the cylinder needles and in the other case with the meshes formed by the dial needles. In other words, the fabric from defendants' machine has the looped supplemental thread interlaced with the front wales of the fabric, while the fabric from the Exhibit Bellis Machine has the looped supplemental thread interlaced with the rear wales, that is, when you look at the fabric on its looped face. * * * "Defendants say that Fisher's loopers cooperate with one set of needles only—the dial needles. Fisher's loopers cooperate also with his cylinder needles, because these loopers, after bringing the thread down over the dial needles to form the crinkle, as shown in his Fig. V, continue to hold down the thread in loops, not only until it has been cast off the dial needles with the loops of body thread, but the loopers still continue to hold down the extra thread loops after they have been brought down onto the loops of body thread of the cylinder needles, until tied in by the loops cast off by the latter, and furthermore the loopers are then 'further depressed a trifle to tighten the extra thread loops' (Fisher patent, p. 318, lines 33–34). As will be seen by the shape of the looper cam, in Fig. IV of Fisher patent (p. 326), the loopers are held down all the way round the cylinder, except where momentarily raised (by cam 31) to take the extra thread from guide eye 34. Fisher's loopers thus do co-operate with both sets of needles by first forming the extra thread loops over the dial needles, and by holding those loops onto the loops formed by the cylinder needles until the extra loops have been tied in.

"In both the machine of the Bellis patent sued upon and defendants' machine, the shanks of the dial needles act in conjunction with the loopers to form the loops of the supplemental thread that are to be engaged with the knit fabric, and in both it requires the co-operation of both sets of needles and the loopers in order to form the said loops, and to cause them to be engaged with the fabric, so that the loops of supplemental thread will project from the back of the fabric to form the backing therefor, as is desired in the product of the machine."

The Bellis loop is formed by having the extra thread pushed against the dial needles and out over the cylinder needles. The Fisher loop is formed by having the extra thread pushed against and over and down between the dial needles carrying a body thread. When the dial needle withdraws, the body and supplemental threads are cast off together, and thereby the two become interlaced. This operation is described in the Fisher patent as follows:

"As the dial needles continue their outward movement, the extra thread slips back over the ends of the latches onto the shanks of the needles, where it is left with just a trifle of slack, so that as the dial needles move in again, having engaged with the main thread, they draw it easily under the extra thread, which is cast off over the needle hooks at the same time as one loop of the main thread, and is caught on the inside of the fabric by the loops of the main thread."

The operation and result of the two devices thus differ in that in the one the supplemental thread is pushed from the inside outward over the cylinder needles, and thereby firmly interlaced in the body of the fabric; in the other the supplementary thread is pushed in from the outside, and interlaced, "secured," or "caught on the inside of the fabric," as the patentee says.

In the light of the foregoing discussion, it is seen that not only was Bellis the first to produce a fleecing ribber and a fleece rib, but he was the first to produce a machine which interlaced loops on a double ribbed fabric. He was the first to conceive a practical method and means for obviating the mechanical difficulties attendant upon the introduction of the extra needles. It may, therefore, fairly be said that he fulfilled the requirements of a generic invention, in that he devised a machine which performed the function of looping on a ribbed fabric, a function never performed thereon by any earlier machine, and thereby produced a result never before produced, namely, a ribbed fabric capable of being fleeced, and that in doing this he exercised invention of a high order. And inasmuch as there is no prior art limiting Bellis as the first to produce a machine capable of providing loops on a ribbed fabric adapted to be fleeced, we think his invention is entitled to be regarded as of such primary character as to embrace defendants' machine, which performs the same functions of looping and engaging a thread in the fabric by a combination of means covered by the terms of the claims in suit, and operating on the same principle, with the same resulting fleecing capacity.

It is argued by defendants, and found by the court below, that the Bellis invention is not a meritorious one because its machines are inoperative or impracticable for successful commercial operation. This argument rests upon the following contentions: Bellis, in his subsequent patent, No. 574,129, for an improvement, consisting in the addition of a ring to his prior machine, says as follows:

"The upper peripheral edge, s, of the ring, S, also serves to direct the finished fabric, which is drawn by suitable takeups, downward, so that the newly formed backing loops do not come into the way of the jacks to be next actuated, which, as has been found, was the case where no such ring, S, was provided on the machine, the jacks on such machines generally catching the

loop previously formed, and tearing on its upward motion the threads apart, destroying in this way the backing, but this is entirely obviated by the use of the said ring, S."

All the Bellis machines, with perhaps one exception, are provided with this ring. Scott & Williams, the owners of one half of the patent in suit, have patented and make a different machine, and certain hostile experts testify that in their opinion the Bellis machine is impracticable for various reasons.

This last contention is met by proof that the Bellis machines with the ring improvement have been in successful commercial operation for some eight years, and the theories advanced to show why the Bellis machines would not run successfully are denied by witnesses who claim to testify from actual observation.

The Scott & Williams machines are different in some particulars from the specific construction of the patent, but the testimony of complainants' experts, not disproved by defendants, is to the effect that these machines are within the patented construction. The patented ring is an improvement on the original machine, and remedies a defect therein. But this is a mere detail improvement, and, in effect, merely amounts to an enlargement of the dial of the patent. We are unable to see, therefore, how it affects the meritorious character of the invention. It is frequently a characteristic of generic inventions that their first embodiments work imperfectly, and where the imperfections may be remedied, as in this case, by what amounts to a mere readjustment of relative sizes, such change does not affect the character of the underlying creative conception. In these circumstances, the majority of the court is of the opinion that the decree of the court below as to the defendant corporation must be reversed, with costs.

Inasmuch as it does not appear that the defendant Kerman has any connection with the infringement, except as an officer of said corporation, the bill should be dismissed as to him, with costs. Hutter v. De. Q. Bottle Stopper Co., 128 Fed. 283, 62 C. C. A. 652.

The cause is remanded to the Circuit Court, with instructions to enter a decree in accordance with this opinion.

ROBINS CONVEYING BELT CO. v. AMERICAN ROAD MACH. CO.

(Circuit Court of Appeals, Third Circuit. June 6, 1906.)

No. 14.

1. PATENTS—CONSTRUCTION OF CLAIMS—REFERENCE TO SPECIFICATION AND DRAWINGS.

Where the meaning of the language used in the claims of a patent is doubtful, or it is susceptible of two different constructions, the specification and drawings may properly be referred to for the purpose of ascertaining the true construction of the claims.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 243.]

2. SAME—INFRINGEMENT—SUBSTITUTION OF EQUIVALENTS.

A pulley revolving on a central shaft and one having trunions revolving in bearings at the ends are well known mechanical equivalents, and the substitution of one for the other, which is an element in a patented combination, does not avoid infringement.

3. SAME—IDLERS FOR BELT CONVEYORS.

The Robins patent, No. 571,604, for a belt conveyor, claims 5 and 6 of which cover troughing idlers for supporting such conveyor-belts, were not anticipated, and, in view of the superior utility of the device over those in prior use and its immediate commercial success, must be held to disclose patentable invention. Also *held* infringed.

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

For opinion below, see 142 Fed. 221.

Frank Busser and George J. Harding, for appellant.

Harold Binney and Joseph C. Fraley, for appellee.

Before DALLAS and GRAY, Circuit Judges, and CROSS, District Judge

CROSS, District Judge. The patent in suit relates to new and useful improvements in conveyor-belt apparatus. It was issued to one Thomas Robins, Jr., November 17, 1896, is known as No. 571,604, and was duly assigned to the complainant on the 30th day of November, 1897. The device is intended for the transportation in bulk of coal, ore, minerals, grain, and other like substances. Conveyor-belts vary in width and length according to circumstances, and, to the end that they may convey the material without spilling, it is desirable that they should be concaved by turning up the edges, giving them a trough-like shape. It is also necessary that they should be supported at frequent intervals to prevent them from sagging, not only of their own weight, but more especially because of the load superimposed thereon. This support is afforded by rollers or pulleys actuated solely by the friction of the belt in passing over them, and they are therefore commonly known as "idlers." It is desirable that these idlers should not only support the belt as above indicated but should also permit it to move over them smoothly and with the least possible friction and disturbance. The patent in suit embraces the composition and construction of a conveyor-belt, and also the idlers or pulleys supporting the

same. It is with the latter portion of the patent only that we are concerned. The claims involved in the suit are Nos. 5 and 6, and are as follows:

"(5) The supporting pulleys, L, K, L, the hollow bearings, F, therefor, and the horizontal and turn-up hollow shafts secured in the said bearings, and the oil devices mounted on the ends of the turn-up shafts, substantially as set forth.

"(6) In combination, the two brackets or castings suitably supported, the horizontal pulley mounted between them, the turn-up shafts secured in the said brackets or castings, and the pulleys L, loosely turning thereon, substantially as set forth."

The bill of complaint is in the usual form, and charges the defendant with infringement of the above claims. The defendant denies infringement, and also denies the validity of the patent in suit. Appellant's brief, however, lays particular stress upon the defense of noninfringement. Conveyor-belts were originally supported by a single horizontal cylindrical pulley, upon which the belt rested in a flat position. Later the belt was supported and troughed by means of a spool-shaped pulley or idler. Both of these forms, however, proved to be objectionable and inadequate; the former because, as the belt was carried flat, there was a constant tendency to spill the load over its sides, and the latter, or spool-shaped pulley, because its varying diameter necessarily caused the belt in its progress to slip, with resultant friction, loss of power, and comparatively speedy destruction. Several patents have been cited as anticipations of the patent in suit, but reliance to show anticipation is chiefly placed upon the Healey patent, issued May 21, 1873, and the Creager patent, issued November 15, 1887. The Healey patent discloses a horizontal pulley in suitable bearings, with separate side pulleys set at an angle with the horizontal pulley to trough the belt. The side pulleys are, however, independently mounted, and do not lie in the same vertical plane with the horizontal pulley. The drawings and specifications clearly disclose an arrangement of the pulleys whereby the horizontal pulley is located to a greater or less degree forward of the angular or troughing pulleys. The result of this construction is that any given cross-section of the belt is not supported by the three pulleys at the same time. It is first supported at the center by the horizontal pulley, and then, as it advances, it is supported at the sides by the angular pulleys. The Healey device was to some extent a paper patent, since it never came into general or extensive use. It had obvious disadvantages. The testimony clearly demonstrates that in its use there is much more friction upon the belt than in the patent in suit. Furthermore, the belt is comparatively soon cracked by sagging between the lateral pulleys where it is unsupported by the horizontal pulley; then, too, the load is not borne so smoothly, nor can it be carried up so steep an incline, because of the constant shaking and joggling of the belt in passing over rollers adjusted in different vertical planes. The Healey patent, although issued about 18 years prior to the patent in suit, never seems to have suggested to any one a construction like that of the Robins patent, which was designed to, and does substantially, obviate all of the disadvantages just adverted to in the use of the Healey patent. The Creager patent is so unlike the complainant's that

it requires but slight consideration. It shows three rollers in the same vertical plane, all turning upon a common horizontal axis. The side rollers, however, are not of cylindrical shape, but are fashioned like the ends of an ordinary spool. This construction perhaps lessened, but did not, since the side pulleys were not of uniform diameter, obviate, the objections inherent in the solid spool-shaped pulley; the same friction, loss of power, and excessive wear upon the belt still existed. With respect to the patents just referred to, the defendant, however, takes the position that while, possibly, neither of them, considered by itself, is like the complainant's or suggests it, yet when it is recalled that the Healey patent discloses three cylindrical rollers with the side rollers set at an angle, but in a different vertical plane, and that the Creager patent shows three pulleys, which, although not cylindrical, are in the same vertical plane, the two patents do, taken together, disclose all that is novel in the complainant's patent, and that there was no novelty or invention in combining them. We cannot, however, assent to this contention. Both patents were old at the time Robins made his invention, yet he was the first to arrange cylindrical rollers so as to trough the belt, and by operating them in the same vertical plane obviate substantially all of the disadvantages, not only of the Healey and Creager patents, but of any other construction known to the art. The device in suit was a success from its inception, it came at once into general use, and we are satisfied is of manifest novelty and great utility. The testimony shows that it practically doubles the life of the belt, because of the reduced friction and the regular and constant support which it receives. This consideration, coupled with its undoubted commercial success from the outset, would be entitled to turn the scales in favor of the validity of the patent, if it were otherwise in doubt. "Where the patented invention consists of an improvement of machines previously existing it is not always easy to point out what it is that distinguishes the new and successful machine from an old and ineffectual one. But when, in a class of machines so widely used as those in question, it is made to appear that at last, after repeated and futile attempts, a machine has been contrived which accomplishes the result desired, and when the patent office has granted a patent to the successful inventor, the court should not be ready to attempt a narrow or astute construction, fatal to the grant." Keystone Mfg. Co. v. Adams, 151 U. S. 139, 144, 14 Sup. Ct. 295, 297, 38 L. Ed. 103. "The argument drawn from the commercial success of a patented article is not always to be relied upon. Other causes, such as the enterprise of the vendors and the resort to large expenditures in advertising, may cooperate to promote a large marketable demand. Yet, as was well said by Mr. Justice Brown in the case of Consolidated Brake-Shoe Co. v. Detroit Co. (C. C.) 47 Fed. 894: 'When the other facts in the case leave the question of invention in doubt, the fact that the device has come into general use, and has displaced other devices which had previously been employed for analogous uses, is sufficient to turn the scale in favor of the existence of invention.' Krementz v. The S. Cottle Co., 148 U. S. 560, 13 Sup. Ct. 721, 37 L. Ed. 558. At this point we are constrained to say that we cannot yield our assent to the argument that

the combination of the different parts or elements for attaining the object in view was so obvious as to merit no title to invention. Now, that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result never attained before, it is evidence of invention. It was certainly a new and useful result to make a loom produce fifty yards a day, when it never before had produced more than forty, and we think that the combination of elements by which this was effected, even if those elements were apparently known before, was invention sufficient to form the basis of a patent." Loom Co. v. Higgins, 105 U. S. 580, 591, 26 L. Ed. 1177. See, also, Topliff v. Topliff, 146 U. S. 156, 164, 12 Sup. Ct. 825, 36 L. Ed. 658; Consolidated Valve Co. v. Crosby Valve Co., 113 U. S. 157, 179, 5 Sup. Ct. 513, 28 L. Ed. 939; Magowan v. New York Belting Co., 141 U. S. 332, 343, 12 Sup. Ct. 71, 35 L. Ed. 781; The Barbed Wire Patent, 143 U. S. 275, 292, 12 Sup. Ct. 443, 36 L. Ed. 154.

The defendant insists, however, that there is nothing in the claims under consideration which necessarily requires that the axes of the three pulleys shall be in the same vertical plane. The claim refers to two brackets or castings, suitably supported, with horizontal pulleys mounted between them, and turn-up shafts are described as secured in said brackets or castings. This language indicates, and we think means, that the three pulleys are to be mounted with their axes in the same vertical plane. The language used, without straining it, permits this construction, and a reference to the drawings and specifications removes any possible doubt which might otherwise exist. Moreover, it seems to us that a construction of the claim which would require that the axes of the pulleys should be located otherwise than in the same vertical plane would clearly be forced and unnatural. The construction which we have adopted is consistent with the other requirements of the claim, and certainly does no violence to any of them; but, if any doubt existed as to the meaning of the claim, or if it were susceptible of two interpretations, it would be both right and proper that reference should be made to the drawings and specifications, not for the purpose of changing or altering the claim, but to ascertain its true and proper interpretation. "In a case of doubt, where the claim is fairly susceptible of two constructions, that one will be adopted which will preserve to the patentee his actual invention." McClain v. Ortmayer, 141 U. S. 419, 425, 12 Sup. Ct. 76, 78, 35 L. Ed. 800. "The court should proceed in a liberal spirit, so as to sustain the patent and the construction claimed by the patentee himself, if this can be done consistently with the language which he has employed." Klein v. Russell, 19 Wall. 433, 466, 22 L. Ed. 116. The claim must be read in the light of the description, and, if it be fairly susceptible of two meanings, that construction must be adopted which will sustain, rather than defeat, the patent." McEwan Bros. Co. v. McEwan (C. C.) 91 Fed. 787. See, also, Stilwell-Bierce & Smith-Vaile Co. v. Eufaula Cotton Oil Co., 117 Fed. 410, 414, 54 C. C. A. 584; Electric Smelting & Aluminum Co. v.

Carborundum Co., 102 Fed. 618, 42 C. C. A. 537; Hogg v. Emerson, 11 How. 587, 606, 13 L. Ed. 824. Thus interpreted, all doubts are dissipated, and we find that the claim requires that the three pulleys be mounted with their axes in the same vertical plane.

Claim 6 as thus defined is clearly infringed by the defendant's device, which has a central pulley supported by two brackets, and the equivalent of turn-up shafts secured in said brackets. The additional brackets or supports at the ends are immaterial, and, as one of complainant's experts says of them, "they secure the shafts in their bearings as called for in claims 5 and 6 of the patent in suit." The substitution of pulleys integral with their central shaft or trunion ends rotating in sockets for pulleys loosely revolving on shafts whose ends are fixed is too obvious, as well as too old in mechanical arts, not to make one the equivalent of the other in a case like the present. It is clearly a case of attempting to avoid infringement by the use of mechanical equivalents. The defendant's devices have the three-pulley combination for supporting and concaving the belt at a single cross section or line, and the pulleys are in the same positions and relations with each other, and mounted in the same relative position between brackets, as the patent in suit. The form has been changed to the extent that the pulleys in the defendant's device have trunions revolving in fixed bearings, while the complainant's has a fixed axis, with pulleys turning loosely thereon. The only differences are inconsequential and manifest evasions. There is a constant tendency by those who seek to evade the claims of a patent to dwell too much on verbal refinements, and not enough on the reality and substance of the things to which the language of the claim refers. This tendency must be avoided in order to do justice to inventors, and it sometimes must be avoided in order to protect the public from too great a scope of the monopoly claimed by the patentee. It is true that the law requires that precise invention of the patent should be described adequately in the claims, and, if the patentee has claimed less than he is obviously entitled to, as manifested in the specifications and drawings, he must suffer the consequences. But this requirement of the law only makes the caution above expressed the more necessary, and mere verbal refinement must not be allowed to obscure the real nature of the patented invention, if it can be fairly gathered from the language of the claims. We are therefore clearly of the opinion that the defendant's device infringes claim 6 of the patent in suit.

Claim 5 is like claim 6, except that it provides for oil devices mounted on the ends of the turn-up shafts. Oiling devices of a somewhat similar construction and purpose are old, but, as applied and used in the patent in suit, whereby the oil passing down the hollow shaft with the turn-up ends, and passing through apertures in the shaft, lubricates all of the pulley bearings without the use of separate grease-cups, disclose a true combination. The method of oiling adopted by the patent in suit is novel, and harmonizes peculiarly well with its hollow shaft and pulley arrangement. The respondent's oiling device adopts the same principle and substantially the same method and construction, so far as it can, considering that the complainant's pulleys run loosely upon the shaft and the defendant's upon trunions supported by brackets.

The patent in suit has a hollow shaft, through which the oil passes to lubricate the pulleys, while the defendant uses hollow brackets, through which the oil passes to lubricate the trunions of the pulleys. Both have the oil cups mounted on, or at the ends of, the side pulley, and on or at the ends of the turn-up shafts or trunions. They therefore both accomplish the same result by the same means, in substantially the same way.

We therefore conclude that claim 5 is likewise valid, and has been infringed by the defendant.

The decree below will be affirmed, with costs.

WILLIAMS CALK CO. v. KEMMERER et al.

(Circuit Court of Appeals, Third Circuit. June 6, 1906.)

No. 3.

1. PATENTS—DESIGNS—SUBJECTS PATENTABLE.
   An article to be a proper subject for a design patent must be one which by artistic treatment in form and configuration may be given value from an æsthetic point of view.
   [Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 13.]
2. SAME—HORSESHOE CALK.
   The Williams design patent, No. 29,793, for a horseshoe calk, is void because the subject of it is not one patentable as a design.
3. SAME—INFRINGEMENT—HORSESHOE CALK.
   The Williams patent, No. 666,583, for a horseshoe calk, if valid, is limited by the prior art and by the proceedings in the patent office to the precise structure shown. As so limited, *held* not infringed.

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

For opinion below, see 136 Fed. 210.

H. S. Knight, for appellant.

Archibald Cox, for appellees.

Before DALLAS and GRAY, Circuit Judges, and CROSS, District Judge.

CROSS, District Judge. On December 13, 1898, design letters patent No. 29,793, were issued to one John R. Williams for a new, useful, and original shape or configuration of a horseshoe calk, and on January 22, 1901, letters patent No. 666,583 were granted to said Williams for certain new and useful improvements in horseshoe calks, both of which patents were subsequently assigned to the complainant. The complainant has filed a bill alleging infringement of both of these patents, and asking the usual relief in such cases. The Circuit Court, on final hearing, dismissed the bill, with costs, both on the ground of the invalidity of the patents and because they had not been infringed.

We think the design patent is invalid. Section 4922 of the Revised Statutes [U. S. Comp. St. 1901, p. 3396] was not intended to embrace a patent for such a design as is set forth in the design letters patent under consideration. It was intended, in order that

a design might be patentable, that it should of itself, as an artistic configuration, present something new and useful from an æsthetic point of view. Within the meaning of the act, there is nothing artistic, ornamental, or decorative in the design of a horseshoe calk; it is essentially a mechanical, and not an æsthetic, device. It is impossible to suppose that it should be bought or used because of its æsthetic features. Its success as a calk would depend upon its useful, and not its artistic, character. As was well said in Rowe v. Blodgett & Clapp Co. (C. C.) 103 Fed. 873:

"Design patents refer to appearance, not utility. Their object is to encourage works of art and decoration which appeal to the eye, to the æsthetic emotions, to the beautiful. A horseshoe calk is a mere bit of iron or steel, not intended for display, but for an obscure use, and adapted to be applied to the shoe of a horse for use in snow, ice, and mud. The questions an examiner asks himself while investigating a device for a design patent are not 'What will it do?' but 'How does it look? What new effect does it produce upon the eye?' The term 'useful' in relation to designs means adaptation to producing pleasant emotions. There must be originality and beauty; mere mechanical skill is not sufficient."

The views thus expressed by Judge Townsend were affirmed by the Circuit Court of Appeals for the Second Circuit in 112 Fed. 61, 50 C. C. A. 120, and fully express our own as to this patent.

The mechanical patent of the complainant has only one claim, as follows:

"A horseshoe-calk constructed with an attaching screw-shank, a square base, radial blades having vertical flattened beveled edges, vertical straight sides, and rounded, beveled, outwardly-tapering knife-edge lower ends, providing a conoidal-shaped tread, and arching recesses between the blades beneath the square base, the widening of the inner ends of the blades to form the arching recesses, preventing the calk from becoming completely worn down, so as to leave a wrench-hold."

This claim apparently contains seven elements which are set forth with unusual particularity and minuteness. Without considering the question of the validity of this patent, it is sufficient to say that even a cursory examination of the prior art discloses a necessity for the restrictions which the patentee imposed upon himself when he phrased his claim with such guarded and minute particularity. This was not done idly or of choice, but because it was not otherwise possible for him to disclose anything that savored of novelty or invention.

It is perhaps true that the exact form of construction claimed by this patent cannot be found in any other one patent of prior date, but all, or substantially all, of the elements it embraces can be repeatedly found in the prior art. For example, we find the square base, the screw attachment, the radial cruciform blades, the vertical straight sides, the arching recesses between the blades, and the conoidal shaped tread. It is obvious that the foregoing embrace the salient features of the complainant's device. The necessity which so conspicuously controlled the patentee in minutely particularizing and qualifying the elements of his claim becomes all the more apparent, when we examine the file-wrapper of the patent in suit. Such an

examination discloses that he was compelled over and over again to amend and narrow his claims in order to avoid the prior art, and prevent the rejection of his application. Thus the file-wrapper shows that Williams first claimed for calks with the ends formed with bevels, and again with rounded lower ends. These were rejected; the examiner saying:

"There is no invention whatever in rounding off or beveling the cutting edges as desired, this being a matter of mere choice in shapes, and inevitably resulting from the ordinary wear of the shoe for a few hours or days."

After such rejection the claims were amended, so that they respectively read having "beveled lower ends," "rounded lower ends," and "beveled and rounded lower ends." These amended claims were in turn rejected for substantially the same reasons as those given for the prior rejection. The claims were then consolidated and amended so as to read with "rounded beveled outwardly tapering knife-edge lower ends, providing a conoidal tread"; the applicant adding at the foot of his amendment the following:

"The single claim now presented is restricted to a construction not found in the references, and which comprises a conoidal tread of peculiar construction."

This amendment was likewise rejected, the examiner stating that:

"The arching recesses, the beveling and the knife-edges are fully disclosed in the art. [See O'Neill.] The conoidal tread has been commented on previously. The slight difference shown is a matter of degree rather than of invention."

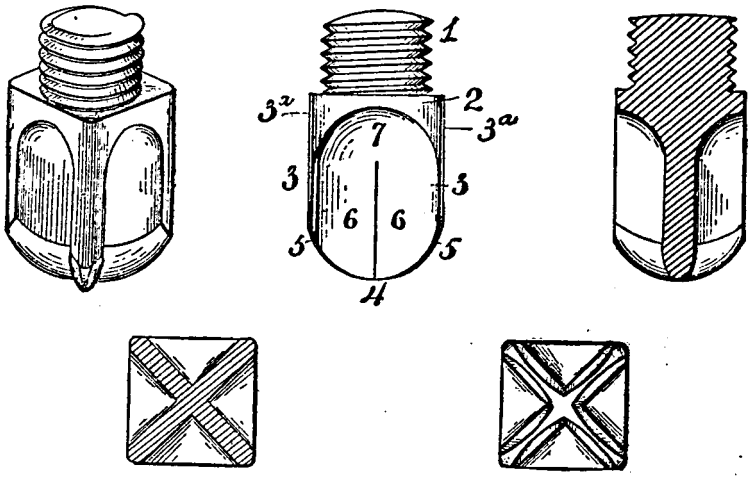
The claim was then put in the form in which it appears in the patent, and as thus framed was at first rejected, but was subsequently allowed and the patent issued.

This brief synopsis of the file-wrapper, taken in connection with what has been said in relation to the prior art, demonstrates that the claim if upheld, must be narrowly and strictly construed. The waivers and disclaimers of the file-wrapper were acquiesced in by the patentee in order to obtain his patent, and he is estopped from denying their force and effect.

"Where an applicant for a patent to cover a new combination is compelled by the rejection of his application by the Patent Office to narrow his claim by the introduction of a new element, he cannot after the issue of the patent broaden his claim by dropping the element which he was compelled to include in order to secure his patent." Shepard v. Carrigan, 116 U. S. 593, 597, 6 Sup. Ct. 493, 29 L. Ed. 723. "It is well settled that the claim as allowed must be read and interpreted with reference to the rejected claim and to the prior state of the art, and cannot be so construed as to cover either what was rejected by the patent office or disclosed by prior devices." Hubbell v. United States, 179 U. S. 77, 80, 21 Sup. Ct. 24, 45 L. Ed. 95.

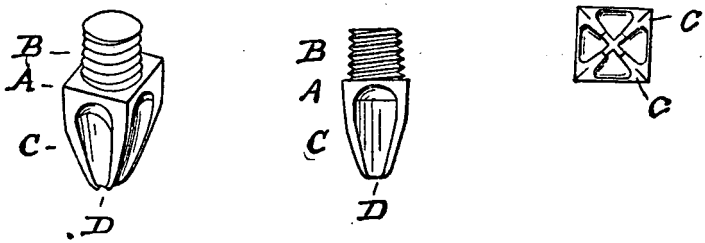
When the claim is construed as we have indicated that it must be, it does not appear open to question that the defendants' device does not infringe the complainant's. Its patent is distinguished from the prior art, if at all, solely by the construction appearing at the end or tread of the calk. The patentee claimed as to this part of his de-

vice two rounded cutting or knife-edged surfaces, such as are plainly indicated in figures 1 and 4 of the drawings accompanying the patent and here reproduced.



The defendants' calk is of entirely dissimilar construction, as a glance at the subjoined diagrams will show.

Fig. 1. Fig. 2. Fig. 3.



They are not knife-edged, they are not rounded, they are not outwardly tapering, they are not vertical, and are rounded rather than beveled, but, if beveled, they are only slightly so, and at the lower ends. The above differences are disclosed by an inspection of the diagrams and exhibits in the case. If, in addition to such inspection, an attempt were made to apply the language of the claim of the patent in suit to the defendants' device, it would be unsuccessful, except in two or three particulars. The screw-shank attachment, the square base, and the arching recesses between the blades beneath the square base of the two devices might be sufficiently described in the same terms, but in all other respects language which would adequately and appropriately define the one would be entirely inadequate and inappropriate to define the other. In suggesting, as we have just

done, that perhaps three of the elements of the claim of complainant's patent can be found in the defendants' alleged infringing device, we have allowed much more than is granted by the defendants' expert, who says:

"Of the seven elements of this claim, I can find, therefore, but one which is unquestionably present, namely, the screw-shank. The second and third, namely, the square base and radial blades, have at the best but an imperfect representation. The fourth, sixth, and seventh elements are certainly absent, even on the most liberal construction."

Then, after expressing the opinion that the complainant's patent discloses no patentable novelty, he adds:

"It is obvious, however, that with three of the seven elements of the combination entirely absent from the exhibit [defendants'] under consideration, and with three of the remaining but imperfectly represented, it is impossible to consider the exhibit as an embodiment of the combination of elements recited in the claim of the patent in suit."

But, as was said by the court below:

"The significant point of difference to that where the claim [complainant's] calls for blades with strictly vertical sides developing into completely rounded ends, the defendants, after narrowing down their calks by tapering the sides, cut off the ends of the blades so as to form a sort of truncated pyramid or cone; the cruciform radial effect being at the same time retained, and an effective gripping surface provided by a notching or pointing of the ends. Form here is essential, and equivalency of function counts for little in view of the prior art, as well as the express terms of the claim."

If the complainant held a basic or initial patent, a different view might perhaps be taken of the case, but confined as its patent is in its scope, and limited as it must be to the precise wording of its claim, we do not hesitate to say that the defendants' device is not an infringement.

The decree below, dismissing the bill, with costs, is affirmed.

CORTELYOU et al. v. CHARLES E. JOHNSON & CO.

(Circuit Court of Appeals, Second Circuit. March 16, 1906.)

No. 139.

1. PATENTS—CONTRIBUTORY INFRINGEMENT—LIMITATION OF DOCTRINE.

The doctrine of contributory infringement should be limited to cases where the articles sold are either parts of a patented combination or device, or are produced for the sole purpose of being so used as to constitute infringement, and should not be extended to apply to ordinary and staple articles of commerce, used in connection with a patented machine, because the patentee sells or licenses such machine upon the condition that he alone shall furnish such articles. Townsend, Circuit Judge, dissenting.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 400–402.

Contributory infringement of patents, see note to Edison Electric L. Co. v. Peninsular Light, P. & H. Co., 43 C. C. A. 485.]

2. SAME—SUFFICIENCY OF PROOF.

Evidence considered, and *held* insufficient to sustain the burden of proof resting on a complainant to show that defendant had knowledge of restrictions contained in the licenses granted by complainant to users of its patented machines, so as to charge defendant with liability for contributory infringement in selling an article to such users to be used in violation of such restrictions.

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

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York, awarding an injunction restraining the defendant from selling ink to the licensees of a machine known as the "rotary neostyle." This machine is made under letters patent No. 584,787, granted June 22, 1897, to Henry W. Lowe, and is sold with the following notice attached:

"License Agreement.

"This machine is sold by the Neostyle Company with the license restriction that it can be used only with stencil paper, ink, and other supplies made by the Neostyle Company, New York City."

