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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.

DECEMBER, 1906—FEBRUARY, 1907.

WITH TABLE OF CASES IN WHICH REHEARINGS HAVE BEEN GRANTED OR DENIED.

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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 H. MOODY, 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 [1].....Brooklyn, N. Y.
Hon. THOMAS I. CHATFIELD, District Judge, E. D. New York [2].....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.....New York, N. Y.
Hon. JOHN R. HAZEL, District Judge, W. D. New York.....Buffalo, N. Y.
Hon. JAMES L. MARTIN, District Judge, Vermont.....Battleboro, Vt.

THIRD CIRCUIT.

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

[1] Resigned January 1, 1907.

[2] Appointed to succeed Edward B. Thomas.

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. NATHANIEL EWING, District Judge, W. D. Pennsylvania.....Pittsburgh, Pa.

FOURTH CIRCUIT.

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Hon. NATHAN GOFF, Circuit Judge.....Clarksburg, W. Va.
Hon. JETER C. PRITCHARD, Circuit Judge.....Asheville, N. C.
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Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....Greensboro, N. C.
Hon. WILLIAM H. BRAWLEY, District Judge, E. and W. D. South Car..Charleston, S. C.
Hon. EDMUND WADDILL, Jr., District Judge, E. D. Virginia.....Richmond, Va.
Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia.....Lynchburg, Va.
Hon. ALSTON G. DAYTON, District Judge, N. D. West Virginia.....Philippi, W. Va.
Hon. BENJAMIN F. KELLER, District Judge, S. D. West Virginia.....Bramwell, W. Va.

FIFTH CIRCUIT.

Hon. EDWARD D. WHITE, Circuit Justice.....Washington, D. C.
Hon. DON A. PARDEE, Circuit Judge.....Atlanta, Ga.
Hon. A. P. McCORMICK, Circuit Judge.....Dallas, Tex.
Hon. DAVID D. SHELBY, Circuit Judge.....Huntsville, Ala.
Hon. THOMAS GOODE JONES, District Judge, M. and N. D. Alabama...Montgomery, Ala.
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[3].....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.....Dallas, 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.

Hon. JOHN M. HARLAN, Circuit Justice.....Washington, D. C.
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. LOYAL E. KNAPPEN, District Judge, W. D. Michigan.....Grand Rapids, Mich.
Hon. AUGUSTUS J. RICKS, District Judge, N. D. Ohio[4].....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.

[3] Died February 4, 1907.

[4] Died December, 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. EDWARD S. FARRINGTON, District Judge, Nevada.....Elko, 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.

CASES REPORTED.

CASES ON REHEARING.

CASES IN WHICH REHEARINGS HAVE BEEN GRANTED OR DENIED.

American Bridge Co. of New York v. Bainum.....146 Fed. 367
Rehearing denied October 15, 1906.

Bradford v. Expanded Metal Co.....146 Fed. 984
Rehearing denied October 15, 1906.

Conroy v. Penn. Electrical & Mfg. Co.....146 Fed. 749
Rehearing denied October 15, 1906.

Klutt v. Philadelphia & R. Ry. Co.....142 Fed. 394
Rehearing denied December 31, 1906.

Toy Tong v. United States.....146 Fed. 343
Rehearing denied October 15, 1906.

CASES

ARGUED AND DETERMINED

IN THE

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

WHITE RIVER SAV. BANK OF WHITE RIVER JUNCTION, VT., v. CITY OF SUPERIOR.

(Circuit Court of Appeals, Seventh Circuit. August 11, 1906.)

No. 1,196.

1. MUNICIPAL CORPORATIONS—POWER TO CONTRACT INDEBTEDNESS—VALIDITY OF BONDS.

A municipal corporation can incur no indebtedness for an object not within the powers, express or implied, granted by its charter, and a purchaser of its bonds is chargeable with notice of its charter powers and limitations when the purpose for which the bonds were issued is fully disclosed in their recitals.

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

2. SAME—STREET IMPROVEMENT BONDS—GENERAL LIABILITY OF CITY.

The charter of the city of Superior, Wis., of 1889 (Laws Wis. 1889, pp. 407–413, c. 152, subsec. 16, §§ 139–167, et seq.), provides for the improvement of streets and generally that the cost in the first instance shall be borne by abutting property in proportion to benefits assessed, except at intersections of streets or alleys, and across public grounds, which shall be borne by the city at large. The city is authorized to pay for such improvements by the issuance of improvement bonds covering the assessments made on abutting lots, which shall contain recitals showing that they are chargeable to particular property specified, and required to extend a portion of the assessment each year on the tax rolls against such property and to credit the tax when collected to the fund against which payment of the bonds is charged. *Held*, that such charter did not vest in the city power to assume payment or obligation to pay in any event the expense of such improvements as a general liability, and that improvement bonds reciting that they were issued under such charter, and specifying the property assessable for their payment in accordance with a schedule of such assessments on file, are not enforceable, nor the purchase money recoverable, against the city as a general liability.

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

The plaintiff in error White River Savings Bank was the plaintiff below in a suit to recover of the city of Superior upon 22 bonds of $500 each, and interest coupons attached. The issues were submitted to the court, on waiver of a jury trial, and resulted in findings and judgment in favor of the city of Superior. Upon this writ of error the conclusions of law only are challenged.

The complaint alleges 24 causes of action—one for each of the bonds and attached coupons, respectively, and two for money had and received in the consideration paid by the original purchasers of the bonds, under assignments to the plaintiff.

The answer avers: (1) That the city was indebted beyond the constitutional limit and the bonds were invalid as general obligations; (2) that they were issued under the charter provisions for improvement of the streets and not as general obligations; (3) that no provision was made to pay principal or interest by general taxation and the bonds were invalid as general obligations; and (4) facts by way of defense to the alleged causes for money had and received.

The bonds in suit were alike in form, except as to number and description of street improvement mentioned in each, and the following exhibit illustrates the form of all:

"No. 1176 State of Wisconsin. $500.00

"City of Superior.

"Street Improvement Bond.

"County of Douglas.

"Know all men by these presents, that the city of Superior, in the county of Douglas, state of Wisconsin, for value received hereby acknowledges itself indebted to and promises to pay the bearer hereof the sum of five hundred dollars lawful money of the United States of America, to be paid on the second day of January, A. D. 1898, redeemable at the pleasure of the said city of Superior after the second day of January, A. D. 1896, with interest thereon at the rate of six per centum per annum, payable semi-annually on the second days of July and January in each year as evidenced by the semi-annual coupons hereto attached as they severally become due, both the interest and principal of this bond being payable at the National Bank of the Republic in the city and state of New York.

"This bond is issued by authority of chapter 16 of the charter of the city of Superior, approved March 23d, A. D. 1889, and by a resolution duly passed, approved and published in said city of Superior and state of Wisconsin, bearing date the 29th day of May, A. D. 1891. This bond is one of five bonds numbered from 1175 to 1179 inclusive, the aggregate amount of which is two thousand three hundred and fifteen and $^{83}/_{100}$ dollars and is issued for the purpose of defraying the cost of constructing the improvement on Dock street between North First street and a point 600 feet north of north line of North First street and on account of such assessment made upon the property abutting upon said street between said points for such improvement as the owners have not elected to pay.

"The payment of the principal and interest of this bond is made chargeable upon the property abutting upon said street between said points as evidenced by a statement and schedule of such special assessments on which the bonds are issued as recorded in the office of the city clerk of said city of Superior.

"And it is hereby certified and recited that all acts, conditions and things required to be done, precedent to and in the issuing of this bond, have duly happened and been performed in regular and due form as required by law.

"The full faith and credit of the city of Superior, Douglas county and state of Wisconsin, is hereby irrevocably pledged for the prompt payment of this bond, both principal and interest.

"In testimony whereof, the said city of Superior, county of Douglas and state of Wisconsin has caused this bond to be signed by its mayor and city clerk and the seal of said city to be attached this second day of January, A. D. 1891.

"————, Mayor.

"W. J. Dargis, City Clerk.

"Countersigned: ————, Comptroller."

The following agreement extending the time of payment was made July 2, 1898, and accepted by the city:

"For and in consideration of one dollar to me in hand paid by the city of Superior and other valuable consideration the undersigned owner and holder of this bond hereby agrees to and does extend the time of payment thereof until the first day of July, 1908, and agrees to forbear suit thereon until said date and further agrees to and does hereby reduce the rate of interest on said bond after the first day of July, 1898, to the rate of 5% per annum, payable semi-annually as evidenced by coupons attached to this bond provided that said city shall have the option of paying the said bond with accrued interest of any time prior to July 1st, 1908, and provided further that in case of failure or neglect of the city to pay any installment of interest for a period of six months after the same becomes due the bond shall become due at the option of the holder.

"White River Savings Bank,
"By William G. Watts, its Attorney in Fact."

The charter of the city under which these bonds were issued, is chapter 152, p. 349, Laws of Wisconsin for 1889, and subchapter 16 thereof (page 407), mentioned in the bonds, is entitled "City Improvements" and embraces sections numbered consecutively from 139 to 167 inclusive. The following references are deemed sufficient for the sections applicable to the controversy. Sections 139, 140, 141, and 142 authorize and provide for establishing grades of streets, regulation of sidewalks, with general provision as to opening and paving streets. Sections 143, 144, and 145 read as follows:

"Section 143. In the first instance the grading, graveling, paving, planking, macadamizing or improvement of any street or alley, and the construction of cross walks where there is no intersection of streets, shall be chargeable to the lots or parcels of land fronting or abutting upon such street or alley, in proportion to the benefits accruing to such lots or parcels of real estate by reason of such improvement. Provided, however, that the total amount so assessed to the abutting real estate as benefits shall not exceed the entire cost of such improvement. And provided, further, that in no case shall the amount so assessed to any parcel of abutting real estate exceed the benefit accruing to such real estate by such improvement except in case of sidewalks.

"Section 144. The expense of all crosswalks at the intersection of streets or alleys, and across public grounds shall be paid by the city at large. The expense of maintenance, relaying, keeping in repair and cleaning of streets, in all cases where the streets shall have been constructed to the established grade and graveled, planked, macadamized or paved as required by the common council, shall be paid out of the general fund of the city.

"Section 145. Before the council shall change or alter any established grade, or shall order any work to be done on any street, in whole or in part, at the expense of the abutting real estate, it shall order the board of public works to view the premises and determine the damages and benefits which will accrue to each parcel of abutting real estate, by such change or alteration of grade; the entire cost of the contemplated work or improvement upon the street the benefits and damages that will accrue to the several parcels of abutting real estate by such work or improvement, and the amount that should be assessed under the provisions of this charter, to each parcel of such abutting real estate, as benefits accruing thereto by such contemplated work or improvement."

The succeeding sections, up to 157, direct the course to be pursued in the letting and performance of the work and the making of assessments. Section 157 reads: "When a contract is let for doing any work specified, herein chargeable to the abutting real estate, it may provide that the amounts so chargeable may be paid with certificates against the lots or in improvement bonds, or that payment may be partly made in certificates and part in cash or improvement bonds, or both."

Section 158 prescribes the notice to be given for letting a contract when the amount chargeable to the abutting lots is finally determined, which notice states, "It is proposed to issue bonds chargeable to the abutting real estate to pay the special assessments and such bonds will be issued covering all of said

assessments except in cases where the owners of the property have elected to pay on presentation of the certificates."

Section 159 reads: "After the expiration of said thirty days the council may issue improvement bonds covering all the assessments except such as the owners have filed notices of election to pay as stated in the preceding section. Said bond shall be signed by the mayor and clerk, be sealed with the corporate seal of the city and contain such recitals as may be necessary to show that they are chargeable to particular property, specifying the same and the number and amount of said bonds."

Section 160 directs that the bonds be "semi-annual interest coupon bonds, payable at the option of the city after five years and absolutely at the expiration of seven years of their date, and shall draw interest at a rate not exceeding six per cent per annum."

Section 161 requires the city clerk to prepare and record "a statement of the special assessments on which the bonds are issued"; and section 162 provides, "The treasurer shall pay the interest on, and principal of said bonds as the same become due and charge the amount to the proper fund."

Section 163 reads: "In each year after the issuing of said bonds, when the tax roll for the year is prepared, one-fifth of the special assessment on each parcel of property covered by said bonds with six per cent interest on the amount of said special assessment then unpaid, shall be extended on the tax roll as a special tax on said property, and thereafter this tax shall be treated in all respects as any other city taxes, and when collected, the same shall be credited to the fund against which payments on said bonds are charged."

Section 164 prohibits actions to avoid any such special assessment after bonds have been issued covering the same and that the bonds shall be conclusive proof of all the proceedings.

General provisions of the charter, in so far as they appear material, are mentioned in the opinion.

E. F. McCausland, for plaintiff in error.

L. K. Luse, for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge, after the foregoing statement, delivered the opinion of the court.

The issuance of the bonds in suit and their sale by the city of Superior in November and December 1891, at 94 per cent. of the face and accrued interest, are conceded facts; and the findings are that the plaintiff in error purchased them from the holder, at par, more than four years after they were issued, while the city had promptly paid the interest meantime. Each bond bears the designation "Street Improvement Bond," and recites that it is issued by authority of chapter 16 of the city charter of 1889 (chapter 152, p. 407, Laws 1889), for street improvements upon portions of a certain street described in the bond, and "is made chargeable upon the property abutting" thereon, "as evidenced by a statement and schedule of such special assessment on which the bonds are issued, as recorded." Recovery is sought against the city, as a general obligation assumed by it, in thus issuing and selling the bonds, and not dependent upon the collection of the special assessments referred to. The primary test of liability, therefore, irrespective of the recitals, is, whether the charter provisions vest power in the city to incur such general obligation in any event. That power to borrow money "does not belong to a municipal corporation

as an incident of its creation," and "must be conferred by legislation, either express or implied," is stated by Mr. Justice Bradley, in the prevailing opinion in The Mayor v. Ray, 19 Wall. 468, 475, 22 L. Ed. 164, as the general doctrine. See 1 Dillon's Municipal Corp. (4th Ed.) §§ 122, 125. The only dissent from this expression of the rule—and as well the diversity of opinion in the general authorities—arises out of the strict limitation it may impose in reference to an implied power. It is well settled, however, that the municipality can incur no indebtedness for an object not within the powers, express or implied, granted by its charter, and that the purchaser of a bond is chargeable with notice of the charter powers, when the purpose is fully disclosed in the bond recitals. If the city of Superior was not empowered to assume and pay for the improvements described in the bond, or incur indebtedness for such expenditure, as a general municipal charge, it is plain that such liability cannot be imposed in this action. The purpose and material facts are recited in the bonds and none of these recitals tend to the view of general liability—aside from the formal promises of the city and pledge of its "faith and credit"—while the purchaser is bound by the law and facts thus brought to his attention.

The meaning and policy of sections 143 and 144 are unmistakably this: That the expense for the original or "first instance" of permanent improvement of a street or alley, to the extent of its frontage on abutting lots shall be borne exclusively by and made chargeable to such abutting lots, in proportion to benefits assessed under other provisions; and that the remaining expense of such improvement, at the intersections of streets and alleys and across public grounds, shall be borne by the city at large. The succeeding sections, from 145 to 156 inclusive, provide for the assessment against abutting lots, the letting of the work and the giving of certificates to the contractor of amounts chargeable to lots. Section 157 authorizes the contract for the work "chargeable to the abutting real estate" to provide "that the amounts so chargeable may be paid with certificates against the lots or in improvement bonds, or that payment may be partly made in certificates and part in cash or improvement bonds, or both." Section 158 prescribes the notice to be given when improvement bonds are intended, stating the purpose "to issue bonds chargeable to the abutting real estate, to pay the special assessments," except where owners elect to pay. Section 159 provides for issuing the bonds to "contain such recitals as may be necessary to show that they are chargeable to particular property, specifying the same." They are to be made "payable at the option of the city after five years and absolutely at the expiration of seven years," and bear interest, not exceeding 6 per cent. (section 160); the city clerk is to record a statement of the assessments with a copy of the bonds (section 161); the treasurer is to pay accruing interest and principal "and charge the amount to the proper fund" (section 162); one-fifth of the special assessment, with 6 per cent. interest, "shall be extended on the tax roll as a special tax on" the lots so asssessed, "and thereafter this tax shall be treated in all respects as any other city taxes," and when col-

lected "credited to the fund against which payments on said bonds are charged" (section 163); and no action to avoid the assessments shall be maintained after the bonds are issued (section 164).

No departure from the above-mentioned purpose of sections 143 and 144 is stated in terms in either of these provisions, nor is any express provision or authority found elsewhere in the charter which makes the bonds general obligations. But the contention is in substance, that such intent must be inferred from the provisions for issuing improvement bonds; that in such event, the city elects to thus raise the means to pay for the improvement; and that it is "then reimbursed out of the assessments when collected." If this view were otherwise tenable, it is, as we believe, inconsistent with the general provisions of the charter, particularly section 103, that: "The common council shall have authority to issue bonds for the following specific purposes only"—and then specifies objects, none of which are applicable to special assessments. In other sections: funds from special assessments are excepted from control of the common council (section 92); money cannot be appropriated for purposes not expressly authorized (section 93); and orders cannot be drawn upon the treasurer unless money is in his hands to the credit of the fund (section 95).

The question, however, whether this issue of improvement bonds became a general obligation against the city, under the provisions of the charter of 1889, was recently (1902) before the Supreme Court of Wisconsin, in Uncas National Bank v. Superior, 115 Wis. 340, 344, 91 N. W. 1004, and it was decided, in a well considered and unanimous opinion, that the city was without power to incur general liability for the purpose, and that the bonds were not enforceable otherwise than through the special assessment provisions of the charter. While the interpretation referred to occurred long after the issue and sale of these bonds, so that we may not rest upon it as conclusive of rights acquired by the plaintiff in error, we concur in such interpretation, recognizing, not only its importance and weight as the rule of that court, but satisfied of its correctness, upon independent consideration of the statute.

The contention upon behalf of the plaintiff in error that a prior decision of the same court (1893) in Fowler v. City of Superior, 85 Wis. 411, 415, 54 N. W. 800, is controlling in respect of the rights involved in this suit, or at least strongly persuasive, against the construction adopted in the Uncas National Bank Case, is without force, for the reason that it arose under and involves only the provisions of a subsequent charter of 1891 (chapter 124, p. 774, Laws 1891), which differed in material terms from the charter of 1889. Were the provisions involved in the Fowler controversy substantially identical with those involved here, the determination would not be free from difficulty, in view of the facts found in reference to the negotiation of the bonds in suit. In this court, prior to the decision in the Uncas National Bank Case, the question of liability arose, in King v. City of Superior, 54 C. C. A. 499, 501, 117 Fed. 113, upon bonds in like form, issued under the charter of 1891, and it was then rightly treated as set at rest by the decision in the Fowler Case; but the rule fol-

lowed there is not applicable to bonds issued under the charter of 1889. In Uncas National Bank v. Superior, 115 Wis., the opinion (page 349, 91 N. W. 1007) points out important distinctions between the charters of 1889 and 1891, and construes the charter of 1889 as conferring no power to incur general obligation for payment of the bonds, "notwithstanding what was said in the Fowler case." Other distinctions appear, not mentioned in that opinion, namely, section 132 of the charter of 1891, authorizes such other recitals in the bonds "as the common council may think proper to insert," not provided in the prior charter. Section 133, referring to the issue of improvement bonds, expressly authorizes sale of the bonds in installments, by the common council "at not less than par value" and collection of the proceeds to be "paid to the contractor," while no such provision appears in 1889, nor any mention of sale of the bonds. Section 130 provides that the work may be paid in certificates, bonds or the "proceeds of the sale of such bonds," while use of the proceeds is not mentioned in the charter of 1889.

We are of opinion, therefore, that the construction of the statute under which the bonds in suit were issued, is unaffected by the Fowler Case; that no power is vested in the municipality to assume payment or obligation to pay, in any event, the expense of the improvements in question as a general liability; that the bonds are not enforceable, nor the purchase money recoverable, against the city upon any theory of the present action; and that the court below rightly dismissed the complaint on the merits.

The judgment accordingly is affirmed.

CITY OF SUPERIOR v. MARBLE SAV. BANK OF RUTLAND, VT.

(Circuit Court of Appeals, Seventh Circuit. August 11, 1906.)

No. 1,204.

1. MUNICIPAL CORPORATIONS—SEWER BONDS—GENERAL LIABILITY OF CITY.
The charter of the city of Superior, Wis., of 1889 (Laws Wis. 1889, p. 415, c. 152), in that part relating to sewers (subchapter 18), after providing for special assessments on abutting property, authorizes the council to issue bonds covering such assessments which "shall specify on their face that they are sewerage bonds, and chargeable only to the particular lots and parcels of land described therein, and such other provisions as the council may think proper to insert." It is further provided that the council may sell such bonds at not less than par, and pay the proceeds to the sewer contractor, and that "the city shall pay the principal and interest on said bonds as they fall due, and shall reimburse itself by a tax on the particular lots mentioned in said bonds." *Held*, that bonds so issued and sold constituted general obligations of the city.

2. SAME—ESTOPPEL BY RECITALS.
Where a city was authorized by its charter to insert in sewer bonds "such other provisions as the council may think proper," it is estopped by a recital that all acts, conditions, and things required to be done precedent to and in the issuance of the bonds had been duly done and performed as required by law, and by a provision pledging its full faith and

credit for their payment, to set up as a defense to the bonds that it did not provide funds for their payment as required by law.

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

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

This writ of error is brought by the city of Superior (defendant below), to reverse a judgment against the city and in favor of Marble Savings Bank (plaintiff below) upon 10 "Sewer Improvement Bonds," of $500 each, and annexed coupons. The facts are undisputed and error is assigned only upon the conclusion of law that the bonds were valid general obligations of the city.

The bonds were identical in form and tenor, except in serial number and description of sewer improvement, as follows:

"109 United States of America. $500.00

"State of Wisconsin.

"City of Superior.

"Sewer Improvement Bond.

"County of Douglas.

"Know all men by these presents, that the city of Superior, in the county of Douglas and state of Wisconsin, for value received hereby acknowledges itself indebted to and promises to pay the bearer hereof the sum of five hundred dollars lawful money of the United States of America, to be paid on the first day of July, A. D. 1897, redeemable at the pleasure of the city of Superior after the first day of July, A. D. 1895, with interest at the rate of six per centum per annum, payable semi annually on the first days of July and January in each year as evidenced by the semi annual coupons hereto attached as they severally become due, both the principal and interest of this bond being payable at the National Bank of the Republic in the city and state of New York.

"This bond is issued by authority of chapter 18 of the charter of the city of Superior, being chapter 152, Laws of Wisconsin, approved March 23rd, A. D. 1889, and by an ordinance duly passed, approved and published in said city of Superior and state of Wisconsin, bearing date the second day of September, A. D. 1890. This bond is one of twenty six bonds numbered from 285 to 310 inclusive, the aggregate amount of which is twelve thousand six hundred and sixty four and 48/100 dollars and is issued for the purpose of defraying that part of the cost of constructing a sewer on alleys between west 3rd and west 6th streets from Division to Carlton avenues, also in the alleys between west 6th and west 9th streets from Carlton avenue to a point two hundred (200) feet west of Morgan avenue, also in the alley between west Second and west Third streets from Cadotte to Carlton avenues in sewer district No. 3 in the city of Superior, which part of the cost is made chargeable as a special assessment to the abutting real estate thereon according to chapter 18 of the city charter of the city of Superior and on account of such assessment made on the property abutting upon said street and alleys between said points for such improvements as the owners have not elected to pay.

"The payment of the principal and interest of this bond is made chargeable to the property abutting upon said streets and alleys between said points as evidenced by a statement and schedule of such special assessments on which the bonds are issued as recorded in the office of the city clerk of said city of Superior.

"And it is hereby certified and recited that all acts, conditions, and things required to be done precedent to and in the issuing of this bond have duly happened and been performed in regular and due form as required by law.

"The full faith and credit of the city of Superior, Douglas County and state of Wisconsin, is hereby irrevocably pledged for the prompt payment of this bond, both principal and interest.

"In testimony whereof the said city of Superior, county of Douglas and state of Wisconsin has caused this bond to be signed by its mayor and city clerk and the seal of said city hereto attached this first day of July, A. D. 1890. "City of Superior, Wis. 1889. [Corporate Seal]"

L. K. Luse, for plaintiff in error.

E. F. McCausland, for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts). The bonds involved in this action were issued and sold by the city of Superior, under the authority of subchapter 18 of its charter of 1889 (chapter 152, p. 415, Laws Wis. 1889), as "sewer improvement bonds." This charter is considered in the opinion filed herewith in White River Savings Bank v. City of Superior (No. 1,196) 148 Fed. 1, but the provisions of chapter 18, upon which recovery was awarded in the present suit, are plainly distinguishable from those found in chapter 16, relating to street improvement bonds. In that opinion, the sections of chapter 16 appear, together with such general provisions of the charter as affect either controversy in reference to the power of the city to incur indebtedness or general obligations, and recapitulation is needless in the present opinion.

Chapter 18 of the charter treats of "Sewers," and section 201 prescribes the notice to be given, when a contract has been let and amounts chargeable to abutting lots have been determined, "if the common council deems it for the best interest of the property owners affected by the special assessments," which notice is not substantially different from the form given for street improvements in section 158 of chapter 16. Section 202 authorizes the issue of bonds to cover all special assessments, which the lot owners do not elect to pay under the notice, which "shall specify on their face that they are sewerage bonds, and chargeable only to the particular lots and parcels of land described therein *and such other provisions as the council may think proper to insert.*" With the important exception of the language we have italicized in the above quotation, the terms of this section are substantionally like those contained in sections 159 and 160, in chapter 16 for street improvement bonds.

The succeeding provisions are sections 203, 204, and 205, as follows:

"Section 203. Said bonds may be sold by the common council at not less than par value, and the proceeds paid to the sewerage contractor, or the contract may provide that the contractor shall take the bonds as a payment on his contract at their par value with accrued interest.

"Section 204. The city shall pay the principal and interest on said bonds as they fall due, and shall reimburse itself by a tax on the particular lots mentioned in said bonds in the following manner.

"Section 205. The city clerk shall, in each year for five years succeeding the issue of said bonds, enter in the tax-roll as a special tax upon each of the parcels of land mentioned in said bonds, one-fifth of the special assessments as to each said parcel of land with six per cent interest on the whole amount of said special assessment on such parcel of land then unpaid. Said tax shall be treated in all respects as any other city tax, and when collected shall be credited to the sewerage fund of said city."

Express authority is thus given: (1) to issue the bonds, with "such other provisions as the council may think proper to insert;" (2) to sell them, "at not less than par value" and pay the proceeds to the contractor, except when the contract provides for the contractor to take them; and (3) the city is required to pay principal and interest "as they fall due, and shall reimburse itself" through the special assessments. The purpose to make the bonds, when so issued and sold, general obligations of the city, to accomplish their sale at par value, is unmistakable; and under such legislative intent the authority to that end is ample. Fowler v. City of Superior, 85 Wis. 411, 419, 423, 54 N. W. 800; United States v. Fort Scott, 99 U. S. 152, 157, 160, 25 L. Ed. 348. Under the recitals in the bond, the city cannot now raise objection that funds were not provided to meet such requirement. King v. City of Superior, 117 Fed. 113, 118, 54 C. C. A. 499. The provisions referred to exempt the bonds in suit from the rule of Uncas National Bank v. Superior, 115 Wis. 340, 344, 91 N. W. 1004, referred to in the above mentioned opinion of this court in White River Savings Bank v. City of Supreior, and from the distinctions, as well, upon which we were constrained to pronounce against liability in the last mentioned case.

The judgment of the Circuit Court accordingly is affirmed.