The defendant is not charged with direct infringement of the Lowe patent, but is charged with contributory infringement, in violation of the license agreement.

The opinion of the Circuit Court is reported in 138 Fed. 110.

Francis T. Chambers, for appellant.

Samuel Owen Edmunds and Edmund Wetmore, for appellees.

Before COXE and TOWNSEND, Circuit Judges, and HOLT, District Judge.

COXE, Circuit Judge. In the case of Cortelyou v. Lowe, 111 Fed. 1005, 49 C. C. A. 671, this court fully accepted and approved the decision in the Heaton Peninsular Button-Fastener Case (77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728), and by so doing made it, in effect, the law of the Second Circuit. The opinion of Judge Lurton in the Peninsular Case covers the entire field of controversy and presents the

arguments, and all the arguments, in support of the complainants' contention. It is a clear, comprehensive and convincing exposition of the law as applicable to the facts as stated in the bill and admitted by the demurrer, and, upon similar facts, is as controlling upon us as if it were originally promulgated by this court. The fact that the court is now differently constituted is, of course, quite immaterial. If entitled to be considered at all upon a question of general significance, like that under consideration, it should operate as an additional reason for adhering to existing conditions. It is the court, not the individuals composing it, that declares the law; and it would be unseemly, to say the least, to review propositions previously established, even though as an original question we might have been led to a different conclusion. Cimiotti Co. v. Nearseal Co., 123 Fed. 479, 59 C. C. A. 58.

The Lowe Case arose upon the same general contention which is made in the case at bar, namely, the alleged unlawful sale of ink to the licensees of the Neostyle machine. The injunction order, which was there affirmed, enjoined the making, selling or offering for sale of any duplicating ink adapted for use on restricted rotary neostyles with intent that such ink shall be so used. It is true that an estoppel was alleged in the bill by reason of the fact that the defendant, Harry W. Lowe, is the inventor and had assigned to the complainant the patent not only but the secrets and formulas for the manufacture of the ink and had agreed not to engage in the manufacture and sale of said ink. Harry W. Lowe did not defend the suit and it is very doubtful whether the estoppel alleged could be urged against John C. Lowe. Granting that it could be, it is apparent that it was not relied upon either in the Circuit Court or in this court, where the affirmance rested solely upon the concurrence of the court in the doctrine of the Peninsular Case.

No two cases are identical upon the facts. Differences can always be pointed out, but the question for the court to determine is are the differences of such a character as to induce the court to believe that if the facts in the second case had been present in the first case the same result would have been reached; in other words, are the cases the same in principle? The Peninsular and Lowe Cases have been generally followed in this and other circuits, several of the causes being unreported, but see Cortelyou v. Carter (C. C.) 118 Fed. 1022; Brodrick Co. v. Mayhew (C. C.) 131 Fed. 92, affirmed (C. C. A.) 137 Fed. 596. We therefore feel ourselves controlled by the Peninsular and Lowe Cases upon every point where the facts cannot be fairly distinguished, but, on the other hand, for reasons hereafter stated, we are of the opinion that the doctrine of those cases should not be extended to cover cases where the record shows a substantial distinction.

The majority of the court, consisting of Judge HOLT and the writer, is of the opinion that the decree at bar pushes the doctrine of contributory infringement to its extreme limits if, indeed, it does not transgress those limits. The doctrine originated in a desire to secure to a patentee complete protection in all the rights granted him by the patent, but it was confined to those rights; it went no farther. One who sold an element of a patented combination, which could not be used except in an infringing combination or device, was not permitted to reap the

benefits of such sale. He did not himself directly infringe, but he promoted the infringement of others by putting in their hands a device which could only be used in violation of the patent. When confined to articles, whether covered by the patent or not, which are made for the express purpose of inducing infringement and are not intended for any legitimate use, the doctrine of contributory infringement is logical, just and salutary. But we doubt the wisdom of extending it to the ordinary commodities of life, used in connection with a patented machine, because the patentee sells or licenses the machine upon the condition that he alone is to furnish these commodities. Care should be taken that the courts, in their efforts to protect the rights of patentees, do not invade the just rights of others, engaged in legitimate occupations, by creating new monopolies not covered by patents and by placing unwarrantable restrictions upon trade. We think it is clear that the doctrine may be carried far enough to produce such results. For instance, should the patentee of a fountain pen, by such a notice as we have under consideration, be permitted to hold as an infringer one who sells ink to the owner of the pen even though he knows of the restriction? To compel the dealer to make inquiries and take the precautions necessary to save himself from being sued as an infringer would place intolerable burdens upon business. Should the patentee of a motor car, by such proceedings, be able to hold the monopoly on all gasoline used in its propulsion, or the patentee of a stove or a refrigerator have an action of infringement against one who furnishes ice or coal, respectively, to its owner? These may seem to be extreme cases and yet they are not so far beside the mark as may at first appear. It was stated at the bar that among the "supplies" necessary for the operation of the neostyle were oil and varnish. It is not easy to perceive how a machinist who lubricates the machine and the painter who varnishes it can escape the charge of infringement. If the doctrine be driven to its ultimate conclusion the merchant and the consumer may find themselves enmeshed in a network of monopolies embracing all the necessaries of life. No one may safely sell coffee to the consumer but the patentee of his coffee mill, no one can furnish him flour but the patentee of his baking pans and he may yet be compelled to buy milk from the patentee of his milk can and soap from the patentee of his bath tub. It is manifest that the doctrine may be expanded ad infinitum. We incline to the opinion that the line should be drawn to include those articles which are either parts of a patented combination or device or which are produced for the sole purpose of being so used and to exclude the staple articles of commerce.

For these reasons we think that the complainants should be confined strictly to existing law and that the doctrine should not be expanded so as to brand as a wrong-doer one who, having no agreement express or implied with the patentee, sells to the public commodities needed in the ordinary affairs of life.

We are of the opinion also that the complainants have not shown sufficient notice of the terms of the license agreement to bring them within the law of the Peninsular Case. In that case the bill alleged,

and the demurrer admitted, that the defendants "with full knowledge of this method of putting complainants' monopoly in general use are making and selling staples adapted only to use with these machines." In this case, as in all cases, the burden is on complainants to prove infringement by a preponderance of evidence. The defendant's knowledge of complainants' "selling plan" is specifically alleged in the bill and denied in the answer. It must be proved. The presumption drawn from the fact that the machine was largely advertised and therefore the officers of the defendant must have known its character is entitled to little weight in the face of the explicit testimony of these officers that they did not know. Having assumed that they had knowledge of the machine the next presumption is that "they doubtless inspected the Neostyle Company's ink used thereon." All this is plausible but insufficient.

The foundation of the complainants' action is defendant's knowledge, not of the machine, not of the ink, but of the restriction agreement which alone made the sale of ink to the owners of the neostyle machines unlawful. The defendant had a right to sell to the owner of a machine, sold without the restriction, and there was nothing unlawful in selling to an owner of a machine having the notice thereon unless the defendant knew of such notice. The defendant is an old and well known establishment, having been engaged in the manufacture and sale of ink for many years. The proof shows that it made six sales in all of stock ink to be used on neostyles, but it also appears that there were a number of machines in use at the time of defendant's sales which were sold free from all restrictions and there is no proof, except in one instance, that there was a "license agreement" on the machine at the time of the sale by defendant, much less that the defendant knew of the agreement. In no instance did the defendant solicit the sale; it merely booked orders received. The only testimony which tends to show knowledge, and the only testimony establishing a sale in the Southern District of New York, relates to two sales to Barney Gerber who was employed by the complainants to procure a sale, in New York, of ink for a machine having on it the license agreement. In fact the notice was not the one now relied on, but one which was abandoned several months before any of the acts complained of in this controversy.

We are of the opinion that this transaction offers insufficient basis to sustain this action. The sale was not solicited by the defendant, but by the complainants. As Gerber was acting for the complainants it is clear that he was not induced to infringe relying upon any statement of defendant's agent who made the sale. They could not suffer any injury from such a transaction. Furthermore, though we are convinced that Randall, defendant's salesman, read the restriction notice it is evident that he misunderstood its import as he assured Gerber that no trouble would follow from buying the defendant's ink as it was not patented.

We are convinced that the preponderance of evidence is to the effect that the defendant did not know the nature of the accusation against it until the bill was filed. No reason appears why the com-

plainants should not have notified the defendant by letter, or otherwise, of the precise nature of their contention as they seem to have done in other instances. Instead of doing so they have preferred to leave this most important branch of their case to conjecture and to the unsatisfactory testimony of one who was employed by them to play the part of a contributory infringer at the alleged instigation of the defendant's salesman who was located in New York.

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

TOWNSEND, Circuit Judge. I concur in the reversal of the decree solely on the ground that the evidence is insufficient to show that the defendant had notice that the Neostyle for which the ink was ordered had been sold under any restriction.

I cannot concur in the argument of the majority of the court that a theoretical public policy should be permitted to deprive a patentee of his rights conferred by the grant of the patent. The Supreme Court of the United States, referring to the decisions declaring the rights of the patentee and their limitations, says in the recent decision in Bement v. Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058:

"These cases are cited in the opinion of the court in the case of Heaton Peninsular Co. v. Eureka Specialty Co., supra. Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee, for the right to manufacture or use or sell the article, will be upheld by the courts."

And, as the Court of Appeals said in Heaton Peninsular Co. v. Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728:

"As to the right to use the invention, he, the purchaser, is obviously a licensee, having no interest in the monopoly created by the letters patent."

In my view of the case, the reasoning of the majority of the court is contrary to the law as laid down by the Supreme Court and by the courts in the various circuits, and virtually reverses our decision in 111 Fed. 1005, 49 C. C. A. 671, adopting and approving that of the Circuit Court of Appeals for the Sixth Circuit in Heaton Peninsular Co. v. Specialty Co., supra. But, apart from these considerations, the whole argument ab inconvenienti of the majority of the court, based on the dangerous doctrine that public policy may nullify existing laws because said laws may be perverted by future unwarranted applications or extensions thereof, seems to be fallacious in theory and unwarranted in fact. It is met by the admission of the appellants, which is abundantly established by the authorities, that by a properly worded contract in the form of a lease all the advantages sought to be secured by the owner of the patent may be effectually protected. The only contention here is that this is a case of a sale, and that a sale of a patented article removes it from the monopoly of the patent. Furthermore, the self-interest of the patentee, seeking to derive a

profit from his patent, will sufficiently protect the public against burdensome or unreasonable restrictions upon its use. Let us suppose, however, that a patentee having a valuable invention wishes to protect himself against the ruin of its reputation by the use of improper or dangerous material. Will it be claimed in the case of a patent gun, for example, adapted for use only with a certain kind of powder, that the owner of the patent may not sell the gun on condition that only said certain kind of powder shall be used therein? Or, in the case of a delicate mechanism, that it shall only be used with a certain kind of oil or chemical preparation furnished by the owner of the patent? Or suppose, as in the case at bar, the patentee, having created an invention which is of great benefit to the public, finds that his chief profit may be derived from selling the patented article at a nominal figure to the public, on condition that the public shall use certain unpatented materials in connection with it. Is it so that a patentee who has a right to withhold the use of his invention altogether from the public may not thus secure the profit from its use and greatly increase its sales by selling it at a price below its cost, under conditions whereby the sole profit to be derived by him from the benefit thus conferred upon the public shall be by the purchase of materials to be provided by him? If a patentee, desiring to protect himself in the use of a lamp, for example, may do so by a lease on the condition that only a certain kind of oil shall be used therein, may he not, in the same way, protect himself by sales of mantels to be used only on said lamps, but which could not be leased because they perish in the using?

If any attempts to unwarrantably impose an onerous monopoly, such as are suggested by the majority opinion, should hereafter be so presented as to call for the interposition of a court of equity, we think the machinery of such court would be adequate for that purpose. It will be sufficient, however, to consider the question when it arises. No such question is presented in this case.

ÆOLIAN CO. v. HARRY H. JAELG CO.

(Circuit Court, S. D. New York. January 30, 1906.)

On Motion for Preliminary Injunction.

Harold Binney, for the motion.
Charles Neave, opposed.

PER CURIAM. This motion is predicated on a claim of contributory infringement of a patent sold under a license agreement. The questions involved have been recently considered and disposed of in this circuit, and injunctions have been granted in similar cases by Judge Lacombe, of the Circuit Court, and Judge Ray, of the District Court. While the case at bar may be distinguished in some of its aspects from the other cases, yet we are constrained to grant the motion on the authority of the previous decisions. This disposition of the case is made solely in view of the prior decisions, and is not to be taken as an intimation as to the probable disposition of the case of Cortelyou v. Johnson, 145 Fed. 933, in the Circuit Court of Appeals.

AMERICAN SALESBOOK CO. et al. v. CARTER-CRUME CO., Limited, et al.

(Circuit Court, W. D. New York. April 30, 1906.)

No. 207.

PATENTS—INVENTION—MANIFOLDING SALESBOOKS.

The Beck patent, No. 647,934, for a manifolding salesbook and holder, the purpose of the improvement being to facilitate the manipulating of the leaves without soiling the fingers with the carbon sheet, was not anticipated, and in view of the success of the device shown must be conceded invention. Also *held* infringed.

In Equity. On final hearing.

M. B. Philipp and H. H. Rockwell, for complainants.
Warfield & Duell, for defendants.

HAZEL, District Judge. This suit in equity is brought for the infringement of the second and third claims of letters patent No. 647,934, issued April 24, 1900, to Warren F. Beck for "manifolding salesbook and holder." The defenses are want of patent ability, prior use, and anticipation. A phase of this controversy was heretofore considered by this court (125 Fed. 499) on demurrer to the bill, and the patent held invalid for want of invention and novelty, on the ground that the variation from the prior art was of a trifling character, not calling for the exercise of the inventive faculty and was perfectly obvious to those engaged in the manufacture of such devices. A decree was allowed dismissing the bill, and on appeal the Circuit Court of Appeals, without opinion, reversed such decree and required the defendants to answer. The cause is now submitted on final hearing. It may be fairly presumed that the appellate tribunal was of opinion, not

only that the grant of the letters patent required evidential facts to negative the assertion of want of novelty, but also that the claims on their face were not palpably lacking in patentability. Upon the former hearing it was thought that complainants' claim to invention rested solely in the cutaway portion of the carbon sheet, which exposed the underlying sales sheet and enabled manipulation of the leaves without soiling the fingers by contact with the carbon. The patent, however, is for a combination with a manifold pad of a transfer sheet overlying the leaves thereof and having a space clipped therefrom; the transfer-sheet folded over the loose ends of the assembled leaves of the pad and concealing such free ends, except where exposed by the clipped-out portion of the carbon. Thus access to such loose ends is prevented, except at the cutaway portion of the carbon, which cutaway part enables taking hold of the free ends to withdraw the leaves without manipulating or touching the carbon. Complainants claim that, by this arrangement of placing the thumb spacing at or near the free ends of the leaves of the manifold pad, exposing a portion thereof, the remainder of such free ends being otherwise concealed by the carbon sheet, a novel and patentable result was attained. Hence it appears that the claims involve something more than the mere cut-out portion of the carbon at the free ends of the leaves for the purpose of facilitating their removal from the pad without soiling the fingers. The utility of the structure is not denied.

According to the patentee the prior art contained many imperfections which retarded the convenient use of the manifolding salesbook. Manipulation of the carbon by inserting the same between the original and duplicate leaves with danger of soiling the fingers, the inability to utilize the entire leaves of the pad because the carbon did not completely cover the same, the liability of tearing the carbon sheet in withdrawing the original and duplicate leaves, the necessity of textile fabrics for the carbon and of specially made holders to clamp the carbon sheet, are some of the defects cited by complainants to substantiate their claim for novelty and utility in the Beck device. Stress is placed upon the requirements of the trade that the carbon sheet must completely rest upon or overly the leaves of the pad, otherwise a complete transfer of the writing on the original sheet would be impossible. Is complainants' assertion substantiated by the evidence? Was an advance made by the patentee in a field of invention circumscribed and extensively delved into by others? The specification, in recognition of the state of the art, says:

"My invention relates to improvements in the pads used by merchants and others in taking manifold copies of orders, etc., and to the holders for such pads; the objects of my improvements being: First, to provide a simple and cheap form of holder wherein a pad and a carbon or transfer sheet may be placed and replaced independent of one another; and, second, to provide means for manipulating the leaves of the pad without touching the transfer sheet with the fingers."

Claims 2 and 3 read as follows:

"(2) The combination, with a manifold-pad, of a holder or cover therefor having a carbon or transfer-sheet secured thereto, said transfer-sheet being folded over upon the leaves of the pad at their free ends and having a portion

cut away to expose a portion of the leaves at or near their free ends for the purpose set forth.

"(3) The combination, with a manifold pad, of a carbon or transfer sheet normally resting upon the top of the pad and overlying the leaves thereof, said transfer-sheet having a portion cut away to expose a portion of said leaves at or near their free ends for the purpose set forth, the leaves at their free ends being otherwise concealed by the transfer-sheet."

The second claim describes three elements, viz.: A manifold pad, a holder therefor, a carbonized sheet folded over upon the leaves of the pad at their free ends; such carbon sheet having a portion cut away to expose said free ends of the leaves. Claim 3 has two elements, a pad and a carbon sheet overlying the leaves and having a portion cut out to expose the leaves at or near their free ends; the leaves at their free ends being otherwise concealed by the transfer sheet. The general arrangement of the pad in question prevents taking hold of the leaves except where the carbon is cut out, and hence the underlying leaf is removable without touching the carbon sheet. That the cutaway portion must always be located at or near the free ends of the leaves, the free ends being otherwise concealed by the transfer sheet, would seem to be of the essence of the claims. Several forms of manifold pads for duplicate and triplicate copies are mentioned in the specification, and the inventor does not confine himself to the specified manner of fastening the transfer sheet in the holder. He expressly states that the carbon sheet may be attached to the holder by means of bails snapping over bosses, or when used without a holder may be pasted on the back of the pad. In brief, a broad claim is made for a manifolding pad combined with a transfer sheet having a portion cut away at or near the free ends of the leaves; the free ends of the leaves being otherwise concealed by the carbon sheet, and the object of the construction, as stated, being to enable removing the leaves without lifting the transfer sheet. In this situation the question is whether the prior art disclosed this device?

Defendants contend that the patent in suit is completely anticipated by the patent to Oldfield, No. 517,359, owned by defendants. This patent undoubtedly closely approaches the Beck invention. The Oldfield manifolding books in evidence are so-called side carbon books with a margin at the top side of the carbon sheet and a cutaway portion in the same at the lower right-hand corner. The specification points out that the carbon may be placed between the original and duplicate leaves by handling the upper broad uncarbonized margin thereof without danger of smutting the fingers. The functional object of the cutaway portion of the carbon sheet is not specially referred to in the specification, although the drawing attached to the patent shows such spacing at the lower right-hand corner. The transfer sheet in this patent is attached to the side and does not fall over the free ends, nor is the cutaway portion in the carbon sheet at or near the free ends, nor the manner of manipulation of the carbon and leaves like that of complainants' device. The free ends of the leaves are at the top of the pad, and, if the cutaway portion in the carbon sheet were at that end, it is thought the same result would follow as described in claim 3 of the patent in suit. The general arrangement of

the Oldfield pad warrants the inference that the principle use of the spacing was to remove the duplicate sheet without detaching the carbon, in the event the same had not been torn out with the original.

The next point relates to the prior public use of the embodiment of the patent in suit. The Mooney book manufactured by the defendant in 1895, has a cover with a carbon holder which consists of a wire extending from the upper to the lower end of the cover. To this wire is attached a clamp extending across the cover, but being shorter in width by half an inch. The carbon sheet which covers the leaves is firmly held over their free ends by the clamp. There is a notch or space cut out from the lower right corner of the carbonized sheet which defendants contend performs the functions of the patent in suit. Other Mooney books in evidence show the carbon sheet attached to the clamp which extends the entire breadth of the pad and without the notch at the lower right-hand corner. Complainants argue that the notch in the Mooney book was the result of a faulty construction occasioned by defendant's inability to supply a clamping device of sufficient width to hold the carbon sheet of the dimensions desired by Mr. Mooney; that the dimensions of the pad ordered by him were greater than the standard width, and to supply his order the defendants used a holder of standard width which for convenience necessitated cutting out a portion of the carbon. In short such construction was accidental and never designed for the function of complainants' device. This point is thought to have force, in view of the fact that defendants did not set up the pad in question in the original or first amended answer, and apparently the same came under their observation during the progress of the hearing. However, it is thought the Mooney structure does not disclose the elements of the claims in suit and was not intended to be operated in the manner of the Beck patent. Defendants gave evidence to show that the Mooney pad was commonly used in precisely the same way as the Beck invention; the notch being used for thumb spacing. My impression, however, is that the original method involved raising the clamping device to which the carbon sheet was attached to withdraw the original leaf lying thereunder and not the use of the clipped-out portion for that purpose. Moreover, the carbon sheet of the Mooney pad was not combined with the pad as to fold over and conceal the loose ends as specified in claim 3.

The Mandel triplicate book, manufactured by defendants in 1895, has two carbon sheets, the second of which is notched at the upper right-hand corner to facilitate handling the first without soiling the fingers. The carbons are placed in the center of the book; the leaves being numbered on either side thereof. This exhibit manifestly does not disclose claims 2 and 3. The character of the evidence in relation to the Binner book does not warrant its consideration to invalidate the patent in suit. Considerable testimony was given to show that in 1896 and 1897 the Binner company was engaged in manufacturing a salesbook which had a corner of the carbon slipped out to expose the underlying leaves and facilitate handling thereof. But the testimony in this regard is not strictly harmonious, and, in the face of complainants' contrary showing, a reasonable doubt arises as to its accu-

racy. An examination of the prior art, as shown in the patents to Frink, the Carter reissue, Randall, Kinnard, and Oldfield, would seem to indicate that invention was required to improve the manifolding arrangement described in such patents, specially in relation to the manner of manipulating the leaves to escape contact of the fingers with the carbon. For example: In the Carter reissue patent a tape was threaded through the carbon sheet, in the Randall patent a hardened tape or edge was attached to the carbon, and in other prior patents resort was had to various expedients to overcome the difficulty mentioned.

Beck abandoned the old side carbon which by handling easily became torn or worn, and by his adaptation, among other things, a carbon sheet in a manifolding salesbook may conveniently be used without smirching the fingers, and, if such carbon sheet is coated on both sides for making triplicate copies, the handling thereof according to his method is likewise without soiling. The specification indicating the scope of the claims says:

"In fact, my invention in this respect comprises any form and arrangement of pad and transfer-sheet wherein the transfer-sheet if left intact as it lies upon the pad would conceal the free or loose ends of the leaves of the pad, thereby rendering it necessary to lift the sheet in order to withdraw the leaves from beneath it in manipulating the pad, the cutting away of a portion of the transfer sheet so as to expose a portion of the leaves at or near their free ends, enabling this withdrawal to be accomplished without lifting or otherwise handling the transfer-sheet."

True, the improvement of Beck was not remarkable or a great advance in the art. Oldfield had but little to do to conform his structure precisely to that of Beck, yet the record satisfactorily shows that the simple change or alteration made by the patentee has annually resulted in increased pecuniary value, and that the defendant company, which for years has been engaged in supplying the trade with manifolding pads, has adopted the improvement. In the main, the patents of the prior art seem to have had one central motive, the solution of the same simple problem—an adjustment of the elements of a manifolding book which would enable speedy and convenient manipulation of the leaves without smutting the fingers by handling the carbon sheet. This the patentee has accomplished, and, in view of the manifest results of his improvement, I conclude that the patent is not devoid of patentable invention.

Infringement of claims 2 and 3 not being disputed, a decree may be entered for the complainants for an injunction and accounting, with costs.

BREDIN et al. v. SOLMSON.

(Circuit Court, D. Maryland. October 27, 1905.)

PATENTS—SUIT FOR INFRINGEMENT——RECOVERY OF PROFITS.

The owner of a patent, who has granted an exclusive license thereunder for certain territory, cannot, suing alone, recover profits made by an infringer which, but for the infringement, would have inured to the sole benefit of the licensee.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 580.

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

In Equity. Suit for infringement of patent. On exceptions to master's report upon profits and damages.

S. S. Bacon and Bacon & Milans, for complainants.
Charles M. Clarke, for respondent.

MORRIS, District Judge. The complainants are the owners of patent No. 424,905, granted to Albert Clinton Sims, April 1, 1890, for an improvement in weather strips, and by a decree of this court (132 Fed. 161), affirmed by the Circuit Court of Appeals for the Fourth Circuit (136 Fed. 187), the patent was held good, and the defendant, Moses Solmson, was held to have infringed it and was enjoined. The case was then referred to a special master to ascertain and report the profits made by the defendant from the improvement and the damages suffered by the complainants. At the hearing before the master it was made to appear that the complainants, as owners of the patent, had the patented weather strips manufactured by the Chamberlaine Metal Weather Strip Company of Detroit, the stock of which corporation they owned, and that to introduce and sell the weather strips to the public they contracted with persons in designated territories to become the exclusive licensed agents for its sale during the life of the patent. For the territory of Maryland, Virginia, Delaware, and the District of Columbia Burch and Hughes were, in consideration of $3,400 paid by them to the complainants, constituted by the complainants agents, with the exclusive right of selling the patented weather strips in the territory mentioned during the life of the patent, the same to be manufactured by the complainants and purchased from the complainants.

No testimony was offered to show what was the manufacturer's profit which the complainants might have made by sales which it failed to make to its agents by reason of the infringement, and that possible element of recovery was disclaimed and waived in writing by the complainants, they claiming in this suit to recover only the damages and profits sustained by them other than the manufacturer's profits. The master finds that the contract between the complainant and Burch and Hughes for which they paid the complainants $3,400 was, in effect, an exclusive right granted to Burch and Hughes to sell the patented article during the life of the patent in the territory mentioned, which included Maryland, where the defendant, Solmson, infringed. Testimony was adduced to prove what profits were made by Solmson. The master

finds that Solmson's net profits amounted to $925, but he reports as his conclusion of law that the complainants are not entitled to have Solmson's profits awarded to them, as these profits could not, in any event, have accrued to them, but belonged to Burch and Hughes, who had the exclusive right to sell in Maryland, and that, as Burch and Hughes are not parties to this suit, there can be no decree with respect to such profits. The master thereupon reported that the complainants were not entitled to recover profits, and, as no damages were proved, complainants were entitled to only nominal damages.

It is to these conclusions that the complainants' exceptions are principally addressed. As stated in Walker on Patents, 715:

"The generic rule for ascertaining the amount of the profits recoverable in equity for the infringement of a patent is that of treating the infringer as though he were a trustee for the patentee in respect of the profits which he realized from his infringement."

Applying that rule to this case, it does not appear logical that Solmson should be held to be a trustee for the complainants in respect to profits, the loss of which was no detriment to the complainants, but was a detriment to Burch and Hughes, the exclusive licensees for Maryland. A decree in favor of the complainants for profits would be to place them in a better condition by reason of the infringement than they would have been in if there had been no infringement. It has been held that suits in equity for the recovery of profits must be brought by the owner of the patent right and the exclusive licensees suing together as joint complainants. Walker on Patents, § 400; 3 Robinson on Patents, §§ 1091–1101.

The profits made by selling the infringing article obviously belong in equity to the party who has lost them, and the party losing them in the present case is Burch and Hughes, who had the exclusive right to do the very thing which Solmson unlawfully did. In Birdsell v. Shaliol, 112 U. S. 485, 5 Sup. Ct. 244, 28 L. Ed. 768, it was held that, although the patentee had sued and recovered nominal damages for the use of a machine, it was not a bar to a subsequent suit by the patentee and his licensee together for the benefit of the licensee against another person who afterwards used the same machine. The settled rule would appear to be (3 Robinson on Patents, § 1099; Birdsell v. Shaliol, 112 U. S. 485, 5 Sup. Ct. 244, 28 L. Ed. 768) that a suit in equity which is for the benefit of the licensee must be brought in the name of the patentee and licensee together. It seems clear that in the present case the profits could be recovered only for the benefit of Burch and Hughes, the exclusive licensees for Maryland, and that therefore a recovery of profits cannot be decreed in favor of the complainants.

The exceptions are overruled, and the special master's report confirmed. The complainants having recovered nominal damages, are awarded all their costs, except the costs of the reference to the master, which latter costs they are decreed to pay.

LEONARD v. SIMPLEX ELECTRIC HEATING CO. et al.

(Circuit Court, S. D. New York. December 1, 1905.)

JUDGMENT—RES JUDICATA—PATENTS—SUIT FOR INFRINGEMENT.

The bill in a suit for infringement of a patent alleged that defendant claimed the right to make the alleged infringing articles by virtue of another patent, and that the same was void, because for the same invention, and granted on a later application than complainant's. Defendant, however, did not set up such patent as a defense, nor were any proofs taken in relation thereto. *Held*, that a decree for complainant in the suit was not an adjudication upon the validity of such patent, which was not within the issues, and did not constitute a bar to a subsequent suit between the same parties for its infringement.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1263, 1265.

Operation and effect of decree in equitable suits for infringement of patents, see note to Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co., 68 C. C. A. 541.]

In Equity. On plea.

Kenyon & Kenyon, for complainant.
Duncan & Duncan, for defendants.

WALLACE, Circuit Judge (orally). I am prepared to decide this case now. The plea of the defendants is interposed to so much of the bill of complaint as alleges infringement of the Carpenter patent, granted February 24, 1891. The plea sets up an estoppel by a prior adjudication in 1895 in a suit in the United States Circuit Court for the District of Connecticut between persons with whom the parties to the present suit are in privity. The complainant has filed a replication to this plea, and upon the proofs taken upon the issue thus joined the general question is whether the facts set up in the plea are true. In disposing of the case I shall treat the Connecticut suit as one between persons with whom the parties to the present suit are in privity, giving to the decree the effect it would have had if the present parties had been formally parties thereto. The plea alleges that the Connecticut decree adjudged that the Carpenter patent was void as being for the same invention as that of the patent to Morford, granted January 17, 1893, and wrongfully issued because Morford was an earlier inventor, and his application was pending at the time in the patent office. The Connecticut decree did not, in terms, adjudge the Carpenter patent to be void, or refer to that patent in any way. The decree itself and the pleadings in the cause are all the evidence there is from which to ascertain the findings of the court.

The law of res adjudicata has nowhere been better stated than in Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195, in its bearing upon the questions at present involved. The opinion in that case clearly points out the difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. "It is a finality as

to the 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 where the second action between the same parties is upon a different claim or demand, the judgment in the former action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding was rendered."

The present suit is not upon the same claim or demand as that which was the subject of the former suit, but proceeds upon the theory that the Carpenter patent is valid, and that the present defendants have infringed it. This being so, the former decree operates as an estoppel only as to those matters which were controverted in that action and necessarily determined by the decree. There was no issue in that suit presented by the pleadings respecting the validity of the Carpenter patent. The bill indeed alleged that the defendants therein claimed the right to make articles infringing the Morford patent under the authority of the Carpenter patent; that the latter patent was wrongfully issued while the application for the Morford patent was pending; that the application for each patent was for the same invention; and that Morford was the earlier inventor. The bill did not distinctly aver that the two patents as issued were for the same invention, but for present purposes it may be assumed that this was the purport of the averments. All these averments were by way of anticipation of a supposed defense which might be interposed to the bill. They were necessary only to enable the complainant to give evidence of the facts in the event that the defendants asserted the Carpenter patent as a defense. The defendants, however, did not assert the Carpenter patent as a defense, or as a partial defense, or as defensive matter of any kind. No proofs were adduced to such an issue, and if there had been they would have been outside the issue raised by the pleadings. It follows that whether the Carpenter patent was a valid patent, or whether it was for the same invention as that described and claimed in the Morford patent, are questions which were not before the court. This being so, it is clear that neither question was necessarily determined by the decree. In the case (United States & Foreign Salamander Felting Co. v. Asbestos Felting Co.) cited from 4 Fed. 813, decided by Judge Blatchford, the decree in the former suit was an express adjudication upon the point involved in the second suit, to wit, the invalidity of the Reilly patent; the Reilly patent having been set up as a defense in the former suit. So in the other cases which have been cited, the former adjudication distinctly determined the matter in dispute. These cases in no way conflict with the views I have expressed.

These considerations render it unnecessary to consider the effect of the disclaimer which has been filed by the present complainant with a view of limiting the claim of the Carpenter patent. The defense set up by the plea is not proved, and the defendant must answer the part of the bill to which it was interposed.

The complainant is entitled to the costs of the plea.

ALLEN et al. v. CONSOLIDATED FRUIT JAR CO.

(Circuit Court, D. New Jersey. June 5, 1906.)

1. PATENTS—SUIT TO RECOVER ROYALTIES—EQUITY JURISDICTION.
A court of equity is without jurisdiction of a suit for an accounting for profits, damages, or royalties based on a contract granting a license under a patent, nor is such jurisdiction conferred by the fact that the bill also prays for the cancellation of other patents, since a suit for that purpose cannot be maintained by a private individual.
[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 348.]

2. COSTS—DISMISSAL FOR WANT OF JURISDICTION.
Where both parties have taken proofs without objection, in a suit which is subsequently dismissed for want of jurisdiction appearing on the face of the bill, defendant will not be allowed costs.
[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, § 197.]

In Equity. On motion to dismiss for want of jurisdiction.

Andrew Foulds, Jr., for complainants.
Theodore B. Booraem, for defendant.

LANNING, District Judge. By their bill the complainants set forth that Joseph C. Allen, one of the complainants, was the original, first, and sole inventor of improvements in receptacles for tooth powder having telescopic tops with circumferential openings; that he duly filed his application for a patent thereon; that on June 5, 1901, he assigned his invention and his right in and to any letters patent that should be issued thereon to the defendant, reserving to himself a royalty to be paid to him by the defendant upon the articles manufactured and sold under the patent, in case one should be allowed; that on December 12, 1901, he assigned to Lewis A. Allen, the other complainant, an undivided interest in the agreement between himself and the defendant; that thereafter patent No. 706,710 was duly issued to the defendant, but for a device narrower than was warranted by the invention; that the defendant, in fraudulent violation of its agreement with Joseph C. Allen, thereafter procured one Henry D. Kent, one of its officers, to apply for and secure in his own name patents for other receptacles which in fact covered the invention of Joseph C. Allen; that these patents are numbered 701,893, 711,053, and 717,216, and have been assigned to the defendant; and that the defendant has been manufacturing and selling under these latter patents large numbers of the receptacles above mentioned. The prayer of the bill is that the defendant may be required to account for profits and damages, and for royalties on the receptacles sold under all of the patents, and that the last three patents may be delivered up to the complainants and canceled. There is also a prayer for general relief. The defendant has answered the bill, denying the fraud and denying its liability to account to the complainants for royalties, except for receptacles manufactured and sold under patent No. 706,710. The complainants filed their replication to the answer and have taken their prima facie proofs, consisting of 66 pages. The defendant has also taken proofs, consisting of 688 pages. The defend-

ant has now concluded that this court is without jurisdiction to grant any relief under the bill and moves to dismiss the bill for want of jurisdiction.

I think the motion must be granted. It is a well-settled rule that a bill in equity cannot be maintained for the mere recovery of profits, damages, or royalties. There is adequate and complete remedy at law for such recovery. It is true that, for the purpose of administering full and complete relief, a United States Circuit Court may maintain a bill for an accounting for profits and damages in a suit for the infringement of a patent where injunction is granted, or where some other equitable relief is required; but the only remedy sought by this bill, in addition to an accounting for profits and damages, is a cancellation of the three patents granted to Kent. It is settled, however, that a patent cannot be annulled in a suit instituted by a private individual except as between the parties in one of the classes of causes mentioned in section 4920 of the Revised Statutes [U. S. Comp. St. 1901, p. 3394], where a suit is brought by a patentee against an alleged infringer. This is not such a suit. If the three patents to Kent were secured by reason of fraud, the proper procedure to secure their annulment is by a bill filed in the name of the United States. See United States v. Bell Telephone Company, 128 U. S. 368-373, 9 Sup. Ct. 90, 32 L. Ed. 450; Mowry v. Whitney, 14 Wall. 441, 20 L. Ed. 858; Walker on Patents, § 322.

It is clear that the court is without jurisdiction to grant the relief prayed for, and the bill must be dismissed; but, inasmuch as both parties have taken proofs under the pleadings as they stand, no costs will be allowed to the defendant. This conclusion is in accord with Spring v. Domestic Sewing Machine Co. (C. C.) 13 Fed. 446, decided in this court more than 20 years ago.

GLUCOSE SUGAR REFINING CO. v. DOUGLASS & CO.

(Circuit Court, N. D. Iowa, Cedar Rapids Division. July 6, 1906.)

No. 35.

PATENTS—SUIT FOR INFRINGEMENT—PLEA.

In a suit in equity for infringement of a patent, a plea which sets up the single defense of noninfringement is not a good plea, such defense being one which should be taken by answer, and the plea will either be stricken out or ordered to stand as an answer, as in the judgment of the court will best subserve the ends of justice.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 521.]

In Equity. On motion to strike defendant's plea from the files.

Robert H. Parkinson, for complainant.

Chas. A. Clark & Son, for defendant.

REED, District Judge. This suit was commenced March 30, 1905, charging infringement by defendant of letters patent No. 541,941, issued to Ansel Moffatt July 2, 1895, as the original and first inventor of an improvement in the process of making lump starch, which patent,

with all rights thereunder, it is alleged had been duly assigned to the complainant. The defendant demurred to the bill, which was overruled December 21, 1905, with leave to answer by the February rules. Instead of answering, the defendant files a plea to the bill, which in substance alleges: That in November, 1903, one Edward Gudeman, a citizen of the United States, became and was the original and first inventor of a process of making lump starch; that on May 2, 1905, letters patent of the United States No. 789,127 were issued to him therefor, and on the same day were duly assigned by said Gudeman to the defendant; that defendant is and has been manufacturing starch under said invention only; that said process is radically different from the alleged process and invention set forth in the bill of complaint, the particulars of the difference being specifically set forth in the plea, and is in no manner an infringement of the same.

The complainant moves to strike this plea from the files, or that it be set down as an answer to the bill for the reasons: (1) That it is filed in disregard of the order of the court that defendant answer the bill; and (2) that it is not a proper plea, but is an answer denying the infringement of complainant's patent. If it is true that the process by which defendant manufactures starch is substantially different from the complainant's process, then it is not an infringement thereof; and the fact that it is covered by the Gudeman patent, which is later than complainant's is wholly immaterial, for that would not bar the plaintiff's suit. The plea, therefore, is but a denial of the infringement of complainant's patent. Pleas in equity are of three classes: (1) To the jurisdiction of the court; (2) in abatement of the suit; and (3) in bar of the bill; and all pleas must fall within one of these classes. 1 Bates, Fed. Eq. § 221. Pleas in bar, considered with reference to their form, are of three kinds, viz. (1) affirmative, (2) negative, and (3) anomalous. 1 Bates, Fed. Eq. § 228. It was formerely a question of some difficulty to determine whether or not a purely negative plea in equity was legitimate, though it now seems to be so considered in some instances, as where the title of the complainant or his right to maintain the suit is denied. Story's Eq. Pl. § 668; 1 Bates, Fed. Eq. § 228 (2). But a mere denial of a substantive fact alleged in the bill as grounds for relief, is not proper as a plea. In Sharp v. Reissner (C. C.) 9 Fed. 445, Mr. Justice Blatchford, then circuit judge, held that in a suit for infringement of patent a plea which sets up the single defense of noninfringement is not a good plea, that such defense should be brought forward by answer—citing Milligan v. Milledge, 3 Cranch, 220, 2 L. Ed. 417; Bailey v. Le Roy, 2 Edw. Ch. (N. Y.) 514. See, also, Story's Eq. Pl. § 652, note 2; 2 Daniell, Ch. (5th Ed.) 603, note 4; 1 Bates, Fed. Eq. § 222. The authorities cited by the defendant do not controvert this rule, but go to the question of practice in testing the sufficiency of a plea. No doubt the legal sufficiency of matters properly alleged in a plea is to be determined by setting the plea down for argument, which admits the facts alleged to be true; or, if the facts are not admitted, by taking issue upon the plea to determine their truth. This rule, however, is not applicable where the matters alleged in the plea are not proper

to be so brought forward. In such case the plea may be stricken out on motion, or set down as an answer to the bill. Rhode Island v. Massachusetts, 14 Pet. 210–257, 10 L. Ed. 423; Sharp v. Reissner (C. C.) 9 Fed. 445; Newton v. Thayer, 17 Pick. (Mass.) 129. If this plea should be set down for argument, it would be admitted that the process by which defendant manufactures starch is radically different from that described in complainant's patent, and that such manufacture was not therefore an infringement of that patent. If issue should be taken upon the same, then it would also be admitted that if the facts alleged were found to be true they would constitute a bar to the suit, and whether or not they are true would involve an examination at large of complainant's and defendant's process of manufacture, and thus the whole merit of the bill would be involved. Under the older practice, if the facts alleged were found to be true, the bill would be dismissed as of course, regardless of its merits. Story's Eq. Pl. § 697; Hughes v. Blake, 6 Wheat. 453–472, 5 L. Ed. 303; Farley v. Kittson, 120 U. S. 303–314, 7 Sup. Ct. 534, 30 L. Ed. 684.

It is the strict and technical character of these rules of chancery pleading, and the danger of injustice often arising from them, that gave rise to the equitable discretion generally exercised by the court of chancery in relation to pleas. In many cases where they are not overruled, the courts will not permit them to have the full effect of a plea; but will save to the defendant the benefit of it at the hearing; and in others will order it to stand as an answer, as in the judgment of the court will best subserve the purpose of justice. Story's Eq. Pl. §§ 697–699; Rhode Island v. Massachusetts, 14 Pet. 210–257, 10 L. Ed. 423. Equity rule No. 33 provides that: "If upon an issue the facts stated in the plea be determined for defendant, they shall avail him as far as in law and equity they ought to avail him." This seems to be but declaratory of the practice of the court of chancery as stated in Rhode Island v. Massachusetts, supra, to exercise its discretion in the matter of pleas. If issue were taken upon this plea, and it was not determined for defendant, then under equity rules Nos. 34 and 39 it would have the right to answer, and again bring forward the defense of noninfringement, and thus the whole matter of the bill would be subject to re-examination.

It will best subserve the purposes of justice to strike out the plea, with leave to defendant to answer by the August rules, and it is so ordered.

NATIONAL AUTOMATIC WEIGHING MACH. CO. et. al. v. NEW YORK SCALE CO.

(Circuit Court, S. D. New York. May 16, 1906.)

PATENTS—INFRINGEMENT—AUTOMATIC SCALE.

The Smith patent, No. 375,102, for an automatic scale (claim 11), which covers a device for returning the indicator to its normal position after it has indicated a person's weight by means independent of the weighing mechanism, is limited to the particular means shown. As so limited, *held* not infringed.

In Equity. On final hearing.

A. Parker Smith, for plaintiff.

Fremont E. Shurtleff, for defendant.

WHEELER, District Judge. The plaintiff owns patent No. 375,102, dated December 20, 1887, and issued to William Robert Smith for an automatic weighing scale. In these penny in the slot scales the weight of the person on the platform by the counterbalancing mechanism sets a limit according to the weight, and the coin carries the index to that point which shows the weight. When the person gets off the platform, the counterbalancing mechanism returns to its place, ready to weigh again, and the index returns to 0. Formerly, if another person got on while the one weighed was getting off, so the counterbalancing mechanism would not be fully relieved, the index would not go to 0, but to the new limit, and the weight of that person be indicated without inserting another coin, and so on. A part of this patent, which is for returning the index to 0 when the weight on the platform is shifted, so as to require another coin for indicating another weight, is now only in question. The specification says:

"Extending from the platform is an upright case, within which my mechanism is placed. Extending from the lever mechanism underneath the platform, and up through the upright case, is a rod or suitable connection, to the upper extremity of which the weighing spring is connected. The upper end of this spring is suspended from a projection on the upper end of the metallic frame, which frame I secure to the back of the case in an upright position, as shown. On a standard or rod loosely pivoted to an offset on the upper extremity of the rod connecting the weighing spring and the lever mechanism of the platform is secured a pivoted catch, which engages with a sleeve sliding on the standard, and connected to a weight by a band passing over a pulley. Projecting from the sleeve is an offset or arm, which engages with a cap on the front of the rack, and serves both as a support and stop for the rack-bar which actuates the indicating mechanism. The rack-bar has a vertical motion in suitable bearings, its up motion being limited by a nut at its lower end, and its down motion by a cap which extends over the projecting arm of the sleeve when the latter is carried down by the descent of the rod connection between the weighing spring and the scale and its projecting standard. On the partial removal of the weight from the platform of the scales, the connecting rod rises with its standard, carrying with it the sleeve and the rack-bar suspended from the sleeve-offset. On the upward motion of the sleeve a pawl at the lower extremity of the catch which holds the sleeve engages with a rack, over which it passes freely in its descent, disengages the catch, and releases the sleeve, which is thus slid upward by the fall of the counterweight, carrying with it the rack-bar back to its normal position. The up movement of the rack returns the indicator to zero, at which point the rack is locked in place by the latch."

The only claim alleged to be infringed is:

"(11) The combination, with weighing scales, of indicating mechanism actuated by the descent of the scales, means for automatically releasing the indicating mechanism from its connection with the scales, and means independent of the weighing scales for returning the indicating mechanism to its normal position, whereby on the descent of the scales the weight is indicated, and the indicating mechanism then returned to zero, substantially as described."

The defendant's scales have "means independent of the weighing scales for returning the indicating mechanism to its normal position,"

and if the patent would cover any such means the defendant's would infringe; but such a claim cannot be valid to cover everything to accomplish the same result that any one might invent, but only the particular means described in the specification. The operative mechanism of the patent seems to be the sliding sleeve retracted by a weight over a pulley, and releasing the indicator; that of the defendant is a segment retracted by a spring and weight, with a pinion on the axis of the indicator. The defendant's means for this purpose are therefore essentially different from those of the patent. They do not accomplish the resetting of the indicator when the persons being weighed are shifted in substantially the same way, but in a different way. If the patent was for a pioneer invention of the whole machine, the means of the defendant might be considered equivalent to those of the patent in the operation of the principal parts; but in this part of this patent for this mere detail they must do the same thing in detail in substantially the same way to be an infringement. The patent is for this detail, and the defendant's is a different detail. Therefore, if this claim is valid for the specific means of accomplishing this object, the defendant does not infringe.

Bill dismissed.

RUMFORD CHEMICAL WORKS v. EGG BAKING POWDER CO.

(Circuit Court, S. D. New York. June 13, 1906.)

PATENTS—SUIT FOR INFRINGEMENT—DISTRICT OF SUIT.

In a suit for infringement of a patent brought in the Southern District of New York against a corporation of another state having a regular place of business in New York City, infringement within the district of suit required to sustain the suit, under Act March 3, 1897, c. 395, 29 Stat. 695 [U. S. Comp. St. 1901, p. 589], is not made out by proof that an infringing article sold in another state bore a label with the name of defendant and the words "New York" thereon, in the absence of evidence that defendant made, used, or sold the article, or attached the label, or was engaged in the manufacture of similar articles in New York.

In Equity.

Philip Mauro and C. A. L. Massie, for complainant.
Walter S. Logan, for defendant.

HAZEL, District Judge. This is an action for infringement of letters patent No. 474,811, for a baking preparation, granted May 17, 1892, to the complainant, assignee of the inventor. The defendant offered no evidence, but contends that the complainant has failed to prove the commission of the infringing acts within the jurisdiction of the court, as required by the act of March 3, 1897, c. 395, 29 Stat. 695 [U. S. Comp. St. 1901, p. 589]; also that infringement of the patent in suit by the product alleged to have been manufactured and sold by defendant is not established. The bill waives answer under oath, and, accordingly, the allegation denying infringement, though under oath, cannot be considered as evidence. Admittedly, the defendant, a West Virginia corporation, has a regular and established place of business

within the Southern District of New York, but the commission of the alleged infringing acts is denied. In Bowers v. Atlantic, G. & P. Co. (C. C.) 104 Fed. 887, Judge Coxe, considering the act of March 3, 1897, said:

"If a corporation be sued outside the district of which it is an inhabitant, then it must be in a district where there is infringement and a regular place of business. Infringement alone will not give jurisdiction, a regular place of business alone will not give jurisdiction, both must concur."

The alleged infringing article was purchased in the city of Philadelphia. The label on the can purporting to advertise the defendant's business has printed thereon the words, "Egg Baking Powder, * * * Manufactured by Egg Baking Powder Company, New York." The place of manufacture of said infringing article was not shown, nor was any evidence whatever given to establish the identity of its manufacturer, or to connect the defendant with the manufacture and sale thereof. Neither is it shown that the label belongs to the defendant, or is authoritatively used. Considering the testimony in the most favorable aspect to the complainant, I do not think infringement of the patent in suit has been sufficiently proved. There are so many logical and persuasive inferences to be drawn from the evidence to negative infringement in the Southern District of New York that I am reluctant to reject them. The evidence of infringement in the Southern District of New York is extremely slight, and seems not to come within the limits of probability with sufficient clearness to require the defendant's denial on that point. The facts established in the case of Hutter v. De Q. Bottle Stopper Co., 128 Fed. 283, 62 C. C. A. 652, were much stronger. The contention of the complainant is based entirely upon suspicion and conjectural inferences drawn from the printed label on the can containing the baking powder. But this is not sufficient, especially when it is borne in mind that the allegation of infringement charges a tort, which must be satisfactorily proved. King v. Anderson (C. C.) 90 Fed. 500; Edison Electric Light Co. v. Kaelber (C. C.) 76 Fed. 804; Slessinger v. Buckingham (C. C.) 17 Fed. 454. In the absence of evidence indicating that the defendant made, used, or sold the infringing article, or attached the label to the can containing the baking powder, or was engaged in its manufacture in the Southern District of New York, I am not inclined to adopt the complainant's view that a prima facie case of infringement has been established.

The point discussed was not waived by the defendant, and, therefore, without considering the question whether the contents of the exhibit can in evidence is an infringement of complainant's preparation, the bill must be dismissed, with costs.

DAIMLER MFG. CO. et al. v. CONKLIN.

(Circuit Court, S. D. New York. June 15, 1906.)

1. EQUITY—PLEADING — BILL — MULTIFARIOUSNESS — PATENTS — SUIT FOR INFRINGEMENT.

Allegations in a bill for infringement of a number of patents that the inventions, each and all of them, are applied to a machine, and that defendant is using a machine "in which is embodied each and all of the inventions, improvements, or discoveries of said letters patent," and is infringing all of said patents, are equivalent to an allegation that the inventions are conjointly used and infringed, and the bill is not objectionable on the ground of multifariousness, and especially where profert is made of the patents, which show that each of the inventions is a part of a machine, and incapable of independent use.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 341.]

2. PATENTS—SUIT FOR INFRINGEMENT—PARTIES—JOINDER OF COMPLAINANTS.

Where a bill for infringement of patents alleges that a licensee has an interest in the patented inventions which is capable of being impaired by the asserted infringement of defendant, he may properly be joined as a complainant.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 470.]

In Equity. On demurrer to bill.

Taylor & Anderson and Howard Taylor, for complainants.

Henry M. Earle, for defendant.

HAZEL, District Judge. The bill charges infringement of four United States letters patent of which complainant corporation is the owner. The defendant has demurred thereto on the grounds that the bill is multifarious, in that it contains no allegation that the patents are capable of conjoint use, or are conjointly used or infringed by defendant, and that there is an improper joinder of parties complainant. The allegations of the bill that "the inventions aforementioned, and each and all of them, are applied to a machine," etc., and that the defendant imported and now uses a Mercedes machine, "in which is embodied each and all of the inventions, improvements, or discoveries of said letters patent," and further, that the defendant "is now infringing each and all of the letters patent aforesaid," etc., are the full equivalent of an allegation that the patents are conjointly used and conjointly infringed by the defendant. Manifestly, the bill need not set forth that the patents are capable of conjoint use, for, as stated, it charges that the four different patented inventions are embodied and used in the defendant's machine. Furthermore, the patents of which profert is made indicate that the inventions are integrally attached to a machine, and therefore it is evident that they are capable of conjoint use. If the patents could be used independently—for instance, a wrench or lamp may be used generally on automobiles or on a wagon—it is thought a different question would be presented. But where the parts patented are actually embodied in the machine, an allegation that they are so combined is thought to be sufficient, and the subject-matters may be properly joined in a single action for infringement of such patents. It is sometimes difficult to perceive whether several patented devices alleged to be in-

fringed are capable of conjoint use, and, accordingly, an inspection of the patents is helpful to determine whether the defendant is likely to be prejudiced by trying out the questions arising under separate and distinct patents. Hayes v. Dayton (C. C.) 8 Fed. 702. As the patents under consideration indicate that all the inventions are capable of being united in a single machine, it follows that the defendant cannot be prejudiced if the question of the asserted infringements be disposed of in this suit.

Referring to the objection that there is an improper joinder of parties complainant, I think the bill prima facie sufficiently avers the license to Lehman-Charley to indicate its exclusive character in the territory specified. In any event, the bill alleges that Charley had an interest in the patented inventions, which is capable of being impaired by the asserted wrongful acts of the defendant, and, accordingly, he is thought to be a proper party complainant. Robinson on Patents, § 1098; Williams et al. v. Bankhead, 19 Wall (U. S.) 563, 22 L. Ed. 184; Birdsell et al. v. Shaliol, 112 U. S. 485, 5 Sup. Ct. 244, 28 L. Ed. 768.

The demurrer to the bill is overruled, with costs. Defendant may answer within 20 days.

KRANS v. ADOLPH HOLLANDER CO.

(Circuit Court, S. D. New York. May 16, 1906.)

PATENTS—INVENTION—NECKWEAR SUPPORTER.

The Krans patent, No. 719,814, for a neckwear supporter and fastener, is void for lack of patentable invention in view of the prior art.

In Equity. On final hearing.

George E. Morse, for plaintiff.
James C. Chapin, for defendant.

WHEELER, District Judge. The plaintiff's patent, No. 719,814, dated February 3, 1903, is for a neckwear supporter and fastener made of wire, "possessing resiliency and readily applied," and in which "its bends or turns are so disposed as to shift the breaking points of the shield beyond those where the securing points pass through said shield." The specification and drawings show offsets passing through the shield, and bent against its opposite side, to prevent its breaking where the spurs pass through in the middle. In the first, second, third, and sixth claims alleged to be infringed the offsets of wire passed through and clenched against the other side of the shield and the essential feature. Among the many patents on such fasteners preceding the plaintiffs is No. 302,763, dated July 29, 1884, issued to Edward C. Morris, which shows such offsets stapled firmly to the shield, to "secure a springiness of the fastener in all directions." This would strengthen the fastener in the middle, as the plantiff's offsets do, although that is not mentioned as an effect. The difference in this respect is between stapling the offsets of wire through the shield, and passing them through and clenching them against it on the other side,

and it appears to be the work of a mechanic, rather than the exercise of the ingenuity or skill of an inventor. The room left by the other patents was very small, and this seems to have left hardly any, and not enough to sustain the plaintiff's patent.

Bill dismissed.

MUNSON v. STANDARD MARINE INS. CO.

(Circuit Court, D. Massachussetts. July 3, 1906.)

No. 66.

1. INSURANCE—MARINE POLICY INSURING AGAINST LIABILITY FOR COLLISION OR STRANDING OF TOW—COSTS OF SUCCESSFUL DEFENSE.

   Under the liability policy upon a tug set out in the opinion the insurer is not liable for the cost of a successful defense made by the tug in a suit to subject it to liability, which the insurer had declined to defend.

2. SAME—CONSTRUCTION OF POLICY.

   In a policy insuring a tug against legal liability for loss or damage caused to its tows or other vessels through collision or stranding, a sue and a labor clause, authorizing the tug to make all reasonable efforts in and about the defense, safeguard, and recovery of such vessels, without prejudice, has no application to expenses incurred in defending the tug itself against a suit brought to subject it to liability.

At Law.

Carver & Blodgett, for plaintiff.

Carpenter, Park & Symmers and Edward S. Dodge, for defendant.

LOWELL, Circuit Judge. This was an action to recover upon an insurance policy, by which the defendant insured the plaintiff "on the steam tug Carbonero" for a year "against any loss or damage for which the said tug may become legally liable, caused by collision and/or stranding, as hereinafter stated." The other material parts of the policy are as follows:

"This policy shall cover only the legal liability of the said tug for loss or damage and charges, as herein provided: First. When such legal liability of said tug shall have been incurred or caused by injury to any other vessels or crafts, their freights then being earned on cargoes on board of such vessels or crafts at the time of the disaster and/or cargoes, by stranding and/or collision while they shall be in tow of the said tug, either alongside or at the end of a hawser. Second. When such legal liability shall have been incurred or caused by the collision of the said tug with any other vessels or crafts not in tow of the said tug at the time. Third. When such legal liability shall have been incurred or caused by the collision of any vessels or crafts in tow of the said tug with any other vessels or crafts not in tow of the said tug at the time, and the said tug shall be legally liable in either case to pay any sum or sums in consequence of any damage caused by such collision to such vessels or crafts, their freights and/or cargoes.

"The liability of this company is limited in all cases to the amount hereby insured, and is further limited to the amount of actual repairs to vessels rendered necessary in consequence of any disaster insured against, and to the actual loss or damage to cargo, which shall be valued at the cash market price thereof on the day of the disaster, and to the actual amount of freight lost in consequence of any disaster insured against; and in no event shall the loss or damage or charges of any or all of them, either as to vessel or vessels,

cargo or cargoes, freight or freights, or all combined, exceed the amount hereby insured, and all losses shall be paid in the proportion which the amount insured bears to the value of the said tug, as expressed in this policy.

"This policy shall not cover any liability for loss of life, personal injury, demurrage, loss of use, detention, officers' or crew's wages, fuel or provisions, in any case or cases whatsoever.

"This policy shall not cover any injury or damage to the hull, machinery, engines, tackle, or fittings of the said tug, and shall not cover any injury or damage to any other vessel or cargo or freight owned wholly or in part by the insured.

"This company shall not be liable for any loss or damage under this policy, unless the liability of the said tug for such loss or damage shall have been first determined by a suit at law or otherwise, if this company shall so elect; and in case legal counsel shall be employed in defending any proceeding to test the liability of the said tug, the same shall first be approved in writing by this company.

"All claims paid under this policy shall reduce any further liability thereunder to the extent of the sum or sums so paid, unless the amount be made good by additional insurance and additional premium paid therefor.

"The insured must give this company prompt notice of any disaster causing loss or damage, and a failure to give such notice shall discharge this company from any liability for loss or damage under this policy.

"It shall be lawful and necessary for the insured, his, her, or their agents, factors, servants, and assigns, to sue, labor, travel for, and make all reasonable efforts in and about the defense, safeguard, and recovery of such vessels, crafts, and cargoes, or any part thereof, without prejudice to this insurance, and the acts of the insured or this company or their agents in recovering, saving, and preserving the property in case of disaster shall not be a waiver or an acceptance of an abandonment, or as affirming or denying any liability under this policy, but such acts shall be considered as done for the benefit for all concerned, and without prejudice to the rights of either party."

"The insured, as a part consideration for this insurance, agrees and expressly warrants:

"First. That the said insured shall in no way or manner do anything or consent to any act or agreement which shall in any way admit any liability in any matter connected with this insurance to the prejudice of this company without its consent in writing, and that any attempt so to do shall render this policy and all claims thereunder absolutely void."

Two barges in charge of the Carbonero had been anchored by the tug. They were lost under the circumstances described in 106 Fed. 329, 45 C. C. A. 314. The Carbonero was libeled for their loss, but the libel was dismissed. 122 Fed. 753, 58 C. C. A. 553. The suit at bar was brought to recover the legal expenses, including counsel fees, incurred in behalf of the tug in the proceeding in admiralty just mentioned. The defendant denied liability altogether, and the case was tried without a jury upon an agreed statement of facts. Only one defense made to the action need be considered here, viz., that the costs and charges which the plaintiff sued to recover were incurred in a suit wherein the tug was at length exonerated from blame.

The question presented is this: In a policy of insurance against liability like that here in question, is the insurer liable for the cost of a successful defense? I think not. Ambiguous expressions in the policy should be construed against the insurer, but the defendant's liability must be based upon an interpretation of the contract entered into by the parties, and not upon another contract which the plaintiff might have reasonably desired. The policy in dispute is expressed to indemnify the plaintiff "against any loss or damage for which the said tug may become legally liable, caused by collision and/or stranding,

as hereinafter stated." Evidently the "loss or damage" referred to is not loss or damage to the Carbonero, but loss or damage to some other vessel, for which damage the Carbonero is liable. If the tow is stranded by vis major, so that the tug is not liable for the damage done to the tow, costs incurred in defending the tug against a claim for damage are not caused to the tug by the stranding, but by the misguided energy of a libelant without a case. It can make no difference whether the successful defense made by the tug is a denial of the stranding altogether, or a denial of the tug's liability for it. Moreover, the insurer's liability, stated generally, as above, is later defined more particularly. "This policy shall cover only the legal liability of the said tug for loss or damage and charges as herein provided." The plaintiff contends that he is entitled to recover by reason of the word "charges." Even if this word may cover some legal expenses, yet these expenses, to be recoverable here, must be "charges as herein provided," viz.:

"First. When such legal liability of said tug shall have been incurred or caused by injury to any other vessels or crafts, their freights then being earned on cargoes on board of such vessels or crafts at the time of the disaster and/or cargoes, by stranding and/or collision while they shall be in tow of the said tug, either alongside or at the end of a hawser."

The second and third clauses are manifestly inapplicable here, and that there was no legal liability on the part of the Carbonero for the damage done to the barges is now res judicata. As the plaintiff must bring himself within this clause in order to recover, his suit fails.

Other clauses of the policy confirm the interpretation thus put upon it. The defendant's liability is further and independently limited "to the amount of actual repairs to vessels rendered necessary in consequence of any disaster insured against." This is not an action for the cost of repairs. Again:

"This company shall not be liable for any loss or damage under this policy unless the liability of the said tug for such loss or damage shall have been first determined by a suit at law or otherwise, if this company shall so elect, and in case legal counsel shall be employed in defending any proceeding to test the liability of the said tug, the same shall first be approved in writing by this company."

The "suit at law" has decided that the tug was not liable, and, furthermore, this clause seems intended to protect the defendant from liability for legal expenses, unless incurred with its consent. If the plaintiff believed that the tug's liability, alleged in the libel, was within the terms of the policy, he should not have incurred expense in defending the tug, and should not have opposed a decree against it. A decree thus obtained was a risk which the defendant took by declining to defend the suit in admiralty. The plaintiff, indeed, had agreed not to admit his liability for damage, but he had not agreed to contest a suit brought against the tug.

It is to be noticed that each of the limitations above referred to sets out independently exclusive conditions of the defendant's liability. To recover the plaintiff must bring himself within each and all of these limitations, not merely within some one of them. This appears from the introductory words of the several clauses: "This policy shall cover

only," etc. "The liability of this company is limited in all cases to," etc. "This company shall not be liable unless," etc. Doubtless the policy should receive a reasonable construction as a whole, but the court is not justified in disregarding any condition of liability stated; still less may it disregard these conditions when they all agree in excluding the defendant's liability in the case at bar.