BRATTLEBORO SAV. BANK OF BRATTLEBORO, VT., v. CITY OF SUPERIOR. BENNINGTON COUNTY SAV. BANK OF BENNINGTON, VT., v. SAME. BELLOWS FALLS SAV. BANK OF BELLOWS FALLS, VT., v. SAME. WILMINGTON SAV. BANK OF WILMINGTON, VT., v. SAME.

(Circuit Court of Appeals, Seventh Circuit. August 11, 1906.)

No. 1,225–1,228.

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

E. F. McCausland, for plaintiff in error.

L. K. Luse, for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

PER CURIAM. The above-entitled writs of error, Nos. 1,225, 1,226, 1,227, and 1,228, involve, respectively, the same question presented and herewith decided in No. 1,196 (White River Savings Bank of White River Junction, Vermont, v. City of Superior, 148 Fed. 1). The issue, however, arose in each case upon demurrer to the complaint, upon bonds of like character, under the authority of the charter of 1889. The demurrers were sustained by the Circuit Court, and the complaint in each case dismissed.

In conformity with the decision above mentioned, in No. 1,196, the judgment in each case is affirmed.

NATIONAL EXCHANGE BANK OF PROVIDENCE, R. I. v. CITY OF SUPERIOR.

(Circuit Court of Appeals, Seventh Circuit. August 11, 1906.)

No. 1,224.

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

C. B. Miller, for plaintiff in error.
L. K. Luse, for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

PER CURIAM. The judgment challenged upon this writ of error dismisses the complaint of the plaintiff in error, upon a general demurrer to the complaint and each cause of action set forth. The complaint alleges 30 causes of action, founded, respectively, upon bonds issued by the city of Superior, under the charter of 1889. Twenty-nine of the bonds described were for street improvements, issued under subchapter 16 of the charter (Laws Wis. 1889, p. 407, c. 152), and the thirtieth alleged cause of action described a sewer improvement bond, issued under subchapter 18 (Laws Wis. 1889, p. 415, c. 152). Each of the 29 first-mentioned causes of action is ruled by the opinion of this court in White River Savings Bank v. City of Superior (No. 1,196) 148 Fed. 1, handed down herewith, and demurrer was rightly sustained to each thereof. The thirtieth cause of action is within the rule of City of Superior v. Marble Savings Bank (No. 1,204) 148 Fed. 7, also decided herewith, and, under the authority of that case, the ruling upon general demurrer was erroneous.

The judgment is reversed accordingly, and the cause remanded for further proceedings in conformity with this opinion.

MORRIS v. CHESAPEAKE & O. S. S. CO., Limited.

(Circuit Court of Appeals, Second Circuit. June 5, 1906.)

No. 258.

SHIPPING—CARRIAGE OF GOODS—CONTRACT FOR SPACE—ENTIRETY—MODIFICATION BY PAROL.

A contract by which a steamship company agreed to furnish to a shipper space for a shipment of cattle on each of a number of named ships sailing in different months *held* to be an entire contract, and not a separate one for each vessel, and therefore not subject to modification by parol evidence to except one vessel on the ground that as to such vessel it never went into effect, because of the nonfulfillment of an unexpressed condition precedent.

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

For opinion below, see 125 Fed. 62. See, also, 148 Fed. 986.

A. Opdyke, for libelant.

J. Parker Kirlin (John M. Woolsey, of counsel), for respondent.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. We are satisfied that this is an entire contract, not seven separate contracts, and therefore not within the exception which admits parol evidence to show that a written contract is not a contract at all, because it never went into effect; some unexpressed condition precedent not being fulfilled.

The decree is affirmed, with interest, but without costs, upon the opinion of the district judge and the report of the commissioner.

LOOK et al. v. SMITH.

(Circuit Court of Appeals, Sixth Circuit. June 5, 1906.)

No. 1,531.

PATENTS—NOVELTY—SPRAYER.

The Smith patent, No. 651,938, for a sprayer, is void for lack of novelty.

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

Chappell & Earl (Fred L. Chappell, of counsel), for appellants.

Milton E. Robinson and Robinson, Martin & Jones, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge, delivered the opinion of the court.

This is a suit brought for the infringement of letters patent No. 651,938, issued to the appellee, complainant below, June 19, 1900, for an improvement in sprayers. The patent contains four claims. The court below held the fourth claim invalid, sustained the first, second, and third, held they were infringed, and ordered an injunction and an accounting. From this there is an appeal.

The following are the four claims:

"(1) The combination in a sprayer of a cylinder and plunger, a receptacle head or cover secured in a position adjacent to the end of the cylinder, a receptacle-casing secured in axial line with said head or cover, a receptacle and a suction-tube, extending from a point approximate a blow-hole in the cylinder into the receptacle through the said head or cover, substantially as set forth.

"(2) The combination in a sprayer of a cylinder and plunger, a receptacle head or cap secured at the end of the cylinder, a longitudinally-arranged detachable receptacle adapted to be secured to said head or cap, and a suction-tube passing through the said cap or head from a point approximate a blow-hole at the end of the cylinder to a point within the receptacle, substantially as set forth.

"(3) The combination in a sprayer of a cylinder and plunger and a flanged receptacle head or cap secured at the end of the cylinder, a suction-tube passing through the cap, a receptacle-casing secured to the cylinder, and coinciding axially with the cap and the receptacle, substantially as set forth.

"(4) The combination in a sprayer of a cylinder and plunger, a receptacle head or cap secured to the cylinder, a receptacle, a receptacle-casing and a suction-tube passing from a point approximate to a blow-hole in the cylinder into the receptacle, substantially as set forth."

This being a combination patent, each element of which is old, the court below sustained the first, second, and third claims on the ground that the longitudinally-arranged detachable receptacle which it found therein, taken in connection with the other elements, was new. Not finding this longitudinal arrangement of the detachable receptacle in the fourth claim, the court was unable to find anything new in it, and held it invalid.

If the longitudinal arrangement of the detachable receptacle is the only novel feature in the combination, the first and third claims must fall with the fourth, for only the second claim contains it. But this is immaterial in the view we take of the case, for an examination of the prior art satisfies us that the longitudinal arrangement of the receptacle for holding the spraying solution is not new, it being found in prior patents. See the Horn patent, No. 604,151, granted May 17, 1898; the Drinkwalter patent, No. 615,963, granted December 13, 1898; the Tabor patent, No. 616,989, granted January 3, 1899; the Young patent, No. 617,847, granted January 17, 1899; the Bassler patent, No. 618,531, granted January 31, 1899; and the Lisk patent, No. 630,613, granted August 8, 1899. But, if this were not so, we do not think a mere change in the position of the receptacle, viewed in relation to the cylinder, involved any act of invention. In point of fact, the prior art shows the receptacle when detached from the cylinder placed in almost every possible position with reference to the cylinder, and in a number of cases the two combined.

Having reached the conclusion that the patent is invalid for the reasons stated, the decree is reversed, and the case remanded, with directions to dismiss the bill.

CONNORS et al. v. ORMSBY.

(Circuit Court of Appeals, First Circuit. June 28, 1906.)

No. 595.

1. PATENTS—ACTION FOR INFRINGEMENT—ISSUE AS TO INVENTION.

In an action at law for infringement of a patent, the question of invention is ordinarily for the jury, subject to the direction of the court concerning the construction to be put on the patent; but, if the patent appears to the court to be plainly invalid for want of invention, a verdict for the defendant should be directed as in other cases where the evidence is not sufficient to justify a verdict for plaintiff.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 434.]

2. SAME—INVENTION—TRANSOM LIFTER.

The Ormsby reissued patent, No. 11,639 (original No. 466,081), for a transom lifter, is void for lack of invention.

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

William K. Richardson (George H. Maxwell, on the brief), for plaintiffs in error.

Norman F. Hesseltine, for defendant in error.

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

LOWELL, Circuit Judge. This was an action at law to recover damages for the infringement of reissued letters patent No. 11,639, issued to Ormsby for improvements in transom lifters. The claim in suit was as follows:

"(1) As a means for operating a series of hinged windows or skylights, a shaft adapted to rotate in bearings and provided with a series of pinions adapted to engage racks connected to said windows, and a spring engaged with said shaft and with a suitable nonrotating support, said spring being arranged to be compressed by the closure of the windows and to rotate the shaft in the direction required to raise the windows, so that when the shaft is turned to raise the windows the spring assists in the operation, and when the windows are lowered the spring is compressed, the spring acting at all times to counterbalance the windows, as set forth."

The defendants' answer contained a general denial. The jury returned a verdict for the plaintiff, under certain rulings of the Circuit Court to which the defendants excepted. We need consider but one of these exceptions, viz.: The refusal of the court to direct a verdict for the defendants upon the ground "that no patentable invention resides in the device of the Ormsby patent."

The question of invention is ordinarily for the jury, subject to the direction of the court concerning the construction to be put on the letters patent. If, however, the patent in suit appears to the court to be plainly invalid for want of invention, a verdict for the defendants should be ordered. The presumption of validity which arises from the patent itself does not necessarily require the submission of the question of invention to the jury. Heald v. Rice, 104 U. S. 737, 26 L. Ed. 910; May v. Juneau County, 137 U. S. 408, 11 Sup. Ct. 102, 34 L. Ed. 729; Fond du Lac County v. May, 137 U. S. 395, 11 Sup. Ct. 98, 34 L. Ed. 714; Market St. Railway v. Rowley, 155 U. S. 621, 15 Sup. Ct. 224, 39 L. Ed. 284. In our opinion, the patent in suit plainly lacks invention.

A rack and pinion attachment in a transom lifter is shown in prior patents; for example, in the Paine patent, No. 345,857. An elbow lever attachment in a transom lifter, having a spring employed in connection therewith, was also old in the art, being shown in the Kinnell and Rothnie British patent, No. 11,271, of 1888. To apply the spring of the latter to the rack and pinion attachment of the former does not call for patentable invention. As a result, we think it clear that the plaintiff's patent was invalid. The Circuit Court should, therefore, have ordered a verdict for the defendants, as requested, upon the ground that the evidence directed to the question of invention was not sufficient to justify a verdict for the plaintiff.

The answer did not allege want of patentability, nor did it set out the patents just referred to. As the plaintiff made no objection to the introduction of these patents in evidence, and has not argued before us that they should have been excluded from consideration, we need not pass upon the question of their admissibility. Exceptions sustained.

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 plaintiffs in error recover their costs of appeal.

STAPLES & HANFORD CO. v. LORD.

LORD v. STAPLES & HANFORD CO.

(Circuit Court of Appeals, First Circuit. March 9, 1906.)

Nos. 624, 629.

APPEAL—RECORD—MATTERS TO BE SHOWN—INJUNCTION—AFFIDAVITS USED ON MOTION.

Where, on the hearing of a petition for injunction against infringement, affidavits used on a prior hearing are referred to and used, they should, under the circumstances of this case, be incorporated in the record on an appeal.

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

Frederic P. Warfield and Holland S. Duell, for complainant.

Fred L. Chappell, Chappell & Earl, and Roberts & Mitchell, for defendant.

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

PER CURIAM. Charles H. Lord has filed a suggestion of a diminution of the records in the appeal by him against the Staples & Hanford Company and the cross-appeal of the Staples & Hanford Company against him, and with it his petition for a writ of certiorari in reference thereto. The suit in the Circuit Court was a bill in equity in behalf of the Staples & Hanford Company against Charles H. Lord, alleging infringement of letters patent for an invention. In that case an opinion favorable to the complainant was passed down on March 25, 1905, holding that Lord was an infringer and directing an injunction and an account. Thereafterwards, on May 9, 1905, Lord filed a petition for a rehearing and for an order to reopen the case, and in connection with that certain affidavits; but, on full consideration, that petition was denied on May 11th. Thereafterwards, on May 24, 1905, an interlocutory decree in favor of the complainant was entered. Subsequently thereto, on August 19, 1905, the Staples & Hanford Company filed its petition for an injunction against Lord, with reference to the manufacture and sale of an article which Lord claimed was not covered by the interlocutory decree; and on the hearing of that petition the court decided in favor of the defendant, and the complainant appealed.

In the present petition Lord alleges that he served notice that, on the hearing of the petition filed on August 19th, he would refer to the affidavits used in connection with the petition for a rehearing and to reopen the case, and that, at the hearing of the petition of August 19th, he referred to the entire record, including such affidavits. Of course, if this allegation is true, and these affidavits were submitted to the court on the petition of August 19th, and the court allowed them to be submitted, they should be made a part of the record on the cross-appeal. The petition for certiorari has not been answered; and, as it is better for the court to have at the outset a record too full than one

which does not present the entire case, we deem it advisable to allow the writ to issue. Probably, in view of our conclusions, the parties will supply the alleged diminution without the necessity of the formal issue of a writ.

The petition for a writ of certiorari filed by Charles H. Lord on February 23, 1906, is allowed, and the writ will issue accordingly.

STAPLES & HANFORD CO. v. LORD.

LORD v. STAPLES & HANFORD CO.

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

Nos. 624, 629.

PATENTS—INFRINGEMENT—SPRING SUPPORTS.

The Staples patent, No. 474,536, for spring supports formed of wire for seats, etc., was not anticipated, and discloses invention, but is limited to such supports having bends in the wire to receive the springs and to prevent them from slipping thereon. As so construed claims 1 and 3 *held* infringed by one structure made by defendant, and not infringed by another.

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

The following are the opinions of LOWELL, Circuit Judge, in the court below:

This was a bill in equity to restrain the infringement of letters patent No. 474,536, issued May 10, 1892, to Staples. Claims 1 and 3 are in suit, viz.:

"(1) The combination, with the seat-frame, of spring-supports formed of wire, with horizontal portions of approximately the measurement of the opening of the seat-frame and having bends in the wire to receive the springs, and end portions extending upward and laterally to rest upon the upper surface of the seat-frame and adapted to be bent to fit various sizes of frames, and means for permanently attaching the ends of such spring-supports to the upper surfaces of the seat-frame, substantially as set forth."

"(3) The combination, with the seat-frame, of spring-supports formed of wire, with horizontal portions of approximately the measurement of the opening of the seat-frame and having bends in the wire to receive the springs, and end portions extending upward and laterally to rest upon the upper surface of the seat-frame and adapted to be bent to fit various sizes of frames, and downwardly-projecting ends to enter holes in the seat-frame, substantially as set forth."

The complainant introduced evidence to show that before his invention the springs of carriage cushions, chair seats, lounges, and other unholstered furniture were supported upon webbing, an inconvenient, dirty, and weak arrangement; that webbing was the only support in practical use; that his patented wire supports came into use slowly, but are now generally employed throughout this country, as well as in Germany. The defendant contended that the patented arrangement was anticipated by metal straps or strips employed as spring supports. Several patents were introduced in evidence showing this arrangement, and it was old in the art; but it was not in commercial use and, as compared with the patent, its disadvantages are obvious. The defendant's argument referred also to wire fastenings which hold bedsprings in place. Ordinarily these fastenings merely connect the springs, and do not form a complete base upon which the springs rest. The whole structure, including the springs, in most instances rests upon slats, though in some

cases the connecting wires are more extended, and support, or could support, a part of the weight.

With some doubt, I am of opinion that invention was needed to develop the patented device from the prior art. For years bed-springs had been connected by wires, yet wires had not been used as spring supports in upholstered furniture. Though the patented device did not come into immediate general use, yet in a few years its use had become almost universal and, in the language of some of the largest manufacturers, had practically caused a revolution in the method of adjusting springs. The wires of the patent are easily adjusted and can easily be bent into shape, so as to fit seat-frames of slightly varying sizes. The patented device is useful also in that the spring supports may be sharpened at the end and driven into the frame of the seat. For transportation, the spring supports may be packed in very small compass as pieces of wire of moderate length, the parts being assembled at the upholsterer's with little trouble. Upon the whole, I think that both the claims in suit are valid, and should have a reasonably broad construction. If this be true, the defendant has infringed. His manufacture is under a patent whose validity need not be considered here. It describes a particular method of attaching the springs to the wires, which may be a patentable improvement; but the later patent cannot protect one who makes use of the general method of supporting wire springs, which is claimed in the patent in suit.

Decree to be entered for complainant for an injunction and account.

The complainant filed a bill in equity to restrain the infringement of letters patent No. 474,536. The first and third claims, which were in suit, are as follows:

"(1) The combination, with the seat-frame, of spring-supports formed of wire, with horizontal portions of approximately the measurement of the opening of the seat-frame, and having bends in the wire to receive the springs, and end portions extending upward and laterally to rest upon the upper surface of the seat-frame, and adapted to be bent to fit various sizes of frames, and means for permanently attaching the ends of such spring-supports to the upper surfaces of the seat-frame, substantially as set forth."

"(3) The combination, with the seat-frame, of spring-supports formed of wire, with horizontal portions of approximately the measurement of the opening of the seat-frame and having bends in the wire to receive the springs, and end portions extending upward and laterally to rest upon the upper surface of the seat-frame, and adapted to be bent to fit various sizes of frames, and downwardly-projecting ends to enter holes in the seat-frame, substantially as set forth."

After final hearing, a perpetual injunction was issued, though no final decree has yet been entered. Thereafter the complainant filed in the same proceeding a petition asking that the defendant be restrained from using and selling a device not precisely identical with that complained of in the original bill. The question of infringement raised by this petition has been heard upon affidavits. The defendant contends that it cannot be disposed of except after a full hearing of witnesses, with opportunity for cross-examination, and that, if the complainant wishes to proceed more summarily, he should do so by contempt proceedings in this case, or by a new bill. The question of practice need not be decided at the present time, as the court is convinced that the defendant must prevail on the merits. In the claims above quoted, the defendant has stated, as an element of his invention, that his "spring-supports formed of wire" have "bends in the wire to receive the springs." The defendant's wires have no bends, and the springs are attached to his straight wires by separate wire fastenings. That the patentee deemed the "bends in the wire to receive the springs" to be an essential part of his invention appears from the claims above quoted from the specifications (page 1, lines 41–46, page 2, lines 53–56), and from the proceedings in the Patent Office, as disclosed by the file wrapper of the patent in suit. The defendant wrote the Commissioner of Patents as follows: "The spring-support is bent so as to hold the

spring itself from slipping upon the wire." See defendant's record in original proceedings, page 65. And "the bends in the wires, in the form of eyes or corrugations, hold these springs so that they do not slip upon the spring-supports." Page 66. Under these circumstances, the difference between the patent in suit and the defendant's device alleged to infringe, has been made material by the patentee, and the court cannot disregard his action. The difference between the defendant's spring support and the patent is considerable. While the defendant may have reverted to this clumsy and complicated device merely in order to avoid the complainant's patent, yet he may have the right to do this very thing. Those who prefer to buy the defendant's spring supports, with their separate and superfluous wire fastenings, instead of the neater and simpler patented device, cannot be hindered from doing so. That the patentee could have obtained broadly a patent for his spring supports, irrespective of their adaptation to receive the springs, is not so plain as to warrant an injunction upon this petition.

Petition denied.

Frederic P. Warfield (Holland S. Duell, on brief), for complainant.

Fred L. Chappell, for defendant.

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

PER CURIAM. The court adopts the conclusions of the Circuit Court and the line of reasoning shown by the two opinions passed down by the learned judge of that court with reference to the matters brought before us on these appeals. In each case the decree will be:

The decree of the Circuit Court is affirmed, and the appellee recovers costs of appeal.

LORD v. STAPLES & HANFORD CO.

(Circuit Court of Appeals, First Circuit. July 24, 1906.)

No. 629.

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

Frederic P. Warfield and Holland S. Duell, for complainant.

Fred L. Chappell, Chappell & Earl, and Roberts & Mitchell, for defendant.

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

PER CURIAM. The court having fully considered the petition filed by the defendant, appellant, on June 21, 1906, for leave to proceed further in the court below, on account of alleged newly-discovered evidence, and being clearly of the opinion that the alleged newly-discovered evidence is of a class of evidence which was always within the reach of the defendant, appellant, by the use of ordinary diligence, and, also, being of the opinion that it is immaterial because it relates to sheet metal spring supports:

It is ordered that the petition be, and the same is hereby, denied.

D'ARCY v. STAPLES & HANFORD CO.

(Circuit Court of Appeals, Sixth Circuit. July 5, 1906.)

No. 1,539.

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

The following is the decree in the Second Circuit:

And now, to wit, on this 13th day of July, 1905, this cause having been brought on for hearing on motion on behalf of complainant for a preliminary injunction to enjoin and restrain the defendants from infringement upon United States letters patent in suit, No. 474,536, dated May 10, 1892, to John A. Staples, as to claims 1 and 3 thereof, and upon complainant's exclusive rights thereunder, said motion being based upon bill of complaint, affidavit of John A. Staples, affidavit of Joseph H. Freeman, and all proceedings herein; it appearing that defendants herein were duly served with process, notice of motion and said papers above recited, and the subpœna having been returned, said return having been filed: Now, said defendants having failed to appear, upon reading and filing the bill of complaint, the notice of motion, admission of service, affidavit of John A. Staples verified July 7, 1905, affidavit of Joseph H. Freeman verified July 7, 1905; and upon Complainant's Exhibit A (certified copy letters patent in suit), C (certified copy opinion in suit of Staples & Hanford Co. v. Charles H. Lord), B (certified copy decree same suit), D (copy complainant's record same suit), E (original bill of sale to complainant herein by defendants), F (certified copy Staples assignment), G (certified copy post assignment), H (certified copy Staples & Hanford assignment), I (certified copy complainant's certificate of incorporation), and J (carriage seat embodying defendants' construction complained of herein having bends in hooked wires supporting springs); and upon due consideration had, and upon motion of Warfield & Duell, complainant's solicitors—it

is ordered, adjudged, and decreed that letters patent of the United States, No. 474,536, issued to John A. Staples, dated May 10, 1892, for improvement in support for chair seats, are good and valid letters patent as to claims 1 and 3 thereof; that said John A. Staples was the first, true, and sole inventor of the invention described and claimed in said letters patent and particularly recited in the first and third claims thereof; that the complainant, Staples & Hanford Company, is entitled to the exclusive right in and to said letters patent, in and to the invention secured thereby and in and to the entire right to recover damages and profits from all infringers thereon and that the title thereto is duly vested in the complainant, Staples & Hanford Company; and that the defendants, Abraham D. Fowler and Wygant D. Fowler have infringed upon the said letters patent No. 474,536 and upon the exclusive right of the complainant thereunder as to claims 1 and 3 thereof by selling and using spring supports embodying the invention and subject-matter described and claimed in the above specified claims of the said letters patent; and it is further ordered, adjudged, and decreed that an injunction issue out of and under the seal of this court addressed to and enjoining and restraining the defendants, Abraham D. Fowler and Wygant D. Fowler, and as copartners doing business under the name or style of the Newburgh Carriage Company, their agents, attorneys, servants, and workmen, from directly or indirectly making or causing to be made, using or causing to be used, or selling or putting into practice, operation, or use any supports of the construction shown in Complainant's Exhibit J, or otherwise embodying the said invention or inventions, embraced in said letters patent and particularly the first and third claims thereof, or otherwise infringing thereon, until the further order of this court.

Chappell & Earl (Fred L. Chappell, of counsel), for appellant.

Warfield & Duell, for appellee.

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

PER CURIAM. Appeal from a preliminary injunction granted upon basis of an adjudication upon same patent in the Second Circuit, and upon the showing made by affidavits and exhibits including record in former litigation over same patent. The defendant was allowed to go on with its business on giving bond to account for profits and damages, which has been done. Without expressing any opinion upon the merits, the court finds no such abuse of the discretion of the Circuit Court as to justify any modification of the injunction granted.

Affirmed.

INDIANA MFG. CO. v. J. I. CASE THRESHING MACH. CO.

(Circuit Court, E. D. Wisconsin. August 22, 1906.)

1. PATENTS—SUIT FOR INFRINGEMENT BY VIOLATION OF CONDITIONS OF LICENSE CONTRACT—LEGALITY OF CONTRACT.

   Where a bill alleges infringement of patents by the violation of the conditions of a license contract thereunder, and seeks in effect the specific enforcement of the contract, its legality is involved directly and not collaterally, and must be established before equity will grant relief.

2. MONOPOLIES—COMBINATIONS IN RESTRAINT OF TRADE—LICENSE CONTRACTS UNDER PATENTS.

   Conceding that a number of patents relating to the same art may be united by purchase in the same ownership, and that the grant of combination licenses thereunder on conditions specified may be within the lawful monopoly given by the patent law, yet to be immune from the operation of Anti-Trust Law of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200] the contract must be referable solely to the inventions under the patents, and intended to secure a monopoly in the beneficial use of specific inventions only; and where it extends beyond such purpose, and is intended to create a monopoly in the manufacture of the article to which the patents relate by securing and holding for the benefit of the parties all patents relating thereto under which such manufacture may be carried on, and not for the protection of patent righs, it may constitute a conspiracy and combination in restraint of trade in violation of the law.

3. SAME.

   Complainant acquired by purchase the ownership of, or exclusive license to use, 21 United States and two Canadian patents, all relating to pneumatic straw stackers, and confederated all of the manufacturers of threshing machines in the country in a plan of uniform licenses under the combined patents with a uniform price fixed for the product and payment of a royalty to complainant for each machine until the end of the full term of any of the patents or of any which might thereafter be acquired by complainant. It thereafter acquired numerous other patents, until it held over 100 in all. The devices of such patents were not all capable of conjoint use in a single machine. None of them covered the pioneer invention of a wind stacker. A number covered noninterfering devices performing the same functions and capable of independent use by different manufacturers, and many were of no practical value, and not used by any of the licensees. *Held*, that the purpose and effect of such system of contracts was to create a monopoly in wind-stacker products without reference either to any specific invention or the validity of any patent; that the agreement fixing the selling price of any form of the product was not attributable to any patent in the list nor to specific invention in either of the patent devices, and was not within the protection of the patent law, and that the combination created by such contracts was in restraint of trade and illegal as in violation of Anti-Trust Law July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200] and the contracts not enforceable in equity.

In Equity. On final hearing.

W. H. H. Miller, Charles K. Offield, Charles C. Linthicum, Chester Bradford, Harold Taylor, and E. H. Bottum, for complainant.

Robert S. Taylor, Charles Quarles, I. K. Boyesen, and James H. Peirce, for defendant.

SEAMAN, Circuit Judge. The issues of law and fact in this case are complicated, and the volumes of testimony, exhibits, and

argument, are formidable, both in matter and in the various phases of the controversy. That they are difficult of solution goes without saying; and with the great interests involved and harsh defense set up, it is not singular that consummate ability is brought into the contest, with the contentions upon which the solution hinges strongly presented and combatted, and the testimony and discussion not free from acrimony.

The bill is filed to enforce the alleged rights of the complainant, under certain letters patent for improvements in straw elevators and stackers, and contracts with the defendants for manufacture and sale thereunder of "Pneumatic Straw Stackers," and the relief sought is plainly in the nature of specific performance of the contract, whatever may be the name applied to the suit. It is not alone for the recovery of the royalties promised—for which the remedies at law may be adequate—but for equitable relief, by injunction and otherwise, for the enforcement of that and other terms of the contracts referred to.

The answer is voluminous in recitals of alleged equities in favor of the defendants, setting up matter tending to three grounds of defense: (1) Invalidity of the contracts in suit, as parcel of an unlawful combination to suppress competition in trade; (2) violation of the contracts on the part of complainant, so that enforcement must be denied in equity; and (3) nonuse by the defendant of the patent inventions. In argument the bill is challenged as multifarious, and for want of equity upon various propositions, which do not call for discussion, apart from one or the other of the defenses above mentioned.

The issue upon the validity of the contracts ("A" and "B") arises at the threshold, and its solution is imperative, as it clearly appears that one or both are part of the alleged combination agreement. These contracts are set up in the bill and are in evidence, as one of the fundamental grounds for the relief sought, and unless they are valid the rule is elementary (McMullen v. Hoffman, 174 U. S. 639, 654, 19 Sup. Ct. 839, 43 L. Ed. 1117) that "no court will lend its assistance in any way towards carrying out the terms" of such contract, "nor will a court of equity enforce any alleged rights directly springing" therefrom. So, their validity must be ascertained, under the issue, as a condition precedent to any relief in equity, irrespective either of the seeming want of equity in the attitude of the defendant respecting such issue, or hardships which may be imposed upon the complainant. The contention that the complainant may rest claim for infringement upon the patents alone, without reference to the license contracts, under the rule that use of the invention contrary to the terms of license constitutes infringement, is without force, if assumed to be otherwise tenable, for the reason that bill and testimony claim the benefits of the contract, and each is wholly directed to enforcement of its terms. Indeed, the relief prayed for in every aspect requires the contract for its sanction. With the case thus predicated, the validity of the contract is directly and primarily involved, and the authorities cited and pressed for

consideration as denouncing collateral inquiry or attack (vide Harrison v. Glucose Sugar Ref. Co., 116 Fed. 304, 307, 53 C. C. A. 484, 58 L. R. A. 915, and Dennehy v. McNulta, 86 Fed. 825, 827, 30 C. C. A. 422, 41 L. R. A. 609, in this circuit, and Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 545, 22 Sup. Ct. 431, 46 L. Ed. 679) are plainly inapplicable, and the test mentioned in the Wiswall Case (86 Fed. 671, 674, 30 C. C. A. 339) for marking the distinction between direct and collateral attack, lends no support to the contention upon that point. Were it questionable, in any view of the subject-matter of the bill, whether it was open to such inquiry, doubt would be set at rest by these express allegations thereof; that like contracts were made with other manufacturers to the extent of embracing in the "license system" thereof "substantially all manufacturers of threshing machinery on this continent," and all pneumatic straw stackers made in the United States and Canada; that violations by the defendant—sale at less than the price fixed being one of the charges—endanger the entire system, leading "to dissatisfaction and unrest on the part of the other licensees" and encouraging like violations. Whether the system thus referred to may not be within the lawful exercise of patent privileges, is, of course, another question, dependent in each case upon the facts which enter into the arrangement, but it cannot be doubted that the contracts which make up the system are open to challenge, either for monopoly not authorized by the patent law, or for other taint. Equity is not content to enforce an agreement upon its form alone, but will search beyond its terms to ascertain the true object, when the issue of legitimacy is raised. I am satisfied that such issue is presented here, and must be determined under the evidence.

The question of the lawfulness of the monopoly created by the contracts and license system in suit is one of mixed law and fact. The substantial facts are well established, if not conceded, and the inferences of fact impress me as free from difficulty, unless it be in reference to the nature of invention in one or more of the patents, which enters into the ultimate inquiry of the effect of the combination. Laying out of view the feature of property in patents (owned or to be acquired) involved in the argument, the doctrine is settled that the monoply in trade created by the agreement violates the express terms of Act Cong. July 2, 1890, c. 647, § 3, 26 Stat. 209 [U. S. Comp. St. p. 3200], known as the "Sherman Anti-Trust Act" (as well as the common-law) so that the contract cannot be upheld, unless saved from invalidity by the element of patent license referred to. Bement v. National Harrow Co., 186 U. S. 70, 92, 22 Sup. Ct. 747, 46 L. Ed. 1058; Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. On the other hand, the grant of a patent creates a lawful monopoly, for the term of the grant, in use of the invention, and the right of the owner (patentee or assignee) is well recognized, to parcel out, restrict, or withhold such use, at will; and he may fix the price at which the patented article or product shall be marketed. With the aggregation of patents embraced in this combination agreement, how-

ever, the question of the applicability in all phases of the one and the other of the above-mentioned rules is not, as I believe, settled by the authorities. The decisions are not harmonious in cases which seem to be analogous in certain features, so that the question, broadly stated, remains at large, to be determined upon general principles which are settled, both in reference to the public policy of the laws respectively which restrain general monopolies, and those which confer a limited monopoly for inventions and literary productions, and in the light of the leading opinions cited. Nor can the conclusions yield to the influence (suggested in argument) of the grave interests which may be effected upon the one side, or of privity or alleged misconduct or inconsistent acts of the other party.

The primary contract ("A") grants license to the manufacturers under 21 United States patents expressly named, and two Canadian patents, "relating to the art or method of taking straw and dust from threshing machines," which the licensor "controls by ownership or exclusive license," and extends "until the full end of the term of any such patent" owned by it, or of the license under patents which are thus controlled, together with "any inventions which may be hereafter acquired" by the licensor. The terms to be observed do not require specification for the present purpose, except that the royalty to be paid is $30 on each stacker made "embodying any of said inventions or improvements," and "the selling price to users of machines" thereunder must be $250, when sold on time, or $235 for cash sales, with agency commissions limited to $25; and the licensee is not to dispute the patents "directly or indirectly" nor "make their alleged invalidity a defense" in any manner. This agreement was executed between the present parties April 8, 1895. On January 20, 1899, they made a supplemental agreement ("B") in compromise of differences, which I deem immaterial for the present consideration, unless it be in the provision that the licensee "will not, either directly or indirectly, raise any question as to the validity of the contract ("A") which it reaffirms.

This license agreement, upon its face, does not depart, as I assume, from the customary forms of a license system, except in the great number of patents included, and, perhaps, the extent or indefiniteness of the term which may be implied from the recitals. The testimony is voluminous in reference to numerous additional patents which have been acquired by the complainant, from licensees and others, in the development of its system, so that its so-called "patent properties exceed 100 in number," although five only are alleged in the bill to be invaded by the defendant's structure. While I have deemed it unnecessary to examine this array of patents, in detail, except the five referred to—not even to ascertain their relation respectively, remote, or otherwise, to the wind stacker art—these general facts are either conceded or undisputed. Many of the patents named in the contract and subsequently acquired are of no substantial value; many are neither used nor applicable for practical use by any of the licensees in the system; some are used only by single licensees; and, however the fact may be in reference to the five alleged to be infringed, the

patent devices combined under the terms of the license are not, "in whole or in part, capable of conjoint use in a single machine." On reference to the subject-matter of these patents, it is obvious upon their face that all are not of such relation and character that each is needful, in any sense, to protect the just monopoly granted to any patentee in the list, as pioneer or subordinate invention, although a portion may be so related and useful to one another, when associated under the license. Moreover, the fact is not only presumptive from the grants, but appears on the face of the patents respectively—whatever view is adopted of the legitimate scope of invention in the alleged pioneer pneumatic stacker—that more or less of the patents included in the license system are not in interference with either of the prior inventions disclosed in any of the patents; and that such devices are capable of independent use in an independent mechanism of the art.

Upon these premises alone—of numerous patents covering various inventions in the ownership of a single purchaser, and license issued thereunder for exclusive use of the inventions by licensees upon the terms specified—the rule is assumed (for the present consideration) to be settled that monopoly of such inventions is within the objects of the grants, and that the transactions do not, prima facie, violate the general provisions of law against combinations in restraint of trade. Bement v. National Harrow Company, 186 U. S. 70, 93, 22 Sup. Ct. 747, 46 L. Ed. 1058. Nevertheless, I am satisfied that monopoly thus secured, to be immune from the anti-trust act, must be referable solely to the inventions under the patents, and that a combination of licensees formed thereunder may create a monopoly which exceeds the legitimate scope of the patent privileges, not within the contemplation of the provisions for the grant, and thus violate the general act referred to—with or without intentional co-operation on the part of the licensor. In other words, while exercise of the right which the authorities concede to be inherent in the grant, of obtaining several patents by purchase and combining them in a license, results, in a sense, in combination of licensor and licensees to uphold monopoly of the inventions, which may be lawful, I am of opinion that such combination must be limited to the express policy and object of the patent grant—monopoly in beneficial use of a specific invention—and when extended beyond that purpose by concert of action, may thus be brought within the inhibition of the general law; that this right to assemble and hold patent properties, alike with the instance in the Northern Securities Case, may be abused; may be the means and guise for creating what has been aptly termed "a conspiracy of monopolists," so that the act which is otherwise innocent and within individual rights becomes unlawful as opposed to public policy in the methods employed; and that the transaction must be probed, under the issue beyond the license terms, to ascertain the true objects sought and obtained by this combination.

The testimony is too voluminous for recapitulation here, but the general plan and purpose of the system promoted and carried out by the complainant, upon its own showing, may be thus summarized:

Owning the alleged pioneer patents of Buchanan for pneumatic straw-stacker devices (No. 297,561, of 1884, soon to expire, and No. 467,476, of 1892), under which its predecessor corporation was operating, the use of such general pneumatic means in the threshing machine art was deemed of great value. Means along the same line were soon devised by other inventors—notably the patents expressly included in this suit, Nethery's (1893) No. 493,734; Nethery's (1894) No. 517,475; Landis' (1894) No. 512,553; Landis' (1894) No. 514,266—and were used or about to be adopted by threshing machine manufacturers. By way of dominating the art these patents were acquired by the complainant (or its predecessor), and the manufacturers of threshing machines throughout the country were confederated in a plan of concerted license under the combined patents, with a uniform price fixed for the product. Certain of the patents were taken out in Canada for extension of the system there, and all manufacturers supplying both countries with threshing machines were brought into the arrangement, which included the purchase from licensees and others of any patents, either in use or liable to "disturb the harmony" of the plan. In the course of carrying forward the system, other patents were acquired from time to time—both from subsequent licensees to bring them in and from other patentees when conflict seemed possible—all within the contemplation of the uniform license which was expressly designed to preserve to the licensor the bulk royalty named in the license, and as well to preserve among the manufacturers unity in the selling price of all machines made under either of the patent devices, irrespective of validity or value of either of the purported inventions. The contract "A" in suit is one of the series uniting the threshing machine manufacturers—for other kindred manufacturers were ultimately included as joint licensees—and each licensee entered the system with full understanding of and concurrence in the design. The complainant was, therefore, the promoter of a two-fold combination of numerous patent properties and of all manufacturers of threshing machines, whereby great interests were affected—unquestionably within the language (if not the scope) of the anti-trust act, as "in restraint of trade or commerce among the several states, or with foreign nations" (section 1 [U. S. Comp. St. 1901, p. 3200]), or "to monopolize any part of the trade" thereof (section 2 [U. S. Comp. St. 1901, p. 3200]).

Indeed, the design as above recited is expressly referred to in one of the briefs of the complainant, in various forms, by way of indicating equities in favor of the relief sought by the bill, of which the following citations are examples:

(a) In one paragraph the complainant is thus extolled:

"Not only is it the owner of a vast number of letters patent identified in this record relating to all phases and conditions of the wind-stacker industry, but it also stands before this court as the practical creator of that industry, and without whose faith in such industry, and the patents represented thereby, such industry would not to-day exist, or if existing, would have existed in the shape of discordant factions, contests in the courts, injunctional proceedings against manufacturers and users, as widely variant as they are patentees of a hundred patents."

(b) In black-faced type, the benefits of the contract are thus stated:

"The royalty of $30 per wind stacker to complainant; the profit of $100 per wind stacker to defendants; and the price of $250 per wind stacker to the ultimate purchaser or user or farmer were entirely 'satisfactory' to all."

(c) The testimony is mentioned as convincing:

"That these defendants have received from this complainant a protection representing a large money consideration over and above the royalty fee of $30"; and, "that the complainant went widely beyond any duties imposed upon it by the terms of the license, and that to prevent any possible claim against any of complainant's licensees for infringement of letters patent, and to protect each licensee in the undisturbed conduct of its business of the manufacture of 'wind stackers,' complainant has simply paid out vast sums of money in the purchase of letters patent, the existence of which in the hands of third or hostile parties might be used either as weapons of direct assault against complainant's respective licensees, by possible suits for infringement, or might be used in particular localities to destroy the business of particular licensees by reason of an attempt to manufacture wind stackers in destruction of an established trade by such licensees, respectively."

(d) And again:

"The resulting advantages of the payment of these vast sums of money, and of the purchase of these patents by complainant, all enuring alone to the benefit of the respective licensees (and to none other more than those defendants), would, in itself, as a consideration, justify the payment of a license fee or a reasonable compensation in distinguishment from the monopoly represented by the patents identified by the license right; and this fact is just as certain, and these conditions are just as operative as a protection to these defendants under their license, even if by any chance defendants could invent a wind stacker so radically different from the wind stacker of all of the patents of complainant as admittedly not to come under or infringe any claim of any such patents."

(e) So, the liberality of the contract is referred to as exempting the defendant from royalty, if its so-called Norton Stacker lay outside of any of the patents," while entitled to "have all the benefits and advantages of that license without its royalty burdens," and the further benefits are thus enumerated:

"The defendant could and would sell its wind stackers at the price of $250, because that price is the price fixed for the market by complainant's monopoly, and adhered to by every other manufacturer in the United States and Dominion of Canada, and there would be no reason why this single defendant, as an exception, should sell at a less price. Complainant's license contract and their more than 100 patents would be equally as valuable to defendant as to the other licensees, because such patents are a barricade and protection from any other manufacturer entering the field of industry, the practical result being that the defendant would take his $100 profits upon each wind stacker manufactured and sold, and this solely by reason of the fact of complainant's patents and the binding license obligations upon all other wind-stacker manufacturers of the country."

(f) The further consideration for the agreement is urged, that the complainant was to withdraw from the field as manufacturers, and thus free the licensees from such competition.

These propositions, therefore, impress me as clearly established by the evidence: That monopoly in the general so-called "wind-stacker" products was both intended and accomplished without reference either to any specific invention or the validity of any patent and not referable alone to any patent or group of patents; that the several

patents purporting to cover that field, which were purchased by the complainant, were potent if not essential means to the end thus sought, and the other patents which were acquired from time to time were at least helpful; that concurrence of the manufacturers, in unity of action, to prevent competition in "wind stackers" of any form, was alike potent and plainly essential to carry out the plan; and that the agreement fixing the selling price for any form of the product was solely for the benefit of the manufacturers—the basis of their concurrence—and, in no sense, attributable to either patent in the list, nor to specific invention in either of the patent devices. Doubtless, the complainant's initial object was a plan for royalties from all manufacturers, with its Buchanan patents as the germ (especially the first one, with brief term to run) and acquisition of all other patents, which might be brought into competition, both by way of entrenching and perpetuating its claim, and to reach all who were engaged in the manufacture of the various forms of "wind stackers." While such plan of cumulative ownership of patents, for the purpose of obtaining royalty alone under the protection of all, is sanctioned by the authorities—notably, Bement v. National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058—as between licensor and a licensee, I am of opinion that this combination of all manufacturers under the plan of acquisition and for the purposes above outlined, is without such sanction, so that no escape appears from the conclusion that it violates the anti-trust act, if not the common law. It is unmistakably a combination of manufacturers to restrain competition in the make and sale of their products, with merger of the patents in one ownership as a means employed for that purpose, and thus not entitled to the beneficent rule of the patent law which intends protection only of monopoly of the use of specific invention—not to foster combinations of patentees and manufacturers for general monopoly.

The complainant relies upon the line of authorities defining and upholding the rights of monopoly under patents (as I have above summarized their rule), with special reference to these recent cases as decisive: Bement v. National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, and United States Con. S. Raisin Co. v. Griffin & Skelly Co., 126 Fed. 364, 61 C. C. A. 334. The first-mentioned case is controlling in so far as it is applicable here, and is not without force in the one aspect of combining numerous patents in single ownership and granting license thereunder upon terms analogous to the single license set out in this bill. But the case there decided is plainly distinguished by the express terms of the opinion from the combination between the licensor and the various manufacturers above indicated. That was a hearing on error to the Supreme Court of New York (after the state Court of Appeals had reversed for want of jurisdiction to review the facts), and the only reviewable question, as stated in the opinion, was the validity of the single contract in suit, with no facts found of a combination of licensees as set up there in the answer. So, the question of the effect of such alleged combination was not reviewable under the findings, and was excluded from consideration, as the opinion carefully and repeatedly points

out; and it furnishes no support for the agreement in suit. The Raisin Co. Case, supra, if otherwise applicable, is expressly founded upon a view of the last-mentioned decision of the Supreme Court which overlooks the distinction referred to, as I understand it, and I am unable to concur in that view; and I deem it distinguishable, in any event, from the combination which appears in the case at bar.

On the other hand, the decisions in the Third Circuit, in National Harrow Company v. Hench (C. C.) 76 Fed. 667, in the Circuit Court and upon appeal, 83 Fed. 36, 27 C. C. A. 349, 39 L. R. A. 299, impress me as stating the true rule which should govern the present contract, and the conclusion of illegality in the present combination may well rest on the grounds there expressed.

I am further impressed, however, with special features, which enter into this arrangement, in reference to the patents (not appearing in any of the cases called to attention), lending force, as I believe, to the contention of unlawful monopoly. When the undertaking was started, the pneumatic straw stacker was not a mere experiment, but in practical use, as an attachment to or part of the threshing machine. Its usefulness and popularity were well recognized, in various of the patent forms. Manufacturers of threshing machines were either making them under a patent, or procuring them from a maker, to be used with the machine; and many, if not all, of such manufacturers were desirous of license, under one or another of the existing patents, to make the stacker in connection with their machine. The five patents named in the bill as infringed were then in the field—with others listed in the license, which do not call for special reference—as competitors for that trade; and it is unmistakable that this condition was a moving cause for the combination. Consideration of these patents, in the light of the prior art and in relation to each other, is of interest—and in one view essential—to show their bearing upon the plan. Upon the issue of infringement they were elaborately discussed in the oral arguments (and as well in the briefs), and I have given much time to their careful examination. For the purposes of the present point, however, it seems inadvisable to discuss in detail the claims under either, or the prior art (upon which direct issues may hereafter arise), and a summary statement of my deductions and their basis will serve for application here.

On behalf of complainant, it is contended that Buchanan's patent No. 467,476 (which it then owned) was the first successful stacker in this art—the pioneer "wind stacker"—with the four succeeding patents of Nethery and Landis (Nos. 493,734, 517,475, 512,553, and 514,266) as mere improvements, but entitled to liberal interpretation. This view of the second Buchanan patent, as dominating the art, is untenable, upon my understanding of the prior Buchanan patent No. 297,561 (of 1884) and various earlier patents and publications in evidence; and the Nethery and Landis patents impress me as departures from any patentable novelty in No. 467,476 of Buchanan—not in conflict or dominated by it—but alike with its improvements upon No. 297,561 and other prior devices. The first Buchanan patent of 1884 may fairly be assumed as the pioneer in this country of the present form of pneumatic straw stacker, although all its general features

are anticipated in the British patent of Brinsmead (1868) and other early foreign devices shown in patents and publications. His second patent (in suit) is unmistakably of the same general form, with improvement in stacking function through means for vertical movement of the trunk and other details; so Netherly and Landis have improved with other specific means, but neither has departed from the general form and pneumatic idea disclosed in the original Buchanan patent. With the expiration of that patent, at the utmost, each of the improvers was entitled to the use of its disclosures, and I am satisfied that no invention of either improver was invaded by the other. In Buchanan's second patent the improved means was adapted from the old art—a mere development of the primary conception, when called for in practical use, to accommodate the stacking—of undoubted value, but not entitled to functional dominition.

As noninterfering patents of conceded utility each was open to independent use by manufacturers under license from the patentee, and it must be inferred that the pooling of the patents and enlistment of all manufacturers in a pool contract was mutually entered into in that view, and with special reference, on the part of complainant, to the early expiration of the first Buchanan patent. The royalty value of each rested upon the practical value of the improvement and the market was at hand, equally open to each, before the combination; each appears to have meritorious features to give it standing in that market. Thus all of the patents above specified—and others, as well, included in the arrangement—were in the attitude of competitors with each other for use under royalty, by the manufacturers, while the manufacturers were in competition with each other, both for bargaining to obtain license and in sale of their products. The patentees were among themselves, therefore, in that sense, equally with the manufacturers, rivals in trade for royalty use—presumptively so as to all in the same line of use, and as matter of fact in reference to those above mentioned—and thus, as I believe, within the letter and policy of the law which prohibits combinations between such "possible rivals in trade." Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679; Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518; Carroll v. Greenwich Ins. Co., 199 U. S. 401, 409, 26 Sup. Ct. 66, 50 L. Ed. 246. The settled rule in reference to the privileges vested in patent property is not overlooked in this view. As tersely stated in the opinion by Judge Baker, speaking for the Circuit Court of Appeals, in Victor Talking Machine v. The Fair, 123 Fed. 424, 426, 61 C. C. A. 58, 60, "without applying to the Patent Office, one may make and use and sell the device that embodies his invention. That is his natural right. Within his domain, the patentee is czar. The people must take the invention on the terms he dictates, or let it alone for 17 years. Cries of restraint of trade and impairment of the freedom of sales are unavailing, because for the promotion of the useful arts the Constitution and statutes authorize this very monopoly."

Nor do I overlook the recognized right (as before mentioned) of the patent owner, as such czar "within his domain," either to suppress his own or prescribe the terms of its use by others; or to own

and enforce monopoly under several patents. Nevertheless, as I conceive the rule, without the domain of monopoly for each individual invention, the owner stands on an equality with all other property owners and is equally amenable to the general law against confederation with others, tending to create another kind of monopoly, through concerted action of the confederates.

The patent privilege is granted by the government by excluding others from its use, unless licensed by the patentee as owner; and this exclusive use is strictly enforced by the courts; and if properly termed a monopoly—a definition not accepted by all the authorities—it is readily distinguishable from that of the common law. For enforcement it requires neither the aid of other patent privileges, nor concurrence of third parties; nor can combination with other patents lend support for its judicial enforcement. The right of the owner to purchase and enjoy other patent privileges by way of investment or increase of royalties, together with all other recognized property rights therein, except the exclusive use of each invention conferred by the grants, are held alike with the rights common to other property owners to make them profitable. So, the nature of the patent privilege confers no immunity to combine with other patentees or under other patents in a confederation of users, when such combination is prohibited generally, as in the terms of the anti-trust act. While purchase alone of the outstanding patents, interfering or noninterfering, by the complainant, might be within its rights, the combination which was entered into, with that as one of its means, as I believe, violated the law. The arrangement was not within the rule, which is of general application, that differences may be composed and litigation settled between the parties by bona fide compromises. Nor was the foreclosure which it contemplated, of all questions as to the validity or value of any patent brought into the combination, justifiable under the circumstances; and I am of opinion it was opposed to public policy.

With the contracts thus viewed, neither is enforceable in equity, and the bill must be dismissed.

Decree will be entered accordingly, but final orders respecting the funds in court will be reserved until the parties can be heard on application for appeal and stay, if so advised.

UNITED SHOE MACHINERY CO. v. DUPLESSIS SHOE MACHINERY CO.

(Circuit Court, D. Massachusetts. July 9, 1906.)

No. 102.

1. PATENTS—LENGTH OF TERM—PRIOR FOREIGN PATENT.

Formal identity of claims is not necessary to constitute identity of a United States and a foreign patent, within the purview of Rev. St. § 4887 [U. S. Comp. St. 1901, p. 3382], but substantial identity of the invention as covered by the claims is sufficient.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 188½–191.]

2. SAME—EFFECT OF TREATY.

Article 4 bis, inserted in the international convention for the protection of industrial property of March 20, 1883, by the additional act proclaimed by the President, August 25, 1902 (32 Stat. 1936, 1939), did not have the effect of changing the term of a patent granted by the United States to a citizen thereof, as that term is fixed by statute; and such a patent, granted prior to January 1, 1898, and which is limited by the provisions of Rev. St. § 4887 [U. S. Comp. St. 1901, p. 3382], to the term of a prior foreign patent for the same invention, is not extended by such additional act.

3. SAME—EXPIRATION—SOLE SEWING MACHINES.

The French and Meyer patent, No. 412,704, for a sole sewing machine, expired September 17, 1902, with the expiration of the term of the prior British patent, No. 13,366, of 1888, granted to the same patentees for substantially the same invention.

In Equity.

See 133 Fed. 930.

Elmer P. Howe and Benjamin Phillips, for complainant.

T. Hart Anderson, for defendant.

LOWELL, Circuit Judge. This is a bill in equity filed December 21, 1903, to restrain the infringement of letters patent No. 412,704, issued October 8, 1899, to French and Meyer for an improvement in sewing machines. All the claims are in issue as follows:

"(1) In a chain-stitch wax-thread sole-sewing machine, the following instrumentalities, viz.: A channel-guide, a hooked needle, the needle-segment, feeding mechanism, actuating means for the said needle-segment, as the link, B^3, lever, B^4, and cam, 200, to force the needle with a loop upon its shank into the stock and out through the inner channel of the sole, and there hold the said needle temporarily substantially at rest while the stitch is being set, a thread-guide, means to actuate it to supply the hooked needle with thread, and a take-up, as b^2, a cam, as C^1, and connecting devices intermediate the said cam and the said take-up, the said cam through the said connecting devices actuating the said take-up to pull upon the loop of needle-thread about the shank of the needle while the needle is in the stock and holds the said loop upon its shank, the said take-up drawing the said loop about the shank of the needle, as described, to set the last stitch, of which the said loop forms a part, without straining the between substance, the said stitch being set before the loop to form the next stitch is drawn through it, substantially as described.

"(2) In a chain-stitch wax-thread sole-sewing machine, a hooked needle, a thread-guide to supply it with thread, feed mechanism to feed the stock while the hooked needle holds on its hook a loop of thread, and means to actuate the said needle to force it into the upper and sole and out through the channel therein and temporarily hold the said needle substantially at rest in the stock, combined with a take-up, as b^2, and means to actuate it to act upon the thread and draw the same back through the sole and upper while the last loop formed by the needle is yet on the shank of the needle, the needle yet remaining in the stock, the said take-up completing the setting of the stitch before the said needle is withdrawn from the stock and out from the old loop upon its shank, substantially as described.

"(3) In a chain-stitch wax-thread sole-sewing machine, a hooked needle, means to actuate it to enter the upper and sole and emerge therefrom in the inner channel thereof, and a thread-guide and means to actuate it to supply the hook of the needle with thread, combined with a feeding mechanism, a take-up, a cam, and intermediate devices to actuate the said main take-up to draw the thread about the shank of the needle and set the stitch while the needle is in the stock and the loop of thread last drawn through the stock by it is yet

on the shank of the needle, the said cam and intermediate devices at the same time moving the take-up far enough to draw thread from the thread-supply sufficient for a new stitch, and with an auxiliary spring-actuated take-up to take up the slack in the needle-thread drawn off by the main take-up, the said auxiliary take-up thereafter giving up the said slack thread to the needle as the latter again acts to draw a loop of thread through the stock, substantially as described.

"(4) In a chain-stitch wax-thread sole-sewing machine, the take-up, b^2, and the auxiliary take-up, b^5, the thread-guide, and the hooked needle and actuating means therefor, combined with the thread-holder, d, and means to actuate it, whereby the said thread-holder is made to act upon the needle-thread between the said thread-guide and the stock, and while the needle is in the stock and the last loop of thread drawn therethrough is yet upon the shank of the needle, the said threadholder taking from the auxiliary take-up and through the said thread-guide before the latter acts to lay its thread in the hook of the needle a sufficient quantity of thread to prevent the rending of the same across the hook of the needle as the loop is being drawn by the needle through the stock, substantially as decribed.