Plaintiff relies upon the "Sue and Labor Clause," so called. In Cunard Steamship Co. v. Marten (1903) 2 K. B. 511, the Court of Appeals held that the ordinary "Sue and Labor Clause" was inapplicable to a contract of liability insurance, and so, being a meaningless survival, might be neglected. If, on the other hand, the clause be given its full meaning as an independent provision, it is concerned with the defense and safeguard of vessels other than the tug, and so does not aid the plaintiff.

The cases which have construed policies of this sort are few, and none of them are precisely in point. In Xenos v. Fox, L. R. 4 C. P. 665, and in Cornell v. Travelers' Ins. Co., 175 N. Y. 239, 67 N. E. 578, the court held that the expenses of a successful defense could not be recovered under a liability insurance policy. In those cases the policies were not precisely like that here in question, but the reasoning of the courts was largely applicable. In Egbert v. St. Paul Ins. Co. (D. C.) 92 Fed. 517, the costs recovered were those of a suit in which the liability of the insured had been established.

There must be judgment for the defendant.

THE MARY P. MOSQUITO (two cases).

(District Court, E. D. Virginia. May 18, 1906.)

COLLISION—STEAMER AND SCHOONER—MUTUAL FAULT.

A schooner and steamer both *held* in fault for a collision between them at night in Chesapeake Bay, the schooner for changing her course so as to cross that of the steamer, and the latter for failing to sooner see the schooner, and for afterward continuing her speed of 15 miles an hour with only a slight change of course, when there was at least risk of collision in so doing.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 52.]

In Admiralty. Cross-libels for collision.

On the evening of 18th of March, 1906, about 7:30 o'clock, the steamer Norfolk, a vessel of 1,248 gross tons burden, length 246 feet, beam 46 feet, one of the line of steamers plying between the cities of Norfolk, Va., and Washington, D. C., while en route to Washington, at a point in Chesapeake Bay between Old Point and Thimble Light, and about midway between said places, collided with the schooner Mary P. Mosquito, a two-masted fishing vessel of 45 tons burden, about 85 feet long, 22 feet 7 inches beam; that the steamer was proceeding outward at the time on a course about east three-quarters north, and the schooner inward on a course west half south. The tide was ebb, wind blowing about 10 miles an hour from the southeast, the sea smooth and otherwise unobstructed, save by the vessels in collision. The steamer's contention is, briefly, that while proceeding outward she first observed the green light of the schooner about a quarter of a mile away, from a quarter to half a point on the starboard bow, when she sounded two whistles, starboarded her wheel, with a view of giving greater fairway, and,

without slackening her speed, proceeded on her journey at her full speed of 15 miles an hour; that suddenly the schooner changed her course by shutting in her green and showing her red light, apparently proceeding across the steamer's course, when danger signals were sounded, the jingle rung, and the engines reversed, and everything done to avoid a collision, but which proved ineffective, and the vessels collided; the schooner's bowsprit cutting into the steamer's starboard bow, and extending considerably into and across the ship, causing serious injury. The schooner's contention, on the other hand, is that, while proceeding on her course, she observed the steamer about a mile off, slightly on her port bow, showing both green and red lights; that the vessels thus approached each other until within a short distance apart, when the steamer sounded two blasts of her whistle, and suddenly changed her course to port, apparently with the intention of attempting to cross the schooner's bow, and, upon seeing this maneuver on the part of the steamer, orders were given to hard starboard the helm, with a view of swinging to port, and avoiding the collision, but which proved too late, and the vessels came together, the bowsprit of the schooner catching in the joiner work of the steamer on the latter's starboard side, breaking the schooner's jibboom, carrying away her topmast and head gear, and damaging her stem. Each vessel charges negligence on the part of the other—the steamer that the schooner failed to keep her course and speed, and changed her course suddenly; that she attempted to cross the steamer's bow; her failure to have a competent master, crew, and lookout; and, on the part of the schooner, that the steamer was also without a proper lookout; that she did not keep out of the way of the schooner, or allow sufficient space for safe navigation: that she failed to slacken her speed and stop or reverse; that she improperly changed her course; that she attempted to cross ahead of the schooner, and failed timely to observe the schooner approaching. Considerable evidence was taken, and it is largely upon a correct determination of the facts that the case turns.

J. W. Willcox, for Norfolk & Washington Steamboat Company.
H. H. Little, for The Mary P. Mosquito.

WADDILL, District Judge (after stating the facts as above). There is considerable conflict in the evidence, and as to some of which it is difficult to reconcile the apparent contradictions; and, without attempting to do so as to many of the details, the conclusion reached by the court upon what seems to it to be the essential and material questions is as follows:

First. That the schooner was negligent in that she failed to maintain her course and speed up to the time of the collision, which largely brought about the same. It is true she insists that the only change in her course was made when the collision was inevitable, and that that was to port, and not to starboard, with a view of lightening the blow of the collision as far as possible. But, taking all the facts and circumstances into account, including the injury to the steamer, and particularly that of witnesses not connected with the navigation of either vessel, the court finds that the version of the steamer as to the movements of the schooner at and about the time of the collision is sustained by the evidence, and that the vessels were proceeding green to green, as claimed by the steamer, until the schooner suddenly changed her course to starboard, and across the steamer's bow.

Second. That while it is true the schooner was negligent in changing her course as indicated, it by no means follows that the steamer was free from fault in bringing about this collision. The failure of her navigators earlier to see and observe the schooner's lights cannot

be overlooked, nor can she be said to be free from fault in her navigation after they observed one of the schooner's lights. What was done might have proven harmless had not the schooner changed her course; but it was clearly negligence on the part of the steamer, on observing the green light a quarter to half a point on her starboard bow, and only a quarter of a mile away, to have proceeded at the speed of 15 miles an hour, only slightly varying her course to port. It was her duty to avoid the risk of collision, as well as the collision, and this she utterly failed to do, even after she saw the schooner.

Third. The schooner insists that the steamer was negligent in failing to have a competent lookout properly stationed at the time of the collision. The court is not prepared to say in this case that the location of the steamer's lookout, namely, on the forward part of the hurricane deck, immediately in front of the pilot house, instead of on the bow of the ship on the main deck, was not proper; but certain it is it does not appear to have entered materially into this collision, as it is quite apparent from the size of the two vessels, the character of the night, and the formation of the steamer's deck, that observation could have been made as well from the place the lookout was stationed as from the bow of the ship, which is usually and may be said to be the preferable place for the lookout to be stationed.

Fourth. Counsel for the schooner also insists that whatever error was committed by the schooner respecting her change of course was error in extremis, caused by the negligent navigation of the steamer, and for which the schooner should not be held liable. In this view the court does not concur. It is true that, had the collision occurred as claimed by the schooner, namely, that she was showing her red instead of her green light to the steamer, and that the steamer suddenly cut across her bows, and the schooner then changed her course to port to lighten the blow of the collision, the doctrine of error in extremis might apply. But this is not the way the collision occurred. The vessels approached each other green to green, and the steamer having ported, with a view of giving wider passageway, the sailing vessel neither continued on her course nor went to port, but, on the contrary, starboarded, thereby making a collision almost inevitable. The fact that the steamer starboarded shortly before the collision, and that the schooner did not at that time change her course to port, as claimed by her, is sustained by the evidence overwhelmingly. Indeed, there is much in her own evidence tending to show that the maneuver was to starboard, instead of to port.

It follows from what has been said that the collision was brought about by the combined negligence of the two vessels, and that, as a consequence, the damages arising therefrom, including the costs of court, should be borne equally by them.

ALLEN et al. v. SHERIDAN.

(Circuit Court, E. D. Missouri, E. D. June 1, 1906.)

No. 5,321.

INTERNAL REVENUE—ENFORCEMENT OF TAX—REPLEVIN OF PROPERTY SOLD—REMEDY IN FEDERAL COURT—EXCLUSIVENESS.

Property seized and sold by a collector, in the enforcement of the internal revenue laws, cannot be replevied from the purchasers by the former owner under process from a state court, and such a proceeding will not be tolerated by a federal court; the remedy for a wrongful seizure given by the statute being exclusive.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Internal Revenue, § 78.]

On Petition for an Order on Defendants to Deliver Certain Personal Property to Plaintiffs.

D. P. Dyer, U. S. Atty., E. P. Johnson, Asst. U. S. Atty., for plaintiff.

Blodgett & Davis, for defendant.

POLLOCK, District Judge. Plaintiff Allen is collector of internal revenue for the First collection district of Missouri, and the other plaintiffs were purchasers at a sale of certain personal property, levied upon by a deputy collector, under a warrant of distress issued upon an assessment of taxes against one J. C. Knott, in the sum of $900 for taxes due the United States by him as a manufacturer of oleomargarine. The defendant immediately after said sale, as constable, under color of a writ of replevin issued by William J. Hanley, Esq., a justice of the peace, seized said property and withheld the same from the possession of the plaintiffs, to whom it was sold by said deputy, and the plaintiffs joined in a petition setting forth said facts and stating that said replevin was not authorized by law, was executed in violation of the laws of the United States, for the purpose of hindering, delaying, and defrauding the United States out of the aforesaid taxes. Defendant filed a general demurrer to the petition, which the court overruled.

Heretofore there was presented to this court a bill for injunction to restrain the sale made by the collector in the Knott case. Under the positive mandate of Congress an injunctive order to restrain the collector from making the sale was, of course, denied. It is perhaps well, and this court is gratified at the thought, that the parties bringing this replevin action, the defendants here, and those advising the bringing of the same, have fallen into such kindly hands as the law officer of this court, Col. Dyer, or in all probability we would be confronted this morning with a very different proceeding than that now presented. The mistake made by counsel representing the defendants in the present case is as to the nature of the title passed by the government at sales made in the collection of the revenues of the country. It is contended that defendants have been deprived of their property without due process of law. Not so. The revenues of a country are its life blood. The power to levy and collect revenue is full and ample under the acts of Congress made in pursuance of constitutional provi-

sions, and such acts are the supreme law of the land, binding upon all parties, at all times. Not only will sales of property by the collector not be enjoined, but such property seized in the hands of the officer is not the subject of replevin. The sale cuts off all prior rights, and the title passed at such sale is an underlying title. Not only are the collection laws drastic, but, that they might be made effective, severe penal laws exist, and are strenuously enforced against those who do not pay the revenues assessed, and as well against those who interfere to prevent sales by the collector in the enforcement of the revenue laws. It would defeat the end of such laws, and put a stop to government itself, could such proceedings as have been attempted by defendants in this matter be tolerated, or should the purchaser at such a sale be prevented from bidding the full and fair value of the property offered, from the fact that he might be called upon to defend the title passed by the government at a sale made. Such is not the law. The defendants here have their remedy under the law, but it is an exclusive remedy. Necessity has given rise to the present scheme for the levy and collection of the revenues. All of the states at all times have not been as friendly to the enforcement of the revenue laws of this country as is this state at the present time, and drastic laws firmly enforced have been a necessity of government. The proceedings attempted by defendants to replevin the property sold by the collector in this case, in the enforcement of the revenue laws, cannot be tolerated.

The demurrers will be overruled, and the orders asked for the return of the property will be granted.

ELLIOTT v. GILMORE et al.

(Circuit Court, E. D. Pennsylvania. May 17, 1906.)

No. 60.

TRIAL—AMENDMENT OF VERDICT BY COURT—ADDITION OF INTEREST.

A verdict may be amended by the court by the addition of interest where it is conclusively shown by the affidavit of all of the jurors that it was their intention that interest should be computed on the amount awarded from a prior date.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 799.]

On Motion to Amend Verdict.

Keator & Johnson, for plaintiff.

Albert B. Weimer and John G. Johnson, for defendants.

HOLLAND, District Judge. It is very evident that the jury in this case intended to render a verdict in favor of the plaintiff for $2,500, with interest from the 1st day of July, 1902, to the date of the rendition of the verdict, which was April 20, 1906, so that the verdict should have been for $3,070.40 instead of $2,500. The verdict was rendered late in the day, and the jury separated. The following day, however, all the jurors signed an affidavit that it was their intention that the verdict should be for $2,500, with interest thereon from July 1, 1902. Under the circumstances we are of the opinion

that the court is authorized to correct the verdict to conform to the intention of the jury. Burlingame v. Central Railway (C. C.) 23 Fed. 706; Cope v. Kidney, 115 Pa. 228, 8 Atl. 836; Murphy v. Stewart, 43 U. S. 263, 11 L. Ed. 261.

The order of the court, therefore, is that judgment be entered in favor of the plaintiff, Thomas I. Elliott, and against the defendants, John O. Gilmore and Charles T. Schoen, for the sum of $3,070.40.

KLUTT v. PHILADELPHIA & R. RY. CO.

(Circuit Court, E. D. Pennsylvania. June 22, 1906.)

No. 25.

NEW TRIAL—GROUNDS—VERDICT AGAINST EVIDENCE—COLLISION—RUNNING DOWN ROWBOAT—INSUFFICIENT LOOKOUT.

A new trial denied to defendant in an action for the running down and killing of plaintiff's husband, who was in a rowboat, by defendant's tug and tow, on the ground that the question whether the killing was due to defendant's negligence in failing to maintain a proper lookout was one for determination by the jury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 135–149.]

On Rule for New Trial.

Francis Fisher Kane, for plaintiff.

John G. Lamb, for defendant.

HOLLAND, District Judge. With the exception of a few minor details, the evidence on the trial of this cause in April, 1906, in this court was the same as on the first trial, and the Circuit Court of Appeals, in an opinion by Judge Acheson, 142 Fed. 394, held that it was for the jury to say whether, by the employment of proper lookouts, the defendant's tug might not have discovered the exposed situation of Klutt in time, by the exercise of ordinary care and diligence, to have avoided the accident. It is true the defendant's evidence in this trial showed that there were no box cars on the floats, and the captain claimed he was at the wheel, and had an unobstructed view all around, and that this view was not interfered with in any way by the cars on the floats, nor did they interfere with his view of the man in the rowboat. Plaintiff's witnesses claim decedent was caught in the ice, but the captain insists he was not, but negligently endeavored to cross the river in front of the tow, and failed to pass in time, and that he (the captain) blew the whistle and reversed his engine so soon as he saw there was danger of his tow striking the decedent. This was a question for the jury, and if the man was fast in the ice, it was for the jury to say whether a lookout might not have discovered this in time and avoided the accident.

New trial refused.

In re CRAMOND.

(District Court, N. D. New York, June 6, 1906.)

1. BANKRUPTCY—LIENS—VALIDITY.

The rule that a bankrupt's trustee takes title to the bankrupt's property as of the date of the adjudication, subject to all valid liens thereon created more than four months prior to the filing of the bankruptcy petition, has no application to liens whenever created, which though valid as to the bankrupt are invalid as to creditors.

2. SAME—CREDITS OF BANKRUPT—ADMINISTRATION BY TRUSTEE.

Money due to a bankrupt on a paving contract at the time of the filing of his bankruptcy petition, though subject to valid liens, was properly paid to the bankrupt's trustee to be administered, and paid over to those entitled thereto under the direction of the bankruptcy court.

3. SAME—REFEREES—TRUSTEES—COMMISSIONS—PROPERTY SUBJECT TO LIENS.

Under Bankr. Act July 1, 1898, c. 541, §§ 40, 48, 30 Stat. 556, 557 [U. S. Comp. St. 1901, pp. 3436, 3439], as amended by Act Feb. 5, 1903, c. 487, §§ 9, 11, 32 Stat. 799 [U. S. Comp. St. Supp. 1905, pp. 687, 688], providing that referees shall be entitled to commissions on "all moneys disbursed to creditors by the trustee, and that trustees shall be entitled to such commissions on all moneys disbursed by them as may be allowed by the courts," credits of a bankrupt subject to valid liens, which credits were collected and disbursed in the bankruptcy proceedings, were liable for commissions to the referee and trustee in case the other property of the bankrupt was insufficient to pay such commissions and the expenses of administration.

4. SAME—LIEN CLAIMS—ALLOWANCE—STATUTES.

Bankr. Act July 1, 1898, c. 541, § 57a, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], provides that secured creditors may prove their claims showing the claim, the consideration, and securities held therefor, and section 57e provides that secured claims and others having priority may be allowed for certain purposes, but shall be allowed only for such sums as to the courts seem to be owing over and above the value of the securities or priorities. *Held*, that such sections had reference to the allowance of secured claims for the purpose of fixing the sum on which a dividend from the general estate was to be paid, and for the limiting of the voting power or voice of the secured creditor or creditor having a priority at creditors' meetings.

5. SAME—LIENS—VALIDITY.

A municipal contractor, who subsequently became a bankrupt, after having assigned the amount to become due to him from a city on a paving contract to a bank for advances to enable him to perform the contract, made other similar assignments to materialmen for materials furnished. The materials were all furnished and the work was completed and accepted subject to a slight deduction more than 30 days prior to the filing of the bankruptcy petition; the price being payable by the city within 90 days thereafter. *Held*, that such materialmen, though having filed and perfected a lien for the materials furnished, as authorized by Laws N. Y. 1897, p. 517, c. 418, § 5, were entitled to liens on the fund due from the city to the contractor by virtue of their assignments independent of the state law, which were enforceable against the fund in bankruptcy.

6. SAME—LABOR CLAIMANTS—NOTICE OF LIEN—FAILURE TO FILE.

Laws N. Y. 1897, p. 517, c. 418, § 5, provides for a lien for labor and materials furnished to a public contractor on the amount due from a state or municipal corporation. Section 12 (page 520) declares that at any time before the completion and acceptance of the improvement, and within 30 days thereafter, a person performing work for the contractor,

his subcontractor, assignee, or legal representative may file a notice of lien with the officer having charge of the disbursements of the state or corporate funds applicable to the contract under which the claim is made, and section 17 (page 522) declares that the lien for labor or materials shall not continue for a longer period than three months after the notice of the filing of the lien, unless an action is brought to foreclose the same, etc. *Held*, that persons having performed labor for a municipal contractor, who thereafter became bankrupt, having filed no notice of lien under such sections, had no lien on the amount due from the city to the contractor, though they were entitled to priority of payment over general creditors, under Bankr. Act, July 1, 1898, c. 541, § 64b, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447].

7. SAME—EQUITABLE LIENS—PRIORITY OF CLAIM.
Where a municipal contractor, who subsequently became a bankrupt, on assuming a paving contract with the city, assigned all his right to money payable from the city under the contract to a bank in order to obtain money with which to perform the work, and the bank advanced money for such purpose in good faith to enable the contractor to complete the contract, it acquired an equitable lien on the fund due from the city to the contractor, though some of the advancements were made after the contractor became insolvent, which was superior to the right to priority of payment given by Bankr. Act July 1, 1898, c. 541, § 64, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], to labor claimants having no other lien.

8. SAME—STATE LAWS—NOTICE OF LIEN.
A bank, having advanced money to a municipal contractor to enable him to perform the contract, in consideration of an assignment of an amount due the contractor from the city, was not entitled to file a lien on such fund under Laws N. Y. 1897, p. 514, c. 418, providing for liens on funds due to public improvement contractors on behalf of "laborers and materialmen."

9. SAME—CLAIMS—PRIORITY OF PAYMENT—DEBTS HAVING PRIORITY.
Bankr. Act July 1, 1898, c. 541, § 64b, subd. 5, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], providing for payment of debts owed to any person who by the laws of the state or the United States is entitled to priority, has no reference to liens actually existing on credits belonging to the bankrupt to be paid after the payment of taxes, subject to abatement for commissions expressly allowed to referees and trustees, etc.

Review of the decision of referee in bankruptcy adjudging that the costs and expenses of the proceedings in bankruptcy, including commissions of referee and trustee, and claims for labor performed within three months of the adjudication, not exceeding $300 to each laborer, be paid from the amount received by the trustee in bankruptcy on a street paving contract between William J. Cramond, now the bankrupt, and the city of Rome, N. Y., which money was not actually due and payable at the date of the filing of the petition in bankruptcy, before payment therefrom to certain assignees of the money to become due on such contract on assignments thereof made prior to the bankruptcy and more than three months prior thereto as security for advances of money to be made, and which were made, to carry on and prosecute the work to be done and procure the necessary material to be used in executing the contract, and also to procure material to be used, and which was necessarily procured and used, in the execution and performance of such contract. The assignments of such money to become due and payable were made prior to the advances of money and furnishing of material and prior to the doing of any work on the contract. The labor claims, sought to be given priority, were for labor done for the contractor, now bankrupt, in the execution of such contract, and six of the assignees of such moneys filed liens pursuant to the lien law of the state of New York. The labor claimants, in question here, did not.

Wm. J. Powers and Thomas J. McNamara, for labor claimants.
D. F. Searle, for assignees of moneys.
McMahon & Larkin, for trustee.

RAY, District Judge. On the 26th day of August, 1904, the now bankrupt, William J. Cramond, then solvent, entered into a written contract with the city of Rome to pave, with brick, East Dominick street in said city from First street to the entrance to the Locomotive Works. He was to furnish all the material and perform all the labor and payment of the contract price, $26,009, was to be made 90 days after the completion and acceptance of the work. The contract also contained this provision:

"After the acceptance of all or any portion of the work by the common council, within ninety days thereafter, payments will be made for that portion, or all of the work accepted."

This contract was duly filed in the office of the chamberlain of the city of Rome. On the same day, August 26, 1904, the said William J. Cramond executed and delivered to the First National Bank of Rome, N. Y., an assignment, of which the following is a copy:

"For a valuable consideration to me in hand paid, the receipt whereof is hereby acknowledged, I hereby sell, assign, transfer and turn over unto the First National Bank of Rome the sum of ten thousand dollars ($10,000) with interest, of the moneys first due or to become due to me on a contract between the city of Rome and myself made and executed August 26, 1904, for the paving of E. Dominick street from First street to the Locomotive Works, the original of which contract is on file in the chamberlain's office of the city of Rome, and a copy of which is hereto attached and made a part hereof. And I hereby give and grant unto said the First National Bank of Rome full power and authority to collect and receive upon said contract from the said the city of Rome in my place and stead the said sum of $10,000, with interest thereon, and to take all necessary proceedings for the collection thereof, and to execute and deliver all proper receipts and vouchers therefor the same as I might or could do were not this assignment made. I hereby expressly represent that I have full power and authority to execute this assignment; that the said sum of money is to become due me from the said the city of Rome by reason of said contract; that no assignment or transfer of the moneys to become due upon said contract other than this has been executed by me, and the said the city of Rome, its common council and chamberlain, are hereby authorized and directed to pay to the said the First National Bank of Rome the said sum of $10,000, with interest thereon from the date hereof.

"Witness my hand and seal at Rome, N. Y., this 26th day of August, 1904.
"William J. Cramond. [L. S.]"

August 31, 1904, this assignment, or a copy thereof, was filed in the proper office. This assignment was made in good faith, and, in fact, to secure advances of money to be made and which were made, from time to time, by the bank to said Cramond to the amount of $10,000 to enable him to pay labor and purchase material to be used and which were used in performing the contract.

On the 2d day of September, 1904, said Cramond executed and delivered to the New York Brick & Paving Company of Syracuse, N. Y., another assignment of moneys to become due on such contract with the city of Rome, to the amount of $11,000, which was filed in

said office on the same day. The material part of said assignment reads as follows:

"For a valuable consideration to me in hand paid, the receipt whereof is hereby acknowledged, and in payment for and to secure the payment of bricks delivered and to be delivered, I hereby sell, assign, transfer and turn over to the New York Brick and Paving Company of Syracuse, New York, the sum of eleven thousand dollars ($11,000) of the moneys first due or to become due to me on a contract between the city of Rome and myself made and executed August 26th, 1904, for the paving of East Dominick street from First street to the Locomotive Works, the original of which contract is on file in the chamberlain's office of the city of Rome, N. Y., and a copy of which is hereto attached and made a part hereof. And I hereby give and grant unto said New York Brick and Paving Company full power and authority to collect and receive from the city of Rome upon said contract in my place and stead of said sum of eleven thousand dollars ($11,000), or whatever amount may be due and owing for brick furnished at the price agreed upon, with interest thereon as agreed, and to take all necessary proceeding for the collection thereof and may execute and deliver all proper receipts and vouchers therefor, the same as I might or could do were not this assignment made. It is understood that the First National Bank of Rome, New York, has an assignment prior to this to secure the payment of ten thousand dollars ($10,000). * * * The said city of Rome, its common council and chamberlain are hereby authorized and directed to pay to the said New York Brick and Paving Company the said sum of eleven thousand dollars ($11,000) out of the said moneys first due or to become due to me on said contract, subject to the rights of the said First National Bank of Rome, under the assignment above mentioned."

This was given and received in good faith as security for material, brick, to be furnished and used and which was thereafter furnished and used, to the full value of $11,000, in the performance of said contract.

On the 27th day of December, 1904, said the New York Brick & Paving Company filed in the proper office a notice of lien in due form "upon the moneys of the city of Rome applicable to construction of the public improvement" described therein, being the paving mentioned and described in the aforesaid contract. The amount of the lien claimed was $11,296.20, and the notice of lien contained the following:

"The amount claimed to be due is $11,296.20, for which said lienor has an assignment to the amount of $11,000.00, leaving a balance not covered by assignments of $296.20, with interest from November 1, 1904."

On the 6th day of September, 1904, said Cramond executed and delivered to the Medina Quarry Company, of Albion, N. Y., a third assignment of moneys to become due on such contract, to the amount of $3,475.00, to secure it for curbing stone to be delivered and used and which were thereafter, to the full value of $3,475, delivered and used in the execution and performance of such contract. This assignment was also given and received in good faith and duly filed in the proper office on the same day.

On the 28th day of December, 1904, said Medina Quarry Company filed a notice of lien "upon the moneys of the city of Rome, applicable to the construction of the public improvement" therein mentioned, the pavement in question, for the sum of $3,658.90, and interest on cer-

tain sums from certain specified dates, reciting the said assignment of moneys to become due on said contract to the amount of $3,475 thereof.

These notices of lien were in due form and properly executed and duly served. March 23, and 24, 1905, these lienors obtained from a judge of the Supreme Court, and duly filed same, with notice thereof, orders extending said liens, respectively, pursuant to the provisions of the lien law of the state of New York. The labor claimants whose rights are in question here have not, so far as appears, filed notices of lien pursuant to the statute of the state of New York, known as the lien law. On the 27th day of January, 1905, a petition in bankruptcy was filed in this court to have said Cramond adjudicated a bankrupt, and on the 28th day of January, 1905, he was adjudicated a bankrupt accordingly. Thereafter and on the 11th day of February, 1905, one M. H. Powers was duly appointed and qualified as trustee of the bankrupt's estate. He qualified February 16, 1905. The said contractor entered on the performance of the contract, soon after its execution and delivery, and completed it, substantially, employing labor on which he made payments, but a large number of laborers, 76 in number, were unpaid in full at the time of the bankruptcy. The total of these claims is over $1,018.64, all for labor performed for the contractor in the execution of the contract and on this paving work within the three months prior to the adjudication in bankruptcy. On the 19th day of December, 1904, the common council of the city of Rome adopted the following resolution: "Resolved that the paving of East Dominick street be accepted. That $100 be reserved for the cleaning of the streets in the city."

The contractor did not clean the streets, but the trustee in bankruptcy did, and on the 19th day of March, 1905, the city paid to the trustee the amount due on the contract with interest, in all $26,386.36. This was done pursuant to an order of the referee in bankruptcy that payment be made to the trustee, and the validity of that order was not questioned. The trustee has received from the other property of the bankrupt $622.79. The estate, $27,009.15, will not pay the expenses of administration and the amount of said assignments and liens and leave anything for the labor creditors. Or, if the expenses of administration and labor creditors, to the amount of $300 each, are paid and then the amount of the said assignments are paid, in order, the Medina Quarry Company will not be paid in full.

The question is: Shall any part of the $26,386.36 be applied to the payment of the costs and expenses of administration, including commissions, and to the payment of these labor claims, or of either, before paying the Medina Quarry Company in full? Has the bank a lien prior to the claim of these laborers?

February 27, 1905, the First National Bank of Rome filed its claim at $10,451.74, the New York Brick & Paving Co. filed its claim at $11,286.20, and the Medina Quarry Co. its claim at $3,658.90. The title of the trustee in bankruptcy, when appointed, relates back to the date of adjudication. Act July 1, 1898, c. 541, § 70, 30 Stat. 565, 566 [U. S. Comp. St. 1901, p. 3451]. He takes title to the property of the

bankrupt as it then was and subject to all valid liens thereon created more than four months prior to the filing of the petition. But this rule has no application to liens, whenever created, which, although valid as to the bankrupt, are invalid as to creditors. First National Bank of Baltimore v. Staake (U. S. Supreme Court No. 213, decided April 30, 1906) 26 Sup. Ct. 580, 50 L. Ed. ——. The court says:

"The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors."

The money due on this contract belonged to the estate in bankruptcy subject to all valid liens, if any, and was properly paid to the trustee, and it is his duty to administer it or pay it over to those entitled thereto pursuant to the order and direction of this court which has its custody for the purposes of administration and distribution. The various claimants have proved their claims, and it is the duty of the court to adjudicate their respective rights and priorities and establish all liens on the funds and determine their amount and direct their payment. I do not understand the law to be, or that the bankruptcy act contemplates, that the referee and trustee shall do this work without compensation in case it shall be determined that the liens on the funds of the estate, assuming that all are subject to liens are equal to or greater than such assets. Such a rule would require the officers of the court to spend time and money in caring for, protecting, and preserving the funds of the estate, subject to liens, for the benefit and profit of the lienors without compensation or reimbursement.

The court of bankruptcy is a court of equity (section 2 of the Bankrupt Act of July 1, 1898, c. 541, 30 Stat. 545, 546 [U. S. Comp. St. 1901, p. 3420]), and when it lawfully takes hold of and administers the estate of a bankrupt and has the funds in its possession for that purpose it may direct, and it is its duty to direct, that the lawful fees and commissions of its officers and expenses of such administration be paid therefrom, and when necessary, in such cases, liens on such funds must abate for this purpose.

Section 40 of the bankruptcy act (30 Stat. 556 [U. S. Comp. St. 1901, p. 3436]) expressly states:

"Sec. 40. Compensation of Referees.—(a) Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

Section 48 of the act (30 Stat. 557, 558 [U. S. Comp. St. 1901, p. 3439]) provides:

'Sec. 48. Compensation of Trustees.—(a) Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have

administered such commissions on all moneys disbursed by them as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition."

There is no suggestion that these commissions, etc., are confined to and must be computed on moneys disbursed to the general creditors by the trustee. In section 40 the language is "all moneys disbursed to creditors by the trustee" and in section 48 "all moneys disbursed by them as may be allowed by the courts." This pre-supposes, of course, that the money disbursed belonged to the estate of the bankrupt and was rightfully in the hands of the trustee for disbursement. Such funds may come into the possession of the court for this purpose in two ways: (1) By operation of law, and (2) by the consent or acquiescence of those interested therein. This position is founded in common sense and reason, and is supported not only by the express language of the act, but by authority. In re Sanford Furniture Mfg. Co., 11 Am. Bankr. Rep. 414, 126 Fed. 888; In re Sabine, 1 Am. Bankr. Rep. 322.

By the amendatory act of 1903 the words "all moneys disbursed to creditors by the trustee" were substituted for "sums to be paid as dividends and commissions" in section 40 of the original act, which provides for commissions to referees. By the same amendatory act the words "all moneys disbursed by them" were substituted for the words "sums to be paid as dividends and commissions" in section 48 of the original act, which provides for commissions to trustees. Here, as to trustees, there is no limitation to "moneys disbursed to creditors." The language covers, and evidently was intended to include, all moneys lawfully disbursed by the trustee, and held by him as such, whether to creditors, secured or unsecured or having priority, or to other persons. If to creditors it is immaterial whether the amounts lawfully paid them from the funds in court are paid as dividends or in satisfaction of a lien or liens on the fund. By section 1 of the act "creditor shall include any one who owns a demand or claim provable in bankruptcy." Secured claims are provable in bankruptcy, although allowable only to a certain amount. See section 57 of the act (30 Stat. 560, 561 [U. S. Comp. St. 1901, p. 3443]).