"(5) In a chain-stitch wax-thread sole-sewing machine, a hooked needle, a thread-guide to supply the needle with thread, means to actuate the needle to draw the thread in the form of a loop from the inner channel of the sole through the between substance and upper, feeding mechanism to move the sole, and means to move the needle forward to pass through the upper and between substance and come substantially at rest, combined with a take-up, as b^2, and means to actuate it while the needle is in the stock to pull upon the loop of thread yet on the shank of the needle next the outer side of the shoe, and pull the said thread back through the upper and about the said needle, to set the stitch, the pull on the thread in setting the stitch being in the direction to draw the upper closely to the sole, substantially as described."

The defendant set up an earlier British patent issued to the same parties, No. 13,366, of 1888, application dated September 17, 1888. The following claims were relied upon:

"(1) In a sole-sewing machine, a hooked needle to enter the upper and sole, and emerge therefrom in the inner channel thereof, and a thread-guide to supply the hook of the needle with thread, combined with a take-up, as b^2, and a cam to operate it, whereby the thread is drawn upon by the take-up to set the stitch while the needle is in the material, and to also draw off thread from the thread supply, substantially as described.

"(2) In a sole-sewing machine, a hooked needle to enter the upper and sole, and emerge therefrom in the inner channel thereof, and a thread-guide to supply the hook of the needle with thread, combined with a main take-up, a cam to actuate it to draw the thread and set the stitch while the needle is in the stock, and the loop of thread last drawn through the stock is yet on the shank of the needle, and at the same time to draw off thread for a new stitch, and with an auxiliary spring actuated take-up to take up the slack in the needle thread drawn off by the main take-up, and thereafter give up the slack thread to the needle, as the latter acts to draw a loop of thread through the stock, substantially as described.

"(3) In a sole-sewing machine, the take-up, the thread-guide, and the hooked needle, combined with the threadholder and its attached rocking-shaft, whereby the threadholder is made to act upon the needle thread between the thread-guide and the stock, and while the needle is in the stock, and the last loop of thread drawn through the stock is yet on the shank of the needle, the said thread-holder taking from the take-up through the thread-guide before the thread-guide acts to lay the thread into the hook of the needle, a sufficient quantity of thread to prevent it rending through the hook of the needle as the loop is being drawn by the needle through the stock, substantially as described."

The defendant contended that the above mentioned patents were identical, within the purview of Rev. St. § 4887 [U. S. Comp. St. 1901, p. 3382], and that, therefore, the patent in suit was limited by the term of the British patent, and so expired September 17, 1902, before this bill was brought.

The drawings of the British patent are identical with those of the patent in suit. The British specifications and claims are substantially identical with the American, as the latter were originally filed. The complainant admits that the specifications remain substantially identical. The specifications of the patent in suit speak of "chain-stitch wax-thread sole-sewing machines," while the specifications of the British patent speak of "chain-stitch," the "chain of the stitch," the "usual waxing device or thread supply." It was decided by the Court of Appeals for this Circuit in Westinghouse Electric Co. v. Stanley Instrument Co., 138 Fed. 823, that, in order to be within the purview of section 4887 identity of patents must appear in their claims. In the claims of the British patent no reference is made to wax-thread, but, considering the specifications and the nature of the invention, the omission is immaterial. The British claims do not mention a chain-stitch, but it appears from a consideration of the machine described that the British patentees had in mind only a chain-stitch machine, and that their invention had no practical application to any other. It is true that one of the complainant's experts testified that it is possible to embody the claims of the British patent in a lock-stitch machine; but this embodiment would be without practical use.

The complainant further seeks to differentiate the two patents by reason of the omission from claim 1 here in suit of all mention of drawing off thread from the thread supply, as mentioned in claim 1 of the British patent. The complainant urges that the gist of the former claim is a take-up, which sets the stitch, while in the British patent this take-up is necessarily combined with a draw-off or pull-off from the thread supply, this feature being absent from the American patent. The complainant also contends that claim 4 of the patent in suit differs from claim 3 of the British patent by the presence in the former of an auxiliary take-up in addition to the principal take-up. This is not found in the British claim 3, but it appears, in substance, in the British claim 2.

Considering that the original American application was the same as the British patent, and that it then embodied the same invention; considering, also, that the changes made in the American patent office did not and could not affect the substance of the invention set out in the original application, I can find in neither patent here in question evidence of "an essential, novel and patentable improvement on what was claimed" in the other. 138 Fed. 829. The mention made of a pull-off in British claim 1, and of an auxiliary take-up in American claim 4, involves nothing but a rearrangement of claims, and a restatement of the invention which they cover. Formal identity of claims is not necessary to constitute identity of patent, within the purview of section 4887. Substantial identity of invention, as covered

by the claims, is sufficient. This latter identity exists in the case at bar. It is unnecessary, therefore, to consider the dictum in Siemens v. Sellers, 123 U. S. 276, 283, 8 Sup. Ct. 117, 31 L. Ed. 153, and to determine if identity of some claims will shorten the life of others admittedly different.

The complainant further contends that, even if the patents are identical, yet the life of the American patent is extended by Article 4 bis, inserted in the international convention of March 20, 1883, for the protection of industrial property, by the additional act proclaimed by the President, August 25, 1902 (32 Stat. 1936, 1939). The article reads as follows:

"Patents applied for in the different contracting states by persons admitted to the benefit of the convention under the terms of articles 2 and 3 will be independent of the patents obtained for the same invention in the other states adherents or non-adherents to the Union. This provision will apply to patents existing at the time of its going into effect."

By Rev. St. § 4887, an American patent issued later than a foreign patent for the same invention was limited to expire not later than the foreign patent. By chapter 391 of the Acts of March 3, 1897 (29 Stat. 693, § 1 [U. S. Comp. St. 1901, p. 3382]), this limitation was repealed as to patents applied for on and after January 1, 1898. In Sawyer Spindle Co. v. Carpenter, 143 Fed. 976, the Circuit Court of Appeals for this Circuit decided that chapter 1019 of the Acts of March 3, 1903 (32 Stat. 1225, § 1 [U. S. Comp. St. Supp. 1905, p. 663]), did not revive a patent which had theretofore expired by virtue of section 4887. The patent there in suit had expired before the additional act was proclaimed, and so the article above quoted had no application to it.

The complainant contends that article 4 bis. is inconsistent with that provision of section 4887 which limits the term of the American patent by the term of the foreign. As the treaty is later than the Revised Statutes, and later than the amending act of 1897, the complainant contends that the treaty is to be taken as amending the amended statute, and hence that the American patent here in suit, having been in existence August 5, 1902, was prolonged by the treaty until 17 years from its issue.

The mutual relation of treaties and statutes under the Constitution of the United States has often been considered by the Supreme Court. Thus, in Geofroy v. Riggs, 133 U. S. 258, 266, 267, 10 Sup. Ct. 295, 33 L. Ed. 642, that court said:

"That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised, or inherited, are fitting subjects for such negotiation, and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries, the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer, and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement. The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its de-

partments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter without its consent. Ft. Leavenworth Railroad Co. v. Lowe, 114 U. S. 525, 541, 5 Sup. Ct. 995, 29 L. Ed. 264. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

On the other hand, it had been observed by the Supreme Court in the Head Money Cases, 112 U. S. 580, 598, 5 Sup. Ct. 247, 254, 28 L. Ed. 798:

"A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations, residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is the law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined; and when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."

And in Whitney v. Robertson, 124 U. S. 190, 194, 8 Sup. Ct. 456, 31 L. Ed. 386, the court said:

"When the two [treaty and statute] relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing."

The Supreme Court has laid down no rule by which this court can determine in all cases whether a particular provision of a treaty is to be deemed self-executing or not. If the intent of a treaty is to confer some right of American citizenship upon the citizens of another country, the treaty may be deemed self-executing, though its effect is to modify or repeal statutes concerning descent, taxation, confiscation, and perhaps even statutes relating to customs duties. Had the article of the convention here in question gone no further than to admit an alien to the rights of a citizen of the United States concerning patents, it might have been deemed self-executing; but to change the term of an American patent granted to a citizen of the United States as that term is fixed by statute, must be deemed beyond the authority of a treaty. Congress alone has power "to promote the

progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Article 1, § 8. The treaty in question was not void or wholly ineffective, though it was not self-executing, but rather dependent upon congressional action. When, in the act of 1903, Congress gave effect to some of the provisions of the treaty, it omitted to deal with article 4 bis.

As the invention covered by the English patent is identical with the invention of the patent in suit, the latter expired with the former before this suit was brought.

The complainant's bill must be dismissed.

In re PLANT.

CORBIN v. MUMFORD.

(District Court, S. D. Georgia, W. D. July 23, 1906.)

1. BANKRUPTCY—PREFERENCE—CREATION.
   Where, a day or two before open insolvency of a bank and the closing of its doors, defendant, its receiving and paying teller, with full knowledge of its insolvency, drew his check against the fund and paid himself $3,100 which he claimed as a creditor of the bank, such transaction constituted a preference which was recoverable in an action against him by the bank's trustee in bankruptcy.
   [Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, §§ 259–262, 267.]

2. SAME—RECEIVER—APPOINTMENT—EQUITABLE LIEN.
   The appointment of a receiver for the bank a day or two after the payment of such check constituted an equitable levy on the funds so received by the teller as well as on the other assets of the bank in its possession.

3. SAME—NATURE OF PROCEEDINGS.
   A trustee was entitled to maintain a bill in equity in the bankruptcy court to recover such fund and was not limited to an action at law.
   [Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, §§ 419–424.]

4. JURY—TRIAL BY JURY—RIGHTS.
   Where a bill in equity was filed by a bankrupt's trustee to recover an alleged preference, and the facts were not disputed, defendant was not entitled to a trial by jury.

5. SAME—EQUITY—PLEADING—RELIEF.
   Where a bill by a bankrupt's trustee to recover an alleged preference contained a prayer for general relief, the court was not limited to the entry of a money judgment against the preferred creditor, but was authorized to issue an order commanding such creditor to pay the money received to the bankrupt's trustee, and to commit the creditor for contempt until the order was complied with.

In Bankruptcy.

M. P. Callaway, for complainant.
W. S. Grace, for defendant.

SPEER, District Judge (orally). We think that the learned counsel on both sides of this case have not given sufficient importance to

a very familiar principle relating to it, and that is that, before a demurrer to a bill in equity should be sustained upon the ground that there is an adequate remedy at law, it must be made to appear that the remedy at law is in all respects as complete, as efficient, as expeditious, and as adequate as the remedy in equity. Now, the defendant, by whom this demurrer is made, was the receiving and paying teller of the bankrupt concern. On a day, or two days, before open insolvency and the closing of the doors of the bank, having access to its funds, he, according to the averments of the bill, with full knowledge of the insolvency, drew his check against the fund and paid himself $3,100, which he claims as a creditor of the bankrupt concern. Now, if that money had been paid by the bankrupt himself to any favored creditor, it would have been unquestionably a preference It follows that if his agent, his employé, took advantage of his position, which, according to the allegations charged, gave him access to those funds, he also became a favored creditor. It was the creation of a preference, either by the permission of the bankrupt himself, or because of the powers which were intrusted to him. The defendant was the once fiduciary agent of the bankrupt. He held a position of trust—he was an acting trustee—and his action in appropriating, in violation of the bankruptcy law, a portion of that fund to his own possession, is not merely a violation of the law against implied trusts, but it is a violation of an actual positive trust, a disregard of proper conduct on the part of the agent. The appointment of the receiver a day or two afterwards constituted an equitable levy on this fund, which was in contemplation of law an equitable levy on all that fund just as much as on the vaults of the bank, if he had improperly withdrawn that fund from the vaults and put it to his own credit or put it in his own pocket. This is a very different case indeed from that on which the defendant relies (United States v. Bitter Root Development Company, 200 U. S. 451, 26 Sup. Ct. 318, 50 L. Ed. 550), where a bill in equity was brought against certain trespassers who were trespassing on land of the United States and were cutting a large amount of timber, which could not be identified. That was an action for simple trespass or trover, and the Supreme Court held that it made no difference how much fraud was charged, because the facts showed that it was simply a case of trespass or trover. Here the case is charged as a constructive fraud, and, if the facts exist as stated, the pleader would have been justified in charging it as an actual fraud in contemplation of the bankruptcy law. The main cause of action here is not, as the gentleman has argued, legal, but is equitable. The bankruptcy court is an equitable court, and it is within the power of the bankruptcy court to set aside this preference. It would seem that Mumford has no right to a trial by jury, because such a trial is to find the facts. Here the facts are not in dispute. The duty of the court is not to find the facts, but to consider their effect as they are charged in the bill, and admitted by the demurrer. If the facts were in dispute as to whether Mumford actually took the money, it might be that he would have the right of trial by jury, but that is not this case.

It is said that the court can only enter a money judgment against Mr. Mumford. I do not think that this is true. The great moderation of the pleader does not change the nature of this transaction in any sense, and there is, in addition, a prayer for general relief. In view of this, it is quite competent for this court to issue an order on this bill, commanding Mr. Mumford to pay over this money, and, if he does not, to commit him until he does pay it over, and to issue an attachment for that purpose. I do not, then, agree with counsel when he insists that nothing here can be granted but an ordinary money judgment. It is a case where the funds of an insolvent concern, in violation of the bankruptcy law, were appropriated by one occupying a position of peculiar trust toward all the creditors, for the purpose of settling his own debt, and to that extent depriving the other creditors of their right to distribution under the law creating a uniform system of bankruptcy. It is therefore not only peculiarly within the powers of the bankrupt court, but within the range of its extraordinary and punitive powers in case they become necessary. And for this reason the court adheres to its original opinion, although profoundly impressed by the ingenuity and earnestness of counsel for the defendant.

The demurrer is again overruled.

Ex parte MOEBUS.

(Circuit Court, D. New Hampshire. August 23, 1906.)

No. 351.

1. COURTS—JURISDICTION OF FEDERAL COURTS—HABEAS CORPUS.

A federal court is without jurisdiction of a habeas corpus proceeding for the discharge of a state prisoner where the only question involved is his identity with an escaped convict, and no diversity of citizenship is alleged.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 804, 805.

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

2. HABEAS CORPUS—SUCCESSIVE APPLICATIONS FOR WRIT.

In jurisdictions where appeals have been provided for in habeas corpus cases, it has come to be the rule, either as one of law or of practical administration, that a judge is not required to consider an application for a writ which has been denied by another judge, but may remit the petitioner to his remedy by appeal.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 121.]

On petition for writ of habeas corpus.

See 137 Fed. 154.

Henry Edward Moebus, pro se.

E. G. Eastman, Atty. Gen., for respondent.

PUTNAM, Circuit Judge. This is a petition for a writ of habeas corpus, brought against the warden of the state prison of the state

of New Hampshire by a man imprisoned therein who styles himself Henry Edward Moebus, but who is claimed by the warden, and by the authorities of the state, to be in truth and in fact, Mark Shinburn, who was convicted in the courts of the state of breaking and entering, and sentenced to confinement at hard labor in the state prison for 10 years, who was afterwards lawfully committed in pursuance of that sentence, and who thereafter broke jail, and was recaptured in New York, duly extradited and recommitted, and now held to serve the unexpired term of his sentence.

By our order, the petition was filed in court on May 10, 1906, and an order of court duly made that the warden of the state prison, H. K. W. Scott, should show cause why the writ should not issue. On June 18, 1906, the warden duly answered, closing his answer that the term of imprisonment fixed by the sentence referred to had not expired, and with the statement that the respondent, in his capacity as warden, held the petitioner for the purpose of serving out the unexpired term and for no other purpose, alleging at the same time that the petitioner is Mark Shinburn.

The petition does not allege that there is involved any controversy between citizens of different states, and that on account thereof the federal courts have jurisdiction for any of the reasons explained in King v. McLean Asylum, 64 Fed. 331, 12 C. C. A. 145, but it is apparently based on some supposed claim to the effect that the petitioner is imprisoned in violation of some provision of the Constitution of the United States. The petitioner has several times informally stated his case to us, and we have never been able to perceive that any federal question of that character was involved. Neither do we now perceive any. On the other hand, it seems to us that the only possible question involved was one of identity, a question which, perhaps, might have been investigated by the federal courts, either in New York or in New Hampshire, so long as the extradition proceedings were not completed, but a question which became purely of a local character after those proceedings were completed and the petitioner was in custody in the prison of the state.

Also, the petitioner made separate applications to the United States district judge for the district of New Hampshire and to the justice of the Supreme Court of the United States assigned to this circuit, each of which applications was denied. At common law, it was settled that a refusal by any judge to grant a writ of habeas corpus, or a refusal of any judge to discharge from custody a petitioner by, or in behalf of, whom such a writ had been granted, did not constitute res judicata, but that the petitioner was at liberty to apply to any other judge, and so on until the whole series of judges had been exhausted. It is, however, commonly understood that the rule is practically otherwise in those jurisdictions where statutory rights of appeal, or writs of error, have been granted with reference to such proceedings, and that, either as a rule of law or as a practical rule of administration, no judge would allow a writ when some other judge has refused it; but that any subsequent judge would remit the applicant to his remedy by appeal, or writ of error, unless some substantial change in the cir-

cumstances had intervened. In the present case, there has been no such change of circumstances, and, therefore, it may well be that we should have refused to consider this application at all, and should hold the applicant to his remedy by appeal under the statute, with the consequent further holding that, if the statutory time for an appeal had expired, the applicant had lost his rights if he had any. As, however, the petitioner has now for the first time applied to us formally, we have concluded to allow him to complete the circle made up of the justice of the Supreme Court assigned for this circuit, the district judge for the district of New Hampshire, and myself as the circuit judge who ordinarily attends to such matters in that district as come before the circuit judges. We do this more particularly in order that the petitioner may take out his appeal, if he desires so to do, but with the express statement that no further applications of the character now before us will be entertained by us.

The petition of Henry Edward Moebus, filed July 6, 1906, is denied for want of jurisdiction, and, for that reason, the answer of H. K. W. Scott is adjudged sufficient, and the writ af habeas corpus prayed for is denied.

QUEEN ANNE'S FERRY & EQUIPMENT CO. v. QUEEN ANNE'S R. CO.

(Circuit Court, D. Maryland. May 9, 1906.)

1. RAILROADS—FORECLOSURE SALE—CLAIMS ENTITLED TO PRIORITY OVER MORTGAGE.

A railroad mortgage provided that in case of default the trustee at the request of 50 per cent. of the bondholders should take possession of the road and all the mortgaged property and operate or sell the same as the bondholders might direct. The company became insolvent and was earning insufficient income to pay expenses when a committee was appointed representing practically all of the bondholders and stockholders, and they deposited their bonds and stock. The committee took full charge and management of the property and operated the same until a sale was negotiated, having full authority to vote the stock deposited and to pledge the bonds or stock to secure money for operating expenses, and, in fact, exercised all of the powers which the trustee was given by the mortgage in case of default, which default occurred shortly after its appointment. A sale was negotiated by the committee for the benefit of the bondholders and stockholders, who transferred their bonds and stock to the purchasers to be used in payment, receiving bonds and stock of the new company therefor. Such sale was consummated through a friendly foreclosure suit, and the decree confirming the same required the purchasers, they having knowledge of all the facts, to pay any claims which should be adjudged prior in equity to the mortgage. *Held*, that the management of the road by such committee was virtually that of the bondholders, and that indebtedness incurred by it for expenses and supplies in operating the road after the bondholders might have taken possession by the trustee was superior in equity to the mortgage debt and entitled to priority of payment from the proceeds of the corpus of the property and therefore to be paid by the purchasers.

2. SAME—OPERATING EXPENSES—ADVERTISING.

Bills for advertising the road, its trains, etc., contracted by the committee while in the management, were for legitimate operating expenses

and are entitled to priority as such, equally as though they had been contracted by the trustee in possession.

Exceptions to master's report upon the claims of creditors of the railroad company asserting an equity against the proceeds of the sale of the corpus of the mortgaged property claimed to be superior to that of the mortgage bondholders.

Taylor & Keech and John C. Rose, for creditors.
Bond & Robinson, for purchasers.

MORRIS, District Judge. The original bill in this case was a general creditors' bill against the Queen Anne's Railroad Company filed February 20, 1904. The bill alleged that the railroad company was largely indebted to the complainant for arrears of rental for three steamboats owned by the complainant and leased to and used by the railroad company in the operation of its road; and alleged that the defendant company was also largely indebted to many other creditors for supplies and materials furnished for the operation and maintenance of its lines of railroad and ferries; and that, if the numerous creditors who were pressing for payment were allowed to enforce their claims by suits, the result would be to deprive the railroad company of the means of operating its system of railroad and ferries, and to destroy its power to earn revenue and to meet its obligations. The bill alleged that there was secured by a mortgage of the railroad three series of bonds: First, a series of first preference 5 per cent. bonds aggregating $330,000; second, a series of consolidated mortgage bonds, of which $865,000 were outstanding; and, also, a series of income mortgage bonds aggregating $600,000. The bill alleged that the corporation was insolvent, and that, in order to protect the holders of the bonds, as well as all other creditors, it was absolutely essential that the railroad property should be kept and maintained and disposed of as an entirety, and that any other course would result in the utter dissipation and waste of the corporate assets and property. The bill prayed for the appointment of a receiver with power to operate the railroad, ferries, and steamboats, leased, controlled, and operated in conjunction with the railroad, with all the usual powers given to receivers in like cases to continue the business and maintain the integrity of the system of railroads and ferries. On the same day the defendant railroad company answered, admitting the allegations of the bill, and consented to the appointment of a receiver as prayed. On the same day the receiver was appointed as prayed. He was authorized to pay the interest on the $330,000 first preference bonds; to pay all the rentals, taxes, and fixed charges necessary to prevent such defaults as would imperil the integrity of the system of railroads; and to pay the debts for wages, services, materials, and supplies growing out of operation of the railroad within a period not exceeding six months anterior to the date of the decree. The receiver proceeded to execute the powers given to him and operated the railroad and connecting ferries for about 12 months when he delivered possession to the purchaser under the foreclosure sale. On November 26, 1904, the International Trust Company, the trustee named in the mortgage, filed

a petition praying leave to file a bill of complaint for the foreclosure of its mortgage of the railroad property. Leave was granted and on the same day the bill was filed asking for a decree for sale subject to the $330,000 first mortgage preference bonds. Upon the consent of the Queen Anne's Railroad Company, a decree was entered as prayed. The receivership case and the foreclosure case were consolidated and a sale was made and ratified for the sum of $480,000. The purchasers reported were Henry P. Scott and Nicholas P. Bond. Of the purchase price $30,000 was paid in cash and the purchasers also delivered to the trustee $865,000 of the first mortgage consolidated bonds, being the total amount issued, also $600,000 of the income bonds, and stock, of the railroad company of the par value of $883,300, and the receiver was, by order of court, directed to deliver possession to the purchasers. The decree for sale provided that, in addition to the $30,000 to be paid in cash at the time of the sale, the purchasers should also pay, as the court might direct, such additional sums in cash as might be required to pay all liens or claims prior in equity to said mortgage (except the first mortgage preference gold bonds) to be determined by the court, the balance of the purchase money to be satisfied by the surrender of first consolidated mortgage bonds.

The foreclosure sale and purchase were really the carrying into effect of an agreement which had been already made between the purchasers and the holders of the first consolidated bonds and the holders of the income bonds and the owners of the stock, by which they were all to receive from the purchasers securities in a new transportation company which was to consolidate under one management this railroad and other lines of transportation. The purchasers were fully cognizant of the previous history and management of the road and its securities, and are to be treated as affected by any circumstances which would affect the bondholders themselves. There was no surplus income at any time, and no diversion, as the revenue never, in any one year, was sufficient to pay the running expenses, and if the claims now in controversy are paid, they can only be paid out of the corpus of the mortgaged property.

The solution of the question raised by the exceptions to the master's report depends upon whether or not there are present in this case special circumstances which give rise to a peculiar equity in favor of the claimants. It is quite clear from the facts appearing in the case that the purchasers at the foreclosure sale obtained the bonds with which they propose to pay for the property under such circumstances, that whatever equities affected these securities in the hands of those from whom they were obtained, now affect them in the hands of the purchasers.

Since the case of Gregg v. Metropolitan Trust Company, 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717, decided by the Supreme Court in March, 1905, it is to be regarded as the rule that supplies furnished to a railroad are not, where there has been no diversion of income, entitled to precedence over a mortgage lien, recorded before the supplies were furnished, where there are no special circumstances affecting the mortgage bondholders' claim to priority. There having

been no diversion in this case, the inquiry will be addressed to the question whether there were any special circumstances which ought to create an exception to the general rule.

The mortgage foreclosed is dated March 1, 1901. It provides that if the railroad shall fail to pay any semi-annual installment of interest, or fail to keep the property free from all taxes and other liens, then the trustee may take possession of all the mortgaged property, and if requested in writing by 20 per cent. of any series of bonds and indemnified against liability, shall be bound to take possession subject to the right of a majority in amount of the outstanding bonds to countermand such action. Also it is provided that, in case of such default, on the written request of 50 per cent. of all the bonds outstanding, the trustee shall take possession of the railroad and property, and all books, records, papers, accounts, and money of the railroad, and all management and control thereof, and manage and operate the same and receive the income thereof and apply the same, first to the management of the railroad and to making such repairs thereon as may be needed to keep the same in good working order, next to the payment of the interest and principal of the bonds, or, on written request of 50 per cent. of the bonds in default, to sell all the property. It is also provided that, in every case of default, the duty of the trustee should be subject to the right and power of the majority in amount of the bonds to direct and control the trustee's action, or to order more effectual remedies, and also that 50 per cent. or more of the bonds outstanding might, at any time, remove the trustee and appoint a new one.

It was the summer excursion business of the railroad and its steamers which was depended upon for revenue. It was found, however, after the summer of 1902, that there had accumulated a large floating debt, and that the financial condition of the railroad was altogether bad. The holders of the first consolidated mortgage bonds and the income bonds were driven to act in order to keep the railroad a going concern until they could get a purchaser for it. The owners of the bonds were very largely also the owners of the stock, and practically they were the owners of the road subject to the $330,000 of preference bonds. The semi-annual interest coupons on the bonds due September 1, 1902, were paid, but it was certain that default would be made in the payment of the coupons falling due March 1, 1903, and something had to be done to preserve the credit of the railroad and keep it going. To attain this end the holders of the first consolidated mortgage bonds, the holders of the income bonds, and the holders of the stock united together and on November 29, 1902, appointed a committee which became known as the "Securities Committee." This committee from the first represented 75 per cent. of the bondholders and stockholders, and during its active existence all the bondholders and substantially all the stockholders made themseves parties to the agreement by which the committee was appointed. This committee of five entered upon the duty of preserving and maintaining the railroad as a going concern. They held their first meeting on December 6, 1902, and, as appears from their minute book, between that date and Feb-

ruary 21, 1904, when the receiver was appointed by this court they held 42 meetings. During that time the directors of the company held but one meeting and the stockholders one meeting. It is to be seen, from their minutes and from what they actually did, that the committee, in exercising the powers given it by the agreement under which it was appointed, exercised supreme control over the railroad and its property and directed everything that concerned it and gave to it the credit which kept it going. By the terms of their appointment, the depositors of the securities gave to the committee the power to represent the depositors in any measure or action of any kind necessary or proper to accomplish the purposes of their appointment, to superintend the operation of the railroad by its officers and directors, and to confer with them as to the management and operation of the road with same powers as the depositors might have, to vote all shares of the capital stock in order to enforce official action on the part of the directors, and to select and elect directors in accordance with the opinion of the committee, and, finally, to negotiate a sale of the securities and property and franchise of the company, a sale, however, before consummated to be submitted to a meeting of the security holders. The committee, for the purpose of raising money to operate the road most effectually and to provide new equipment and additions, were authorized to pledge the securities deposited, and, if unable to sell the property, were authorized to form a new company to take it over, also to institute proceedings to foreclose the mortgage or to postpone such proceedings. As the committee had all the powers that the bondholders had and all the powers of the stockholders, with the power to change the trustee designated by the bondholders' mortgage, and to change the directors, and, as the purpose of their appointment was to keep the road running until a reorganization or sale could be effected, it is quite clear that they could, in substance, do whatever any or all of the interest they represented could do.

When we examine the minutes of the meetings of the committee and the testimony to see what they really did do, I think it becomes apparent that they, in fact, managed the railroad as persons having absolute control and possession would manage it. The committee authorized the purchase of additional passenger coaches and a locomotive; they negotiated with and employed a new general manager, and when his management proved disappointing to them they discharged him; they took in charge matters connected with the terminals at Queenstown and Love Point and authorized contracts with regard to them; they authorized the purchase of new railroad ties; they investigated the causes of an accident to the steamer Queen Anne, and directed the painting of the steamer Caroline; they authorized the compromise of disputed bills of the Dry Dock Company; they authorized contracts to be made for the supplies of coal; they authorized the purchase of a barge and additional engines, and the building of a new station; they gave orders for a plan for lighting certain piers and for the erection of a derrick. Finally, after the committee had been thus in control of the property from January, 1903, for over a year, they negotiated with the present purchasers for a sale to them upon an

agreed plan and instructed their counsel in connection with the counsel of the purchasers to institute a suit for a friendly receiver, to the end that the plan of sale which had been agreed upon should be faithfully carried into effect. The suit was instituted and a receiver recommended after a conference between the securities committee and the intending purchasers of the road was appointed. It appears that the general manager selected by the securities committee reported directly to the committee, and that after the committee took hold and were furnishing the money to keep the road running and had authority to determine, subject to the ratification of the bondholders, the terms of the sale, the board of directors as such practically abdicated; indeed they were helpless to do anything. The chairman of the securities committee, Mr. Oler, testifies that the committee practically took over the management of the road, and, as it had never been able to meet its expenses, the committee arranged to raise money to carry it along and keep up its credit with the people who sold it its current supplies, and that the expenditures were reported to the committee and controlled by it. By the terms of sale finally agreed upon, for each consolidated mortgage bond the holder was to receive $1,200 in stock of the Maryland, Delaware, and Virginia Railroad Company, and for each income bond $50 of the said stock, and the holder of each share of the old stock was to receive $1 of the said new stock. It thus appears that what the securities committee did was just what the trustee under the mortgage by direction of the bondholders would have had the right to do, viz., to take possession of the road and run it, making repairs and keeping it in working order and finally to sell it. When a trustee takes such possession, the debts incurred by the trustee in running the road are to be paid in preference to the lien of the bondholders, whose agent the trustee is.

In this case the situation was complex. There was an impending possibility that, its credit being exhausted, its business not paying its running expenses, the whole system of railroad and ferries might collapse and the consolidated bondholders might lose everything. It was thought best that a committee composed of persons who held the bonds should endeavor to meet the difficulties, so the committee took charge in place of the trustee under the mortgage. They worked faithfully and sedulously. They held meetings and kept careful minutes of their proceedings showing what things they ordered to be done and what contracts they directed should be made, what persons should be employed or discharged, and they borrowed money and put it into the treasury. Many and difficult questions of policy and detail were discussed and decided by them. They did sustain the credit of the company and did keep the road running and did effect a sale in the results of which the bondholders and stockholders participated, and they carried the transaction through by means of a nominal sale made by the court's decree, but in reality upon the terms previously arranged by the committee with the purchasers. It should be stated in justice to the gentlemen composing the securities committee, themselves large bondholders, and whose names undoubtedly gave financial standing to the railroad, that there is nothing in the case to indi-

cate that they did not intend that creditors who furnished the supplies and materials while they were managing the road should be paid out of the proceeds of the property. They represented the bondholders and were themselves bondholders, and they represented stockholders, but the bondholders alone had any substantial interest, as the company was insolvent and earning nothing for stockholders. With no adequate income out of which to pay the running expenses, what was there to meet the deficit except the proceeds of the property? To suppose that the committee were, for over a year, lending themselves to a scheme by which persons furnishing operating supplies to a general manager appointed by them and acting for them were to be left unpaid, is to do them injustice. In making the contract for sale of the property the purchasers were told that there was existing a floating debt of the railroad company for operating expenses. The existence of such a floating debt was mentioned in the agreement of sale dated February 15, 1904, and an itemized statement was agreed to be furnished, although it does not appear that it was ever insisted upon.

The contract of sale of February 15, 1904, begins by reciting the amount and nature of the outstanding securities of the Queen Anne's Railroad Company, including this recital:

"And whereas the said railroad company is indebted to various persons [including its indebtedness to said committee] as shown by the statement marked 'A' herewith attached."

Then, after reciting that it is the wish of all the parties to the agreement that a new corporation shall be formed which shall acquire the said railroad property and other property, and shall be bonded and capitalized as therein stated, it is further recited:

"And whereas it is the desire of the parties of the first part [that is the securities committee and all the holders of securities of the Queen Anne's railroad who joined in the contracts of sale with the committee] to facilitate in every way the formation of such new corporation or the reorganization of the present Queen Anne's railroad corporation, to the end that when the same is formed or reorganized and securities now owned by them shall be exchanged for the new securities in the name and on the terms hereinafter set forth. And whereas the said parties of the second part [the purchasers] have agreed that they will endeavor within a reasonable time as hereinafter mentioned to carry the above purpose into effect; Provided that the said parties of the first part will contract and agree to take the new securities of the character and to the amount hereinafter designated in exchange and full payment for the various bonds and stocks of the Queen Anne's railroad now held by them, if and when the said parties of the second part shall be able to deliver said new securities which said parties of the first part have agreed to do wherefore these presents are executed."

I think it clearly appears that this whole reorganization arrangement for the benefit of the bondholders and stockholders of the Queen Anne's Railroad Company was one which could not be lawfully carried out to the exclusion and destruction of the rights of the creditors of the road for operating expenses incurred by the securities committee in effecting the arrangement; that the agreement appointing the securities committee, and by which they acquired control of the bonds which they sold to the purchasers of the road, contemplated that

the deficit in operating expenses should be borne by the bondholders, as is shown by a provision in respect to a plan of reorganization, afterwards modified, in which it was provided that $135,000 of new bonds should be applicable to "the repayment of the advances, loans, and indebtedness which may be made and incurred by said committee in carrying out the terms and purposes of this agreement, whether such indebtedness be incurred for the purpose of operating said railroad company in the most effective manner as hereinbefore set out or providing new equipment and additions to the present property, or in providing expenses for the proper and effective carrying out of the objects and purposes of this agreement." The scheme which was in contemplation when the $135,000 of new bonds were specifically appropriated to debts and expenses it was found could not be consummated, and, in consequence, the property remained in the hands of the committee and the receiver much longer than was anticipated and the deficit grew larger. But none the less the effect was necessarily to pledge the deposited bonds for the debts incurred by the securities committee in operating the road as they were authorized to do after they accepted the appointment. All these matters were perfectly well known to the purchasers of the bonds and of the railroad. The securities committee was, in fact and in effect, the agent of the bondholders, and the debts which they contracted in doing what they were appointed to do were, in effect, the debts of the bondholders. The default in the payment of interest on the consolidated bonds foreseen at the time of the appointment of the securities committee on November 29, 1902, to be inevitable, took place March 1, 1903. Upon that default happening, the trustee under the mortgage which secured the bonds was by it authorized to take possession upon request of 20 per cent. of the holders of the consolidated bonds. As the securities committee, did, in fact, in the execution of their duties, proceed to take over and operate the road, the responsibility of the bondholders for their action should fairly date from the point of time when the bondholders themselves, through their trustee, might have taken possession, viz., the 1st of March, 1903, and I think it follows that the bonds, and the property on which they were secured, are chargeable with the operating expenses of the road incurred from and after March 1, 1903. It follows that the exceptions to the master's report based upon the disallowance of priority to the operating expenses incurred after March 1, 1903, are sustained.

Bills for advertising. I can see no reason for excluding them. The road, although hopelessly insolvent, was kept running by the bondholders for two purposes: First, to attract a purchaser; second, to obtain as much income as it could be made to produce. To do this public notice by advertisement of the running of trains was essential, and it seems to me in such a case as this the cost of the advertisements is a proper expense legitimately incurred to keep the road running. The findings of the master with regard to the validity of the several claims of creditors of the company, apart from their question of priority over the mortgage debt, appear to me to be correct, and they all appear to me to be for expenses for which the trustee

under the mortgage would have been liable if the trustee, by direction of the bondholders, had formally taken over the road and run it, and therefore they are such as the bondholders are liable to pay, they having, in substance, done indirectly the same thing through the securities committee.

I will sign an order in accordance with the foregoing views. If, however, there are any claims of creditors which it is thought for special reasons ought not to be governed by this general ruling, I shall be glad to have counsel bring them to my attention and to specially consider them.

UNION TRUST CO. OF SAN FRANCISCO v. LYNCH, Internal Revenue Collector.

(Circuit Court, N. D. California. August 23, 1906.)

No. 13,339.

INTERNAL REVENUE—LEGACY TAXES—INTERESTS VESTED IN POSSESSION.

Where the children and legatees of a testator were to receive only the income from their respective shares in the estate until they reached stated ages, which did not occur in any case until after July 1, 1902, when the repeal of section 29 of the war revenue act of June 13, 1898, c. 448, 30 Stat. 464 [U. S. Comp. St. 1901, p. 2307] took effect, under Act June 27, 1902, c. 1160, § 3, 32 Stat. 406 [U. S. Comp. St. Supp. 1905, p. 450] which provides that no tax shall be assessed under said section 29 in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to July 1, 1902, and that any such tax previously collected shall be refunded, the interest of such legatees for the purpose of taxation was the value of the income received by each respectively from the estate prior to said July 1, 1902, which was subject to the tax only in case it amounted to $10,000, and in computing such amount allowances made by the probate court for their support pending settlement of the estate cannot be included.

On Demurrer to Complaint.

MORROW, Circuit Judge (orally). This is an action to recover from the defendant, the Collector of Internal Revenue for this District, certain legacy taxes that have been paid by the plaintiff in the case under protest, and with respect to which application has been made to the Commissioner of Internal Revenue to refund the taxes, and such application has been denied.

The taxes were levied upon the legacies provided by the will of Richard H. Follis, deceased, who died in this city on May 31, 1900, leaving personal estate valued at $806,935.12, less certain expenses allowed by law amounting to $28,443.84. The clear net value of the personal estate was ascertained to be $778,491.28. The estate was left in trust for five children, namely, Mrs. Margaret De Vecchi, the wife of Dr. De Vecchi, James H. Follis, Richard H. Follis, Lillian Mary Griffin, and Clarence George Follis.

The first decree of distribution in this estate was entered on No-

vember 16, 1900, and the final decree was entered June 26, 1901. Dividing this personal estate into five equal parts as provided in the will, made a legacy for each of the children amounting to $155,698 and 25 cents or 26 cents—more than 25 cents, and less than 26 cents—so that for two of the heirs the shares were determined to be $155,698.25, and for three of the heirs $155,698.26. The Commissioner of Internal Revenue has made three assessments with respect to this estate. The first assessment is dated June 15, 1901, and amounted to $1,349.88. In that assessment Margaret De Vecchi was assessed $173.01, James H. Follis $178.33, Richard H. Follis $346.03, Lillian Mary Griffin $321.46, and Clarence G. Follis $331.02, making the amount stated $1,349.98. This assessment was based upon the following estimated value of each share of the estate as an annuity from the date of the decree of distribution on June 26, 1901, to the time when the particular heir received his or her share of the estate.

The will provided that the trustees were empowered:

"To pay the net proceeds of the income, rents, issues, and profits of said trust quarterly, upon the first day of each and every quarter of the year equally, share and share alike, to all of the children namely, Margaret, James, Richard, Mary, and George, up to and until such time as each of them shall respectively attain the ages following; that is to say: Until said Margaret, now wife of Dr. De Vecchi, shall attain the age of thirty-nine years; until said James H. Follis shall attain the age of 33 years; until years; until said James H. Follis shall attain the age of thirty-three years; until the said Richard H. Follis shall attain the age of thirty-one years; until said Mary Lily Follis shall attain the age of twenty-nine years, and until said George Clarence Follis shall attain the age of twenty-seven years."

The whole of the personal estate was then to be distributed to the heirs when they arrived at the ages named; that is to say, when Margaret De Vecchi arrived at the age of 39 years, the estate was to be appraised and divided into aliquot parts corresponding to the number of children, and she was to be given her aliquot part in severalty and in specie as far as the same might be practicable, but in case there was not in specie the exact amount to be given her the balance could be given her in money. When the next heir arrived at the age mentioned in the will, the property was to be again appraised, and again divided in the same way, and this second heir was to receive his share in the same way as the first. So the distribution was to proceed until the very last, except when the last heir arrived at the age specified in the will, it was not necessary to have the estate appraised, because the property then left was his share, and it was to be handed over to him, the others having received their share.

The Commissioner of Internal Revenue, in June, 1901, determined the then present value of this estate to each of the heirs as an annuity until the time they should arrive at the age specified in the will. In the case of Margaret De Vecchi, the time that was to elapse from the time of the making of this assessment—the assessment was made to correspond with the date of that decree of distribution on June 26, 1901—the time that would elapse between June 26, 1901, and the time when she should reach the age of 39 years, which would be July 24, 1905. This period of time would be 4 years and 28 days; the case of James H. Follis, the time that would elapse between the entry of the decree on June 26, 1901, and the time his share of the estate was

distributed to him would be 4 years and 71 days; in the case of Richard H. Follis, the time that would elapse between the entry of the decree on June 26, 1901, and the distribution of the estate to him on February 6, 1907, would be 5 years and 225 days; in the case of Lillian Mary Follis, the time that would elapse between the entry of the decree on June 26, 1901, and the distribution of the estate to her on August 28, 1906, would be 5 years and 63 days; and in the case of Clarence George Follis, the time that would elapse between the entry of the decree on June 26, 1901, and the distribution of the estate to him on October 30, 1906, would be 5 years and 125 days. Upon the period of time stated in each case, the Commissioner of Internal Revenue made an estimate of the value of each one of those interests as of the date of June 26, 1901, as an annuity to each, and the assessment was made accordingly, and as I have just stated, amounted in the aggregate to $1,349.88.

On August 6, 1901, the Commissioner of Internal Revenue made a second assessment against this estate. This assessment was based on the total amount that would be ultimately distributed to the legatees, and this assessment was added to the first assessment; that is to say, the two assessments together amounted to the sum which the Commissioner determined to be the amount assessable under his revised construction of the act. This again was an assessment upon what was deemed to be the value of the annuities to each one of the heirs during the period that I have just mentioned; that is to say, the period that elapsed between the time of the entry of the decree of distribution and the time when each of them became entitled to the estate. This assessment amounted to $136.84 in respect to each one of the heirs, or $684.20 in the aggregate for all the heirs in addition to $1,349.88, the amount of the first assessment.

On October 18, 1901, the Commissioner of Internal Revenue made a third assessment against each one of these heirs. This assessment amounted to $9,341.87, and against each one of the heirs $1,868.37. This third assessment was based upon the value of the entire corpus of the estate as it then stood; in other words, the Commissioner of Internal Revenue determined what on June 26, 1901, was the value of the entire corpus of the estate of each one of the heirs at that date, and levied an assessment upon the estate accordingly, and upon the interest of each one separately. This third assessment was in addition to the first two assessments. The total amount of all three assessments was $11,375.93. This tax was paid by the executors of the estate to the Collector of Internal Revenue under protest.

The case of Vanderbilt v. Eidman afterwards came up before the Supreme Court of the United States, and the opinion of the Supreme Court is reported in 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563. It is a case somewhat similar to this case. Cornelius Vanderbilt provided in his will that his son Alfred G. Vanderbilt, when he arrived at the age of 21 years, should receive the net income of the residuary personal estate left by the testator until he arrived at the age of 30 years, when he should receive half the estate, and the remainder of the estate when he reached the age of 35 years. The amount of the personal estate was $18,972,117.46. "The right of Alfred G. Vanderbilt

to the beneficial enjoyment, as provided in the will, until he became 30 years of age, was appraised at $5,119,612.43, and upon this sum the executors paid a death duty under sections 29 and 30 of the acts of June 13, 1898, c. 448, 30 Stat. 464, 465 [U. S. Comp. St. 1901, pp. 2307, 2308] at the rate of 2¼ per cent., the tax amounting to $115,191.28. After payment of this amount and subsequently to the passage on March 2, 1901, c. 806, 31 Stat. 938 [U. S. Comp. St. 1901, p. 2286] of an amendment to the war revenue act of June 13, 1898, c. 448, 30 Stat. 448, the Commissioner of Internal Revenue, considering that by that amendment Alfred G. Vanderbilt had become immediately liable for a tax on his right to succeed to the whole residue if he lived to the ages of 30 and 35 years respectively, assessed a death duty based upon that hypothesis. In making this assessment, as by the mortality tables it was shown that Alfred G. Vanderbilt had a life expectancy beyond the ages of 30 and 35 years, the Commissioner assessed the interest as a vested estate equal in value to the sum of the entire residuary estate, viz., $18,972,117.46. Upon this valuation a tax was levied of 2¼ per cent., producing $426,872.64. On this amount, however, credit was allowed for the sum of the tax previously paid, leaving the balance due $311,681.36."

The Supreme Court of the United States had before it this statute upon which the assessment is made in this case; that is to say, sections 29 and 30 of the act of June 13, 1898, c. 448, "An act to provide ways and means to meet war expenditures and other purposes." This act is found in 30 Statutes at Large, c. 448, and the section under which this assessment is levied is on pages 464 and 465. Section 29 of that act provides:

"That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say. * * *"

Then the act specifies the different rates of taxation that are imposed with respect to the different heirs that may be entitled to the estate. In this Vanderbilt Case, the Supreme Court also had before it the repealing act, "An act to repeal war-revenue taxation, and for other purposes." Section 7 of that act (Act April 12, 1902, c. 500, 32 Stat. 97 [U. S. Comp. St. Supp. 1905, p. 446]) provided:

"That section four of said act of March second, nineteen hundred and one, and sections six, twelve, eighteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, Schedule A, Schedule B, sections twenty-seven, twenty-eight, and twenty-nine of the act of June thirteenth, eighteen hundred and ninety-eight, and all amendments of said sections and schedules be, and the same are hereby repealed."

Section 30 was not repealed, as section 30 relates to the collection of the tax. Again, the act of June 27, 1902, c. 1160, to be found in 32

Stat. 406 [U. S. Comp. St. Supp. 1905, p. 450] has a further provision relating to the repeal of this tax, section 3 of that act, which provides as follows:

"That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed, or imposed under said act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."

The question in the Vanderbilt Case was whether the interest of Alfred G. Vanderbilt was liable under the statute to tax as a residuary legatee of the personal estate of Cornelius Vanderbilt. The question that was propounded by the Circuit Court of Appeals to the Supreme Court of the United States for determination was in this form:

"Did sections 29 and 30 of said act authorize the assessment and collection of a tax with respect to any of the rights or interests of Alfred G. Vanderbilt as a residuary legatee of the personal estate of Cornelius Vanderbilt under the 17th clause of the will, with the exception of his present right to receive the income of such estate until he attained the age of 30 years, prior to the time when, if ever, such rights or interests shall become absolutely vested in possession or enjoyment?"

The Supreme Court in its opinion discusses the question, cites authorities, and determines that the interest of Alfred G. Vanderbilt was not liable to this tax; that under the repealing act he did not have the absolute vested possession, or the enjoyment of this estate, prior to the 1st day of July, 1902, when the repealing act went into effect. Under this decision of the Supreme Court the Commissioner of Internal Revenue refunded the tax collected on the second and third assessments in the Follis estate, conceding that under this decision the Follis heirs did not become absolutely possessed or have the enjoyment of the estate until long after this repealing act went into effect. But there was one question in this estate of Vanderbilt that was left open, and is left open, by the very question propounded to the Supreme Court by the Circuit Court of Appeals, and is the exception stated in the question as follows:

"With the exception of his present right to receive the income of such estate until he attains the age of 30 years."

It is under that exception to the question propounded to the Supreme Court of the United States that the government contends in this case that the heirs of the Follis estate were properly assessed for the value of their annuity at the time of the entry of the decree, and it is upon that ground that the Commissioner of Internal Revenue has refused to refund this tax, and the Collector of Internal Revenue defends the present suit. In the Vanderbilt Case it will be observed,

however, that this tax was assessed upon the value of an annuity of much more than $10,000. Below the sum of $10,000 all legacies are exempt under this law. If the legacies do not amount to $10,000 there is no tax. In the Vanderbilt Case there was no question about the amount of the income, and the question was not raised by the Vanderbilt beneficiary. It was largely in excess of $10,000. He did not seem to have raised any controversy as to whether the income was assessable as an annuity. He paid it, and made no application to have it refunded.

The question before this court is whether the Follis heirs are liable for this tax upon their legacies as estimated and determined by the Commissioner of Internal Revenue under the law as determined in the Vanderbilt Case. I have been particular to refer to the time when this estate was to run with respect to each heir before it was to be distributed. It runs from 4 years and 28 days in the case of Margaret De Vecchi to 5 years and 225 days—nearly six years—in the case of Richard H. Follis, and it is upon such periods of time this assessment was levied. In the case of James H. Follis the Commissioner of Internal Revenue found that he would have an income from this estate for a period of 5 years and 225 days, and the Commissioner assessed him for the value of an annuity during that time. Of course, for such a period the valuation amounted to over $10,000. But here is the difficulty about that assessment: The tax did not run for any such time. The tax was repealed on July 1, 1902, and after the decree was entered in this case on June 26, 1901, the law itself was only in existence 1 year and 4 days, and this statute says specifically, that when it is not vested at the time the repealing statute went into effect no tax shall be collected; that is, the specific command of this statute is that unless a person receives a legacy of more than $10,000 which vests in the absolute possession and enyoyment of such person prior to the passing of this repealing act there can be no tax. That is a specific, direct, positive, unqualified direction of the statute, which the court cannot evade.

Now, then, did these heirs receive from this estate the sum of $10,000 during 1 year and 4 days between June 20, 1901, and July 1, 1902? They did not. There is no question about this fact. Moreover, the complaint itself alleges specifically that the heirs did not receive the sum of $10,000 prior to July 1, 1902. That must be taken as an admitted fact, because we are now considering a demurrer to the complaint which admits the facts alleged in the complaint, but it can be very easily determined from the figures contained in the complaint and the exhibits attached thereto concerning the value of the estate and the income derived therefrom.

In addition to that, paragraph 9 of the complaint alleges:

"That all of the taxes aforesaid which have been collected by the defendant were collected upon the contingent beneficial interests of Margaret De Vecchi, James H. Follis, Richard H. Follis, Jr., Lillian Mary Griffin and Clarence G. Follis, none of which interests had become vested prior to July 1, 1902, and none of which interests have, since said decree of distribution or since the death of Richard H. Follis, as aforesaid, become vested, and none of which interests have at any time become vested in possession or enjoyment."

Then paragraph 11 charges:

"That the amount received by the said beneficiaries and each of them prior to July 1, 1902, was and is less than the sum of $10,000; that is to say, each of said children has received and had vested in them from said estate and trust, prior to July 1, 1902, the following approximate sums: Margaret De Vecchi $8,000, James H. Follis, $8,000, Richard H. Follis, Jr., $8,000, Lillian Mary Griffin $8,000, and Clarence G. Follis $8,000."

In the face of such allegations of the complaint, and upon the statement of the facts as they are contained in the complaint, and set forth in this assessment here, it is clear that prior to July 1, 1902, these heirs did not receive into their absolute possession or enjoyment any sum amounting to $10,000, and under this statute it seems to me it is beyond any question that they are not liable to any assessment. The only way they can be made liable would be to determine that on the 26th of June, 1901, and from that date on, during these successive five years, the income that was to be paid to each of them from this estate would in the aggregate have amounted to such a sum, and that on June 26, 1901, under these actuary tables, such income would be of the value of more than $10,000. In the Vanderbilt Case that method of determining a taxable legacy has been condemned with respect to the corpus of the estate. The method of procedure adopted in the Vanderbilt Case to determine the value of that estate at the time of the decree of distribution is the same as has been adopted in this case, and the Supreme Court has said: "You cannot do that." These actuary tables have reference to quite a different subject, and cannot be introduced here to determine the present value of an estate for taxation when such estate can only be taxed when it comes into the absolute possession of the heirs many years later. If it is not the law with respect to the corpus of the estate, it is not the law with respect to the income of the estate, because there is no discrimination in the statute between the income and corpus of the estate. The statute provides for the levy of a tax upon the present vested possession and enjoyment of the estate, and not some future contingent interest. Moreover, what was actually enjoyed and possessed was the amount the superior court of this state allowed these heirs for their support during this time. During the time that the statute continued in force the money which the heirs actually received from the estate in possession and enjoyment was the amount allowed them for support and maintenance under the decree of partial distribution entered on the 16th day of November, 1900, for the sum of $500 a month, and was allowed as the amount reasonably necessary for the support and maintenance of the heirs in the same condition and circumstances as they were supported and maintained by the testator during his lifetime. This was the only part of the personal estate which the heirs received, as I have said before, in actual absolute possession and enjoyment. It was not the legacies that were received but allowances. What the Commissioner has, in effect, assessed and collected tax upon is the amount allowed these heirs by the superior court of this city for their maintenance pending the distribution of the estate by the court. I do not find anything in the law that requires any such assessment. I do not find any warrant for such taxation. I do not think it was the purpose

of the United States statute to assess as a legacy the amount that the superior court has allowed a child for its support. So that, on that ground, I hold that the tax is not legal, and cannot be maintained.

There are other features of this assessment which I might touch on, but I think these two objections to the assessment are sufficient. I think, without any question, this tax was not assessable against these heirs under any view, and that they are entitled to recover upon the facts stated in the complaint. I, therefore, overrule the demurrer.

Ex parte BAKLEY et ux.

(District Court, E. D. Virginia. September 29, 1906.)

HABEAS CORPUS—UNLAWFUL ENLISTMENT OF MINOR—RIGHT OF PARENTS TO DISCHARGE.

The parents of a minor son under the age of 18 years, who has enlisted in the navy without their knowledge or consent, in violation of Rev. St. § 1419 [U. S. Comp. St. 1901, p. 1007], are entitled to his discharge on habeas corpus, and their right cannot be denied because of contemplated or possible court-martial proceedings against the minor for fraudulent enlistment, especially where, between the time demand for his discharge was made by the parents and the procuring of the writ, several months elapsed, during which no proceedings were taken against him.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 16.]

Habeas Corpus.

Mary Philbrook and A. B. Dickinson, for petitioners.
Robert H. Talley, Asst. U. S. Atty., for United States.