If the money comes lawfully into the hands of the trustee, as such, and, if he in the performance of his duty as such is required to protect, preserve, and care for it, and eventually disburse it pursuant to the order of the court, and does so, there is no reason why he should not have his commissions, if the court allows them, even if the funds are subject to a lien which in law and equity the court is required to recognize and enforce. It is true that in some cases the allowance and payment of these commissions may deplete, to that extent, the general fund applicable to the payment of dividends, while in others, as in this case, such allowance may deplete the amount applicable to the payment

of the liens. The act contemplates that secured creditors may and shall prove their claims, and they are to set forth "the claim, the consideration therefor, and whether any, and, if so what securities are held therefor," etc. Section 57, subd. a. Claims of secured creditors and those having priority may also be allowed for certain purposes, "but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities." Section 57, subd. e.

This has reference to the allowance thereof for the purpose of fixing the sum on which a dividend from the general estate is to be paid and also of limiting the voting power or voice of the secured creditor, or creditor having a priority, at creditors' meetings. See section 56, which provides:

"Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided."

It was not intended to prohibit the court in bankruptcy from determining the validity and amount of a lien on the funds lawfully in the hands of the court and trustee, as such, or to deprive the referee and trustee of their commissions fixed and allowed by the law, or by the court, as the case may be, when they respectively adjudicate upon, care for, protect, and preserve and disburse the fund in court.

The amendatory act of 1903 had a purpose, and it is expressed in unambiguous language. Subdivision h of section 57 provides the mode of determining the value of securities held by secured creditors, and when ascertained "the amount of such value shall be credited upon such claims and a dividend shall be paid only on the unpaid balance." If the value has been legally determined outside of the court of bankruptcy, it will take proof of and be governed by that fact, of course. The costs and expenses of administration, including the commissions of referee and trustee, will be paid from the funds in the hands of the trustee; the sum realized from sources outside the paving contract first being applied to that purpose, however.

As to the claims for labor, a more difficult proposition is presented. At the time of the execution and delivery of the assignments no money had been earned by Cramond on the contract. But it was all earned, the contract work all done, except work to the value of less than $50, to be done in cleaning the streets, and the material all furnished, prior to the 19th day of December, 1904, on which day the work was accepted, and more than 30 days prior to the filing of the petition in bankruptcy. The liability of the city to Cramond for the contract price, less $100, was fixed by the acceptance of the work on that day. It was to be paid within 90 days thereafter. When the liens of the New York Brick & Paving Company and of the Medina Quarry Company were filed, December 27 and December 28, 1904, respectively, the contract price of the work had been earned, the work accepted, and the liability of the city fixed, but Cramond was then insolvent. The liens of these two companies, created by filing their notice of liens, were obtained when the contractor, Cramond, was insolvent and

within the four months prior to the filing of the petition in bankruptcy and the adjudication following. The money was then due, within the fair meaning of the words of the assignments, although not payable. Buehler v. Pierce, 175 N. Y. 266–267, 67 N. E. 573.

The assignment then attached to the money earned and due under the terms of the contract. The lien on the fund was not "obtained in or pursuant to any suit or proceeding at law or in equity," or through legal proceedings. In re Emslie, 102 Fed. 291, 42 C. C. A. 350. These liens were not given with intent on the part of the bankrupt to hinder, delay, or defraud his creditors, or any of them. Nor is such a transfer or lien as this, created under such circumstances, held null and void as against creditors by the laws of the state of New York, but, on the other hand, is authorized by statute and held valid. Having filed notices of lien pursuant to law prior to the bankruptcy of Cramond and having continued these liens by an order of the court, it is clear that the New York Brick & Paving Company and the Medina Quarry Company have valid liens on the fund superior to the rights and liens of labor creditors who did not file notices of lien pursuant to the lien law of the state of New York. The filing of a notice of lien is necessary to the preservation and continuance of the lien or the right to a lien given by the statute as against those who having the right to a lien do file such notice. In other words, if several materialmen and laborers have liens or a right to liens, which are perfected and continued on filing the notice required by the statute, and all are on an equality prior to the filing of such notices, those who file the requisite notices of lien gain a priority over those who do not. The priority of such liens is determined by the date of filing. In re Kerby-Dennis Co., 95 Fed. 116, 36 C. C. A. 677; In re Emslie, 102 Fed. 291, 42 C. C. A. 350. But the First National Bank of Rome did not file any notice of lien. In fact it was not entitled to file a lien, as it was neither a laborer nor a materialman. Its right to an equitable lien and priority over the labor creditors rests in its assignment of the money to become due on the contract.

The labor creditors in question here, I am not referring to the few who did file liens, were entitled to a lien under section 5 of chapter 418, p. 517, Laws of New York, approved May 13, 1897, entitled "An act in relation to liens, constituting chapter forty-nine of the general laws," as amended by chapter 37, p. 74, Laws 1902, and which section reads as follows:

"Sec. 5. Liens Under Contracts for Public Improvements.—A person performing labor for or furnishing materials to a contractor, his sub-contractor or legal representative, for the construction of a public improvement pursuant to a contract by such contractor with the state or a municipal corporation, shall have a lien for the principal and interest of the value or agreed price of such labor or materials upon the moneys of the state or of such corporation applicable to the construction of such improvement, to the extent of the amount due or to become due on such contract, upon filing a notice of lien as prescribed in this article."

It will be noted that the lien is given "upon filing a notice of lien as prescribed in this article." That notice is provided for in section 12 of the act referred to, and the material part thereof reads as follows:

"Sec. 12. Notice of Lien on Account of Public Improvements.—At any time before the construction of a public improvement is completed and accepted by the state or by the municipal corporation, and within thirty days after such completion and acceptance, a person performing work for or furnishing materials to a contractor, his sub-contractor, assignee or legal representative, may file a notice of lien with the head of the department or bureau having charge of such construction and with the comptroller of the state or with the financial officer of the municipal corporation, or other officer or person charged with the custody and disbursements of the state or corporate funds applicable to the contract under which the claim is made."

Then follows a statement as to what the notice of lien shall contain. Section 17 of the same act provides for the duration of such a lien, and reads as follows:

Sec. 17. Duration of Lien Under Contract for a Public Improvement.—If the lien is for labor done or materials furnished for a public improvement, it shall not continue for a longer period than three months from the time of filing the notice of such lien, unless an action is commenced to foreclose such lien within that time, and a notice of the pendency of such action is filed with the comptroller of the state or the financial officer of the municipal corporation with whom the notice of such lien was filed, or unless an order be made by a court of record, continuing such lien, and a new docket be made stating such fact."

Section 20 of the act states when and how a lien for a public improvement is discharged, and, so far as material to the labor claims where a notice was filed, is as follows:

"Sec. 20. Discharge of Lien for Public Improvement.—A lien against the amount due or to become due a contractor from a municipal corporation for the construction of a public improvement may be discharged as follows: * * * (2) By lapse of time, when three months have elapsed since filing the notice of lien, and no action has been commenced to enforce the lien."

Those who did not file notices of lien under this statute have no lien on this fund by virtue of the statutes of the state of New York. Such persons had the right to a lien, but no lien until the prescribed notice was filed, etc.

The bankruptcy act, approved July 1, 1898, as amended by the act of February 5, 1903, creates no "lien," in the proper sense of the word, in favor of these labor claimants, but creates a priority in their favor as prescribed in section 64 of the act of July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], which relates to "Debts which have priority." By it (subdivision a) taxes are first to be paid; by subdivision b "the debts to have priority," except as otherwise provided in the act, and "to be paid in full out of bankrupt estates, and the order of payment shall be": (1) Costs of preserving the estates; (2) filing fees, etc; (3) costs of administration; (4) "wages due to workmen, clerks and servants which have been earned within three months before the date of the commencement of proceedings not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the states or the United States is entitled to priority."

By section 67 of the act, which deals with "Liens" in subdivision d, it is provided:

"(d) Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been

recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act." (30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]).

But liens obtained by compliance with the provisions of the lien law of the state of New York are not "liens given or accepted," within the meaning of this subdivision. However, the general scope and purport of the act and of the section relating to liens are that all liens on property good at the time of the adjudication in bankruptcy as against the debtor and all his creditors, and not made void or voidable by some special provision, remain good and valid, and the trustee takes title subject thereto. In re New York Economical Printing Co., 110 Fed. 514, 49 C. C. A. 133, approved as to this point, Hewit v. Berlin Machine Works, 194 U. S. 296–302, 24 Sup. Ct. 690, 48 L. Ed. 986; Thompson v. Fairbanks, 196 U. S. 516–526, 25 Sup. Ct. 306, 49 L. Ed. 577.

In Thompson v. Fairbanks, supra, the court, at page 526 of 196 U. S., page 310 of 25 Sup. Ct. (49 L. Ed. 577), said:

"Under that law it was held that the assignee in bankruptcy stood in the shoes of the bankrupt, and that 'except where, within a prescribed period before the commencement of proceedings in bankruptcy, an attachment has been sued out against the property of the bankrupt, or where his disposition of his property was, under the statute, fraudulent and void, his assignees take his real and personal estate, subject to all equities, liens and incumbrances thereon, whether created by his act or by operation of law.' Yeatman v. Savings Institution, 95 U. S. 764, 24 L. Ed. 589. See, also, Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816; Hauselt v. Harrison, 105 U. S. 401, 26 L. Ed. 1075. Under the present bankrupt act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act. In re Garcewich, 115 Fed. 87, 89, 53 C. C. A. 510, and in cases cited."

Without further discussion, assuming this to be so, it only remains to determine whether or not the First National Bank of Rome, by virtue of its assignment of the moneys to come due on the contract between Cramond and the city of Rome, and the advancement of money and the performance of the contract and the acceptance of the work by the city, acquired a lien on the fund superior to the right to priority of payment given by section 64 to labor creditors having no other lien. And this question, it seems to me, depends on the question whether the bank had an equitable lien that had attached to the fund, the money due from the city to Cramond on the contract, at the date of the adjudication, and which was neither void nor voidable under any provision of the bankruptcy law. I think it had such a lien. It had advanced the money to Cramond from time to time to enable him to perform the contract. This money had gone into material or labor put into the work and the fund due from the city, to an extent, represented, or was created, by these advances. The money was advanced in good faith on the strength of the assignment which contained an order and direction to the city, or its proper fiscal officers, to pay it to the bank. The assignment was duly filed and recorded with the city chamberlain, and the city therefore had notice. Cramond

reserved to himself no right in the money, nor any control over it, or right to revoke the assignment. The principle is well recognized and established in the courts of the United States as well as in those of the states. Peugh v. Porter, 112 U. S. 737, 5 Sup. Ct. 361, 28 L. Ed. 859; Wright v. Ellison, 1 Wall. (U. S.) 16, 17 L. Ed. 555; Trist v. Child, 21 Wall. (U. S.) 441–447, 22 L. Ed. 623; Christmas v. Russell, 14 Wall. (U. S.) 69–84, 20 L. Ed. 762; Hall v. City of Buffalo, *40 N. Y. 193–199; Parker v. City of Syracuse, 31 N. Y. 376–379; Lowery v. Steward, 25 N. Y. 239–242, 82 Am. Dec. 346; Brill v. Tuttle, 81 N. Y. 454, 37 Am. Rep. 515; Dannat v. Comptroller of City of N. Y., 77 N. Y. 45; Gibson v. Lenané, 94 N. Y. 183. It is unnecessary to cite cases in other states. Here the assignment was absolute and the direction to pay absolute and unconditional.

That the right of the assignee, the First National Bank of Rome, was superior to that of the laborers who filed no notice of lien is well settled. Stevens v. Ogden, 130 N. Y. 182, 29 N. E. 229; Lauer v. Dunn, 115 N. Y. 405, 22 N. E. 270; Conselyea v. Blanchard, 103 N. Y. 233, 8 N. E. 490; Brill v. Tuttle, 81 N. Y. 454, 37 Am. Rep. 515; McCorkle v. Herrman, 117 N. Y. 297, 22 N. E. 948.

In Trist v. Child, supra, the court, at page 447 of 21 Wall. (22 L. Ed. page 623), said:

"It is well settled that an order to pay a debt out of a particular fund belonging to the debtor gives to the creditor a specific equitable lien upon the fund, and binds it in the hands of the drawee. A part of the particular fund may be assigned by an order, and the payee may enforce payment of the amount against the drawee. But a mere agreement to pay out of such fund is not sufficient. Something more is necessary. There must be an appropriation of the fund pro tanto, either by giving an order or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor."

In Christmas v. Russell, supra, the court held:

"A mere promise, though of the clearest and most solemn kind, to pay a debt out of a particular fund, is not an assignment of the fund even in equity. To make an equitable assignment there should be such an actual or constructive appropriation of the subject-matter as to confer a complete and present right on the party meant to be provided for, even where the circumstance does not admit of its immediate exercise. If the holder of the fund retain control over it, as ex gr., power on his own account, to collect it or to revoke the disposition promised, this is fatal to the thing as an equitable assignment."

In Peugh v. Porter, supra, the court held:

"An instrument, by which A., as attorney in fact by substitution, for good consideration, assigns to B. an interest in claims to be established against a foreign government in a mixed commission, is valid in equity, although made before the establishment of the claim, and creation of the fund, and may work a distinct appropriation of the fund in B's favor, to the extent of the assignments, within the rule laid down in Wright v. Ellison, 1 Wall. 16, 17 L. Ed. 555."

In Stevens v. Ogden, supra, the court held:

"Under the mechanic's lien law of 1885 (chapter 342, p. 585, Laws 1885), the filing of the prescribed notice originates the lien, and until this is done the laborer or materialman has no preferential right to be paid out of the sum due the contractor from the owner of the building. If, before notice is

filed, the contractor assigns to a creditor in payment of his debt, the whole or any portion of the moneys due or to become due to him on his contract, the assignor is entitled to the same in preference to the lienor."

In McCorkle v. Herrman, supra, the court held:

"Under the mechanic's lien law of 1885 (Laws 1885, p. 587, c. 342), one who has furnished labor or materials in the erection of a building has, prior to the filing of his notice of lien, no preferential right to be paid for his labor or materials out of a sum due from the owner of the building to the contractors, but stands in the same position as other creditors; and if, before he has filed his lien, another creditor, pursuing the usual remedies for the collection of debts, has acquired a legal or equitable right to have the debt applied in satisfaction of his claim, this right is not overreached by liens subsequently filed under said act, save where priority is given by the provisions of the act (section 5)."

These same remarks apply as to the rights of the New York Brick & Paving Company and the Medina Quarry Company, and under them they, under the authorities quoted, are prior to the labor lien creditors who actually filed liens. As each assignee subsequent to the bank took its assignment subject to the prior assignments they will be paid in order of filing and recording.

Since the decision of Whitney, as Trustee, etc., v. Wenman et al., 198 U. S. 539–552, 25 Sup. Ct. 778, 49 L. Ed. 1157, there is no question of the power and jurisdiction of this court to determine all of these questions. The court there said and held:

"We think the result of these cases is, in view of the broad powers conferred in section 2 of the bankrupt act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein. This conclusion accords with a number of well-considered cases in the federal courts. In re Whitener, 105 Fed. 180, 44 C. C. A. 434; In re Antigo Screen Door Co., 123 Fed. 249, 59 C. C. A. 248; In re Kellogg, 121 Fed. 333, 57 C. C. A. 547."

It may be well to remark that in my opinion subdivision 5 of section 64 of the bankruptcy act has no reference to liens actually existing at the time of the adjudication. Liens on the property of the bankrupt, not void or voidable under some provision of the law, whether obtained and created by express contract or by virtue of compliance with the lien law of a state, since the amendment to the act, are first to be paid (excepting taxes) subject to abatement for commissions expressly allowed to referees and trustees on all sums disbursed to creditors in the one case and to any one in the other. While all liens are, in a sense, priorities, and certain priorities may be liens, in a sense, still all priorities are not liens, and in my opinion clause 5 of subdivision b of section 64 does not refer, and was not intended to refer to liens on the estate of the bankrupt. It was assumed that valid liens would be paid, and that the debts and expenses, etc., designated to have priority would have priority of payment out of the estate after liens were satisfied, or out of the proceeds of the property if sold sub-

ject to liens. Since the striking out of the words "sums to be paid as dividends and commissions," in section 48, and the substitution of the words "on all moneys disbursed by them," and a similar change in section 40 by the amendment of 1902, these commissions when necessary to be paid from funds subject to the liens, and which payment causes an abatement of the lien to that extent, gain the priority over liens by virtue of the reading of sections 40 and 48 as amended, which sections now limit or modify subdivision b of section 64, and not by virtue of the reading of section 64. No corresponding amendment was made in section 64 of the act as it was not regarded necessary. The directions of sections 40 and 48 are plain and explicit, and must be read in connection with section 64. Only in exceptional cases does the necessity for applying the modification arise. I think it also clear that, should a case arise where a laborer has acquired a lien by virtue of the state lien law for wages earned within the three months before the commencement of proceedings, even should such lien largely exceed $300, he would hold his lien and be entitled to full payment thereof notwithstanding clause 4 of subdivision b of section 64.

The question is presented that, under section 13 of the lien law of the state of New York (section 13 of chapter 418, p. 520, Laws 1897, not amended), the lien of laborers for daily or weekly wages has a preference over the lien of materialmen, or those not working for daily or weekly wages. The closing subdivision of section 13, which relates to "Priority of Liens," reads:

"Persons standing in equal degrees as colaborers or materialmen, shall have priority according to the date of filing their respective liens; but in all cases laborers for daily or weekly wages shall have preference over all other claimants under this article, without reference to the time when such laborers shall have filed their notices of liens."

As this section does not profess to deal with liens on account of public improvements, it may be questioned whether this clause applies in such cases, but, still, the words are "over all other claimants under this article" and claimants having liens on account of public improvements are certainly "claimants under this article," which is article 1, relating to mechanics' liens, of chapter 49 of the General Laws. It is not necessary to expressly decide the question here as the liens of the First National Bank, the New York Brick & Paving Company, and the Medina Quarry Company do not arise under, and were not created by, the lien law of New York, but by virtue of their assignments, respectively, and they are not claimants under the article in question, and the estate, including the paving fund in question, is not sufficient to pay those liens and the costs and expenses of administration, including commissions, and leave anything for the claimants under the lien law of the state of New York. For the same reason it is not necessary to decide as to the effect of the failure of certain of the claimants under the lien law of New York, bankruptcy having intervened, to obtain an order of the court extending and continuing their liens pursuant to section 17 of that law as amended. These are interesting, but, as the case stands, not practical questions here. It is not necessary to decide as to the priority among themselves of the liens filed under the lien law of the state of New York.

Something has been said as to the effect of advances of money, etc., made under and pursuant to the assignments during the three months immediately preceding the commencement of the bankruptcy proceedings. True some of these advances were made after Cramond became, in fact, insolvent, but the assignees did not know this fact and had no reasonable ground to so believe. In fact I cannot see that it would affect their liens in the slightest degree had they had full knowledge of this fact. They had already taken and filed and recorded their assignments and in good faith made large advances of money and material, respectively. To have ceased to furnish money and material according to the agreement, after Cramond became insolvent, would have resulted in the suspension of work, failure to perform the contract, and the consequent loss of all they had put into the work. These laborers are unfortunate, but I see no way to give them priority over the holders of these assignments of the fund without doing violence to the law as I feel compelled to construe it.

The order of the referee is so far modified that payment and distribution of the funds in the hands of the trustee not derived from the paving contract will be made as follows: (1) Taxes if any; (2) the actual and necessary cost of preserving the estate subsequent to filing the petition, if any; (3) the cost of administration including fees of witnesses and one reasonable attorney fee to the bankrupt as the court, referee, may allow; and then commissions to the referee and trustee computed on all sums disbursed, including the paving contract fund, as specified in sections 40 and 48 of the bankruptcy act and construed by this opinion, so far as such fund will pay same. Should such fund, not including the paving fund, pay such specified sums and such commissions so computed in full and leave a balance, such balance will be paid to the workmen, clerks, or servants of the bankrupt earned by them within the three months prior to the commencement of the bankruptcy proceeding, pro rata, but not exceeding $300 to each claimant. Payment and distribution of the moneys received from the city of Rome on the paving contract will be made as follows: (1) To the referee and trustee any balance of commissions computed on both funds as stated not paid from the fund first mentioned; and (2) to the said First National Bank of Rome, the New York Brick & Paving Company, and the Medina Quarry Company in satisfaction of their liens under their respective assignments of an interest in the fund, as the same may be established as to amount by the referee, in the order named, and in the order of the assignments. In case there is a surplus of this fund, it will be paid to labor claimants who have filed liens as their rights and priorities thereunder may appear.

There will be an order accordingly.

UTAH CONST. CO. v. MONTANA R. CO.

(Circuit Court, D. Montana. January 29, 1906.)

No. 714.

1. DISCOVERY—PRODUCTION OF BOOKS AND PAPERS—REMEDIES—MOTION.
In a suit in equity for an accounting and to foreclose a mechanics' lien for railroad construction work, complainant was entitled to discovery of books and papers in defendant's possession necessary to establish complainant's cause of action on a motion supported by affidavit before trial.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Discovery, §§ 35, 89.]

2. SAME—ANSWER UNDER OATH—WAIVER.
Where complainant filed a bill for an accounting and foreclosure of a mechanic's lien, the fact that the bill waived an answer under oath did not amount to a waiver of complainant's right to discovery.

3. SAME—AFFIDAVIT—DESCRIPTION OF PAPERS.
Complainant sued for an accounting to foreclose a mechanic's lien for railroad construction work done under a contract. Defendant denied the indebtedness, and filed a cross-bill to recover damages for complainant's failure to complete the work, which complainant answered, alleging a change of route and consequent delay, and that defendant had paid certain monthly estimates after the time limited by the contract for the completion of the work had expired, whereupon complainant moved to inspect books, papers, and documents in defendant's possession, described as those relating to final estimates, showing quantities and classifications allowed throughout the work, maps of the railroad line, and the building, cross section, and other notes, particulars of haul, showing number of cubic yards moved, distance hauled, and notes of classification allowed for current estimates and final estimates, prepared by defendant's engineer, as provided by the construction contract, all of which were alone in the possession of defendant. *Held*, that the character and materiality of the papers desired to be produced was sufficiently disclosed.

On Motion for an Inspection of Books and Papers. Granted.

T. J. Walsh, for complainant.
Wm. Wallace, Jr., and M. S. Gunn, for defendant.

HUNT, District Judge. Suit in equity to foreclose a mechanic's lien filed by the complainant upon a certain railroad owned by defendant to secure payment alleged to be due complainant by defendant on account of work done by the complainant in the construction of a railroad line, the said work having been done under and pursuant to a certain construction contract entered into between the parties to the suit. Defendant answered, denying any indebtedness over and above a certain sum, and generally denying the averments of complainant's bill. Defendant filed a cross-bill seeking to recover damages of complainant on account of an alleged failure to complete the work contemplated by the contract. Complainant answered the cross-bill, alleging, among other things, the changing of the route of the railroad from that contemplated when the contract was entered into, and consequent delay. Complainant also pleaded that defendant had paid certain monthly estimates after the time limited by the contract for the com-

pletion of the work. The issues were framed, and complainant now moves the court for an order requiring the defendant to permit the complainant to inspect certain books, papers, and documents in its possession, and to take copies of the same. The books, papers, and documents relate to the final estimates, showing quantities and classifications allowed throughout the work, maps of the railroad line, and the building, cross-section, and other notes, particulars of haul, showing number of cubic yards moved and distance hauled, and notes of classification allowed for current estimates and final estimates prepared by the engineer of the defendant company. The affidavit accompanying the motion states that all such documents and papers were prepared by or under the direction of the engineer of the defendant company, referred to in the contract between the parties, a copy of which is made a part of the bill of complaint, and that all maps, cross-sections, and particulars were prepared and preserved in order that a record might be made and kept of the work done by the complainant under its contract, and in order to ascertain accurately the amount due to the complainant and that complainant has not in its possession any of the maps, documents, or papers that it desires to inspect, but that defendant has all of them. Complainant further says that it is material and necessary to its case that it have an inspection, and permission to take copies of the documents, papers, and maps referred to, and that it cannot safely proceed to trial without such inspection and copies. The defendant objects to the application and motion for production and inspection, upon the ground that the court has no power to grant such motion; because the showing made is insufficient to authorize the making of the order requested; because it is apparent that the application and motion are in the nature of what is termed a "fishing expedition"; and because it does not appear that the books, papers, and documents contain any evidence in support of the allegations in the bill of complaint, or defense to the cause of action stated in the cross-bill.

From this statement it will be seen that the complainant desires an order which will entitle it to the benefit of certain writings in defendant's possession which will aid it in proving the allegations and charges in its bill. Refreshing the mind by reading English and American commentaries and decisions upon discovery, it becomes clear that the growth of the practice has been steady, and we find that judges and text-writers have gradually construed its use in a liberal and broadening manner, while legislative bodies have simplified the methods by which the remedy may be invoked and applied. The ways of business are now very largely by records. Organization into corporate enterprise necessitates the writing down of business transactions by entries in books. Such entries are usually made contemporaneously with the transactions themselves; hence they become the very best evidence whereby the truth can be ascertained, and equitable results reached. The courts should be careful to protect persons against unreasonable, needless, or improper exposure of letters, books, and papers which are evidence in their possession; but where a transaction is, to a very great extent, in writing, and where production and

inspection of the writings in the possession of one's opponent are material to sustain complainant's bill, it is a common right that complainant generally has to obtain an order which will enable him to a discovery of all facts within the knowledge of his adversary, and to the production and inspection of all documents in the possession of the party against whom the application is made, which may assist him in making out his case at the hearing. The right of a subpœna duces tecum is not sufficient relief in many cases. It is often impossible for a complainant to examine books and papers produced at the trial for the first time; and, as the administration of the law progresses, courts should consider the necessity for economizing labor, expense, and time. Again, complainant's rights may not be sufficiently protected by subpœna duces tecum, inasmuch as a notice to produce does not compel a party to produce the document desired. Refusal would be but a ground for the introduction of secondary evidence of the contents of the papers called for. Why is it not proper, therefore, why is it not in the interest of right, to permit an inspection and investigation of such matters as are relevant before trial? That such a practice was known in England is well demonstrated by Sutherland on Books, Papers, and Documents, where many English decisions are quoted from. I particularly regret not being able to read Wigram on Discovery, as nearly all English and American judges refer to that book with respect and frequency.

The practice of compelling a party to produce for inspection may be by motion or affidavit, or petition even more formal. There is undoubtedly a difference among authorities upon this point. But with the sanction of writers who cite eminent English judges to sustain them, I shall follow what appeals forcibly to me as having the better reasoning.

Foster's Federal Practice (section 267) says that in equity and at common law either party may, upon motion supported by affidavit, which affidavit may be controverted, compel a production for inspection. Coit v. North Carolina Gold Amal. Co. (C. C.) 9 Fed. 577.

In Watson v. Renwick, 4 Johns. Ch. (N. Y.) 381, Chancellor Kent denied a prayer "for an order" that defendant deposit under oath with an officer of the court all the books, papers, letters, accounts, memoranda, vouchers, and writings, as called for by the bill, and that plaintiffs might have leave to examine, take copies, and make extracts from the same. That was a bill for discovery and account, with a prayer in the bill that defendant set forth a list or schedule of the books, papers, etc. The petition stated that the defendant had not by her answer made the list, and a motion was made that she be ordered to deposit under oath for the inspection of the plaintiffs all the books, papers, etc., called for by the bill. Chancellor Kent discussed the answer, and decided that it did not lay a sufficient foundation for the motion, according to what was understood to be the settled doctrine and practice in Chancery. He said:

"To entitle the plaintiff before hearing or publication or issue joined to call for the inspection of papers, it is not sufficient that there has been a general reference to them in the answer. They must be described with

reasonable certainty in the answer or in the schedule annexed to it, so as to be considered by the reference as incorporated in the answer, and they must be admitted by the answer to be in the defendant's possession or power; and it must also appear that the plaintiff has an interest in the production of the papers, or books, or instrument sought after."

In the opinion of the chancellor, he cites a number of English cases, among them that of Herbert v. Dean and Chapter of Westminster, 1 P. Wms. 773, where an order was granted that defendant should produce certain books, and the motion was allowed. So in Bettison v. Farringdon, 3 P. Wms. 363, it is stated that Lord Talbot confirmed an order on the defendant for the production of deeds. Production and inspection was also ordered in Gardiner v. Mason, 4 Bro. 479, and in Shaftsbury v. Arrowsmith, 4 Ves. 66. Chancellor Kent deduces the practice to be that, where there is a motion to produce letters and other documents referred to in the answer, it must appear that the answer contains an admission that the documents in question were in the custody of the defendant; and he states the rule for producing papers rests upon the principle that the papers are by reference incorporated in the answer, and become a part of it. But the practice of securing an order for production by motion is certainly recognized by the chancellor, and the primary authorities he cites in his opinion.

In Barton's Suit in Equity (page 122), under the title of "Interlocutory Proceedings," the practice is given by a form of order requiring defendant "on motion," etc., to leave with the register of the court the several books of account, letters, papers relating to the matters in the cause, "and the complainant, his solicitor, agent, or counsel, is to be at liberty to inspect and peruse the same, and to take copies thereof or extracts therefrom," etc.

In Adam's Equity (*page 349) the practice by motion is recognized; the author saying:

"The production of documents is ordered for completion of the discovery in the defendant's answer. The discovery obtained from the answer itself is not the whole to which the plaintiff is entitled. It gives him a statement by the defendant on oath as to all facts to which he was interrogated, and also a schedule of all documents in the defendant's power relating to the subject-matter of the suit. But the documents still remain to be examined, and the information which they contain is frequently the most important part of the discovery. For the purpose of obtaining such examination, the plaintiff is entitled, either before or after the sufficiency of the answer has been determined, and without prejudicing any question on that point, or at any subsequent period in the cause, to move that 'the defendant may produce, and that the plaintiff may have liberty to inspect and take, copies of all the documents so scheduled, and that the same may be produced before the examiner and at the hearing of the cause.' Upon this application an order will be made that they shall be deposited with the clerk of records and writs, or, if a special reason be shown—e. g., their being in constant use in the defendant's business—then in the defendant's own office. The doctrines by which production is regulated have been already discussed in reference to discovery, viz.: (1) The right of requiring it is for the purpose of discovery alone, and does not depend on nor will be aided by a title to possess the documents themselves. (2) The existence of the right must be shown from admissions in the answer that the documents are in the defendant's possession or power, and that they are of such a character as to constitute proper matter of discovery within the ordinary rules. (3) It is a right belonging to a plaintiff only, although a defendant

may occasionally be permitted on special grounds to delay his answer until some document material for making out his defense has been produced by the plaintiff."

In Mitford's & Tyler's Pleading & Practice in Equity (page 450) one of the objects of interlocutory orders is stated to be the production of documents. I quote from the text:

"The defendant is bound, if required by the plaintiff, to set forth in his answer a list of all documents in his possession which can furnish evidence in regard to the matters in question. The production of these documents is necessary to the completion of the defendant's answer. The discovery obtained from the answer itself is not all to which the plaintiff is entitled. It gives him a statement by the defendant on oath as to all facts to which he is interrogated, and also a list or schedule of all documents within the defendant's power relating to the subject-matter of the suit. But the documents still remain to be examined, and the information which they contain is frequently the most important part of the discovery. For the purpose of obtaining such examination, the plaintiff is entitled, either before or after the sufficiency of the answer has been determined, and without prejudicing any question on that point, or at any subsequent period of the cause, to move that the defendant may produce, and that the plaintiff may have liberty to inspect and take, copies of all the documents scheduled in the answer, and that they may be produced before the examiner and at the hearing of the cause. Upon this application an order will be made that the documents be deposited with the proper officer of the court, or, if a special reason be shown, as that they are in constant use in the defendant's business, then in the defendant's own office."