WADDILL, District Judge. This is a petition of Zebedee F. Bakley and Bertha Bakley, his wife, for a writ of habeas corpus, setting forth that their son, Alfred F. Bakley, a boy of the age of 17 years, enlisted in the United States navy without the consent of his parents or guardians, 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 for his discharge from such custody. The petition is duly sworn to by the petitioners, and the respondent in his return sets up the enlistment of said Alfred F. Bakley on the 14th day of March, 1906, he representing himself as of the age of 21 years; that said child is held under and by virtue of such enlistment, which was a fraudulent enlistment, assuming the facts to be true as set forth in said petition; and that he had been in the navy since the time of his enlistment and duly received compensation therefor. The return further avers that on the 24th day of July, 1906, more than a week before the suing out of the writ of habeas corpus, the said Alfred F. Bakley was "detained and recommended" for trial by general court-martial for fraudulent enlistment in the United States navy. With said return was filed a copy of the enlistment record of the said Alfred F. Bakley. Upon the hearing no evidence was offered by the government, and the evidence adduced by the petitioners, including the

proper birth certificate, established that said Alfred F. Bakley was the son of the petitioners; that he was under the age of 18 years at the time he entered the navy, being at that time just 17 years of age; and that he enlisted without the knowledge or consent of his parents. Petitioners further proved that they demanded possession of the boy about the 21st of March, 1906, within one week of the enlistment, by written communication to the Navy Department, advising it of the age of the boy and that he had enlisted without their knowledge or consent. No copy of this communication was preserved by the writer, but its receipt was duly acknowledged on the 24th of the same month, as follows:

"Replying to your letter of the 21st instant, the Chief of the Bureau directs me to state that when Alfred F. Bakley enlisted he made oath that he was 21 years old. This oath must be accepted by the Bureau as correct until positive evidence is produced to the contrary. You are informed, however, that upon the presentation of such evidence the Bureau will have no alternative but to bring Bakley to trial by general court-martial for fraudulent enlistment."

Subsequently on the 17th day of July, 1906, counsel for the petitioners addressed a communication to the Navy Department, informing them of the facts and circumstances of the enlistment of the boy, and requesting his discharge from the service. To this communication no reply was made. On the 23d of July, a further communication was sent to the department by counsel, informing it of the writing of the former letter and of the parents' need of the support of the boy, and again asking for his discharge, and with this communication an affidavit of the parents was forwarded, setting forth the correct age of the boy and the fact of their lack of knowledge or the giving of their consent to his enlistment; and on this same day a letter was written by the same counsel to the commanding officer of the United States receiving ship Franklin, upon which ship the boy was detained, informing him of the fact of the parents' desire to secure the boy's release, and inclosing a copy of the affidavit sent to the department, saying in the letter that they had been advised it was necessary that the same should be filed, and also asking to be given, as far as the officer to whom it was addressed was at liberty to state, any information as to the procedure necessary to secure the boy's release, and offering to furnish any additional affidavits needed. No reply was made by the Navy Department at Washington to either of the letters of counsel; but on the 24th of July, A. C. Dillingham, Captain U. S. Navy, commanding the Franklin, replied to the letter, saying, among other things, that the only action that the parents could take in the premises was to apply for a writ of habeas corpus, and that with the evidence contained in the affidavit sent him it was his duty to report Bakley to the Navy Department for fraudulent enlistment; this letter also advising counsel that the last Congress had passed a law requiring the recruiting officers to obtain other evidence than the recruit's statement concerning his age, etc. See Acts 59th Cong. pt. 1, p. 555; Act June 29, 1906, 34 Stat. 555, c. 3590.

These being the undisputed facts of the case, the petitioners insisted upon the discharge of the boy, and the government asked that he should

not be released, but held for court-martial under the laws, rules, and regulations governing fraudulent enlistment in the navy.

The case of Ex parte Lisk (D. C.) 145 Fed. 860, recently decided by this court, would seem to be conclusive of this case, save for the fact that here the government seeks to set up the threatened court-martial proceedings as a reason for the suspension of the habeas corpus proceeding. In the Lisk Case this contention was not made; but the proposition insisted upon was that an infant could not be released, even at the instance of the parent, who had not assented to his enlistment, because court-martial proceedings might be instituted. This is the only difference between the two cases. Here, upon the fourth demand for the boy's release, and months after the first request, he was reported to the Navy Department, to the end that court-martial proceedings might be ordered against him. No such proceedings were or have ever been inaugurated, if the report was ever made at all, and within one week of the time of the notice of such threatened report this proceeding was regularly commenced by the parents of the child, in accordance with the government's suggestion as to the proper method to secure his release. This court, in the Lisk Case, supra, endeavored to make clear the fact that, so far as the parent who had not consented to his child enlisting in the navy within the prescribed age was concerned, such child could not be considered and treated, in a proceeding by the parent asking for his release, as lawfully in the navy or amenable to naval rules and discipline; and the court perceives no good reason for departing from the decision thus reached. However much the child may personally be under naval authority and control, and a member de jure as well as de facto of the navy, still, as against his parents not consenting to his enlistment, if all the provisions of the acts of Congress, fully set forth in the Lisk Case, are to be given effect to, he cannot be considered or treated as subject to naval authority and rules and regulations in an appropriate proceeding inaugurated by his parents to secure his release. There is no substantial difference between this and the Lisk Case. The writ of habeas corpus ought not to be denied to a parent seeking the custody of his child, confessedly in the unlawful possession of another, because further proceedings looking to his detention for trial by court-martial are contemplated or may be inaugurated. In re Carver (C. C.) 103 Fed. 624, 626; In re Baker (C. C.) 23 Fed. 30. They may never be instituted at all, and it would look like trifling with justice to so treat the parent's request. This would seem to be correct in any case; but surely, where such suggestion of a court-martial was only made in answer to the repeated demands for possession of the child, the court should treat the parent's request, not as made at the time of the filing of the petition for the writ of habeas corpus, but as of the date of the first demand made for the child, and in this view in no event would the so-called court-martial proceeding avail to deny the parents' right here.

From what has been said, this case would clearly seem to be one in which the relief sought by the petitioners should be granted. It is true the decisions on the subject may be said not to be entirely harmonious; indeed, considerable contrariety exists. But it is believed that no

case goes so far as to hold that the habeas corpus proceedings should be suspended because of the institution of court-martial proceedings, other than that of United States v. Reaves, 126 Fed. 127, 60 C. C. A. 675, a decision of the Circuit Court of Appeals for the Fifth Circuit. The cases to the contrary are abundant, state and federal, the state courts having formerly exercised jurisdiction in this class of cases; and the court is convinced that the learned judges who decided the Reaves Case, supra, being a case of desertion, would not have so held under the facts and circumstances of this case. Much of the confusion that apparently exists respecting the subject under consideration arises, in the estimation of the court, either from confounding cases where, as at common law, there was no statutory inhibition in favor of the parent against the enlistment, and such contracts were valid, or cases instituted by the minor personally, with those inaugurated by the parent, or from a misapprehension of the two decisions of the Supreme Court of the United States (Ex parte Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636; Morrissey v. Perry, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644), and in the effort to apply the principles there decided, under the peculiar facts and circumstances of those cases, to a case like the one under consideration here. Both cases were for desertion of the most aggravated character, in which the deserters themselves, two adults, were seeking to claim the exemptions prescribed by the statute.

In the Grimley Case, the petitioner was 40 years old at the time of his enlistment, and swore he was under 35, the prescribed maximum age to enter the service, and after desertion and arrest therefor he endeavored to secure his discharge on the ground that he was not subject to enlistment, because he was too old; and the court rightfully held that, as his relation with the government was a contractual one of a kind that changed his status, such defense might be interposed by the government, but not by him. In discussing this case the court did say that while in the army he was a soldier de jure, as well as de facto, and subject to military jurisdiction and authority, and that the civil courts on habeas corpus were confined to the ascertainment of the jurisdiction of the court, and not to a review of its proceedings; still there is nothing new in the latter proposition, and the same should not preclude a parent from securing the discharge of his child, enlisted without his consent, as well after as before court-martial. In re Carver (C. C.) 103 Fed. 624, 626. A parent under such circumstances in no manner asks a review of the court-martial proceedings. They remain in all respects valid as to the child. The parent says he is not bound by them, since he was not a party to them, and that the child is no less and no more in the navy after court-martial proceedings than before, and that so far as he is concerned he is illegally detained in the service, in contravention of the plain acts of Congress, and he is entitled to his discharge. Moreover, in deciding this case, it will be observed that the court, speaking through Mr. Justice Brewer, said:

"By enlistment the citizen becomes a soldier. His relations to the state and the public are changed. He acquires a new status, with correlative rights and duties; and, although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw

off the garments he has once put on, nor can he, the state not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the state, would not have entered into the new relations with him, or permitted him to change his status. Of course, these considerations may not apply where there is insanity, idiocy, infancy, or any other disability which, in its nature, disables a party from changing his status or entering into new relations."

In Morrissey v. Perry, supra, the deserter entered the service by reason of a false oath while under the prescribed age, and continued therein less than a month, deserted, and remained away for 5½ years, and until he had attained his majority, when he was arrested for desertion, and sought by habeas corpus to secure his release, because he was not of the requisite age when he enlisted. The court refused the relief sought, holding that the contract of enlistment was valid so far as the child was concerned; the parents making no claim in his behalf. Mr. Justice Brewer, also speaking for the court in that case, said:

"Section 1117, Rev. St. [U. S. Comp. St. 1901, p. 813], provides that 'no person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States, without the written consent of his parents or guardians: Provided, that such minor has such parents or guardians entitled to his custody and control.' But this provision is for the benefit of the parent or guardian. It means simply that the government will not disturb the control of parent or guardian over his or her child without consent. It gives the right to such parent or guardian to invoke the aid of the court and secure the restoration of a minor to his or her control; but it gives no privilege to the minor. * * * The contract of enlistment was good so far as the petitioner is concerned. He was not only de facto, but de jure, a soldier, amenable to military jurisdiction. His mother not interfering, he was bound to remain in the service."

These two cases, while upholding fully the contract of enlistment between the soldier and the government, having proper regard to the vigor and efficiency of the army and navy and the necessity of maintaining the same, expressly recognize the validity of every contention here made in behalf of the parents' right. In the Grimley Case the court said:

"These considerations may not apply, where there is insanity, idocy, infancy, or any other disability which, in its nature, disables the party from changing his status."

And the court, in the further progress of the opinion, emphasized the fact of the invalidity of such contracts, when there existed a natural wrong in the manner in which they were entered into. Can there be a doubt in this case that there not only existed the element of infancy, but the express disability arising from the provisions of the act of Congress which invalidated the contract so far as the parent not consenting to the enlistment was concerned? Surely the manner in which the same was effected by the false oath of the infant was, as to the parent, a natural wrong inherent in the inception of the undertaking.

The Morrissey Case could not well have been stronger in its recognition of the parent's rights. It says in clear and unambiguous language that the provision in question was for the benefit of the parent or guardian, and, not content with that, emphasized what was meant, and how the right could be secured:

"It means simply that the government will not disturb the control of the parent or guardian over his or her child, without consent. It gives the right to such parent or guardian to invoke the aid of the court to secure the restoration of the minor to his or her control."

Further, the court, discussing the minor's status, said:

"He is not only de facto, but de jure, a soldier, amenable to military discipline. His mother not interfering, he was bound to remain in the service."

This has but one meaning—that, his mother intervening, he was not bound to remain in the service; that the parent or guardian was entitled to his control, and upon the court's intervention he should be restored to them.

The Circuit Court of Appeals for this Circuit, in the case of Solomon, Sheriff, v. Davenport, 87 Fed. 318, 30 C. C. A. 664, took the same view of the law, namely, that the exemption of the statute was one which the parent could avail of, but not the soldier, and refused to discharge the soldier. If it be said that these decisions do not maintain the position here contended for on the part of the parents for the release of this minor child, to whose enlistment they had not assented, surely they cannot be said to maintain the government's position in this case. Here we have no deserter, no infraction of military discipline, but merely a case where parents, finding their minor child enlisted in the navy in plain violation of law, within 10 days of such enlistment are beseeching the government for his release. This is met, not by the reply that "You shall have him, since we were imposed on, and are manifestly not entitled to him," but, on the contrary, by the cold answer that "To make known your request, to press your demands, means only that he will be proceeded against by court-martial for an offense of fraudulent enlistment, which will defeat your right of restoration." The law, it would seem in this case, is too simple and plain that any such result as this should be brought about, either from anything contained in its letter or spirit. It is as follows (section 1419, Rev. St. [U. S. Comp. St. 1901, p. 1007]):

"Minors between the ages of 14 and 18 years shall not be enlisted in the naval service without consent of their parents or guardians."

This language admits of no cavil or doubt as to its meaning; and to say that a parent seeking to secure possession of his child, wrongfully taken into the navy in contravention of this act, is to be refused and denied such right in the manner here contended for, would be substantially to nullify the law by reason of a court-martial proceeding inaugurated by one wrongdoer against the other—would be in effect to use the law enacted for the parents' benefit, as a medium for their punishment. In re Davison (C. C.) 21 Fed. 618; In re Baker (C. C.) 23 Fed. 30; In re Carver (C. C.) 103 Fed. 624.

Judge Jones, of the Middle District of Alabama, in Ex parte Reaves (C. C.) 121 Fed. 848, being the decision of the lower court in the case above cited, in an elaborate and exceptionally able opinion, discussing this particular phase of the distortion of this act of Congress, said:

"It is a maxim of the law that no power can be exercised indirectly which cannot be lawfully exercised directly, and whether or not the exercise of the power is lawful must be tested and determined 'by its ordinary and natural

effect' upon the right against which the exercise of the power is directed. Henderson v. Mayor, 92 U. S. 259, 23 L. Ed. 543; Joseph v. Randolph, 71 Ala. 499, 46 Am. Rep. 347. If the minor, by doing a wrongful act as against the father, and the government, by doing a further wrong to the father, in attempting to enforce an enlistment made in violation of his wishes, can impress upon the minor, in behalf of the government, as against the father, a status which suspends for any period of time the parent's right to the custody and control of his minor child, it results inevitably that the joint wrong of the minor and the government forfeits, in favor of the government, the wrongdoer, as against the innocent and nonassenting father, rights the statute intended to preserve and safeguard for the father. If this is not doing by indirection what cannot be done directly, it is impossible to present an illustration which would violate the maxim. Magdalen College Case, Coke's Reports, vol. 11, p. 66; Wells v. People, 71 Ill. 532."

The law under consideration was enacted in behalf of the parents and guardians, to the end that their children, of whom they were the natural guardians and protectors, or who were under their lawful direction, should not be wrested from their care and control. Manifestly such an act of Congress should be given a reasonable and liberal interpretation, in order that its purpose and intent, its humane provisions, may not be frustrated and destroyed. The lawmaking power surely went far enough in the interest of the public, and of the possible necessities of the army and navy, when it provided for enlistment of 14 year old children at all; and the prerequisite that the assent of the parent or guardian should be required would seem to have been dictated by the plainest principles of humanity. The desirability of maintaining the strength and efficiency of the military branch of the government is fully appreciated; but, in dealing with this prescribed class of possible recruits, the act of Congress in question, and its manifest purpose and intent, has to be taken into account, and the necessities, certainly in time of peace, cannot be such that those of this class of tender years, between 14 and 18, have to be held in the public service without the consent of their parents or guardians, in plain violation of the act of Congress.

The seriousness, importance, and far-reaching consequences of the questions involved to the parents of the land, cannot be well overestimated. What has happened to the petitioners in this case is liable to take place with any other parents; and if the government's contention be the correct view of the law, then, so far as this large and most unfortunate class of the youth of the land are concerned, the control of parents and guardians must give way to that of the army and navy officials, who, in the nature of things, cannot deal with those committed to them either as children or individuals, but must treat all alike as soldiers; and for the care, love, and affection of tender parents, mother and father, and other loved ones, will be substituted that of the military command, enforceable by the rude decrees of a court-martial. Wayward children are the ones for whom parents ever have the greatest anxiety and solicitude; and to deny to them their right to the care and control of such children, unless required so to do by the plain mandate of the law, would seem to be harsh in the extreme.

The infant, Alfred F. Bakley, will be discharged.

In re A. B. CARTON & CO.

(District Court, S. D. New York. August 21, 1906.)

1. BANKRUPTCY—OBJECTIONS TO DISCHARGE—ESTOPPEL OF BANKRUPT TO DENY STANDING OF CREDITOR.

While Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418] does not give a bankrupt the right to object to the proof of claims, but vests such right in the trustee after his appointment, the bankrupt has an equitable right to insist that objection shall be made to illegal claims, and his failure to exercise such right by requesting the trustee to make such objection estops him to deny the standing of a creditor, whose claim is allowed without objection, to file objections to his discharge.

2. SAME—PRIOR VOLUNTARY COMPOSITION—ACCORD AND SATISFACTION.

A voluntary composition between a debtor and his creditors, after proceedings in involuntary bankruptcy had been instituted, by which the creditors agreed to accept 40 per cent. of their claims in full satisfaction, one-half to be paid in cash and the remainder to be evidenced by the notes of the bankrupt, does not operate as an accord and satisfaction until full payment has been made, and where the debtor is subsequently adjudged a bankrupt on his own petition, not having paid the notes, the creditors joining in the agreement are entitled to prove their original debts, giving credit for the cash payments received.

3. SAME—OBJECTIONS TO DISCHARGE—FALSE STATEMENTS TO OBTAIN CREDIT.

Under Bankr. Act July 1, 1898, c. 541, § 14b (3), 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427] as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684], which provides that a bankrupt shall be denied a discharge if he has obtained property on credit by means of a materially false statement in writing made for the purpose, it is the act of making such statement and the fraudulent intent which constitute the ground for refusing the discharge, and the right to make the objection is not confined to the person defrauded, but it may be made by any "party in interest."

In Bankruptcy. On exceptions to report of special commissioner recommending that a discharge be denied.

James, Schell & Elkus, for objecting creditors.
Gainsburg & Solomon, for bankrupts.

HOUGH, District Judge. In 1904 a petition in involuntary bankruptcy was filed against the present bankrupts. The result thereof was a compromise, followed by an amicable dismissal of the petition, based upon an agreement, the operative words of which are as follows:

"We, the undersigned, creditors of Andrew B. Carton and Lawrence A. Carton, heretofore doing business under the firm name of A. B. Carton & Co., do hereby agree, to and with each other, to accept, for each and every dollar said firm owes or is indebted unto us, the sum of forty (40) per cent., the same to be received by us in full satisfaction, compromise and discharge of our several and respective claims and demands against said firm, and which shall be paid to us as follows: Twenty (20) per cent. thereof in cash, and twenty (20) per cent., to be evidenced by the promissory notes of the said firm, payable within four months and eight months respectively."

The present objecting creditors signed this agreement, received the 20 per cent. in cash provided for, accepted the notes, and Carton & Co. went on in business.

For reasons which produce sympathy, but which appear to me immaterial to the present contention, they found it impossible to pay the notes issued under the above recited agreement; and thereupon sold their stock, fixtures, and books, and filed this voluntary petition, under which they now seek to be discharged.

The creditors who have appeared in this second bankruptcy are substantially the same as those who participated in the first, and they have severally (including especially the objecting creditors) filed claims for their original indebtedness, giving credit for whatever they received under the partially executed compromise of the bankruptcy of 1904. But they have not (or, at least, the objecting creditors have not) brought into court or surrendered either to the bankrupt or his trustee, the unpaid notes issued in 1904, which they may be assumed still to possess.

The creditors objecting constitute the firm of Faulkner, Page & Co., and of their numerous objections I shall consider but two, of which the first alleges in substance that the bankrupts, prior to the proceedings of 1904, issued a materially false statement in writing to a mercantile agency; that Faulkner, Page & Co. were subscribers to that agency; that said statement was delivered by the agency to Faulkner, Page & Co., and in reliance thereon they delivered to the bankrupts certain goods which were unpaid for at the time of the filing of the petition of 1904.

The second specification to be considered asserts that another materially false statement in writing was made by the bankrupts prior to the proceedings of 1904 to the firm of Vietor & Achelis, and that in reliance on said statement that firm sold and delivered to the bankrupts goods which were not paid for at the time of the filing of the petition of 1904.

The first of the above-described specifications the commissioner has overruled on the ground that the delivery of the false statement in question to the commercial agency, its subsequent transmission to Faulkner, Page & Co., and their action upon it was not sufficient to warrant a refusal of discharge under the act; because false statements made to mercantile agencies are not among the lawful grounds of objection, and to this finding the objecting creditor has excepted.

The second of the specifications the commissioner has sustained, holding that it is within the purview of the act to permit Faulkner, Page & Co. to set up as an objection to the discharge of these bankrupts a false statement made to Vietor & Achelis upon which the latter firm could have prevented the discharge of the applicants although they have filed no objections themselves; and to this finding the bankrupts have excepted.

The bankrupts, however, make a preliminary suggestion requiring consideration, before any review of the specifications above noted can be made. They assert that the compromise agreement above set forth operated as a discharge of the original debts of 1904, which the creditors have treated as revived by the failure to pay the 20 per cent. notes.

The objecting creditors reply that their claims have been proved and allowed, as if the compromise of 1904 had never been suggested,

and that such allowance has been without objection on the part of the bankrupts, who are therefore estopped to set up the compromise as a defense.

Bankrupts rejoin that they could not contest the claims of creditors by attempting to confine them to the unpaid balances of the notes issued in 1904 (which they maintain should have been done), because the sole right to object to the proof and allowance of claims rests in the trustee. In re Lewensohn, 121 Fed. 538, 57 C. C. A. 600.

This case does limit to the trustee the right, under General Order 21 (89 Fed. ix; 32 C. C. A. xxii), to re-examine any claim filed against the estate; but suggests that if the trustee refuse to proceed in accordance with law and justice, that the court could by order compel him so to do or remove him for disobedience.

It seems to me clear that if it had been pointed out to the trustee that the creditors of this estate were offering for proof claims uniformly exaggerated, i. e., demanding 80 per cent. of their debts as they existed in 1904, instead of 20 per cent. thereof; it would have been his duty at the instigation of the bankrupts to have this contention disposed of; and that the bankrupts having failed to exercise this right, given in my opinion by the equity of the statute, they are now estopped from claiming upon their application for discharge, that the claims were wrongfully allowed for the greater amount.

There is no element of surprise in this matter; it must have been obvious while claims were in process of proof that on the nature of the claim allowed would depend the creditor's ability or inability to propound these very obvious objections to discharge. The orderly administration of the act required the bankrupts to exercise what I conceive to be their right, while the judicial process of allowing the claims presented was going on, and not reserve till now what is practically a re-examination of the claim of every creditor who chose to object to discharge.

I think this a case of first impression, and it may be argued on the other hand that the language of section 14b (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]) apparently contemplates a new and independent proceeding to which an estoppel based upon previous proceedings in bankruptcy should not be applied. That section declares that the judge shall hear "such proofs and pleas as may be made in opposition (to the discharge) by parties in interest."

This language evidently does not confine the right of objecting to a discharge to creditors, but in a proper case seems to open the field of objection to any one who can show an interest in the proceeding. For example, it would appear that if the bankrupt had committed an offense which within section 14b 1 would prevent a discharge, such offense might be alleged against discharge by the District Attorney, who, as representing the justice of the United States would, I think, clearly be a "party in interest," although he had before that time taken no part whatever in the bankruptcy proceeding. From which it may be urged that upon an objection to discharge duly filed by any "party in interest," a new proceeding is instituted in which every right of the objector to urge his contention may be considered de novo.

As it is upon this theory that the commissioner has proceeded in his very careful report, I shall consider the question of the objecting creditors' standing, although, as above noted, I am inclined to the opinion that the bankrupts are estopped by the judicial allowance of the claims in question from contesting either their amount or the standing conferred by their allowance at the higher figure.

The compromise agreement referred to was entirely outside of the bankruptcy law; it is, in effect, a composition at common law or a "voluntary composition deed." Looking at the instrument in question, therefore, as a voluntary composition, it appears to me plain upon its language that it was the intent of the parties thereto, including these bankrupts, that it should not and could not operate as a novation until and unless both the money and the notes were actually paid. The language is not that certain considerations are accepted in settlement and compromise, but that the creditors agree to accept a certain percentage of their allowed claims "which shall be paid" in the manner specified. The use of future tense seems conclusive as to the intent of the parties.

The presumption of law with respect to any voluntary composition agreement is that it is only discharged "when the terms of the composition are carried out," which includes payment, and not a mere issuance of paper. Ransom v. Geer (C. C.) 12 Fed. 607, with approval.

Considering that the agreement of 1904 was not done under the sanction of the bankruptcy act, it must be regarded as a New York contract, and unless the explicit language of the agreement requires a contrary construction it is clear that in this state a failure to carry out to the letter a composition agreement revives the original debt. Dale v. Fowler, 12 How. Prac. (N. Y.) 462.

It is to be remembered that the notes given in 1904 by these bankrupts were their own notes unindorsed, and their issuance and receipt followed by their nonpayment have been well described upon the argument as an accord without a satisfaction. Nonpayment of such notes clearly revives the original debt. Booth v. Smith, 3 Wend. (N. Y.) 68; Conkling v. King, 10 Barb. (N. Y.) 375.

The second of the specifications of objection above noted is also, I believe, a case of first impression; but with the commissioner I am of opinion that it is the act of issuing a materially false statement, and the fraudulent intent of the man who issues it, that the statute seeks to punish by refusing a discharge. It should not depend upon the whim or good nature of any particular creditor to whom the false statement was made whether the offending bankrupt should be given or refused his discharge. Any "party in interest" who chooses to bring the wrongful act to the attention of the court and proves that it was wrong within the meaning of the statue is entitled so to do.

In a case arising under a different subdivision of the statute, and upon facts quite different, Referee Dexter of this district has expressed opinions quoted by the commissioner herein, and which I adopt as a terse statement of the views I entertain:

"The policy of the bankruptcy act is founded on equal rights and privileges to all creditors; it is not intended as a means to punish the bankrupt at the option of the defrauded creditor only. Discharge from debts is a mat-

ter of favor, and not a matter of right. Honesty on the part of a bankrupt is rewarded by a discharge. Fraud and dishonesty are stamped with disapproval of a discharge. Contumacy on the witness stand, a previous discharge within six years, obtaining money upon false statements, and the commission of an offense punishable by imprisonment under the act, are all valid objections to a discharge, and are not limited to the defrauded creditors alone, but may be urged by any and all creditors. It is the fraudulent conduct that is aimed at, and not retaliation for the individual loss. So that in a peculiar sense, the concern of one creditor is the concern of all. As all share equally in the distribution, so all are protected equally by the withholding of a discharge." In re Berry (Jan. 6, 1905).

The question raised by the first of the above-noted findings of the commissioner is interesting, but it appears to me (in this case) wholly academic. It has never been decided whether under any circumstances a false statement contained in a report to a commercial agency can be made the ground of successful objection to discharge. The considerations advanced in Re Dresser & Co. (D. C.) 13 Am. Bankr. Rep. 619, 620, 144 Fed. 318, are entitled to great weight, and, in my opinion, show that the usual commercial agency report obtained by an agency in order that it may give the new merchant a "rating," and for general distribution among its customers, cannot be made the basis of successful action by an objecting creditor

If, however, such a report as is here shown, be obtained from a merchant by a commercial agency at the request, disclosed or undisclosed, of one or more of the agency's customers, it seems to me incredible that the merchant furnishing such report can be supposed to have given it for any other purpose than of enlightening those persons who habitually deal with him on credit as to his true financial condition. The custom of trade is so well known that when an agency applies to a merchant for a specially signed report on his condition he must know that such report is for the special purpose of enabling those who usually vend him goods to decide upon his financial responsibility.

The testimony in this case leaves me in doubt whether the report produced by Faulkner, Page & Co. was a "special report" or not, or whether it was obtained at the instance or request of Faulkner, Page & Co. or any other creditor or customer of the bankrupts. If the report were obtained upon special request, I fail to see why the doctrine of Mills v. Brill, 105 App. Div. 389, 94 N. Y. Supp. 163, and Eaton v. Avery, 83 N. Y. 31, 38 Am. Rep. 389, should not apply. It cannot be that a merchant may in bankruptcy avoid the consequences of making false statements by always making them to a commercial agency, even though such agency specially request him to tell the truth for a special purpose.

This specification the commissioner has overruled, but inasmuch as he has refused the discharge on other grounds, the discussion, though interesting, is not at present material.

The report is confirmed, and the discharge denied.

Ex parte BROWNE.

(Circuit Court S. D. New York. August 14, 1906.)

EXTRADITION—INTERNATIONAL—RIGHTS OF ACCUSED AFTER EXTRADITION.

In view of Rev. St. §§ 5272, 5275 [U. S. Comp. St. 1901, pp. 3595, 3596], which place a legislative construction on all extradition treaties requiring that a person surrendered thereunder shall not be arrested or tried for any other offense than that which was charged in extradition, until he shall have had a reasonable time to return unmolested to the country from which he was brought, a person extradited from Canada to the United States under the Treaty of 1889 for trial on a pending indictment cannot be seized by officers of the United States on his arrival in this country and imprisoned in execution of a prior judgment against him on a different charge.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Extradition, §§ 22–24; vol. 14, Cent. Dig. Criminal Law, § 195.]

On Writ of Habeas Corpus Obtained by Charles C. Browne.

Henry L. Stimson, Dist. Atty., and W. Wickham Smith, Special Dist. Atty., for the United States.

Black, Olcott, Gruber & Bonynge, for relator.

HOUGH, District Judge. In the year 1903 several indictments were found by the grand jury of this district against the relator. In one he was charged with conspiring to defraud the United States of duties upon imports, and in another with procuring the admission of goods into the United States in violation of Revised Statutes, § 5444 [U. S. Comp. St. 1901, p. 3677]. Upon the conspiracy charge Browne was duly convicted and sentenced to a term in the prison at Sing Sing. This conviction was affirmed upon appeal, and an application for certiorari to the Supreme Court refused. Upon the charge under section 5444 he has never been tried. Browne, having been released on bail pending appeal, fled to Canada after the affirmance of his conviction. Thereupon the United States demanded his extradition as a convict, pursuant to our extradition convention of 1889 with the government of Great Britian. This demand was refused. Immediately a new demand was made, based upon the indictment for violation of section 5444. This requisition Canada honored, and delivered Browne to the proper officer, with whom he was traveling when he was arrested on the railroad train under a warrant based upon the conspiracy conviction, taken away from the extradition officer who had him in charge, and lodged in Sing Sing; whence he has been brought under this writ alleging that his incarceration is in violation of the obligations of the United States under the Ashburton Treaty of 1842 as extended by the above-mentioned convention of 1889, and therefore in violation of the supreme law of the land. The return to the writ shows no warrant for holding Browne in prison, other than his regular commitment under the conspiracy conviction.

Counsel have discovered no instance later than Miller's Case (C. C.) 23 Fed. 32, of the extradition of a convict upon an untried charge followed by imprisonment under his conviction. Miller was before Judge Acheson in 1885, and governmental action substantially identical with that taken here was distinctly approved. The celebrated case of Rauscher, 119 U. S. 407, 7 Sup. Ct. 234, 30 L. Ed. 425, was argued early in 1886, and the court does not advert to Judge Acheson's ruling. This omission of so important an instance from so thorough a review of the whole subject of extradition can only have occurred because Miller's Case was not reported in time for consideration. It is now brought forward as justification for the manner of Browne's incarceration. Such claim cannot be sustained, for Miller may have been, and Browne may be, lawfully detained, but not for the reasons advanced by Judge Acheson, whose whole opinion is based on the decisions carefully considered, and decisively overruled in the Rauscher Case.

The learned counsel for the government remind the court that since 1885 no facts like the present have arisen for judicial consideration, and, while admitting that the judgment in Rauscher's Case has for 20 years rendered it unlawful to try a person surrendered in extradition for any offense committed prior to surrender other than that specified in the demand for extradition, assert (1) that upon the true construction of the Rauscher Case it is lawful to apprehend an escaped convict, even though at the time of apprehension he has been brought within this country solely by virtue of a demand in extradition wholly unconnected with the crime for which he became a convict; and (2) that such right to seize convicts is especially secured to our government in its relations with the king of Great Britain and Ireland by the terms of the Ashburton Treaty of 1842 as supplemented by the extradition convention of 1889, the latter instrument, be it noted, having come into existence since the Rauscher decision. The arrest of Browne under the circumstances above recited certainly constitutes a vigorous assertion of this doctrine. Counsel have, respectively, laid stress upon the manner of Browne's flight to his Canadian asylum, and the "trick" of getting him within the reach of the warrant now holding him in prison, upon the pretense of wanting him upon another charge. These considerations, however, are all circumstances of inflammation, for neither the manner or time of Browne's escape nor the intent behind his enforced return are material to the present inquiry. They suggest subjects fit for diplomatic, rather than for judicial, consideration.

The sole question here presented is not whether that which has been done is wrong or tricky, or injudicious, but whether it is unlawful. Concededly the facts submitted are very different from those considered in the case of Rauscher, but I cannot concur in the narrow view of that decision now urged upon me. The Supreme Court there found great contrariety of opinion not only among judges, but diplomats, as to what might or might not be done

to persons delivered upon demands in extradition. It had under especial consideration the Ashburton Treaty, which on these points is entirely silent; and it must have been aware that the action of this court in the case of Lawrence (so elaborately considered in the Rauscher opinion) had resulted in a refusal on the part of Lord Derby to honor our demand for the surrender of one Winslow unless the United States would especially covenant to do nothing and permit nothing to be done to Winslow, except try him for the offense for which his surrender was requested—a position in which Secretary Fish found it inconsistent with the dignity of this country to acquiesce. Such situation called for and received what I must regard as a declaration of principles by a co-ordinate branch of our government and a chart in all matters of extradition, not grounded upon mere legality, but resting on foundations of national honor. The sum of the doctrine declared is, in the language of the court:

"This right [of extradition], the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made. It is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited and bad faith to the country which permitted his extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them."

Nor are decisions wanting in which the broadest significance has been given to the judgment containing these vigorous expressions.

In Re Reinitz (C. C.) 39 Fed. 204, 4 L. R. A. 236, Judge Brown of this district discharged from custody a man arrested on civil process immediately after his acquittal of the charge of forgery upon which he had been extradited, remarking that the case of Rauscher had definitely settled that an extradited person "cannot be arrested or tried" for any offense committed prior to extradition other than that for which he had been surrendered. In re Baruch (C. C.) 41 Fed. 472, the same distinguished jurist quoted the above extract from the Rauscher opinion and applied it to the case of one who had been haled from New Jersey to New York in order that he might be extradited, and upon his discharge and before returning to New Jersey had been arrested in civil process for the same cause as that for which his extradition had been demanded. He further referred with approval to the opinion of Governor Hill of this state in the case of Hope (Sup.) 10 N. Y. Supp. 28, who, speaking of the Rauscher judgment, says:

"The true theory which now seems to be firmly established is that a state should not be allowed to obtain jurisdiction of the fugitive from justice and then to take advantage of jurisdiction thus obtained and to use it for another and a different purpose."

In Hall v. Patterson (C. C.) 45 Fed. 352, the late Judge Green of New Jersey expressed his view of the Rauscher Case by saying that

after one delivered in extradition be tried and acquitted "he is entitled to have granted to him a reasonable time in which to leave the country before he can be arrested and held to answer for any other crime committed before extradition."

It is also to be remembered that the Rauscher judgment proceeds, not only "upon the ground of a right given impliedly by the terms of the treaty between the United States and Great Britain" (although the Ashburton Treaty is entirely silent on the subject), but also given "expressly by the acts of Congress in the case of a fugitive surrendered to the United States by a foreign nation." Lascelles v. Georgia, 148 U. S. at 542, 13 Sup. Ct. 687, 689, 37 L. Ed. 549. The acts referred to are sections 5272 and 5275, Rev. St. [U. S. Comp. St. 1901, pp. 3595, 3596]; and they remain to-day as they were in 1886, a "congressional construction" of extradition treaties (i. e., of all extradition treaties), "binding upon the judiciary," such construction requiring that a person brought into this country upon extradition shall not be arrested or tried for any other offense than that with which he was charged in extradition "until he shall have had a reasonable time to return unmolested to the country from which he was brought." U. S. v. Rauscher, supra. It is idle to attempt distinctions between convicts and persons indicted, arrests on mesne process and final commitments, between civil and criminal proceedings. The Rauscher judgment, as well as subsequent interpretations thereof, fully warrant the doctrine approved by Sir Edward Clarke in his work on Extradition, that the person extradited cannot be "detained" for any other than the extradition offense until he has had a reasonable opportunity to return to the delivering country.

It remains to consider the contention that the rule above set forth has been (as to Great Britain at all events) abrogated by the convention of 1889. If it were not for sections 5272 and 5275, Rev. St., and the construction given thereto by the Supreme Court, the argument would have more weight; but it was distinctly held that these statutes alone were sufficient to uphold the doctrine of the Rauscher Case, and Justice Gray gave his adherence thereto solely upon that construction. Unless, therefore, the convention of 1889 has abrogated the statutes as well as superseded the doctrine based upon the right "implied" from the Ashburton Treaty, the rule must remain the same.

Article 2 of this convention, after providing that no surrender shall take place if the offense in respect of which surrender is demanded "be one of a political character," declares that:

"No person surrendered by either of the high contracting parties to the other shall be triable or tried or be punished for any political crime or offence or for any act connected therewith, previously to his extradition."

Article 3 declares that:

"No person surrendered by or to either of the high contracting parties shall be triable or be tried for any crime or offence committed prior to his extradition other than the offence for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered."

Article 7 declares that:

"The provisions of the said 10th article (i. e., of the Ashburton Treaty), and of this convention, shall apply to persons convicted of the crimes therein respectively named and specified whose sentence therefor shall not have been executed."

It is strenuously contended that the omission of the word "punished" from article 3, above quoted, leaves the United States free to punish by imprisonment a convict found within its borders, even if at the time of his apprehension he be within the country solely under a warrant in extradition. But these treaty provisions are primarily the obligations of the contracting governments each to the other. They do not purport to repeal or modify any law of the United States, and they are not inconsistent with the continued enforcement of sections 5272 and 5275, Rev. St., which constitute a rule of conduct obligatory upon the officers of the United States, whose conduct is here questioned. It is, of course, true that a statute inconsistent with a treaty is repealed by implication. It is too clear for argument that there is no such implication in this instance. I am therefore of opinion that without further interpreting the language of the convention the governmental contention is untenable in the light of the above referred to sections of the Revised Statutes as still authoritatively interpreted by the case of Rauscher.

It is doubtless true that the insertion of the word "punished," in article 3 of the convention, would have rendered that instrument clearer, and the argument is not without force that its omission is notable in view of its presence in many other extradition treaties negotiated with other nations at or about the same time. As, however, I regard the general doctrine laid down in the case of Rauscher as based upon existing statutes of the United States to be entirely conclusive of this matter, I need not pursue the consideration of the convention of 1889 further than to say that it appears to me very doubtful, in view of the provisions of article 7, that article 3 should be so construed as to permit either of the contracting parties to do by indirection under that article what neither could do openly under article 7, and that I consider the insertion of the word "punished," in article 2, as no more than a recognition of the historical fact that political offenses are frequently punished without trial.

I have given this cause consideration proportioned rather to its importance than its apparent difficulty, and conclude that in my opinion, as long as the present federal statutes on the subject remain in force, unrepealed either by Congress or the express language of a treaty, there is no authority of or within these United States having any right or power to seize, arrest, confine, or detain any person extradited in pursuance of treaty provisions and for a specific offense, for any other offense, crime, or cause whatsoever (committed or existing before his extradition) except for that specific offense, crime, or cause by reason of which the extradition has been granted; and, further, that this doctrine rests, not only nor principally upon the civil rights or personal privileges of a fugitive criminal who has been returned in accordance

with an increasingly civilized international law, but upon the highest grounds of national honor, imposing upon this government and upon all persons subject to its rule the obligation to deal with the human being intrusted to them by a friendly foreign power, only in respect of the matter by reason of which he was so intrusted.

Let the relator be discharged.

KNUTH et al. v. BUTTE ELECTRIC RY. CO. et al.

(Circuit Court, D. Montana. May 28, 1906.)

No. 300.

1. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—JOINT ACTION FOR TORT.

An action to recover damages for the negligent injury of a person while a passenger on a street car is one ex delicto, and not on the contract of carriage, and the plaintiff may join as defendants the street railroad company and an employé, where their joint negligence is alleged to have been the cause of the injury; and in such case the cause of action is not separable for the purpose of removal.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 97.

Separable controversy as ground for removal of cause to federal court, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co., 35 C. C. A. 155.]

2. SAME—FRAUDULENT JOINDER.

Where a joint cause of action against a resident and a nonresident defendant for a tort is stated in the complaint, the joinder of the defendants is within the plaintiff's right, and the cause is not removable on the ground that such joinder was for the fraudulent purpose of preventing a removal, unless such actual purpose is alleged and proved.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 79.]

3. PARTIES—JOINDER.

Where plaintiffs have a joint cause of action against a resident and a nonresident defendant, their motive in joining them is not a proper subject of inquiry.

At Law.

The plaintiffs brought this action against the defendants to recover damages for the death of Bertha Knuth. It is alleged in the complaint that the plaintiffs and the defendant Alfred Jackson are citizens of the state of Montana, and that the defendant Butte Electric Railway Company is a corporation organized and existing under the laws of the state of West Virginia, doing business as a common carrier, operating an electric railroad for the transportation of passengers at Butte, Mont. It is charged that on the 20th of August, 1905, Bertha Knuth, who was 16 years of age, was returning to the city of Butte from a resort just beyond the city limits known as "Columbia Gardens." She was a passenger on one of the electric cars of the defendant company; it being alleged that the defendants were jointly running and operating the car upon which Bertha Knuth took passage and was riding, and that each was bound to the exercise of great care and caution in running and operating the car, to the end that, as a passenger, she would be safely

transported to her destination. It is alleged that the track was laid upon a certain street known as Utah avenue, and across the tracks of the Butte, Anaconda & Pacific Railway Company, which latter company owned and operated a steam railway, and frequently ran cars upon its tracks, all of which was well known to the defendants. It is alleged that the point of crossing of the tracks of the electric railroad company and the Butte, Anaconda & Pacific Railroad was a highly dangerous place, and that there was always great danger of the cars or engines of the steam railway company running into the cars of the electric company, and killing or injuring passengers, and that such danger was well known to the defendants, and was not known to Bertha Knuth; that it was necessary for the defendant company and its employés to exercise extraordinary care in passing the crossing referred to; that on the evening of the 20th of August, when the car on which Bertha Knuth was riding was passing up Utah avenue, it was carelessly and negligently run upon the railway crossing by the defendants, while an engine and a train of freight cars were being operated by the steam railroad company, and that the cars so operated, or one of them, was with great force run against the car in which Bertha Knuth was riding; that the car was overturned and wrecked, and that Bertha Knuth was thrown under the wreck, where she was pinioned down with other passengers; and that she was not taken out for about one and one-half hours, by reason of all of which she was injured, and suffered greatly, and as a result of her injuries died a few days thereafter. Plaintiffs are father and mother of the dead girl. They allege that she greatly assisted them; that the father is a cripple, and the mother is not able to work; that if the defendants had exercised the care and caution required of them in the operation of the electric railway and the running of the car, the collision would not have occurred; that the death of the child was caused solely by the negligence and want of proper care on the part of the defendants. The defendant Butte Electric Railway Company filed a separate demurrer, which was general and special. Thereafter it filed its petition for removal, alleging that it was a corporation organized and existing under the laws of the state of West Virginia; that the allegations of negligence on the part of the defendant company were controverted by the said company; and that the plaintiffs fraudulently and improperly joined as codefendant with the petitioner Alfred Jackson, who was and is a citizen and resident of the state of Montana, and that the sole purpose of joining him as a defendant was to defeat the jurisdiction of the United States court. The necessary bond was given, and the cause was transferred to this court. A motion to remand has been filed upon the ground that there is no jurisdiction in this court.

John J. McHatton and J. G. Brown, for plaintiffs.
W. M. Bickford and Geo. Shelton, for defendants.

HUNT, District Judge (after stating the facts). The counsel for the defendant corporation have presented a learned and elaborate brief, urging reasons why jurisdiction is in this court. But after a very careful study of the opinion of the Supreme Court in Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, and of the allegations of plaintiffs' complaint herein, I am convinced that, upon the face of the complaint, the action appears to be joint. The defendants owed a common-law duty to plaintiffs' intestate. This duty was independent of any contract, and a right to recover may be founded upon a neglect of such duty. The action is, therefore, ex delicto, and defendants, joint tort-feasors, may be sued separately or jointly, as plaintiffs elect. Sessions v. Johnson, 95 U. S. 347, 24 L. Ed. 596.

The fact that plaintiff's complaint sets forth that plaintiffs' intestate was a traveler upon one of the cars of the defendant corporation, and paid her fare, does not justify the inference that the action is upon a breach of the railway company's undertaking. Plaintiffs may properly show that deceased was a passenger, to show the relationship of passenger and carrier, and that on account of such relationship a duty arose on defendants' part to exercise vigilance and care in carrying the passenger. This duty, however, is imposed independently of contract, and for a breach of it action lies, and no contract is required to support it. Atlantic & Pacific Railroad v. Laird, 164 U. S. 393, 17 Sup. Ct. 120, 41 L. Ed. 485; Guardian Trust Co. v. Fisher, 200 U. S. 67, 26 Sup. Ct. 186, 50 L. Ed. 367.

In Doremus v. Root et al. (C. C.) 94 Fed. 760, Judge Hanford, with remarkable terseness, stated the controlling propositions and rules which must be held applicable to the case at bar. He said:

"(1) An action to recover unliquidated damages for a personal injury caused by negligence, although the negligence complained of amounts to a breach of contract on the part of the defendant, belongs to the class of cases denominated 'actions ex delicto.' The tort is the ground of action, and the law of torts must govern the case. In such a case the plaintiff may join several as defendants, and if upon the trial he fails to sustain his complaint against all, but does sustain it against one of them, he may dismiss as to the others and recover against the one found to be liable. Railway Co. v. Laird, 164 U. S. 393–403, 17 Sup. Ct. 120, 41 L. Ed. 485.

"(2) In such an action against several defendants, sued as if they were jointly liable to the plaintiff, they must all meet the plaintiff upon the ground chosen by him; and, even though the complaint shows affirmatively that they have not acted jointly in such a manner as to incur a joint liability, still they cannot divide the cause, so as to present a separate controversy as to the separate acts of each. The defendants are not permitted to recast the issues tendered by the complaint, so as to make several lawsuits in place of the one case which the plaintiff has elected to prosecute against them all jointly. Little v. Giles, 118 U. S. 596–608, 7 Sup. Ct. 32, 30 L. Ed. 269.

"(3) When the right to remove a case from a state court into a United States circuit court depends upon the nature of the controversy and the questions to be litigated, the complaint alone is to be considered for the purpose of ascertaining the nature of the controversy, and finding out what questions are involved. Although defendants by their pleadings may introduce new matter and raise additional questions, they cannot so change the case as to make it cognizable in a federal court, if it was not so at the outset. Walker v. Collins, 167 U. S. 57–60, 17 Sup. Ct. 738, 42 L. Ed. 76.

"(4) Where two defendants are sued together, and the plaintiff demands judgment against both, the court cannot assume that either one of them is the real party against whom the plaintiff intends to wage his action, and that the other has been joined as a codefendant merely for the fraudulent purpose of depriving the real defendant of his right to remove the case into a United States circuit court. In order to sustain the jurisdiction of the federal court on that ground, it is necessary for the removing defendant to allege and prove such fraudulent purpose on the part of the plaintiff. Warax v. Railway Co. (C. C.) 72 Fed. 637."

A joint cause of action being alleged, the following language of Justice Day seems determinative of the question presented by the motion:

"Does this become a separable controversy within the meaning of the act of Congress because the plaintiff has misconceived his cause of action, and

had no right to prosecute the defendants jointly? We think, in the light of the adjudications above cited from this court, it does not. Upon the face of the complaint (the only pleading filed in the case) the action is joint. It may be that the state court will hold it not to be so. It may be (which we are not called upon to decide now) that this court would so determine if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal. The case cannot be removed unless it is one which presents a separable controversy, wholly between citizens of different states. In determining this question the law looks to the case made in the pleadings, and determines whether the state court shall be required to surrender its jurisdiction to the federal court."

Nor can the motion be denied because of the alleged fraud in joining Jackson as a defendant. Plaintiffs had a right to join him as a defendant, and appear to have done so in good faith. Having a right so to proceed against all defendants, and having stated a joint cause of action, their motive in joining all defendants is not the proper subject of inquiry in this court. Finding no issue to be tried as to fraudulent joinder, I hold the point not well taken.

The motion to remand is sustained, and the cause is ordered remanded to the District Court of the Second Judicial District of the state of Montana in and for the county of Silver Bow.

AMERICAN CEREAL CO. v. WESTERN ASSUR. CO.

(Circuit Court, N. D. Iowa, Cedar Rapids Division. August 1, 1906.)

No. 193.

1. INSURANCE—INSURABLE INTEREST.
A bailee, mortgagee, or other lienholder on property has an insurable interest therein.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 139–157.]

2. PLEADING—CONCLUSIONS.
An allegation in a petition on a policy of insurance that the policy insured plaintiff as well as the owner of the property was but a legal conclusion; the question as to who was the assured being determinable from the contract of insurance.

3. INSURANCE—POLICY—CONSTRUCTION—INSURED.
Where a policy provided that, in consideration of the premium, the company insured the Inman Manufacturing Company against loss, etc., on the following described property, the loss, if any, payable to the American Cereal Company, as its interest might appear, the manufacturing company and not the cereal company was the insured.

4. SAME—PROOF OF LOSS—STATUTES—POLICY—PROVISIONS.
Code Supp. Iowa 1902, § 1742a, providing that, in furnishing proofs of loss under any contract of insurance, it shall only be necessary for the "assured" to give notice in writing of the loss to the company issuing the contract, etc., supersedes the provisions of the policy so far as it relates to proofs of loss.

5. SAME—RIGHT OF ACTION—CONDITION PRECEDENT.
The furnishing of proofs of loss is a condition precedent to a right of action to recover therefor, and, unless the proofs are waived by the insurer, the action cannot be maintained until they have been furnished.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1322.]

6. SAME—ACTION—PLEADING.
In an action on a policy, the petition must allege the furnishing of proofs of loss or a waiver thereof by the insurer, or the petition is demurrable.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1593, 1603–1605.]

7. SAME.
Where a policy insured a manufacturing company, loss, if any, payable to plaintiff, a mere allegation in the petition that the insured had neglected and refused to furnish proofs of loss was insufficient to justify plaintiff in furnishing the same.

On Demurrer to Petition.

Dawley Hubbard & Wheeler, for plaintiff.
Carr, Hewitt, Parker & Wright and Grimm, Trewin & Moffit, for defendant.

REED, District Judge. The petition alleges that October 22, 1904, the defendant, through its Cedar Rapids agent, at the solicitation of

the plaintiff, made and delivered to plaintiff its policy of insurance agreeing to insure the Inman Manufacturing Company and plaintiff against loss or damage by fire to the amount of $2,500, for one year from October 23, 1904. That plaintiff paid for said insurance, and the policy provides: "Loss, if any, payable to the American Cereal Company as their interest may appear." That at the time of making said contract of insurance the plaintiff had an insurable interest in the property covered by said policy, and continued to have until said property was destroyed by fire, as hereinafter stated. That on March 7, 1905, while said property was so insured, the same was destroyed by fire. That plaintiff made and gave to defendant notice in writing of said loss, and on April 15, 1905, furnished to defendant proofs thereof under oath as required by said policy and the law of Iowa, copies of which said notice and proofs are annexed to the petition as parts thereof. A copy of the policy is also attached to the petition, the material parts of which are as follows:

"Western Assurance Company, in consideration of the stipulations herein named and of fifty dollars premium, does insure the Inman Manufacturing Company for the term of one year from the 23d day of October, 1904, * * * against all direct loss or damage by fire * * * to an amount not exceeding twenty-five hundred dollars, to the following described property while located and contained as described herein, to wit: Inman Manufacturing Company, $2,500.00, on all fixed and movable machinery and machines with their spare parts, attachments and connections * * * while stored in the brick and frame iron-clad metal roof building of the American Cereal Company known as 'Elevator D' and situated on block 21, Cedar Rapids, Iowa. * * * Other insurance concurrent herewith permitted. * * * Loss, if any, payable to the American Cereal Company as their interest may appear.

"Attached to and made a part of policy No. 184,134 of the Western Assurance Company.

"Dated October 22nd, 1904.

"[Signed] Henry B. Soutter, Agent."

The defendant demurs to the petition upon the grounds: (1) That it is not alleged that the proofs of loss were made by the insured, the Inman Manufacturing Company; and (2) that the Inman Manufacturing Company is a necessary party to the suit.

The first ground of the demurrer is the only one urged in argument, and the only one that need be considered, and it presents for determination the question: Who is the "insured" under the allegations of the petition and the terms of the policy? That a bailee, mortgagee, or other lienholder upon property has an insurable interest therein is not open to dispute. There was no written application for the insurance in question, and the policy does not show who obtained or paid for the same, but the petition alleges, and the demurrer admits, that plaintiff had an insurable interest in the property; that defendant, at plaintiff's request, and on payment by it therefor, made and delivered to plaintiff the policy in question. The petition also alleges that the policy insures the plaintiff as well as the Inman Manufacturing Company. This, however, is but a legal conclusion, and the question as to who is the insured must be determined from the contract of insurance. That contract in unmistakable terms insures the Inman Manufacturing Company only, and the loss, if any, under

the policy, would be the loss of that company and not of the plaintiff, though the defendant agrees to pay to plaintiff the amount of such loss as its interest may appear. This seems to be directly so held in Snell v. Insurance Co., 98 U. S. 85–88, 25 L. Ed. 52, and by Mr. Justice Miller in Williams v. Insurance Co. (C. C.) 24 Fed. 625. See, also, Thompson v. Phenix Ins. Co., 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408; Bailey v. Insurance Co. (C. C.) 13 Fed. 250; Abraham v. Insurance Co. (C. C.) 40 Fed. 723; Fink v. Queen Ins. Co. (C. C.) 24 Fed. 318; Esch v. Home Ins. Co., 78 Iowa, 340, 43 N. W. 229, 16 Am. St. Rep. 443; Longhurst v. Insurance Co., 19 Iowa, 364; Ayres v. Insurance Co., 17 Iowa, 176–191, 85 Am. Dec. 553.

In Insurance Co. v. Chase, 5 Wall. 509, 18 L. Ed. 524, the policy insured Wm. Chase, who was one of the trustees and a creditor of the society that owned the property insured, and he obtained and paid for the insurance taking the same in his own name, with a provision that the loss, if any, is payable to Grenville M. Chase, who was a creditor of William Chase. Neither the interest of William Chase nor of Grenville M. Chase was shown by the policy. It was held that Grenville M. Chase might properly sue to recover for the loss, and that oral evidence was properly admissible to show the interest of William Chase in the property. California Ins. Co. v. Union Compress Co., 133 U. S. 387, 10 Sup. Ct. 365, 33 L. Ed. 730, and Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527–542, 23 L. Ed. 868, are to the same effect; the contract in each case being in the name of the plaintiff, who obtained and paid for the insurance. Traders' Ins. Co. v. Pacaud, 150 Ill. 245, 37 N. E. 460, 41 Am. St. Rep. 355, Hathaway v. Orient Ins. Co., 134 N. Y. 409, 32 N. E. 40, 17 L. R. A. 514, and Liverpool, etc., Ins. Co. v. Davis, 56 Neb. 684, 77 N. W. 66, relied upon by plaintiff, hold that the person to whom the loss is payable is the proper party to sue to recover for the loss. But in neither of these cases was the question raised as to who should furnish the proofs of loss. True, they speak of the person to whom the loss is made payable as being the insured, though another is named as such in the policy. But this is said with reference to the right of such party to sue for and recover the loss, and in this respect they are in harmony with Insurance Co. v. Chase, above. If it be said that they hold that the party to whom the loss is payable is the insured, when another is named as such in the policy, they are not in accord with Snell v. Insurance Co., 98 U. S. 85, 25 L. Ed. 52, and other cases above cited, and must yield in this court to the rule announced in that case.