In Daniell's Chancery Pleading & Practice (*page 1817) the learned author says that it is the practice of the court of chancery to allow a party to apply before the hearing of a suit for the production of documents relevant to the matters in question which are in the possession or power of the opposite party, and lays it down that the power to order the production of documents arises out of "that general jurisdiction for the purpose of discovery which in all proceedings in equity constitutes an important feature."

As pertinent to the point under discussion, I quote as follows:

"The right of plaintiff to obtain a knowledge of the contents of documents in the defendant's possession was formerly exercised by the bill being so framed as to call upon the defendant to set forth the short contents of the deeds in question or to produce them. If, then, upon the coming in of the answer, the defendant admitted the possession of certain deeds, and described them so that they could be identified, the court, unless sufficient disclosure had been made of their contents by the answer, would have ordered them to be produced. The expense of setting out the contents of a deed in the answer in some respects modified this practice, and it became the custom for the plaintiff to charge generally in his bill that the defendant had deeds and documents relating to the matters in question in his possession. Upon this charge, interrogatories more or less searching, according to the nature of the case, were usually founded, so as to extort from the defendant a clear admission of the possession of the required documents; and, if such an admission were obtained, it became competent for the plaintiff to apply for an order that the defendant might produce the required documents. Under the present practice, however, the court may, upon the application of the plaintiff, in any suit, whether the defendant may or may not have been required to answer the bill, or may or may not have been interrogated as to the possession of documents, make an order for the production by any defendant upon oath of such of the documents in

his possession or power, relating to matters in question in the suit, as the court shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just. It is therefore no longer necessary that the defendant should admit the possession of documents in his answer before production can be obtained, and, although production can still be obtained on an admission in the answer, exceptions thereto, on the ground that the defendant has not fully answered the interrogatory as to documents, will be discouraged."

In Pomeroy's Equity Jurisprudence (section 205) the author writes that it is well settled that the matter of the production and inspection of documents depends upon the same principles and doctrines which govern discovery in general. To support his text, he says that, under the original chancery practice, interrogatories are inserted in the complainant's bill, asking the defendant whether he has any documents, or such and such particular documents, in his possession. If defendant's answer admits possession, an order is made on the plaintiff's motion for their production, so that they may be inspected. "Under the more recent practice, the defendant's admissions are made in his answer to interrogatories filed, or in his affidavit made in reply to the plaintiff's motion." Again, in section 206, Pomeroy states that the production of documents rests wholly on the defendant's own admissions, contained either in his answer, or in his answers to interrogatories, or in his affidavit.

Complainant should not be denied what it asks for because in its bill answer under oath was waived. If its bill were one purely for discovery, without prayer for relief by decree, waiver of answer under oath would be deemed waiver of any discovery that might have been sought in the same bill. But complainant seeks an accounting and decree of foreclosure of a mechanic's lien. His bill is therefore one for relief by decree. Now, however, by motion, he asks for what may be called discovery, though technically it is but a mode of giving aid in the progress of the suit. It becomes difficult sometimes to distinguish between discovery and relief by decree, although they are different things. Production of documents may be relief or discovery, as the facts upon which a complainant relies may warrant. Where one prays for inspection and production, claiming a right of ownership of the documents required to be produced, an order of production is granted as relief; while if he prays an order upon the ground that the answer discloses the existence of documents containing evidence which is material to his case, it is called discovery. Langdell on Equity Pleading, § 197. Keeping this distinction in mind, the authorities as to the practice to be pursued may be more easily distinguished. They will show that where production is sought as relief, decree is the only mode of securing it; but if the production of documents is sought for evidentiary purposes, a motion before trial may be proper. The distinction appears logical and substantial, for in the one case the court determines the right after hearing upon pleadings and proofs; in the other, the right is dependent upon whether the contents of the bill and answer disclose right to production of evidence in defendant's possession, which appears to be relevant to the matter at issue.

Langdell (section 201) says that the term "relief," as often used in equity, has reference to the kind and degree of aid furnished to the plaintiff; whereas in truth it has reference to the mode in which the aid given. If given in an answer, he calls it "discovery"; if by decree he calls it "relief"; if by motion and order, he says it has no specific name, as he regards a motion and order as but a proceeding to dispose of an incidental or collateral question, arising during the progress of a suit, the decision of which affects the suit only indirectly. But whether classified under "discovery" or without specific name, the practice of compelling production is recognized.

Story, in his book on Equity Pleadings (section 859), assumes that production and inspection may be had on motion.

In the learned opinion of Judge Hammon in Ryder v. Bateman (C. C.) 93 Fed. 31, the court recognized that there had been "a good deal of conflict" on the subject of discovery and production of documents, and out of the differing rules held to the view that the petition in that case did not justify the granting of the motion for production. The facts as there disclosed on the face of the petition showed that what complainant really wanted was to see a deed described before she chose her defense as between forgery and a genuine signature obtained under circumstances which invalidated the deed for some fraud committed against defendant. The case on its facts, therefore, is very unlike this one. There discovery in its full meaning was sought before answer was filed, while in the case at bar an order for production is asked, not to predicate a bill or answer upon, but as an aid to proof of the allegation already made.

An examination of the bill and answer discloses that the papers and documents which complainant wishes to inspect are material. The motion, too, is quite specific in naming the particular papers to be produced, and they all appear to relate to the matters involved in the issues made. It is difficult to reach an entirely satisfactory conclusion as to what is really the approved practice, without access to many English books. But, after reading all I can find, my best judgment is that, under the facts disclosed, complainant is entitled to have the production and inspection moved for, and that the order, in accordance with recognized chancery practice, may be granted, without infringement of defendant's rights of property.

Defendant must therefore reply to the complainant's affidavit. This it may do within five days.

REINKE v. NORTHERN PAC. RY. CO.

(Circuit Court, D. Montana. April 28, 1906.)

MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS—FELLOW SERVANTS—STATUTES—CONSTRUCTION.

Act Mont. March 5, 1903 (Laws 1903, p. 156, c. 83) provides that every railroad corporation within the state shall be liable for all damages sustained by an employé thereof within the state, without contributory negligence on his part, when such damage is caused by the negligence of any train dispatcher, telegraph operator, superintendent, engineer, or any other employé who has superintendence of any stationary or hand signal. *Held*, that the word "engineer," as used in such section, had reference only to servants in charge of locomotives, and that the statute did not cover an injury sustained by a servant of a railroad caused by the negligence of the operator of a stationary engine used to draw a plow along the floor of flat cars for the unloading of gravel.

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

Duncan & Eby, for plaintiff.
Wallace & Donnelly, for defendant.

HUNT, District Judge. The plaintiff instituted this action to recover $5,000 damages for an injury to his thumb. He alleges that he was a laborer, hired by the Northern Pacific Railway Company; that on August 30, 1904, one McCarthy was an employé of the defendant, employed as an engineer operating a certain Ledgewood engine used by the defendant in unloading dirt and gravel from its gravel cars upon and along its tracks; that on August 30, 1904, plaintiff, as a laborer, was performing his duties, assisting in the managing and manipulating of a certain cable or wire rope, which was attached to a certain drum, which was revolved by the machinery of the said Ledgewood engine; that the gravel cars were being unloaded by drawing a plow or float over and along the floor of the cars, which plow or float was moved by the cable being attached to and passing from the plow over and along the intervening cars, and to the drum, aforesaid; that the drum was placed upon the car or truck upon which the Ledgewood engine was placed and being operated, at which point the cable passed upon and over a spindle or roller, and then was fastened to the said drum, where the cable was coiled around the drum; that, in the unloading of the gravel and dirt from the gravel cars upon and along the tracks, the cable became slackened, and doubled back upon itself; that, in the discharge of his ordinary duties as a laborer, which duties had been assigned to plaintiff by one Davis, an employé and agent of defendant, and conductor of the gravel train, plaintiff climbed the car or truck, upon which the Ledgewood engine was placed, and took hold of the cable, as it was his duty to do, and held it taut, while the said McCarthy, performing his duty, operated the engine, which caused the drum to revolve; that, as plaintiff was holding the cable taut, he was standing about six feet from the roller, and facing the Ledgewood engine; that McCarthy, acting as employé and agent of the defendant, in a negligent and careless manner

started the Ledgewood engine at a high and unusual rate of speed, unknown to plaintiff, and contrary to the usual speed used in operating the said engine and drum, which sudden and violent and careless starting up of the engine caused the drum to revolve so rapidly that plaintiff was jerked from off his feet, and was violently pulled forward by the cable, which coiled so rapidly around the drum that the thumb on his left hand was drawn under and between the cable and the roller, thereby wounding the thumb in such a manner that it was necessary to amputate the same. The defendant has demurred to the complaint on the ground that the facts stated do not constitute a cause of action.

Plaintiff must recover, if recovery can be had at all, under the statute of Montana enacted March 5, 1903 (Laws 1903, p. 156, c. 83), which reads as follows:

"Every railway corporation, including electric railway corporations, doing business in this state shall be liable for all damages sustained by an employé thereof, within this state, without contributing negligence on his part, when such damage is caused by the negligence of any train dispatcher, telegraph operator, superintendent, master mechanic, yardmaster, conductor, engineer, motorman, or of any other employé who has superintendence of any stationary or hand signal."

A later fellow-servant statute, passed in 1905, pertaining to the liability of railroad corporations for damages to employés, is only useful to be consulted as aiding the court in reaching a correct construction of the act of 1903, which is admitted to be controlling in the case. Examination of the various fellow-servant statutes of the states shows that section 1 of the 1903 fellow-servant law of Montana was taken substantially from the statute of Wisconsin approved April 16, 1889, and in force in that state until 1893. The Wisconsin statute reads as follows:

"Every railroad corporation doing business in this state shall be liable for damages sustained by any employé thereof within this state, without contributory negligence on his part, when such damage is caused by the negligence of any train dispatcher, telegraph operator, superintendent, yardmaster, conductor, or engineer, or of any other employé, who has charge or control of any stationary signal, target point, block or switch."

The Legislature of Montana having obtained the statute from another state, the courts will, under well-known rules, have very great regard for, if, indeed, they will not be guided by, the construction put upon the law by the highest courts of the state whence the law was taken.

There could be no recovery by this plaintiff under the common law. That is conceded. So the case must rest upon the true construction of the statute which has changed the rule of the common law. I do not mean to narrow in any way the doctrine that the responsibility of a railroad company to its employés may be a matter of general law, but simply to recognize that, where there is an express statutory regulation changing the common law, the federal courts will adhere to the decisions of the courts of the state upon the subject. We will therefore be aided by the decision of the Supreme Court of Wisconsin

in Hartford v. Northern Pacific Railroad Company, 91 Wis. 374, 64 N. W. 1033. Liability was there sought to be fixed for the act of a foreman of repair shops, who, it was claimed, was a superintendent within the meaning of the statute quoted. The court thus reasoned:

"The question here presented is not what definition the railroad company now gives to the word 'superintendent,' or how Webster defines it; but in what sense did the Legislature use the word in the act in question? To properly determine such question, resort must be had to the established rules for the judicial construction of statutes. It is said that: 'The true rule is to look at the whole and every part of the statute, and the apparent intent derived from the whole of the subject-matter, to the effect and consequences, to the reason and spirit of the law, and thus to ascertain the true meaning of the Legislature, though the meaning so ascertained conflict with the literal sense of the words; the sole object being to discover and give effect to the intention of its framers.' Ogden v. Glidden, 9 Wis. 46; Harrington v. Smith, 28 Wis. 43; Ryegate v. Wardsboro, 30 Vt. 746. Applying this test to the act in question, it clearly appears that the legislative intent was to provide a remedy for the negligence of officers and employés that have to do with the operating department of the road, the movement of trains and cars. Each of those specifically named fits persons that, as a matter of common knowledge, are responsible for the proper movement of trains and cars, 'train dispatcher, telegraph operator, superintendent, yardmaster, conductor or engineer.' And following these designations there is the general clause covering various other persons engaged in the same line of work, but who are not so well and commonly known by any specific name applied to their positions, 'or of any other employé, who has charge or control of any stationary signal, target point, block or switch.' Now, if such was the intent of the framers of the law, and we think it was, then the word 'superintendent' cannot be made to apply to a foreman of the repair shop.

"Again, it is laid down as an elementary principle in the construction of statutes that the common usage of words at the time of the enactment is a true criterion by which to determine their meaning. Smith, Stat. & Const. Law, § 482. The reason of this rule is that what was in the minds of the framers of the law at the time of its enactment, their thoughts, their specific intent, on the subject, must be sought out and given effect, in order to give to the law correct judicial interpretation. Applying the foregoing, there were, at the time of the enactment of the law in question, and had been for a long period of years theretofore, and have been subsequently, in railroad service everywhere in this country, as a matter of common knowledge, officers known as 'superintendents' in the operating department of the road; general superintendents of the whole line, and superintendents of divisions. The general duties of such superintendents are intimately connected with the movement of trains and cars. Now, it must be presumed that the Legislature used the word as it was commonly used. They had in mind the officers of railroads to whom the term was generally applied. The position of superintendent in the railway service is as definitely and well known as that of train dispatcher, telegraph operator, conductor, or engineer. It could not be sincerely claimed that the word 'conductor' can be applied to the foreman of a section gang or a bridge crew, because he merely conducts or manages the work, or that it can be applied to any other conductor than the one who manages the railroad train, and yet the act does not say 'train conductor.' It could not be sincerely claimed that the word 'engineer' can be applied to the engineer who locates tracks and does engineering work of that kind, or who runs some little stationary pumping engine, or to any one of many other persons connected with railroad service that might properly be called 'engineers,' and yet the act does not say 'locomotive engineer.' And the same illustration might be given in respect to each of the persons specifically named in the act. It may thus be clearly seen that to apply the word 'superintendent' to the mere foreman of a repair shop would be entirely inconsistent with the obvious purpose of the act."

An examination of many cases cited from states other than Wisconsin shows that the courts considered their action as controlled by statutes which differ from that prevailing in Montana in 1903. Each case, too, must be distinguished upon its particular facts. So that, after all, we do not find analogies between the rules laid down in states where the statutes are dissimilar, as of very great help in reaching a proper conclusion as to the meaning of the Montana act of 1903.

The statute of Minnesota, for instance, is unlike that of Montana. It has been frequently passed upon by the Supreme Court of that state, and it is but a fair statement of the rule to say that it is there held that no recovery can be had, unless the injury is caused by the negligence of a co-employé in the actual moving of a train or in some manner directly connected therewith. Among the leading Minnesota cases are Johnson v. Railway Co., 45 N. W. 156, 8 L. R. A. 419, and Lavallee v. St. Paul, M. & M. Ry. Co., 41 N. W. 974. In the latter case the court put the decision upon the ground that the statute is intended to be confined in its operation to the cases of employés engaged in operating a railroad, and who are exposed to the hazards attending that business, and does not include all employés of a railroad company without regard to the kind of work in which they are engaged. This was also the view taken by the court in Pearson v. C., M. & St. P. Ry. Co. (Minn.) 49 N. W. 302. See, also, Weisel v. Railway Co. (Minn.) 82 N. W. 576. Swartz v. Great Northern Ry. Co., 101 N. W. 504, is one of the most recent discussions by the Minnesota court. The earlier cases are cited in that opinion and distinguished. Swartz, the plaintiff, was there held to be entitled to recover. He was a section hand, standing 18 feet back along the right of way, and was injured by the negligent acts of a locomotive fireman, who, in doing his duty, sorting coal, picking out the good from worthless pieces, threw out some slate and rock, while the train was moving, and in doing so carelessly hit Swartz. The reason of the decision was that sorting coal for the purpose of feeding a going engine was part of the operation of the railroad, and the injury of Swartz was due to the negligence of one engaged in such operation. In Jemming v. Great Northern Ry. Co., 104 N. W. 1079, decided in November, 1905, the Supreme Court of Minnesota again considered the purposes of the legislation, and the scope of its meaning; and again, by very clear statement, laid down the rule that the law only applies to those employés who are exposed to the peculiar hazards incident to the use and operation of railroads, and whose injuries are the result of such dangers.

The Iowa cases hold substantially as do the Minnesota decisions. The statute of Iowa is by no means as near to that which controlled in Montana as is the Wisconsin law cited. The case of Reddington v. Chicago, Milwaukee & St. P. Ry. Co., 75 N. W. 679, quotes the Iowa statute under which Reddington brought his action. It reads as follows:

"Every corporation operating a railway shall be liable for all damages sustained by any person, including employés of such corporation, in conse-

quence of the neglect of agents, or by any mismanagement of the engineers or other employés of the corporation, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers, or other employés, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

Reddington sued the defendant company for injuries caused by the neglect of a co-employé, while he and the plaintiff were engaged in coaling the engine that drew the train upon which Reddington was employed as a brakeman. The court directed a verdict for the defendant, upon the ground that it did not appear that plaintiff and any co-employé of his were having any railroad machinery moved on railroad tracks at the time of his injury, and that plaintiff was not exposed to the hazards or dangers incident to the use or operation of the railroad. It was the duty of the brakeman to assist a coal heaver in coaling the engine drawing the train on which the brakeman worked. At a certain station, the coal was put into large iron buckets and placed in position on an elevated platform by means of a derrick with a windlass, preparatory to the coming of engines for coal. At the particular station, in coaling an engine, the coal heaver stood on the ground at the foot of the derrick and worked the windlass, so as to raise and lower the buckets, and assist in swinging them to and from the engine by turning the derrick. The duty of the brakeman was to go upon the elevated platform and give signals to the man at the windlass, and to hook the derrick chain to the full bucket, give the signal to hoist, and to help in swinging the bucket around over the tender, to open the spring at the bottom of the bucket, to replace the bottom, and to help swing it about on the platform. The brakeman had hold of an empty bucket, and was walking backward with his head under the bucket, pulling it toward him for the purpose of swinging it into place. Without any signal from him, the bucket was lowered, struck him, and knocked him off the platform and injured him. When the accident occurred, the engine and train was standing still; the engineer being on the ground. The Supreme Court of Iowa held that the court erred in sustaining the defendant's motion for a verdict, inasmuch as the work in which plaintiff and the coal heaver were engaged was directly connected with the movement of the engine, and the hazards were therefore peculiar to the use and operation of the railroad. A rehearing was granted in the case; the second opinion being written by the same judge who wrote the first. The court reversed its former conclusion, and concluded that the injury plaintiff received was not in any manner connected with the use and operation of the railroad.

In C., M. & St. P. Railway v. Artery, 137 U. S. 507, 11 Sup. Ct. 129, 34 L. Ed. 747, the Supreme Court of the United States reviewed a number of the Iowa cases and decided that, under the statute of Iowa, an employé doing duty under direction of a foreman on a moving hand car was engaged in work directly connected with the use and operation of the railway, and could recover for an injury caused by the negligence of such foreman.

The plaintiff cites Callahan v. St. Louis Merchants' Bridge Terminal Ry. Co. (Mo. Sup.) 71 S. W. 208, 60 L. R. A. 249, 94 Am. St. Rep. 746, where the statute of Missouri was discussed by the Supreme Court of that state. The court draws particular attention to the fact that the Iowa act is almost the antithesis of the Missouri law. The statute of Missouri makes a railroad company liable for all damages sustained by any agent or servant thereof, while engaged in the work of operating such railroad, by reason of the negligence of any other agent or servant thereof. A liberal construction was placed upon the statute; but, as the court rests its judgment upon the comprehensive language of the particular statute of the state which is essentially different from the statute of Montana, under which the plaintiff in this action sues, it is unnecessary to examine the case at great length.

My judgment is that, considering the real underlying object of the legislation, that reasoning is the more forcible which construes the law as one which extends protection to those who are injured by the negligence of those persons in the employments named in the statute, and to those only. Or it may be stated this way: The purpose of the legislation was to make a railway company answerable for the negligence of certain employés whose duties are well defined as engaged in and about the work of operating railway trains. It needs no argument to demonstrate that carelessness upon the part of an engineer in charge of a locomotive, or upon the part of a train dispatcher, or of a conductor, may mean fearful peril to human life. So, too, negligence by a yardmaster may endanger those in and about the yards under his charge, or the carelessness of a master mechanic or superintendent might also imperil life and personal safety. This being correct, what was meant by the word "engineer"? Looking at the other words of the statute, the following classes of employés are specified: train dispatchers, telegraph operators, superintendents, master mechanics, yardmasters, conductors, engineers, employés having superintendence of stationary or hand signals. As indicated, all of the employés named for whose negligence a railroad company is made liable are operatives directly connectd with the movement of trains. None other are mentioned, and, unless others are fairly within the meaning of the words used, the courts have no right to extend the statute so as to include them.

Applying these rules of interpretation, I regard the word "engineer" as used in the Montana statute of 1903, under which plaintiff sues, as referring to a locomotive engineer who moves a locomotive used in moving railroad trains. Civil engineers are not those meant to be included; nor are engineers who have to do with engines not connected with the movement of cars or trains upon the tracks; for the perils peculiar to the operation of a train are not directly connected with the employments of such other engineers. Plaintiff assumed the risk incidental to the operation of any stationary engine. Neither the engineer, nor the operatives connected with the movement of the train, had part in the injury done him. The case is but one where the accident might have happened if the stationary engine had been operated by persons not employed by the defendant company, in unloading

gravel from any platform, and the fact that the engine was owned and operated by a railroad company does not of itself authorize the court to change the general rules which control in such instances. This interpretation of the statute of 1903 finds implied approval in the fact that the Legislature of 1905 changed the law by making a railroad company liable for all damages sustained by any employé of such company, "in consequence of the neglect of any other employé or employés thereof, in consequence of the willful wrongs, whether of commission or omission, of any other employé or employés thereof, when such negligence, mismanagement or wrongs, are in any manner connected with the use or operation of any railway or railroad on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding." I think it reasonably clear that the Legislature in passing the act of 1905 had in mind doing away with limitations which circumscribed liability under the act of 1903, and by the later act has imposed liability where it had not existed under the act of 1903.

As bearing upon the significance of the word "engineer" used in the statute of Montana, which controls in this action, the following cases are interesting: In Devere v. Delaware, L. & W. R. Co. (C. C.) 60 Fed. 886, a motion to quash a summons for irregular service was overruled by Judge Green, who held that a statute of the state of New Jersey, authorizing service upon any officer, director, agent, clerk, or engineer of a corporation, permitted service upon an engine driver. The word "engineer," as used in the act, was given its usual and commonplace meaning, which was held to include employés of defendant who were locomotive engineers. In Whitehouse v. Grand Trunk Ry. Co., Fed. Cas. No. 17,565, the United States Circuit Court for the District of Maine had occasion to consider what was meant by the word "engineer," as used in the rules of the railroad company, which provided that no person should be allowed to ride on the engine without the permission of the engineer. It was there argued that the engineer upon whom the authority was given to grant permission was the civil engineer. The court held, however, that the engineers meant were those whose duties brought them in communication with the locomotives or their movements up and down the line. "Throughout the United States," said the court, "this word 'engineer,' when used in connection with railroads, is invariably employed to designate the party in charge of the locomotive. In scores of opinions in the reports of the decisions of the courts of the various states, this word is so employed, and by Worcester and Webster an 'engineer' is defined as 'one who manages an engine'; an 'engine man'; an 'engineer.'"

Upon the facts pleaded, I am of opinion that the case, as presented by the complaint, is not one where plaintiff can claim that his injury was inflicted by the negligence of the engineer, as included within the terms of the statute under which he seeks recovery.

The demurrer is therefore sustained.

UNITED STATES v. ALCORN et al.

(Circuit Court, W. D. Missouri, Central Division. May 25, 1906.)

No. 2,299.

1. POST OFFICE—BOND OF BIDDER FOR MAIL CONTRACT—NATURE OF OBLIGATION.
A proposal bond, given by a bidder for a contract for carrying the mail, conditioned as required by Act June 23, 1874, c. 456, § 12, 18 Stat. 235 [U. S. Comp. St. 1901, p. 2695], which provides that "every proposal for carrying the mail shall be accompanied by the bond of the bidder, * * * and in case of failure of any bidder to enter into such a contract to perform the service, or, having executed a contract, in case of failure to perform the service according to his contract, he and his sureties shall be liable for the amount of said bond as liquidated damages, to be recovered in an action of debt in said bond," is an absolute undertaking to pay the amount named therein as liquidated damages in case of condition broken, and not one of indemnity or security to the government against loss or damages for breach of contract, and in an action thereon the actual damages cannot be inquired into.

2. SAME—ACTION ON PROPOSAL BOND—DEFENSES.
In an action on a proposal bond given by a bidder for a contract for carrying the mail, as required by Act June 23, 1874, c. 456, § 12, 18 Stat. 235 [U. S. Comp. St. 1901, p. 2695], where the bidder entered into the contract with the required surety for its faithful performance, but failed to complete such performance, the fact that the government recovered from such surety the actual damages sustained by reason of the breach of contract does not constitute a defense.

On Demurrer to Answer.

A. S. Van Valkenburgh, Dist. Atty., for the United States.
Montgomery & Montgomery, for defendants.

POLLOCK, District Judge. This is an action at law. The petition contains seven counts. The basis of each cause of action is a bond made by defendants, Alcorn as principal and the Deckers as sureties, to the government, under the provisions of an act of Congress approved June 23, 1874, c. 456, § 12, 18 Stat. 235 [U. S. Comp, St. 1901, p. 2695], which reads as follows:

"That every proposal for carrying the mail shall be accompanied by the bond of the bidder, with sureties approved by a postmaster and in cases where the amount of the bond exceeds five thousand dollars, by a postmaster of the first, second, or third class, in a sum to be designated by the Postmaster General in the advertisement of each route; to which bond a condition shall be annexed, that if the said bidder shall, within such time after his bid is accepted as the Postmaster General shall prescribe, enter into a contract with the United States of America, with good and sufficient sureties, to be approved by the Postmaster General, to perform the service proposed in his said bid, and further, that he shall perform the said service according to his contract, then the said obligation to be void, otherwise to be in full force and obligation in law; and in case of failure of any bidder to enter into such contract to perform the service, or, having executed a contract, in case of failure to perform the service according to this contract, he and his sureties shall be liable for the amount of said bond as liquidated damages, to be recovered in an action of debt on said bond. No proposal shall be considered unless it shall be accompanied by such bond, and there shall have been affixed to said proposal the oath of the bidder, taken before an officer qualified to administer oaths,

that he has the ability, pecuniarily, to fulfill his obligations and that the bid is made in good faith, and with the intention to enter into contract and perform the service in case his bid is accepted."

The facts in relation to the present controversy and the manner in which it arises for decision are: On the 19th day of November, 1897, defendant Alcorn, in response to an advertisement of the Postmaster General of the United States, made a proposal to carry the government mails on route No. 52,293 from Wewoka to Arbeka, in the Indian Territory, from July 1, 1898, to June 30, 1902, for a consideration of $307 per annum, in the form and manner prescribed by the post office department of the government, and transmitted with such proposal to the Postmaster General his proposal bond in the following form, to wit:

"Know all men by these presents, that James P. Alcorn, of Sedalia, in the state of Missouri, principal, Jay H. Decker and Lizzie Decker, of Sedalia, in the state of Missouri, as sureties, are held and firmly bound unto the United States of America in the just and full sum of fourteen hundred dollars, lawful money of the United States, to be paid to the said United States of America, or its duly appointed or authorized officer or officers, to the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

"Sealed with our seals, and dated this nineteenth day of November, 1897.

"Whereas, by an act of Congress approved June 23, 1874, entitled, 'An act making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-five, and for other purposes,' it is provided: 'That every proposal for carrying the mail shall be accompanied by the bond of the bidder, with sureties approved by a postmaster,' in pursuance whereof and in compliance with the provisions of said law. This bond is made and executed, subject to all the terms, conditions, and remedies thereon in the said act provided and prescribed, to accompany the aforegoing and annexed proposal of the said James P. Alcorn, bidder. Now, the condition of said obligation is such that, if the said bidder, as aforesaid, shall, within such time after his bid is accepted as the Postmaster General has prescribed in said advertisement, to wit, within sixty days from the date of acceptance of the bid, enter into a contract with the United States of America, with good and sufficient sureties, to be approved by the Postmaster General, to perform the service proposed in his said bid, and further shall perform said service according to his contract, then this obligation shall be void; otherwise, to be in full force and obligation in law.

"In witness whereof, we have hereto set our hands and seals this nineteenth day of November, 1897.

"Witnesses:
"F. L. Hensinger,
"D. M. Sneed.

James P. Alcorn (Seal)
Jay H. Decker (Seal)
Lizzie Decker (Seal)"

This proposal and bond were duly accepted by the Postmaster General of the United States on the 1st day of February, 1898, and Alcorn did on that date, in accordance with the terms of such proposal bond, and in accordance with the laws of the United States in that behalf made, enter into a contract in writing with the government to carry the mails, according to the terms of his proposal, for the annual consideration therein expressed, and caused such contract to be executed by a certain corporation known as the American Bond & Trust Company of Baltimore, Md. (hereinafter called the "Bonding Company"), to execute such contract as surety for his faithful performance of the same. Thereafter, defendant Alcorn entered upon

the performance of the public service undertaken by him with the government, but failed to complete the same according to his contract, but on the contrary made default therein, by reason of which his contract was breached, to the actual damage of the government in the sum of $336.57, for which amount the government did, on the 23d day of May, 1903, bring an action at law against said corporation, the Bonding Company, in the Circuit Court of the United States for the District of Maryland, in which action the government had judgment for the full amount of the actual damages claimed by it, which judgment was fully paid and satisfied by the Bonding Company. Thereafter, on the 7th day of June, 1905, the government instituted this present action in this court to recover the amount named in the proposal bond, to wit, $1,400, less the sum paid by the Bonding Company in satisfaction of said judgment, $336.57, as liquidated damages. This cause of action constitutes the first count in the petition of plaintiff.

To this cause of action the defendants have answered, admitting the making of the proposal bond, the contract for the carrying of the mails, and the breach of such contract, all as alleged by the plaintiff, but pleads the bringing of the action by the government against the Bonding Company in the Circuit Court of the United States for the District of Maryland, the judgment entered thereon in favor of the government for the actual damages accruing to it by reason of the breach of said contract, and the payment and satisfaction of such judgment as a complete defense and in bar of the prosecution of this action on the proposal bond. To this answer the government demurs.

The remaining six counts of the petition are based on like proposal bonds for the different amounts therein stated (less payments received in satisfaction of former judgments against the Bonding Company in the same manner as heretofore specified) as liquidated damages, to which counts like answers have been put in, against which answers a demurrer has been lodged by the government. Hence, a decision of the demurrer to the answer made to the first count in the petition binds and concludes as to all.

The demurrer thus interposed raises two questions for decision: First. In the absence of the action by the government against the Bonding Company, might the government have maintained an action against these defendants for the full amount stated in the proposal bond, and recovered judgment for the same as liquidated damages, regardless of the extent of the actual damages accruing to the government by reason of the breach of the contract made in pursuance of said bond? Second. If so, is the judgment against the Bonding Company as surety on the contract made by Alcorn for the carrying of the mails in pursuance of the terms of his proposal bond, and the satisfaction of such judgments by the Bonding Company, a defense to this action against the principal and sureties executing the proposal bond for the amount specified in said bond as liquidated damages? And of these questions in their order.

First, looking to the extent of the recovery against defendants in this action on the proposal bond in suit, it may be observed, both

by virtue of the law of their existence and by direct reference to the law in the bonds, the above-quoted act became as much a part of the obligation as though set forth in extenso. The bond, therefore, in express terms, provides if the principal obligor shall breach the one important stipulation therein written, "he and his sureties shall be liable for the amount of said bond as liquidated damages to be recovered in an action of debt on said bond." This stipulation is "that he [the bidder] shall perform the said service according to his contract." This stipulation, it is admitted by defendants in this action in their answer, was not performed by the bidder, Alcorn, but was breached. What, then, is the extent of the recovery against defendants, as principal and sureties on the proposal bond, had the action not been brought and judgment obtained against and paid by the surety on the contract? Is such recovery limited to the actual damages which accrue to the government by the failure to perform the stipulation? If so, such damages have been, by action and judgment against the surety on the contract itself, recovered and paid; hence, of necessity, this action for a second recovery will not lie, there having been one recovery and satisfaction thereof. The solution of this problem must depend upon the general principles of law as determined and applied in the federal court, and upon such statutory enactments as may be applicable thereto; for, if the proposal bond in suit is not to be in the light of security or indemnity to the government against actual damages or loss accruing to it from a breach of the bidder, or stipulation to perform the service, but in the light of an absolute undertaking to pay the government the amount named in the bond by way of an agreed compensation for an unascertained and uncertain loss that might accrue to the government in case of breach of the stipulation by the bidder, then it is quite clear, the parties having dealt at arm's length and having possessed full power to so contract, no inquiry will be had as to the extent of the damages actually flowing from the breach, but, upon the breach of the stipulation being shown, judgment must go, of course, for the amount named in the bond, unless the general principles of law in this regard are found to have been modified or changed by statute. At the common law, prior to the statute of 8 & 9 William III (chapter II), no inquiry into any case was permitted in a court of law as to the extent of the damages arising from a breach of the bond, but, upon such breach being shown, judgment went for the full penalty of the bond. Equity, however, would grant relief in case the amount named was not in the nature of liquidated damages. Watts v. Camors, 115 U. S. 353, 6 Sup. Ct. 91, 29 L. Ed. 406. This being the rule in equity, it has become the practice of courts of law, following the rule in equity, to regard the amount stipulated in the bond to be compensatory, unless the contrary clearly appears. It is not thought, however, from a consideration of the adjudicated cases bearing upon this question, that the federal courts, sitting either in equity or at law, have granted relief against, or refused to award judgment for, the full amount of the bond, where it clearly appears the amount fixed in the bond was agreed to by parties fully capable of contracting, as liquidated damages in case of breach of condition. This will fully

appear from the able and extended review of the authorities, both English and American, by Mr. Justice White in Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366.

Section 961, Rev. St. U. S. [Comp. St. 1901, p. 699], provides:

"In all suits brought to recover the forfeiture annexed to any article of agreement, covenant, bond or other specialty, where the forfeiture, breach or non-performance appeared by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity, and when the sum for which judgment should be rendered is uncertain, it shall if either of the parties request it, be assessed by a jury."

The Circuit Court of Appeals for the Seventh Circuit, in Chicago House Wrecking Co. v. U. S., 106 Fed. 385, 45 C. C. A. 343, 53 L. R. A. 122, in giving effect to this statutory provision in an action at law on a bond in which the amount stated was quite clearly liquidated damages, held only actual damages might be recovered. The Circuit Court of Appeals for the Fourth Circuit in Gay Manuf'g Co. v. Camp, 65 Fed. 794, 13 C. C. A. 137, in a suit in equity granted relief against the enforcement of a demand for liquidated damages apparently solely on the ground of the principles of equity, and without regard to the statute. This ruling was reaffirmed by that court in the same case (68 Fed. 67, 15 C. C. A. 226). However, Mr. Justice White in Sun Printing & Publishing Ass'n v. Moore, supra, of this case said:

"Indeed, the contention but imbodies the conception of the doctrine of penalty and liquidated damages expressed in the reasoning of the opinions in Chicago House Wrecking Co. v. U. S., 106 Fed. 385, 45 C. C. A. 343, 53 L. R. A. 122, and Gay Manuf'g Co. v. Camp, 65 Fed. 794, 13 C. C. A. 137; Id., 68 Fed. 67, 15 C. C. A. 226, viz.: 'That where actual damages can be assessed from testimony, the court must disregard any stipulation fixing the amount, and require proof of the damage sustained.' We think the asserted doctrine is wrong in principle, was unknown to be 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."

Therefore, notwithstanding the above statutory provision, the sole question for decision here is, does it appear from the bond itself, the law of its existence incorporated in the bond, and with general principles of the law as declared by the Supreme Court, that the amount stated in the bond was intended by the parties as liquidated damages? If so, the extent of recovery is the amount stated in the bond. I am of the opinion the amount stated in the bond was inserted by the parties as liquidated damages, to be recovered as such in case of the breach of the stipulation to perform the service by the bidder; that the bond was not given or received as security or indemnity to the government for the actual loss it might sustain by reason of the breach of such stipulation; and that all inquiry as to actual damages sustained in an action on this bond must and should be excluded, and this for the following reasons: First, as has been seen, the bond itself in express terms denominated the amount stated therein as liquidated damages. True, this fact is not conclusive evidence of the nature of the penalty fixed in the bond. Lampman v. Cochran, 16 N. Y. 275. But Mr. Justice White in Sun Printing & Publishing Ass'n, supra, quoting with approval from

the opinion of Mr. Justice Patterson in Price v. Green, 16 M. & W. 346, says:

"The five thousand pounds is expressly declared by the covenant to be as and by way of liquidated damages, and not of penalty.' It is a sum named in respect to the breach of this one covenant only, and the intention of the parties is clear and unequivocal. The courts have, indeed, held that in some cases the words 'liquidated damages' are not to be taken according to their obvious meaning, but those cases are all where the doing or omitting to do several things of various degrees of importance is secured by the sum named, and, notwithstanding the language used, it is plain from the whole instrument that the intention was different."

In Bagley v. Peddie, 5 Sandf. (N. Y.) 192, Sanford, J., delivering the opinion of the court, says:

"Where it is doubtful on the face of the instrument whether the sum mentioned was intended to be stipulated damages or a penalty to recover actual damages, the courts hold it to be the latter. (2) On the contrary, where the language used is clear and explicit to that effect, the amount is to be deemed liquidated damages, however extravagant it may appear, unless the instrument be qualified by some of the circumstances hereafter mentioned. These qualifying conditions are: (3) If the instrument provide that a large sum shall be paid on the failure of the party to pay a less sum, in the manner prescribed, the larger is the penalty, whatever may be the language used in describing it. (4) When the covenant is for the performance of a single act or acts which are not measureable by any exact pecuniary standard, and it is agreed that the party covenanting shall pay a stipulated sum as damages for a violation of any such covenants, that sum is to be deemed liquidated damages, and not a penalty. (5) Where the agreement secures the performance or omission of various acts of the kind mentioned in the last proposition, together with one or more acts in respect to which the damages on a breach of the covenant are certain or readily ascertainable by a jury, and there is a sum stipulated as damages to be paid by each party to the other for a breach of any one of the covenants, such sum is held to be a penalty merely."

In the case at bar the effect of the other provisions of the instrument and other considerations not only fails to qualify the express stipulation for liquidated damages, but in a large measure emphasizes the fact that it was the intention of the parties the amount stated in the bond should be regarded alone as liquidated damages; for the very terms of the bond itself not only provide for the absolute payment of the amount stated on breach of the principal stipulation therein written, the resultant breach of such damages to the government being uncertain, and at the time of the making of the bond unascertainable, but this sum is to be recovered "in an action of debt on said bond."

Now it is quite clear the law-making power in the enactment of this statute employed the phrase "action for debt" in its common-law acceptation. The distinguishing and fundamental feature of such action consists in the fact that it lies only for the recovery of money or its equivalent in sum certain, or that can be readily rendered certain by mathematical computation; and, conversely, upon an action of debt will not lie to recover damages for breach of contract unless such damages have been fixed and liquidated by the prior agreement or judgment between the parties. Raborg et al. v. Peyton, 2 Wheat. 385, 4 L. Ed. 268; Mills v. Scott, 99

U. S. 25, 25 L. Ed. 294; Stockwell v. U. S., 13 Wall. 531, 20 L. Ed. 491.

In David Fry v. William Slyfield, 3 Vt. 246, Chief Justice Hutchison, delivering the opinion of the court, in speaking in an action of book debt, said:

"We may safely go so far as to say that a mere claim for damages for any tortious act or neglect, or for any breach of contract, cannot be recovered in this action."

Hence, it must be thought it was the intent of the law-making power, in the enactment of the statute under which the proposal bonds in question were given, not only to designate the form of action appropriate for the collection of the penalty of the bond, but, by the very form of action directed to be employed for such purpose, to place beyond all question the character of the instrument, and to render the amount stipulated in the bonds, not security or indemnity to the government for actual damages flowing from a breach of conditions imposed on the bidder, but as liquidated damages, for only as such could a recovery be had in an action of debt.

Again, prior enactments afford a legislative construction of the act in question. The statute now in force supersedes former section 3945 Rev. St. This act provided:

"Every proposal for carrying the mail shall be accompanied by a written guarantee, signed by one or more responsible persons, and undertaking that within such time after the bid is accepted as the Postmaster General may prescribe the bidder will enter into an obligation with good and sufficient sureties to perform the service proposed, and no proposals shall be considered unless accompanied by such guarantee."

Section 3946, now superseded by the present legislation, provided for the oath of the bidder as follows:

"That he believes the guarantors pecuniary responsible for and able to pay all damages the United States shall suffer by reason of the bidder's failure to perform his obligation as such bidder."

The present law requires an oath from the sureties on the proposal bond as follows:

"That before the bond of a bidder provided for in the aforesaid section is approved there shall be endorsed thereon the oaths of the sureties therein taken before an officer qualified to administer oaths, that they are owners of real estate worth in the aggregate a sum double the amount of said bond, over and above all judgments, mortgages and executions after allowing all exemptions of every character whatever."

It will thus be seen the preceding sections, superseded by qualifying laws, provide only for the guaranty that the bidder should enter into a contract. Nothing was said about the faithful performance of the contract after being entered into.

From a consideration of the terms of the instruments themselves, the laws of their existence, and from the course of legislation on this subject, I am persuaded the bonds in controversy must be held to be absolute undertakings to pay the amounts therein named as liquidated damages in case of condition broken, and not as indemnity or security to the government against loss or damages for breach of

contract. Am further advised such holding is in conformity with former rulings made by the able judges of this district while presiding at the circuit.

Considering, then, the penalties of the bonds involved in this action to be a debt absolutely owing from defendants to plaintiff as liquidated damages at the time this action was brought against the Bonding Company in the Circuit Court for the District of Maryland, the remaining question is the effect of the former recovery of judgment against the Bonding Company for damages actually occasioned to the government by the breach of the contract entered into by the defendants Alcorn, and the satisfaction of such judgment. The proposal bonds here involved and the contract made by Alcorn with the government, the performance of which is secured by the Bonding Company, were separate and independent undertakings—the one an absolute undertaking to the government to pay a sum certain, contingent upon the default of stipulation to perform the contracted service alone, the other a contract of indemnity to pay the government an amount contingent upon the actual loss to the government occasioned by a breach of the stipulation to perform the service by the bidder. The latter undertaking has been by judgment and satisfaction discharged. Does the former remain, or does such judgment and satisfaction discharge the independent undertaking, and absolve the defendants in this case? To warrant the holding that the former judgment and its satisfaction concludes and bars the present litigation, such ruling must be based on some well-recognized principle of law, and, if none such can be found, the defense must be disallowed. Therefore, on what ground can such holding be predicated? In my judgment, it cannot be placed on the ground of the election of inconsistent remedies, for that both remedies were open to plaintiff, and the pursuit of the one on the contract for unliquidated damages for its breach does not bar this action of debt to recover the liquidated damages.

In National Surety Co. v. United States, 123 Fed. 294, 59 C. C. A. 479, it is held:

"Where the United States took a proposal bond securing performance of a mail route contract, and after letting the contract required another bond from the contractor, each obligation was an independent undertaking, and the second obligation did not stand as a guaranty for the performance of the first."

Neither am I of the opinion the defense interposed can be upheld on the ground that a party may not twice have satisfaction of the same claim or demand, for, as had been seen, the demands here are not the same, and cannot be recovered in the same form of action. The one here made is in an action of debt. The other now interposed as a defense was an action for unliquidated damages for breach of the contract, which unliquidated damages could not have been recovered in an action of debt. True, the question here presented was ruled in United States v. Oliver et al. (C. C.) 36 Fed. 758, in opposition to the conclusion I have reached. The reason for the holding made is not given, and the conclusion there reached is to my mind both unsatisfactory and inconclusive. Therefore, as I am unable to find any estab-

lished legal ground for upholding the defense urged in bar of this action, the demurrer thereto must be sustained.

To this ruling the defendants will be allowed an exception, and unless application by the defendants to plead over is made and allowed within 20 days from the filing of this opinion, judgment will enter as prayed in the petition.

SEYMOUR v. DU BOIS.

(Circuit Court, W. D. Pennsylvania. April 18, 1906.)

No. 17.

1. JUDGMENT—DECREE AS EVIDENCE OF INDEBTEDNESS—FINALITY.
   Complainant in a pending suit petitioned the court for leave to discharge his counsel and to appoint others, and asked that the court make an order fixing the fees to which his counsel were reasonably entitled, and after a hearing, such a decree was entered, making the right of dismissal conditional on payment of the fees, and, on an appeal therefrom by the complainant, was affirmed. *Held*, that such decree was a final adjudication of the amount due from him which would support an action at law for its recovery.

2. EVIDENCE—AUTHENTICATION OF RECORD OF JUDGMENT.
   The authentication of the record of a judgment held in substantial conformity to Rev. St. § 905 [U. S. Comp. St. 1901, p. 677].

3. PARTIES—SUIT BY ASSIGNEE—WAIVER OF OBJECTION.
   Where plaintiff in an action in a federal court sued upon a claim existing in his own right, of which, by reason of diversity of citizenship and the amount involved, the court had jurisdiction, and also added other claims assigned to him by persons who were also citizens of different states from defendant, the question of the nonjoinder of such persons, as parties, cannot be raised by defendant after trial on a plea in bar; the objection being merely formal and curable by amendment under Rev. St. § 954 [U. S. Comp. St. 1901, p. 696].

On Motion for Judgment on Reserved Question.

Judson Harmon, Frederick Seymour, and Lyon, McKee & Mitchell, for plaintiffs.

W. C. Arnold and Thos. H. Murray, for defendant.

BUFFINGTON, District Judge. This is an action of assumpsit brought by John S. Seymour, a citizen of the state of New York, against John E. Du Bois, a citizen of the state of Pennsylvania, personally and as executor of John Du Bois. From the pleadings and proofs in the case it appears that a bill in equity for infringement of a patent had been brought by John Du Bois against the mayor et al. of the city of New York in the Circuit Court for the Southern District of New York. After the death of John Du Bois, John E. Du Bois, his sole devisee and executor of his will, was substituted as complainant. In March, 1899, following, John E. Du Bois employed as counsel to conduct said cause, H. C. Thurston, and through him John S. Seymour, the plaintiff, his partner Eugene M. Harmon (they being associated in the law business as Seymour & Harmon) and Judson

Harmon. Their employment was to prosecute said cause to completion upon a certain contingent fee, John E. Du Bois making advancement for certain outlays and expenses. In pursuance of said employment counsel conducted the cause until April 26, 1901, when Mr. Du Bois presented a petition to the court setting forth he and counsel could not act in harmony, praying leave to discharge them, and to appoint others in their stead. On June 25, 1901, the petition and the answer filed thereto, were referred to one of the standing masters to report what compensation was reasonable for said counsel. He reported on November 21, 1902, and the exceptions filed to his report were overruled. On November 24, 1902, the court confirmed the report, and made an order, fixing the fees hereafter quoted at length. This order was appealed from by John E. Du Bois to the Circuit Court of Appeals, which court affirmed the same. On return of the mandate of affirmance the Circuit Court on November 21, 1904, made an order as follows:

"Ordered, adjudged, and decreed that said decree be, and the same is, hereby affirmed, with costs to be fixed at $34.20, and that said respondents have execution therefor and that such other and further proceedings be had in this cause as according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding."

Subsequent thereto Eugene Harmon died, leaving John S. Seymour the liquidating and surviving partner of the firm of Seymour & Harmon. Henry C. Johnson also died, and his administrator assigned his share of the award to John S. Seymour as did also Judson Harmon his share. None of these parties were or are citizens of Pennsylvania. On July 10, 1905, the said John S. Seymour brought suit in his own name against John E. Du Bois as above noted to recover the entire amount of said decree; the defendant entered a plea in bar, and on trial, a verdict was rendered for the plaintiff for the full amount of the claim, subject to the opinion of the court upon the points submitted by defendant. Judgment is now moved for by plaintiff on the verdict and by the defendant, non obstante veredicto on the reserved points.

In disposing of these questions the case virtually resolves itself into three questions: First, is the order of the Circuit Court for the Southern District of New York such a final and definitive one that suit can be maintained thereon? Second, is the record of that case so certified as to be admissible in evidence? Third, can the plaintiff maintain this action? Turning to the first question, we note that on April 23, 1901, John E. Du Bois presented a petition to that court setting forth that Henry C. Johnson was his counsel of record in said cause; that Johnson himself employed Seymour & Harmon, who became associated with him in the conduct of the case but not by agreement with Du Bois; that certain disagreements had arisen between Du Bois and Johnson and Seymour & Harmon, and that there was a lack of harmony and confidence such as should exist between client and counsel. The petition prayed for leave to discharge Johnson and that the court make an order fixing "such fees to date to which the said Johnson may be entitled, if anything, in the event of the recovery by your com-

plainant upon final proceedings." To this petition an answer was made by Johnson, Seymour & Harmon and Judson Harmon, all of whom contended that Seymour & Harmon and Judson Harmon had been employed by complainant acting through Mr. Eccles and Mr. Johnson. They all averred their readiness to prosecute the cause, but expressed their consent to retire therefrom and permit the substitution of other counsel if provision were made for their compensation. This petition was heard, and June 25, 1901, the following order was made:

"Ordered, adjudged and decreed as follows, viz.: That this cause is referred to Arthur H. Masten, Esq., one of the standing examiners of this court to take testimony and report promptly what is fair and reasonable amount of counsel fees [including disbursements] for all services of complainant's solicitor and counsel to date. Upon the coming in of said report, order of substitution will be made, conditional upon the payment of said fees. Such payment, however, shall be without prejudice to any additional claim if any which solicitor or counsel may have by reason of the breaking of any contract for further services."

Under this reference the master made report on August 19, 1902, exceptions thereto were overruled and on November 24, 1902, an order of confirmation was entered as follows:

"Ordered and adjudged that the fair and reasonable amount of counsel fees, including disbursements for all services of complainant's solicitor and counsel to June 25, 1901, the date of the order of reference, is as follows:

"To Judson Harmon, $1,000. To Henry C. Johnson, $2,500. To Seymour & Harmon, $7,500, and $1,450 incurred as disbursements by complainant's authority in the employment of Edward E. Quimby as a patent expert; and the order of substitution is made conditional upon the payment of said sums, with interest on each item from June 25, 1901; it is further ordered and adjudged, that there is due from complainant to Seymour & Harmon the sum of $674.50, paid by them for account of master's and stenographer's fees in this proceeding; it is further ordered and adjudged, that there is due to Arthur H. Masten the sum of $387.50, the balance of his fees as master in this proceeding; it is further ordered and adjudged, that upon payment of the foregoing sums the complainant may substitute other solicitors and counsel in the place of his present solicitors and counsel."

This order the complainant, "considering himself aggrieved by the final decree entered on the 24th day of November, 1902," appealed therefrom to the Circuit Court of Appeals, and in his appeal specified as error as follows, inter alia, viz.:

"(9) The court erred in adjudging that a fair and reasonable amount of counsel fees (including disbursements) for all services of Judson Harmon to June 25, 1901, is $1,000; (10) the court erred in adjudging that a fair and reasonable amount of counsel fees [including disbursements] for all services of Henry C. Johnson to June 25, 1901, is $2,500; (11) the court erred in adjudging that a fair and reasonable amount of counsel fees [including disbursements] for all services of John S. Seymour, Frederick Seymour, and Eugene M. Harmon, composing the firm of Seymour & Harmon, is $7,500 and $1,450 incurred as disbursements; * * * (13) the court erred in adjudging that there is due from the appellant to the said Seymour & Harmon the sum of $674.50, or any sum paid by them for account of master's and stenographer's fees."

On November 11, 1904, the appeal was dismissed and the decree of the Circuit Court affirmed.

After due consideration we are of opinion the decree of the Circuit Court thus affirmed was a final and definitive one. In the first place, it was so styled and treated by the complainant, and on that basis he availed himself of the right to have it reviewed by the higher court. The decree was evidently so regarded by that court, and, as such, affirmed: Du Bois v. New York (C. C. A.) 134 Fed. 570. But apart from the status thus given it by complainant, it is clear the decree was, as to its subject-matter, a final one. The complainant elected to discharge his counsel and petitioned the court to fix compensation. This the court has done after hearing the parties. Why, then, is not the decree on that subject-matter final and definitive as between the parties litigant? The court had jurisdiction, all parties appeared, submitted proofs, were heard, and the court determined the contested questions by fixing the amount of fees. Thereafter the contentions of the parties in that subject-matter were merged into a decree, and were not open to question elsewhere as between them. Frauenthal's Appeal, 100 Pa. 290; Demarest v. Darg, 32 N. Y. 281; Heilman v. Kroh, 155 Pa. 1, 25 Atl. 751; In re Ralston's Estate, 158 Pa. 645, 28 Atl. 139; Haneman v. Pile, 161 Pa. 599, 29 Atl. 113; Green v. Bogue, 158 U. S. 478, 15 Sup. Ct. 975, 39 L. Ed. 1061; Stewart v. Ashtabula (C. C.) 98 Fed. 516; City v. Fricke, 6 Phila. 578; Myers v. Kingston Coal Co., 126 Pa. 582, 17 Atl. 891; Rauwolf v. Glass, 184 Pa. 237, 39 Atl. 79. The facts in the case of Williams v. Barkley, 165 N. Y. 48, 58 N. E. 765, are quite analogous to the present one, and the principles there stated as to the conclusiveness of such a proceeding as was had in this case when prosecuted to a degree, commend themselves to us, and establish the finality and effect of such an order. Nor can we see that the fact that payment of the compensation awarded was made a condition precedent to substitution can affect the final character of the decree adjudging compensation to counsel. Du Bois, having a right to discharge his counsel, and having by his petition elected to discharge them, is bound by such election, and will not now be heard to say the relation between them and him is not terminated. The authorities as to a party precluding himself by an election are clear. Droege v. Ahrens Mfg. Co., 163 N. Y. 470, 57 N. E. 747; Seanor v. McLaughlin, 165 Pa. 150, 30 Atl. 717, 32 L. R. A. 467; Terry v. Munger, 121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216, 18 Am. St. Rep. 803; Fowler v. Savings Bank, 113 N. Y. 450, 21 Atl. 172, 4 L. R. A. 145, 10 Am. St. Rep. 479; Kinney v. Kiernan, 49 N. Y. 174.

We next inquire as to the sufficiency of the certification of the record. In the certificate of the clerk of the Circuit Court of Appeals it is stated:

"That we having inspected the records and files of the United States Circuit Court of Appeals for the Second Circuit, do find certain paper writings there, remaining of record, in the words and figures following, to wit:"

And the judge certifies:

"I further certify that the seal affixed to the said exemplification is the seal of the United States Circuit Court of Appeals for the Second Circuit and that the attestation thereof is in due form of law."

The certificate of the record from the Circuit Court is in like form. We think these certificates are a substantial compliance with section 905, Rev. St. [U. S. Comp. St. 1901, p. 677]; Ferguson v. Harwood, 7 Cranch (U. S.) 408, 3 L. Ed. 386; O'Hara v. Mobile, 76 Fed. 718, 22 C. C. A. 512. This leaves for consideration the right of the plaintiff to maintain this suit. In the first place, it will be noted the right of action to the claim of Seymour & Harmon inured on the death of Eugene M. Harmon, to the surviving partner, the present plaintiff. His citizenship and the amount in controversy are such as to vest jurisdiction in this case. Such being the facts, does the further fact that the plaintiff has taken an assignment of the claims of the two other counsel and included them in his demand necessitate entry of judgment non obstante veredicto in favor of the defendant? Now the character of the plaintiff's claim, that part of it was assigned, that copies of such assignment accompanied, all this appeared in the statement. To this statement defendant entered a plea in bar. The court, having, as noted above, jurisdiction by virtue of the citizenship of the plaintiff and the amount of the particular claim he had as surviving partner, will the defendant, after a plea in bar, be permitted to raise the question of the nonjoinder of those who assigned their claims? It will be observed that if the joinder of these parties was essential that under the liberal provisions of section 954, Rev. St. [U. S. Comp. St. 1901, p. 696], they could be added as parties plaintiff and their citizenship would not defeat the jurisdiction of the court. Moreover, the question whether the assignee of a chose in action shall sue in his own name or that of his assignor is a mere technical question of process (Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104; Glenn v. Marbury, 145 U. S. 499, 12 Sup. Ct. 914, 36 L. Ed. 790), and that nonjoinder of the assignor is a mere matter of form, and as such amendable, is clear (Robertson v. Reed, 47 Pa. 115; Kaylor v. Shaffner, 24 Pa. 489); and nonjoinder should be raised by a plea in abatement or demurrer; it cannot be raised by a plea in bar (Smith v. Latour, 18 Pa. 243; Haldeman v. Martin, 10 Pa. 369; Deal v. Bogue, 20 Pa. 228, 57 Am. Dec. 702; Witmer v. Schlatter, 2 Rawle [Pa.], 359; Porter v. Cresson, 10 Serg. & R. [Pa.] 257).

In accordance with these views, the motion of the plaintiff for judgment on the verdict is granted; that of the defendant is denied.

UNITED STATES v. MILWAUKEE REFRIGERATOR TRANSIT CO. et al.

(Circuit Court, E. D. Wisconsin. May 31, 1906.)

1. CARRIERS—INTERSTATE COMMERCE—REBATES—CORPORATIONS—ELKINS ACT—VIOLATION.

A refrigerator company was incorporated to own and operate a private car line, and to have charge of all the interstate transportation of the product of a brewing company. A majority of the brewing company's stock, however, was owned by persons who had no interest in the refrigerator company, and the stock of the latter was bought and paid for by the holders with their own money and in their own interest; none of it being held in trust for the brewing company, though the majority of it

was owned by persons who also owned brewing company stock. The brewing company paid its freights in full and received no rebates, nor was it a party to contracts between the refrigerator company and the railroad companies by which the refrigerator company received a rebate of from one-eighth to one-tenth of all freight moneys on all interstate traffic it controlled. *Held*, that such facts were insufficient to establish that the brewing company had received rebates in violation of Elkins Act, Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599.]

2. INJUNCTION—CARRIERS—REBATING—RESTRAINING CRIME.

Equity has jurisdiction to grant an injunction at the instance of the United States against carriers and other corporations, restraining them from giving and receiving rebates in violation of Elkins Act, Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599], though such acts may also constitute a crime.

3. CARRIERS—REGULATION—REBATES—INJUNCTION—RIGHT TO SUE.

Elkins Act, Feb. 19, 1903, c. 708, § 3, 32 Stat. 848 [U. S. Comp. St. Supp. 1905, p. 600], prohibiting rebates by carriers, provides for actions by the Interstate Commerce Commission after investigation, and declares that it shall be the duty of the several District Attorneys of the United States, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings. *Held*, that the Attorney General had authority to institute a proceeding to restrain rebating by interstate carriers of his own motion, without direction or investigation on the part of the Interstate Commerce Commission.

4. SAME—COUNSEL FOR UNITED STATES—APPOINTMENT.

Where a proceeding to restrain certain carriers and shippers from giving and receiving rebates on interstate shipments was instituted at the direction of the Attorney General, who retained special counsel nominated by the informing witness, and defendants made no application for a stay of proceedings in order to object to the appearance of such special counsel, they were not entitled to a dismissal on the ground that prosecutor had agreed with the Attorney General to bear a deficiency in the expense of the prosecution after applying the balance of the Attorney General's appropriation applicable to that purpose.

5. SAME—STATUTES—CONSTRUCTION—SHIPPERS.

Elkins Act, Feb. 19. 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599], provides that it shall be unlawful for any person, persons, or corporations to solicit, accept, or receive any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce, whereby such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by the carrier, and section 2 declares that it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration. *Held*, that a refrigerator company organized for the purpose of controlling the interstate transportation of a brewing company, having entered into a contract for rebates with certain railroads, was a "party interested in the traffic," and was therefore subject to the provisions of such act.

6. SAME.

Under Elkins Act. Feb. 19. 1903, c. 708, § 1, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599], prohibiting the giving or receiving of rebates in respect to the transportation of any property in interstate or foreign commerce "by any device whatever" it was unlawful for a corporation organized to control the interstate transportation of a brewing company to demand and receive as a consideration for the routing of the brewing company's products over certain lines of railroad a concession equal to one-eighth or one-tenth of the published freight rates.

In Equity.
See 142 Fed. 247.

James G. Handen, for Pabst Brewing Co.
Geo. D. Van Dyke, for Milwaukee Refrigerator Co.
W. O. Johnson, for Erie R. Co.
H. K. Butterfield and Charles Quarles, Special Counsel, for the United States.

Before GROSSCUP, BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. This is a proceeding to enjoin the defendants from continuing practices which are claimed to be in violation of Elkins Act, Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599].

The charges in the petition are substantially these:

That the brewing company organized the refrigerator company, is the beneficial owner of the refrigerator company stock, and thereby indirectly receives the moneys paid by the railroad companies to the refrigerator company on account of beer shipments, as hereinafter stated.

That the refrigerator company, apart from the charge that it is a dummy of the brewing company, was organized and is being carried on as a device for the purpose and with the intent of exacting from the railroad companies a large proportion of the freight moneys for interstate and foreign shipments controlled by it; that it has obtained and holds contracts from the brewery company and other owners of goods, whereby it is given the exclusive control of shipments to competitive points; that it withholds such traffic from railroad companies which refuse to return to it from one-tenth to one-eighth of the freight moneys, and gives the business only to the railroad companies which contract to make such returns.

That the defendant railroad companies, with the intent of evading the law, have entered into such contracts with the refrigerator company, and thereunder have paid to the refrigerator company from one-tenth to one-eighth of the freight moneys on all traffic controlled by the refrigerator company.

That, unless restrained, the parties will continue these practices.

1. As to the brewing company.

The majority of the brewing company stock is owned by persons who have no interest in the refrigerator company. The stock of the refrigerator company was bought and paid for by the holders thereof with their own money and in their own interest. None of it is held in trust for the brewing company. The majority of it is owned by persons who also own brewing company stock. But the brewing company pays its freight in full, receives no rebates, and is not a party to the contracts between the refrigerator and the railroad companies. Under the evidence, the most that can fairly be said of the relations between the brewing and the refrigerator companies is that the former gave the control of shipments to the latter as a favor, and to enable it to profit thereby if it could. For failure of proof, the charges against the brewing company are dismissed.

2. Objections to the maintenance of this proceeding against the remaining defendants.

(1) Contention is made that equity jurisdiction does not inherently extend, and cannot by Congress be extended, to restraining the commission of crimes and misdemeanors.

To afford protection where other means are inadequate has been accounted the chief merit of equity. That the infraction of a complainant's rights may also constitute a crime is no reason for denying relief. Cases of refusal where no property was involved came largely, we believe, from the consideration that equity will not enter unenforceable decrees, and not from regard for the intending doer of the criminal act. If a complainant's rights, whether the higher and more sacred rights of person (Warfield's Case [Tex. Cr. Rep.] 50 S. W. 933, 76 Am. St. Rep. 727; Itzkovitch v. Whitaker [La.] 39 South. 499), or the lower and more sordid rights of property, cannot be adequately protected elsewhere; and if a decree and writ that will be enforceable can be framed, no court of equity should acknowledge itself wanting in the primary power of devising decrees and writs to meet the needs of the situation.

The evils that have resulted from railroad companies' secret abatement of published rates in favor of particular persons have long been matters of common report and discussion. If a person whose business was being undermined and ruined through advantages unlawfully given to a competitor should seek relief in equity, the objection that a property right was not involved would be wanting. Because the persons affected are so numerous and widely separated, because their injuries severally may be small, and because the United States has the regulation of interstate and foreign commerce, in our opinion Congress very clearly had the power to authorize equity proceedings by the United States as complainant (parens patriæ in that respect), for the protection of all persons who would be injured by the unlawful practices. This conclusion necessarily was upheld in Swift v. U. S., 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, though the contrary contention seems not to have been presented, and in Mo. Pac. Ry. v. U. S., 189 U. S. 274, 23 Sup. Ct. 507, 47 L. Ed. 811, wherein the question was argued by counsel.

(2) The Attorney General, of his own motion, directed the institution of this proceeding. Defendants claim that a suit of this kind will not lie except upon the initiative of the Interstate Commerce Commission. Section 3 of the Elkins Act (32 Stat. 848 [U. S. Comp. St. Supp. 1905, p. 600]) opens by providing for action by the Commission after investigation. The bill, as it passed the Senate and went to the House, evidently contemplated no other mode. In the House, the mandate that "it shall be the duty of the several district attorneys of the United States to institute and prosecute such proceedings" was amended by inserting after "United States" the clause, "whenever the Attorney General shall direct, either of his own motion, or upon the request of the Interstate Commerce Commission." Whatever doubt concerning the authority of the Attorney General to direct the bringing of this suit might arise from a mere reading of section 3 is removed, we think, by noting the history of the bill.

(3) A witness for complainant testified on cross-examination, in substance, that he was president of a rival refrigerator company; that he brought the alleged unlawful acts of defendants to the notice of the Interstate Commerce Commission; that the Commission took no action; that subsequently he called the Attorney General's attention to these matters; that the Attorney General stated to the witness that he would direct the District Attorney to begin proceedings, that he believed the District Attorney should have assistance, but doubted whether the appropriation at his command for that purpose would suffice to bear all of the expense, and asked the witness if his company would make up any deficiency; that the witness assented; that on the Attorney General's inquiry concerning desirable special counsel the witness named Mr. Charles Quarles, who subsequently was retained by the Attorney General; that the witness, by reason of his arrangement with the Attorney General, has made payments to Mr. Quarles; and that Mr. Quarles represents the witness in certain lawsuits.

On this the defendants have based a motion to dismiss the proceeding.

That the Attorney General exercised his own judgment in determining to direct the bringing of this suit is quite apparent. No witness, though hostile, can properly be criticised for calling the attention of the authorities to alleged violations of law. The facts on which the questions of legality depend are admitted by the defendants. No improper conduct by Mr. Quarles in eliciting the facts is shown or claimed. In open court defendants expressly waived any objection to the presentation and argument of the questions of law by Mr. Quarles on behalf of the United States.

If it be conceded that the law requires the United States to be represented by counsel who are as interested to see the innocent discharged as the guilty held, and that the Attorney General is not authorized to retain special counsel except on the basis that compensation shall come from the United States and nowhere else, it might be that the defendants would be entitled to a stay of proceedings until the United States should be represented by counsel concerning whose relations no objection could be urged. But this was not asked. And since the Attorney General properly directed the District Attorney to begin and prosecute this proceeding, and the defendants concede the facts on which liability must be predicated, if at all, they certainly are not entitled to a dismissal.

3. The character of the refrigerator company's practices.

The company owns refrigerator cars which it places at the disposal of railroad companies for use by them in handling certain kinds of traffic, and they pay it rent for the cars in the form of mileage. There is neither averment nor proof which attacks the company in its character of lessor of cars to the railroads.

But, under the conceded facts, as we view them, the refrigerator company in its relations with the railroads appears in another role—that of shipper. From the brewing company and other owners of goods intended for interstate and foreign transportation the refriger-

ator company obtains the exclusive right to route the shipments to all competitive points, and then withholds or gives the business according to the railroad companies' resistance or submission to the threat of diverting the traffic unless a tenth or an eighth of the freight moneys be paid to it. Control of the traffic is as absolute in the refrigerator company as if it were owner, and in numerous transactions the owner is not the shipper. And if an owner, having full dominion in all respects, conveys to another the dominion for transportation purposes, that other in all dealings respecting transportation should be deemed the owner and shipper. In this case, if the refrigerator company bought the beer, and paid the brewing company's bill less freight, and then collected the beer accounts, and paid the railroads seven-eighths or nine-tenths of the published rates, the granting of a rebate or concession by a carrier to a shipper would not be denied, we take it; and yet, so far as ledger balances and profits of the brewing company, the refrigerator company, and the railroads are concerned, the present method in its results is precisely that.

The foregoing consideration is in answer to defendants' insistence that the Elkins act touches only the carrier and the shipper. But under the strictest construction (and that the act should be fairly interpreted to effectuate its remedial purposes, see New York, etc., R. M. Co. v. Interstate Commerce Commission [U. S. Sup. Feb. 19, 1906]), 26 Sup. Ct. 272, 50 L. Ed. —, we think it was designed to restrain all "parties interested in the traffic."

In section 1:

"It shall be unlawful for any person, persons or corporation * * * to solicit, accept, or receive any rebate, concession or discrimination in respect of the transporation of any property in interstate or foreign commerce * * * whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier."

In section 2:

"It shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration."

And in section 3:

"Upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs * * * by proper orders, writs and process * * * as well against the parties interested in the traffic as against the carrier."

So, if the refrigerator company be not considered as the shipper, it is, at least, a "party interested in the traffic."

4. In the practice stated it is evident that the railroad companies, in acceding to the demands of the refrigerator company, have (1) failed strictly to observe the published tariffs, and (2) granted concessions whereby they received a less rate than that named in the published tariffs for the transportation of property in interstate and foreign commerce, both in disregard of the provisions of section 1.

It matters not that the particular practice herein disclosed is not

described in the act. The inhibition of "any device whatever" that accomplishes the condemned results is a ban upon invention in this field.

So far as the fact of intent is material, it follows from the consideration that the parties knowingly and deliberately did what they did.

Let a decree be entered against the refrigerator and railroad companies defendant, in accordance with the prayer of the petition.

In re LAPLUME CONDENSED MILK CO.

(District Court, M. D. Pennsylvania. May 31, 1906.)

No. 589.

BANKRUPTCY—POWERS OF COURT—ORDER REQUIRING PAYMENT OF MONEY TO TRUSTEE.

The treasurer of a bankrupt corporation cannot be required by a summary order to turn over to the trustee money which he in fact paid out in settlement of debts of the corporation between the filing of the petition and the adjudication, even though such payments were not justified and resulted in preferences to the creditors receiving the same.

In Bankruptcy. Rule on M. P. Cawley to turn over money.

W. N. Leach and R. W. Rymer, for the rule.

C. A. Van Wormer, contra, for respondent.

ARCHBALD, District Judge. This case is ruled by American Trust Co. v. Wallis, 11 Am. Bankr. Rep. 360, 126 Fed. 464, 61 C. C. A. 342, decided by the Court of Appeals of this Circuit. It was there held that where a bankrupt, after the filing of a petition against him and pending an adjudication, collected in money which was due, and paid the same out to various creditors, he could not be required by summary order, there being no question of fraud or bad faith, to turn over to the trustee subsequently chosen the funds of which he had so disposed. See, also, In re Smith Longbottom & Sons (D. C.) 142 Fed. 291. In the present instance the respondent M. P. Cawley, treasurer of the bankrupt corporation, in conjunction with the other officers, after the destruction of its condensary by fire and the abandonment of its business, collected the insurance due on its policies, amounting to $14,200, and reduced to money its other available assets, obtaining in this latter way some $5,000 more; the greater part of all of which was paid out again to various creditors. On February 2, 1905, however, when the proceedings in bankruptcy were instituted, the respondent still had in his hands as treasurer, the sum of $3,468.05, of which, at the time when the schedules were filed, there was but $60.53, the rest of it having been disposed of in payment of other indebtedness, notwithstanding the pendency of the proceedings. Of this, $1,590.64 was paid to the creditors who instituted the proceedings in the hope of securing a discontinuance, the respondent taking an assignment of their claims to himself individually, when this proved of no avail. Some $1,126.76 was used in settlement of suits

brought by parties who had contracts for supplying the condensary with milk, on which judgments had been obtained before a justice of the peace, and appeals taken; the respondent and other directors becoming bail absolute therein. Three hundred dollars were paid to counsel for advice and services. And certain debts were taken care of with the rest of it, the most of which were compromised at 35 cents on the dollar. The respondent no longer having the money, and having accounted for it in this way, the question is whether he can be required by summary order to make it good. Except as it is otherwise provided by the bankruptcy act, the payments so made by the respondent, as treasurer, were entirely lawful and justified. They were in liquidation of the company's obligations, and although some creditors may have been preferred at the expense of others, there is nothing in the general law which stands in the way of this, even in the case of an insolvent corporation. Moller v. Fibre Co., 187 Pa. 553, 41 Atl. 478. Nor is this affected by the fact that as to some of the indebtedness, the respondent and other officers had become bound as sureties for its payment. The obligations so entered into in behalf of the company were voluntary, and there was nothing in law or morals which compelled them to stand by and let them become absolute to their personal detriment. It would perhaps have been more just to have divided the assets ratably among the creditors generally, but business has not yet become altruistic, and they certainly cannot be charged with fraud or bad faith, because in paying some of the debts they took care also of their own interests. The bankruptcy law, however, changes this, and for the purpose of securing equal distribution for bids preferences, making them voidable under some circumstances, and subjecting the debtor to proceedings, where they have been given. But notwithstanding this, and conceding that it may be defeated, if an alleged bankrupt in the face of such proceedings may go on and dispose of his property in disregard of them, the filing of an involuntary petition does not, ipso facto, take from him his dominion over it. It no doubt puts the property within the control of the court, if it sees fit to exercise the power, but pending and prior to an adjudication, it is still his own, title only vesting in the trustee, as of that date, after an adjudication has been obtained. Section 70 (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]). If this is not sufficient to protect the interests of creditors, in any case, upon a proper showing they may have the marshal put in possession or a receiver may be appointed, which will. Section 2, subsecs. 3, 5 [U. S. Comp. St. 1901, p. 3421]; section 69 [U. S. Comp. St. 1901, p. 3450].

Subject then to the right of the trustee to avoid it as a preference, an honest disposition of his property by the bankrupt, even after proceedings have been instituted, therefore stands. This is the substance of the decision in American Trust Co. v. Wallis, supra, and is unquestionably the law. Applying it to the case in hand the result is clear. The respondent under the authority which he possessed as treasurer dispensed the money in his hands in payment of the admitted debts of the company. Some were satisfied in full, while in

a few instances favorable reductions were secured. It is now sought to make him personally answerable for this money; not by suit, upon the ground that it was unwarrantably paid out, with the ordinary incidents of execution, etc., in case a judgment should be recovered; but by summary order of court, for disobedience of which he may be attached and committed, for contempt. It is not pretended that the money sought to be reached is actually in his possession, or control, nor is any concealment or subterfuge alleged, or if it is, it has not been made out. All that is contended for is that it shall be treated as constructively in his hands; that is to say, that he shall be held, as though it were, because it ought to be. But this is a misconception of the remedy invoked, and the power of the court under it. It is effective to lay hold of a specific fund or thing, under the dominion or control of the party ruled, but cannot legitimately go beyond that. Undoubtedly the court will not permit a colorable evasion, and that which is held by another, in his interest, or with his connivance, is the same as though held by the party himself. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. An adverse claim on the other hand made in good faith on what is apparently a sufficient basis, will be respected, and, subject always to the right to determine whether it is so made, the court will not undertake to override or pass upon it. It is true that there are cases where a party has been required to disgorge funds which are traced into his hands, notwithstanding his protest that he has spent them in payment of debts, or has otherwise disposed of them. In re Gerstel, 10 Am. Bankr. Rep. 411, 123 Fed. 166; In re Michael Kane, 10 Am. Bankr. Rep. 478, 125 Fed. 984; Schweer v. Brown, 12 Am. Bankr. Rep. 178, 130 Fed. 328, 64 C. C. A. 574; In re Henderson, 12 Am. Bankr. Rep. 351, 130 Fed. 385. But the orders there made proceed upon an entirely different basis, and are carefully to be distinguished. The statement of the bankrupt was simply not believed, and was therefore disregarded. They are not to be construed as undertaking to compel him to turn over what he has not, but what the court finds, notwithstanding his denials, that he in fact has.

The order which is here sought is not within any of these bounds. As already stated, the respondent, rightly or wrongly, has no money or property of the company in his hands, practically the whole of it, as is clearly shown by the evidence, having been paid out to creditors. The preferences so given are not likely to go unquestioned, and made as they were in the face of bankruptcy would seem to be indefensible, upon action being taken by the trustee. The attempt to get rid of the petitioning creditors, and the assignment of their claims to the respondent are of no particular moment except as they may justify suit against him as the real party who obtained the preference, which he assumed to be. But his liability as treasurer, here and now, upon this or any other ground, to turn over money which he has not got, is another matter, and cannot be sustained.

The rule to show cause is discharged, with costs.

BRIXEY v. CITY OF NEW YORK.

(Circuit Court, S. D. New York. May 21, 1906.)

TRIAL—INSTRUCTIONS—INAPPLICABILITY TO ISSUES.

In an action against the city of New York to recover for a personal injury resulting from an explosion of dynamite stored and prepared in the street by a contractor for use in the excavation of the subway, which storage and preparation as conducted were alleged to be unnecessary, and to constitute a dangerous nuisance, where there was evidence tending to show that it could have been safely stored and kept in the excavation, an instruction that while the state statute prohibiting the storage of explosives in mines had no application if the city officers believed that the storing of the dynamite in the tunnel would be a violation of such statute, then the jury might "drop that question as to whether or not it was a nuisance to keep it above ground at all," was error prejudicial to plaintiff, and especially misleading, where there was no evidence whatever as to such belief.

On motion to set aside the verdict of the jury in favor of defendant, and for a new trial on various grounds, among others, because of errors in the charge.

Abel Crook, for plaintiff.
John J. Delany, for defendant.

RAY, District Judge. The verdict must be set aside and a new trial granted because of prejudicial error in the charge. The action was for damages sustained by the plaintiff by reason of the explosion of a large quantity of dynamite in one of the public streets of the city of New York, which was kept there opposite the Murray Hill Hotel for use in the excavation of the subway. The plaintiff was a guest in that hotel, and was sitting in his room when the explosion occurred. There is no question that he was seriously and to some extent permanently injured. Under the act authorizing the construction of this public work, the contractor and subcontractor prosecuting the work were authorized and had the right to do all things reasonably necessary to accomplish the purpose. In so doing they had the right to use certain designated portions of the public streets in all necessary ways. Things necessary to be done in these designated places, ordinarily nuisances, were not such under the circumstances and necessities of the case because of the legislative grant of authority. But these designated places in the public streets did not cease to be parts of the streets, and they were so far under the control of the city authorities that it was their duty to look out for and abate obviously dangerous nuisances existing there if they had express or implied notice. The keeping and preparing for use of dynamite in the place in question in necessary quantities was not a nuisance if properly done, and its presence there was reasonably necessary for the proper prosecution of the work. But if its presence there was not reasonably necessary, it became and was a nuisance, and it was the duty of the city to abate it if it had notice of its existence. A permit was granted for taking to and having at the place in question a specified amount of dynamite, but a much larger quantity was for a long time, and down to the happening of this event,

complained of habitually, and daily carried and kept there. It was also prepared for use in a little shanty above ground at this place as occasion required, and in cold weather the frozen dynamite was thawed therein and capped in a manner that was exceedingly dangerous; confessedly dangerous if the evidence of the one who handled it is to be credited. The plaintiff contended that the keeping and storing of this dynamite above ground in this shanty was not only obviously dangerous, but wholly unnecessary. The contention was, and is, also, that if necessary it was for a long time handled and kept and prepared there in such a plainly negligent and improper manner that a nuisance existed because of such handling. After the charge was completed and all questions had been properly submitted, the counsel for the city requested the court to charge "that the statutes of the state known as the 'Labor Law,' in force on the 27th day of January, 1902 (the day of the accident), prohibited the storage of explosives in mines." The court said: "I so charge, but I charge that this was not a mine." "This" referred to the subway excavation, and there was evidence that the dynamite might have been kept and stored there safely. Some conversation between the court and counsel followed, and then the court said:

"Yes, that is true; but I also charge you that it was not a mine, and that it would not have been a violation of the labor law to have put this dynamite down there [meaning in the excavation]."

Defendant's counsel excepted. The court immediately added:

"But I do charge that if this city, or its officials having charge of the matter, believed that the storing of dynamite down there [in the subway excavation] was a violation of the labor law, that then you may drop that question as to whether or not it was a nuisance to keep it above ground at all."

The plaintiff's counsel excepted. Clearly this was prejudicial error. There was no evidence whatever that the officials of the city believed any such thing, or acted on any such assumption or theory. Again, the belief of the city officials charged with the duty of abating nuisances had nothing to do with the questions at issue. Again, the statement was dangerously near an instruction that if the city officials held and acted on that belief, then the keeping and storing and handling of the dynamite in the street for a long time in an obviously dangerous manner did not constitute a nuisance for which the city would be liable in case of injury therefrom. This statement obscured the whole issue, and put the case on a false basis, and probably misled the jury.

The motion for a new trial must be granted.

UNITED STATES v. J. G. JOHNSON & CO.

(Circuit Court, S. D. New York. February 8, 1906.)

No. 3,360.

1. JUDGMENT—RES ADJUDICATA—CUSTOMS DUTIES—ACTION FOR RECOVERY.
In an action by importers against the collector of customs, in a Circuit Court, for the recovery of excessive duties, a verdict was directed for the importers for a part of the claims made, and against them for the remainder, judgment being rendered and satisfied on that basis. *Held*, that the entire matter thus became res adjudicata, and the importers could not by subsequent proceedings before the Board of United States General Appraisers, have a further recovery on the merchandise as to which said verdict had been adverse.

2. CUSTOMS DUTIES—BOARD OF GENERAL APPRAISERS—CONCURRENT JURISDICTION.
The jurisdiction of the Circuit Courts of the United States in respect to customs duties prior to the enactment of the Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 131 [U. S. Comp. St. 1901, p. 1886], was concurrent with that given the Board of United States General Appraisers by that act.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision under review reversed the assessment of duty by the collector of customs at the port of New York on merchandise imported under the tariff act of March 3, 1883.

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

Frederick W. Brooks, for the importers.

HAZEL, District Judge. This action comes here upon an appeal by the collector of customs for the collection district and port of New York from a decision made on the 2d day of April, 1903, by the Board of General Appraisers. The single question submitted is whether the issues raised by the protest filed by the importers have become res adjudicata by virtue of a judgment recovered by the protestants against the collector for excessive duties paid upon the merchandise in question. Briefly stated, the record shows that the collector when the importation was entered levied a tariff duty of 50 per centum ad valorem as manufactures of silk under paragraph 283 of the tariff act of March 3, 1883, 22 Stat. 488, c. 121. The protestants claimed that the articles were dutiable at 20 per centum, or, in the alternative, 25 per centum under paragraphs 448 or 459, respectively. Subsequently, an action was brought at law against the collector to recover the excess duties collected. Upon the trial the following proceedings were had:

"John G. Johnson et al. v. Erhardt, N. S. 18,000 Calendar No. 3,270. Same appearances. Tried before the same jury by consent, and the swearing of the jury waived.

"Mr. Fromme: Cal. No. 3,270, Suit No. 18,000, same plaintiffs against Erhardt. I ask that the papers already introduced in evidence in case Cal. No. 3,261, may be considered in this case. The amount of the plaintiffs' claim in this case as shown by the bill of particulars is $10,800. I ask that a verdict may be directed for the plaintiffs under column 1 for $463.50, under

column 6 for $122.70 and under column 24 for $942, making a total of $1,528.20, with interest to date of payment. It is stipulated that as to those amounts for which a verdict is asked in columns 6, 22, 23, and 24 the amounts which have been already specified are the maximum claims for which the plaintiffs can ask.

"The Court (Coxe, J.): Gentlemen of the jury, there seems to be no conflict upon the facts in this case, and you are therefore directed to find a verdict for the plaintiffs for the items which have been proven, amounting to $1,528.20 principal with interest, subject to correction and adjustment at the custom house, by the collector of the port, under the direction of the court, as to the amount, and as to all the formalities and requisites of suit. Upon all other items embraced in the plaintiffs' claim, you are directed to render a verdict for the defendant. The jury rendered a verdict in accordance with the direction of the court. Certificate of probable cause granted defendant."

Upon the rendition of the verdict, judgment was entered which afterwards was paid and satisfied. On May 6, 1892, the collector liquidated the entry, a protest being filed by the importers on May 12, 1892. On October 10, 1901, oral evidence was taken by the Board of General Appraisers in relation to such protest and the claim of the protestants sustained, while the action of the collector was reversed. The importers contend that they are entitled to recover back the remaining excess duties paid on the other claims covered by the entry, on the ground that they did not by their acceptance of the verdict of the jury specifically release the government from the payment of such claims. This contention is wholly untenable. The recovery of the judgment, considered in connection with the stipulation of the parties in open court, whereby it was stipulated that the amount of the verdict requested by the plaintiff was the maximum amount of the claims for which they could recover, undoubtedly is conclusive upon the importers. Although there were several items of merchandise upon which a separate duty was assessed, yet the entire controversy arising out of the unlawful exaction was submitted to the court. The importers resorted to the remedy provided by law for the correction of the illegal assessment of duties; and the adjustment of the controversy by a court of conceded jurisdiction was a liquidation of the claims alleged in the complaint against the debtor. No other consideration was necessary to sustain a remission or relinquishment of any other claims asserted in the complaint for excessive duties collected. The importers were not obliged to pursue their remedy at law against the collector, as the customs administrative act of June 10, 1890, c. 407, 26 Stat. 131 [U. S. Comp. St. 1901, p. 1886], was in force at the time of the trial. Having elected to pursue their remedy in this court instead of before the Board of General Appraisers, a tribunal of concurrent jurisdiction in relation to customs duties, they are precluded from maintaining another remedy to recover any other excess claimed in the complaint to have been unlawfully exacted by the collector.

The decision of the Board of United States General Appraisers is reversed.

FREES et al. v. JOHN SHIELDS CONST. CO.

(Circuit Court, S. D. New York. May 10, 1906.)

COURTS—CONCURRENT JURISDICTION—ACTION BY FEDERAL RECEIVER IN STATE COURT—PRIORITY OF JURISDICTION.

Where a federal receiver has commenced an action on a claim in a state court, which has the power to entertain equitable defenses in actions at law, the federal court will not direct him to suspend such action to permit the defendant to prosecute a suit in equity therein to establish the right to a set-off, merely because the courts of the two jurisdictions held different views on the right of set-off under the facts, but will stay the suit before it until the state court, which first acquired jurisdiction of the parties and subject-matter, has disposed of the action before it.

[Ed. Note.—Federal courts enjoining proceedings in state courts, see notes to Garner v. Second Nat. Bank of Providence, 16 C. C. A. 90; Central Trust Co. of New York v. Grantham, 27 C. C. A. 575; Copeland v. Bruning, 63 C. C. A. 437.]

On Petition by the Hamilton Bank for Instructions to Receiver.

Edmund L. Mooney, for the motion.
Arthur H. Van Brunt, opposed.

TOWNSEND, Circuit Judge. The defendant is a New Jersey corporation and is insolvent, and Calvin E. Broadhead, the New Jersey receiver, was appointed ancillary receiver by this court to enforce in this district a claim of the receiver against the petitioner, the Hamilton Bank, for a sum on deposit in said bank. The bank is a creditor of said company on a note indorsed by said company for the same amount as said deposit. Before the maturity of said note, the receiver brought suit in the Supreme Court of the state of New York to enforce his claim against the petitioner, which suit is now pending. The petitioner claims the right to set off against said sum on deposit its claim by virtue of said note, and has brought a suit in this court to establish said right. The petitioner, however, asserts that this right is not enforceable in the state court, because the note did not mature prior to the appointment of the receiver (Fera v. Wickham, 135 N. Y. 223, 31 N. E. 1028, 17 L. R. A. 456), but is enforceable in this court under the decisions of the federal courts (Frank v. Mercantile Nat. Bank, 182 N. Y. 264, 74 N. E. 841; Schuler v. Israel, 120 U. S. 506, 7 Sup. Ct. 648, 30 L. Ed. 707; North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co., 152 U. S. 596, 14 Sup. Ct. 710, 38 L. Ed. 565). The petitioner, therefore, prays for an order directing the receiver to suspend the proceedings in the state court until after its rights have been determined in the suit against him in this court. It is alleged that the state court "has not jurisdiction to entertain and adjudge upon the matters" alleged as a set-off, and that full and adequate relief can only be had in this court as a court of equity. This contention does not seem to be well founded, in view of the allegations in the affidavits and of the equitable powers of the courts of the state of New York. Apparently, the sole ground on which this claim is based is the one stated above as to the difference in view between the two jurisdictions. Under the New York statutes the Supreme Court has general jurisdiction to entertain

all defenses, both legal and equitable, in a civil action such as the receiver has brought. He was appointed by this court to collect the assets of the estate. Such appointment imposes no limitation as to the tribunal to which he shall resort in the prosecution of his duties as receiver. It must be assumed that the state court, having equity powers, will afford to the parties any relief to which they may be entitled, in accordance with the principles and practice of equity.

There is, therefore, but one issue to be tried in the two proceedings, and, under the settled rule in the case of courts having concurrent jurisdiction, the later proceeding should be stayed until the court which first acquired jurisdiction of the parties and the subject-matter has disposed of the action before it. Zimmerman v. So Relle, 80 Fed. 417, 25 C. C. A. 518; Bunker Hill & Sullivan Mining & Concentrating Co. v. Shoshone Mining Co., 109 Fed. 504, 47 C. C. A. 200.

The petition is denied.

MEMORANDUM DECISIONS.

BUEHNE STEEL WOOL CO. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. March 16, 1906). No. 191 (3924). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see 140 Fed. 772. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Affirmed in open court, on consent.

In re DRESSER et al. (Circuit Court of Appeals, Second Circuit. May 25, 1906.) No. 281. Petition to Review Order of the District Court of the United States for the Southern District of New York. J. A. Hodge, for petitioner. Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Order (144 Fed. 318) affirmed in open court.

ECKSTEIN v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. March 6, 1906.) No. 150 (3597). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see 140 Fed. 94. Comstock & Washburn (J. Stuart Tompkins, of counsel), for appellant. D. Frank Lloyd, Asst. U. S. Atty. Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. Decision affirmed; approving decision of the Circuit Court, and of the Board of General Appraisers.

FRANCIS H. LEGGETT & CO. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. February 20, 1906.) No. 119 (3562). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see 138 Fed. 970.

PER CURIAM. Dismissed on consent, without prejudice.

GOAT & SHEEPSKIN IMPORT CO. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. February 26, 1906.) No. 133 (3641). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see 141 Fed. 493. Note 26 U. S. Sup. Ct. 767, 50 L. Ed.——. Hatch, Keener & Clute (J. Stuart Tompkins, of counsel), for appellants. D. Frank Lloyd, Asst. U. S. Atty. Before LACOMBE and COXE, Circuit Judges.

PER CURIAM. Affirmed on the opinion of the Circuit Court.

HERMANN BOKER & CO. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. February 23, 1906.) No. 145 (3769). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see 140 Fed. 115. Walden & Webster (Howard T Walden, of counsel), for appellants. Henry A. Wise, Asst. U. S. Atty. Before LACOMBE and COXE, Circuit Judges.

PER CURIAM. Affirmed in open court.

HIRSCH et al. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. April 9, 1906.) No. 211 (3725). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see 141 Fed. 380. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Affirmed on consent in open court.

The JOHN FLEMING. (Circuit Court of Appeals, Second Circuit. May 22, 1906.) No. 256. Appeal from the District Court of the United States for the Southern District of New York. Albert A. Wray, for appellant. La Roy S. Gove, for appellee. Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Decree of District Court (136 Fed. 917). Affirmed with interest and costs.

The KNICKERBOCKER. (Circuit Court of Appeals. Second Circuit May 24, 1906.) No. 265. Appeal from the District Court of the United States for the Southern District of New York. Peter S. Carter, for appellant. Amos Van Etten, for appellee. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Decree affirmed with costs on opinion of District Judge (138 Fed. 148).

LAKE STEAM SHIPPING Co. v. BACON. (Circuit Court of Appeals, Second Circuit. May 24, 1906.) No. 261. Appeal from the District Court of the United States for the Southern District of New York. J. P. Kirlin, for libellant. C. S. Haight, for respondent. Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Decree affirmed with interest but without costs, as we agree with the opinion of the Commissioner, and with the opinion of the Court below (137 Fed. 961).

LAWRENCE JOHNSON & CO. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. February 26, 1906. Rehearing Denied March 10,

1906.) No. 146 (3620). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see 140 Fed. 116. Note (C. C.) 124 Fed. 1000. Walden & Webster (Henry J. Webster, of counsel), for appellants. D. Frank Lloyd, Asst. U. S. Atty. Before LACOMBE and COXE, Circuit Judges.

PER CURIAM. Affirmed on the opinion of the Circuit Court.

UNITED STATES v. BUEHNE STEEL WOOL CO. (two cases). (Circuit Court of Appeals, Second Circuit. March 8, 1906.) No. 192 (3915, 3924). Appeals from Circuit Court of the United States for the Southern District of New York. For decision below, see 140 Fed. 772.

PER CURIAM. Dismissed upon consent, in open court.

UNITED STATES v. SAMUEL SCHIFF & CO. (Circuit Court of Appeals, Second Circuit, March 6, 1906.) No. 151 (3631). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see 140 Fed. 63. Charles Duane Baker, Asst. U. S. Atty. Comstock & Washburn (Albert H. Washburn, of counsel), for appellees. Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. Decision of Circuit Court affirmed.

WARD et al. v. WARD et al. (two cases). (Circuit Court of Appeals, Second Circuit. May 22, 1906.) Nos. 61, 62. Appeal from the Circuit Court of the United States for the Southern District of New York. Austen G. Fox, for appellants. Wm. G. Wilson, for appellees. Before WALLACE and TOWNSEND, Circuit Judges. HOLT, District Judge.

PER CURIAM. A majority of the court, after a careful examination of the record, have reached the conclusion that the decrees below ought not to be disturbed, and concur in the views expressed in the opinion of the court below. The decrees are accordingly affirmed with costs. For opinion below, see 131 Fed. 946.

W. W. THOMAS & CO. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. February 26, 1906). No. 143 (3897). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see 140 Fed. 93. Before LACOMBE and COXE, Circuit Judges.

PER CURIAM. Affirmed in open court, upon consent.

CARBONDALE MACH. CO. v. WILLIAM H. BURGESS & CO. (Circuit Court, S. D. New York. June 19, 1906.) Taft & Sherman, for plaintiff. Rose & Putzel, for defendant.

LACOMBE, Circuit Judge. There is no appeal now pending and this court seems to be without jurisdiction to act further. The temporary stay is vacated, and motion denied.

END OF CASES IN VOL. 145.