Section 1742a, Code Supp. Iowa 1902, provides, in substance, that in furnishing proofs of loss under any contract of insurance for damage to or loss of personal property, it shall only be necessary for the assured to give notice in writing of the loss to the company issuing such contract of insurance, accompanied by an affidavit stating the facts as to how the loss occurred, so far as the same are within his knowledge, and the extent of the loss; any agreement or contract to the contrary notwithstanding. This section supersedes the provisions of the policy so far as it relates to the proofs of loss. Washburn-H. Coffee

Co. v. Merchants' Fire Ins. Co., 110 Iowa, 423, 81 N. W. 707, 80 Am. St. Rep. 311. The furnishing of such proofs is not a condition of the insurance, but is a condition precedent to the right of action to recover for the loss, and unless they are waived by the insurer the action cannot be maintained until they have been furnished. Washburn-H. Co. v. Merchants' Ins. Co., above; Edgerly v. Farmers' Ins. Co., 43 Iowa, 587; Ruthven v. Insurance Co., 92 Iowa, 316, 60 N. W. 663; Ervay v. Fire Association, 119 Iowa, 304, 93 N. W. 290. But the furnishing of the proofs, or their waiver by the insurance company, must be alleged in the petition or it is demurable. Von Genechtin v. Ins. Co., 75 Iowa, 544, 39 N. W. 881.

It is alleged in the proofs of loss attached to the petition that the Inman Manufacturing Company is the exclusive owner of the property insured, subject to a lien thereon in favor of the plaintiff, and that said Inman Manufacturing Company neglected and refused to furnish the proofs of loss, and plaintiff therefore makes the same. No doubt there may be grounds that would be a sufficient excuse for the failure of the insured to furnish the required proofs of loss. Ayres v. Insurance Co., 17 Iowa, 176, 85 Am. Dec. 553. But the mere allegation, without more, that the insured neglects and refuses to furnish proofs, cannot be held a sufficient excuse for not furnishing them. The petition shows upon its face that the proofs were not furnished by the insured named in this policy, and there is no allegation that defendant by any act or conduct upon its part has waived such proofs.

The conclusion therefore is that as the petition now stands the demurrer must be sustained. The plaintiff may amend its petition or stand thereon, as it may elect, within 30 days.

It is ordered accordingly.

DETTERING v. NORDSTROM.

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

No. 1,247.

1. JUDGMENT—CONCLUSIVENESS—RES JUDICATA.

Plaintiff sued for an accounting of mineral derived from a mining claim in which he claimed an interest, and when defendant answered, denying plaintiff's title, plaintiff instituted an action at law to obtain an adjudication of the title, also claiming damages for the alleged wrongful withholding of the possession of plaintiff's interest in the claim. During the trial plaintiff elected to waive the damages, which was allowed over defendant's objection, and judgment rendered in favor of plaintiff for his interest in the claim. *Held*, that such judgment did not estop plaintiff in the suit for an accounting to recover the value of his interest in the ore extracted from the claim; his action in waiving damages being merely a withdrawal of that issue in the suit at law and an election to try the question in the suit for accounting.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1262.]

2. TENANCY IN COMMON—MINES—ACCOUNTING.

The right of a co-tenant to credit for the reasonable expense incurred in taking out the gold from a mining claim, as against his co-tenant, was not affected by his inequitable conduct in denying his co-tenant's title, in violating his parol agreement to carry on no mining on the property, in refusing to account, or in making a false statement in his answer in a suit for an accounting that the profits over and above expenses were but $5,000.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Tenancy In Common, § 97.]

3. SAME.

Where, in an action for an accounting of a co-tenant's interest in a mining claim, defendant offered no proof of the reasonable expenses of extracting the gold dust, the court properly allowed a co-tenant, who was the owner of a one-fourth interest in the mine, one-fourth of the gross output thereof.

4. SAME—EVIDENCE.

In a suit for an accounting of a co-tenant's interest in gold dust extracted from a mine, evidence that the terms of a lease executed between defendant and certain miners who worked the mine were fair and reasonable, and in accordance with the custom of the country at that time for claims of the character of those in question, including a payment thereunder of the sum of $2,000, was inadmissible.

5. PLEADING—OFFSET—EVIDENCE.

Where, in a suit for an accounting, the bill involved mutual accounts, defendant, without pleading, was entitled to prove the items constituting his offsets and expenses, provided they were directly connected with the matters alleged in the bill.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1296.]

6. SAME.

Where a bill by a co-tenant of a mining claim for an accounting was limited to the output of the mine and the expenses incurred in mining, defendant, without pleading, was not entitled to offset expenses incurred by him in surveying the claim and expenses of litigation over the location of the lines of the claim.

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

The appeal in this case is taken from a decree rendered in a suit which was commenced by the appellee against the appellant on September 21, 1903, for an accounting of the gold mined by the latter from a placer mining claim situated in the Nome district in Alaska. The complaint alleged that the appellee owned an undivided one-fourth and the appellant an undivided three-fourths of the mining claim; that from May or June, 1902, up to the time of the commencement of the suit, the appellant had taken from the claim more than $100,000 in gold; that the appellee had demanded of him a statement and accounting of said working and mining, and had demanded that he pay the appellee one-fourth of the gold and gold dust extracted from said claim, less the reasonable expense of extracting the same; that the appellant refused to account; and that the amount of the gold dust extracted from said mine by the appellant was largely in excess of the expense of mining. The appellee prayed for judgment against the appellant that he account for the gold dust so extracted by him, less the reasonable expense of working and securing the same. The appellant in his answer admitted that he had extracted $30,000 from the claim, but denied that the net amount derived by him after deducting expenses of mining amounted to more than $5,000. He denied the title of the appellee to any interest in the claim. The case was tried before the court. The appellee introduced in evidence a deed from the appellant to him, of date March 5, 1901, conveying to him a one-fourth interest in the claim. He also introduced in evidence the judgment roll in an action at law in which he recovered judgment against the appellant for the possession of his undivided one-fourth interest of the mining claim. That action was commenced October 3, 1903, subsequently to the commencement of the present suit. By the complaint in that action damages were claimed in the sum of $25,000 for the alleged wrongful withholding of the possession of the appellee's interest in the claim. Said claim of damages was based upon the alleged extraction from the claim by the appellant of $100,000 in gold dust during the same period for which the accounting is demanded in the present suit. It appears from the judgment roll that on the trial of that action the claim for damages was withdrawn by the appellee. The entry in the minutes of the court is as follows: "This case came on for trial before the court and a jury. Counsel for plaintiff then waived all damages against defendants, which waiver was resisted by counsel for defendant and allowed by the court."

At the trial of the present case the appellee relied on the admission of the answer and introduced no evidence as to quantity of gold extracted by the appellant or expenses incurred by him in so doing. When the appellee had rested his case, the appellant moved that the suit be dismissed, because it appeared from the evidence introduced by the appellee that the matter upon which the suit was founded had been adjudicated in the action at law and that the judgment therein was a bar to the present suit. The motion was denied by the court. Testimony was then introduced by the appellant which showed substantially as follows: That on May 26, 1902, the appellant made a written lay or lease of the mining claim to John Leonard and J. D. Reeves, by the terms of which the latter were to have the first $2,000 taken from the mine and the remaining gross proceeds were to be divided one-half to them and one-half to the appellant; that during the period of time mentioned in the complaint $30,082 was taken from the claim by the laymen, of which they received $16,041 and the appellant $14,041 and that this was the total gross amount of gold dust taken from the claim during the period mentioned in the complaint. The court made findings of fact substantially as follows: That the appellee was the owner of an undivided one-fourth interest in the placer mining claim; that during the period mentioned in the complaint the appellant extracted from the mine $30,000 and appropriated the whole thereof to his own use; that prior to the commencement of the suit the appellee demanded that the appellant account and pay to him one-fourth of the amount of the gold dust extracted from said claim less the reasonable cost of extracting the same; that the appellant refused to render any account or to pay to the appellee any sum whatever. As conclusions of law the court found that the appellant and appellee were since March 5, 1901, tenants in common

of said placer mining claim, and that the appellee was entitled to judgment against the appellant for one-fourth of the sum of $30,000, less the sum of $80 expended by the appellant in shipping a part of the gold dust to Seattle, to wit, the sum of $7,480, with interest thereon at 8 per cent. per annum since September 21, 1903, and costs.

Ira D. Orton, J. K. Wood, and Campbell, Matson & Campbell, for appellant.

James E. Fenton, Albert H. Elliot, and O. D. Cochran, for appellee.

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

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

It is earnestly insisted that the court erred in denying the motion of the appellant, made at the close of the appellee's testimony, to dismiss the suit on the ground that the matter involved therein had been adjudicated in the action at law in which the appellee had waived his claim for damages. We find no merit in the contention. The appellee had brought the present suit for an accounting. When the appellant answered, denying his title, he found it necessary to institute the action at law to obtain an adjudication of his title. When that action came on for trial he chose to withdraw from the issues therein his demand for damages, preferring to litigate the same in the present suit which was then pending. Although the language of counsel for the appellee was that the latter then waived all damages against the appellant, it was not intended to be a waiver of the damages and was not so understood by the appellant. This is made clear by the fact that the appellant resisted the waiver of the damages, he evidently preferring to try the question of the damages in that action rather than in the suit in equity. The action of the appellee can reasonably be construed only as an election to try the question of his damages in the equitable suit wherein an accounting could be had. It was intended to be and was a voluntary withdrawal of that portion of his complaint from consideration in that case.

The appellant contends that he had the right to work the mine and was not a trespasser in so doing, and that in the absence of allegation and proof of ouster of the appellee the court erred in allowing the latter one-fourth of the gross amount taken from the mine. It is clear from the record that the trial court did not rule that the appellee was entitled to one-fourth of the gross output of the mine. The complaint did not so pray, nor did the court so adjudge. From the bill of exceptions it appears that the court said to the appellant's counsel:

"We will adopt the rule that you are accountable for the money value were the ground in place, with the ore in place, less the reasonable expenses of extracting the same."

The appellee had admitted in his complaint that the appellant should be allowed "the reasonable amount for working and securing said gold and gold dust." The appellant had answered, admitting the extraction of $30,000 from the mine, but denying that the amount taken out was in excess of the expenses of mining, except in the sum of

about $5,000. There was nothing in the pleadings nor in the ruling of the court to prevent the appellant from introducing proof of the reasonable expense of taking out the gold dust and obtaining credit therefor. His right to credit for such expenses was not affected by his inequitable conduct in denying his co-tenant's title, in violating his parol agreement with the appellee to carry on no mining on the property, in refusing to account, or in making the false averment in his answer that the profits over and above expenses were but $5,000. The reason why the court allowed the appellee one-fourth of the gross output of the mine is found in the fact that the appellant offered no proof of the reasonable expenses of extracting the gold dust. The only testimony he offered in that respect was that of witnesses to prove that the terms of the lease executed between Leonard and Reeves and the appellant were fair and reasonable and in accordance with the custom of the country at that time for claims of that character, including the payment of the sum of $2,000.

Error is assigned to the exclusion of such testimony, but we think it was properly excluded. It was not competent to prove the reasonableness of the bargain made by the appellant with his lessees. Neither the existence of the lease nor its terms had been pleaded by the appellant. It is true that an answer in a suit for accounting does not have the same scope as an answer in ordinary cases, and that under a bill for an accounting involving mutual accounts, the defendant has nothing to plead in order to have the advantage of the items constituting his offsets and expenses directly connected with the matters alleged in the bill. Goldthwait v. Day, 149 Mass. 185, 21 N. E. 359; Wyatt v. Sweet, 48 Mich. 539, 12 N. W. 692, 13 N. W. 525; Armstrong v. Chemical National Bank (C. C.) 37 Fed. 466. The appellee demanded judgment for one-fourth of the gross amount taken from the mine less the expense of mining. The appellant, notwithstanding that he had set up no items of expense was entitled to prove the reasonable expenses of mining and thereby to reduce the amount payable to the appellee. The appellant relies upon Fulmer's Appeal, 128 Pa. 24, 18 Atl. 493, 15 Am. St. Rep. 662, in which it was held, in the case of a slate quarry uncovered and fully developed with machinery and appliances at hand, that the compensation to the plaintiff was to be measured by the fair market value of the slate in place, which was the royalty or slate-leave for the privilege of removing and manufacturing the slate, in view of all the special circumstances. But the court said:

"Where the mineral land has never been developed and no mines or quarries have been opened, the fair market value of the mineral in place which would be the value of the privilege of removing it in view of all its special circumstances would represent the true measure of compensation to the owner."

The circumstances so alluded to in that case were the fact that the mine was in the region of numerous other slate quarries, that there was proof of a generally established rate of royalty for mining the same, and the slate itself had no fixed market value. The court in that case, however, expressly approved the doctrine of the case of

Coleman's Appeal, 62 Pa. 252, in which Mr. Justice Sharswood ruled that the value of iron ore to be accounted for was its value at the pit's mouth after deducting the cost of mining, but distinguished that case from the case under consideration by saying that the whole tendency of the opinion in Coleman's Appeal was to show that there was no substantial difference between the value of the ore in place and its value at the pit's mouth, except the mere cost of digging and removing it from the one place to the other, and that this, "added to the fact that there never had been any sales of ore-leave at the Cornwall banks, and no proof of the opinions of experts as to what such ore-leave was worth, impelled the adoption of the principle upon which the value of the ore-leave was determined." Those remarks are applicable to the present case. There is no evidence in the record that there was any fixed royalty for mining placer claims in the region in which the mine in question was situated. The offer was to prove by experts that the lease was reasonable. It may be said to be of common knowledge that in Alaska no two placer mines contain the same amount of gold dust, and that it can never be certainly known what will be found beneath the surface of any claim. It may be true, in accordance with the offer of proof, that men could be found to undertake the development of placer claims in that general region upon such terms as the appellant made with his lessees; that is, upon allowing them the first $2,000 extracted from the mine and one-half of the gross amount thereafter taken. Such a venture necessarily is one in which the laymen take chances. If they fail to find gold in sufficient quantity to pay for mining, they can abandon the lease. If they find a rich mine, they have the opportunity to make large profits. The appellee could not be bound by such a lease made by his co-tenant to another. The appellant had no right to waste the substance of the mine. He had the right to operate the mine, but with it went the obligation to account for the output less the reasonable expenses of mining and to prove that expense the burden was upon him. Thatcher v. Hayes, 54 Mich. 184, 19 N. W. 946; Purdy v. Rutter, 3 W. Va. 262.

It is urged that the court erred in excluding evidence offered by the appellant of expenses incurred by him in 1893 in surveying the claim and expenses incurred in litigation over the location of lines of the claim. These items might have been proper offsets, if they had been pleaded in the answer. In the absence of an answer setting up such items, the accounting was necessarily confined to the matter presented by the bill. The accounting which was prayed for was not a general accounting. It related only to the output of the mine and the expense incurred in mining. It could not, under the pleadings, extend to matters not connected therewith. Armstrong v. Chemical National Bank (C. C.) 37 Fed. 466; Purdy v. Rutter, 3 W. Va. 262.

We find no error for which the decree should be reversed. It is accordingly affirmed.

McKAY et al. v. NEUSSLER.

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

No. 1,229.

1. MINES AND MINERALS—CLAIMS—ASSESSMENT WORK—INSTRUCTIONS.
Where, in ejectment for an undivided fourth of a mining claim, defendant claimed a forfeiture because of plaintiff's failure to pay her share of certain assessment work done on the property, but the only evidence of such work was defendant's testimony that he went on the claim and did what he considered $100 worth of work, and that he worked 10 days, and estimated the value at $10 a day, it was not error for the court to refuse to charge that, in determining the amount of work done on the claim, the test was as to the reasonable value of the work, and not what was paid for it, or what the contract price was.

2. SAME—BONA FIDES—QUESTION FOR JURY.
Where defendant claimed a forfeiture of plaintiff's interest in a mining claim because of plaintiff's failure to pay her proportion of certain assessment work alleged to have been performed by defendant, whether defendant made a bona fide attempt to comply with the law in order to obtain a forfeiture of plaintiff's interest was not proper for the consideration of the jury.

3. WRIT OF ERROR—ALLOWANCE OF WRIT—SUERSEDEAS—EFFECT.
By the allowance of a writ of error and the approval of a supersedeas, the trial court lost jurisdiction to correct an error in the judgment apparent on the face of the record.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2803–2805; vol. 2, Cent. Dig. Appeal and Error, § 2201.]

In Error to the District Court of the United States for the Second Division of the District of Alaska.

A. J. Bruner, J. C. Campbell, W. H. Metson, F. C. Drew, and Ira D. Orton, for plaintiffs in error.

J. F. Sullivan, M. I. Sullivan, and Theo. J. Roche, for defendant in error.

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

GILBERT, Circuit Judge. The defendant in error brought ejectment to recover possession of an undivided one-fourth interest in a placer mining claim known as "Bench Claim No. 6 on Anvil Creek" in Alaska. It was admitted that she had formerly owned such interest, but it was alleged in defense of the action that her co-owner, D. W. McKay had in the year 1901 performed upon the claim assessment work of the value of $100 and had served on her a demand for the payment of her proportionate share thereof and a notice of the forfeiture of her interest, and had thus acquired the same. The issues presented for trial were whether assessment work of that value had been done by said McKay in 1901 and whether the requisite notice of contribution had been served upon the defendant in error as required by the statute. Upon these issues the evidence was conflicting. The jury found for the defendant in error.

It is contended that the trial court erred in refusing to give the jury the following instruction, which was requested by the plaintiffs in error:

"With reference to the amount of labor required, you are instructed that the law requires $100 worth of work; and in determining the amount of work done upon a claim for the purpose of representation, the test is as to the reasonable value of said work, not what was paid for it, or what the contract price was. But it depends entirely upon whether or not said work was reasonably worth the sum of $100. It is not the value of the claim, with or without the labor, nor the intrinsic value of the labor to the claim, but whether or not, under all the circumstances which surround the particular locality where the mine was situated at the time the labor was performed, the labor which was performed was reasonably of the value or would reasonably have cost $100."

The instruction so refused might undoubtedly have been proper if the evidence had been such as to render it appropriate. It was not applicable to the case made in the court below, for the reason that there was no evidence whatever that money was paid for the assessment work alleged to have been done by McKay or that a contract was made by him for the performance of the same. McKay's testimony was that he went on the claim and did thereon what he considered $100 worth of work; that he worked 10 days, and estimated the value of his work at $10 per day. On his cross-examination he admitted that he did not know what the prevailing wages were at that time and place for that kind of work. The plaintiffs in error offered no other testimony on that subject. In rebuttal thereof two witnesses testified, on behalf of the defendant in error, that the usual wages paid at that time and place for men to do such work was $2.50 per day and board and that the expense of board was not to exceed $1.50 per day. This condition of the evidence on the subject of the value of the work made applicable to the case the instruction which was given by the court on the subject; but there was nothing in it calling for that portion of the instruction asked for as to money paid or contract price, and we find no error in the refusal of the instruction in the form in which it was proffered.

It is said that the court erred in refusing the following instruction:

"The actual value of the work is the true test whether the law has been complied with; but, where the testimony is conflicting as to the value, it is proper for the jury to consider whether there has been a bona fide attempt to comply with the law"

—and in refusing another instruction in which the court was asked to instruct the jury that, if said D. W. McKay made a bona fide attempt to comply with the law, they should take that fact, if it were a fact, into consideration. To this it is sufficient to say that the bona fides of the attempt of an owner to comply with the law in order to obtain a forfeiture of his co-owner's interest has no part in the questions to be considered by the jury in aid of the proof that he did the requisite assessment work or otherwise. The law does not favor forfeiture. It is true that it has been held, in cases where it has been sought to establish a relocation of a mining claim, that the

bona fides of the prior locator might be taken into consideration in determining whether he had done the necessary assessment work to retain his claim. But this was held on the ground that courts are reluctant to enforce a forfeiture and will not do so, except upon clear and convincing proof of the failure of the former owner to perform the amount of labor required by law. Hammer v. Garfield Mining Co., 130 U. S. 291, 301, 9 Sup. Ct. 548, 32 L. Ed. 964, Emerson v. McWhirter, 133 Cal. 510, 65 Pac. 1036; Callahan v. James, 141 Cal. 291, 74 Pac. 853; Quimby v. Boyd, 8 Colo. 194, 6 Pac. 462.

It is contended that the court erred in adjudging the defendant in error to be the owner of one-half of the mining claim described in the complaint, instead of one-fourth, as claimed by her in her complaint and as found by the verdict. The entry of the judgment, in view of the pleadings and the verdict was evidently a clerical error. No effort was made to correct it in the court below. So far as the record goes, it was first suggested by the assignments of error filed at the time when the writ of error was sued out. By the allowance of the writ and the approval of the supersedeas, the court below lost jurisdiction to correct the error, and the defendant in error had thereafter no opportunity to suggest its correction in that court. The judgment of the court below should be modified, so as to adjudge the defendant in error to be the owner of a one-fourth interest in the premises described in the complaint. This will be ordered without costs to the plaintiffs in error.

The cause is remanded to the court below, with instructions to correct the judgment as above indicated. In other respects the judgment is affirmed.

SMITH v. MEANS.

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

No. 1,194.

1. BANKRUPTCY—MODE OF REVIEW—ADVERSE CLAIM TO PROPERTY.
A proceeding, on a petition filed by an adverse claimant to recover property from a trustee in bankruptcy, is not a proceeding in bankruptcy, but a "controversy arising in bankruptcy proceedings," and is reviewable by appeal under Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432].

2. SAME—EVIDENCE CONSIDERED.
A finding against an adverse claimant of property in possession of a trustee in bankruptcy, made by a referee who heard the witnesses and affirmed by the District Court, *held* sustained by the evidence.

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

Appellant filed his petition alleging that he was the owner and entitled to the possession of a certain steam shovel, which prior to the adjudication had been in the possession of the bankrupt and was since held by the trustee, and praying that the trustee be ordered to surrender possession. The findings of the special master, adverse to petitioner, were approved by the court. Appellee has filed a motion to dismiss the appeal.

F. L. Salisbury, for appellant.

Edwin Terwilliger, Jr., and E. C. Ferguson, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. 1. The motion to dismiss is predicated on the assumption that this is a "proceeding in bankruptcy" and reviewable only under section 24b or 25a. Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]. On the contrary, it is a "controversy arising in bankruptcy proceedings," and the appeal was properly taken under section 24a. In re Friend, 134 Fed. 778, 67 C. C. A. 500.

2. The steam shovel was originally purchased from the makers by Bracey, Howard & Co., was in use by the partnership in construction work in Ohio, and with other construction appliances was under chattel mortgage to appellant. Later the bankrupt corporation was organized and succeeded to the property rights of the partnership. The corporation, desiring to take into Indiana the appliances which at that time were covered by a writ of attachment also, secured the dismissal of the attachment and the release of the mortgage, and the property was removed into Indiana and there used by the corporation. So much is established beyond question by the pleadings and proofs. The claim on behalf of appellant is that, when he released the mortgage, the shovel and some other items were sold and delivered to him, an agreed amount credited on the debt, and other security given for the balance. The master found that in fact neither the title to nor possession of the shovel was transferred to appellant. The question is whether the report of the master, on which the decree appealed from

is based, is sustained by the state of the evidence. The master was in the best position to judge of the weight and credibility of the testimony, which was given orally before him, and his finding, approved by the District Court, should not be disturbed by us, unless it appears that an obvious mistake was made in the consideration of the evidence. Crawford v. Neal, 144 U. S. 585, 12 Sup. Ct. 759, 36 L. Ed. 552. Appellant had the burden of proving title and right of possession. Bracey, president of the bankrupt, was the only witness respecting the alleged arrangement with appellant. His testimony, taken with all inferences most strongly in favor of appellant, was to the effect that at Aurora, Ill., appellant's home, he gave appellant new security for the part of the debt that was not canceled by the transfer of property at agreed values; that, for the price then paid by the cancellation of so much of the debt, he (for his company) orally transferred the title to the shovel and other items to appellant; that appellant sent an agent to Ohio to invoice the property and take possession thereof (which, inferentially, was done); that appellant leased the shovel to witness's company; that appellant through an agent put a sign on the shovel "Leased from C. H. Smith"; and that the company's subsequent possession was as lessee. But in other parts of Bracey's examination, and in the testimony of other witnesses, there was ample basis for finding that Bracey was not in Ohio at the time of the alleged delivery of possession, that no agent of appellant came and took possession, that the bankrupt had continuous possession and control of the shovel, and that the sign was put on, if at all, so that appellant might claim the shovel in case attachments were issued. Testimony of the vice president, the secretary, and a director of the bankrupt that they knew nothing of the alleged sale, and that the shovel was listed with other property as a basis for credit, had to be put in the master's balance against the president's statement that there was a sale. Conflicts among appellant's witnesses as to the wording, size, and materials of the sign, together with the testimony of appellee's witnesses that in Indiana there was neither a sign nor traces thereof on the shovel, raised the question whether there had been a sign even while the shovel was being taken out of Ohio.

Complaint is made of the admission of Bracey's declarations out of court, without the proper foundation being laid therefor. The master's finding shows that it was not based at all upon this testimony, and the court in considering the exceptions is presumed to have acted only upon the competent evidence.

The decree is affirmed.

KEASBEY & MATTISON CO. v. AMERICAN MAGNESIA & COVERING CO.

(Circuit Court, E. D. Pennsylvania. August 27, 1906.)

No. 30.

APPEAL—DETERMINATION—MANDATE OF APPELLATE COURT—COMPLIANCE—PATENTS—DECREE IN SUIT FOR INFRINGEMENT.

Where a decree of the Circuit Court adjudging the invalidity of a patent in a suit for its infringement has been reversed by the appellate court, and the case remanded with express direction to enter a decree "declaring the validity of the patent, and adjudging that claim 1 of said patent has been infringed by the defendant," the Circuit Court has no discretion to vary from such mandate by adjudging only that claim 1 of the patent is valid and infringed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4668.]

On Motion to Settle Interlocutory Decree.

See 137 Fed. 602.

Edward K. Jones, for complainant.

H. S. MacKaye and Kenyon & Kenyon, for respondent.

J. B. McPHERSON, District Judge. I do not feel at liberty to disregard the express direction contained in the mandate of the Court of Appeals; and, in accordance with that direction, the decree must, therefore, declare that the patent is valid, and that claim 1 has been infringed. Merely to decree now (as the defendant proposes) that the patent is valid so far as claim 1 is concerned would be to modify the decree and mandate of the Court of Appeals in an important respect, with regard to which I do not think that I have any discretion.

So, also, concerning the costs in the Circuit Court. It is true that the decision of the Court of Appeals is particularly directed to claim 1 of the patent, and that the language of that court in reference to claims 3 and 5 may perhaps, in strictness, be regarded as dictum. But, even thus regarded, it is certainly indicative of the appellate court's opinion concerning the validity of these two claims and their infringement by the defendant, and cannot fail to have a strong influence upon the discretion of the Circuit Court when it comes to be exercised upon the apportionment of the costs that have accrued below. I hold, therefore, that the complainant is entitled to recover full costs in the Circuit Court, and to recover them now, after proper taxation by the clerk. Costs hereafter accruing will be dealt with in the final decree.

A master will be appointed in a short time to take the usual account.

FOSTER HOSE SUPPORTER CO. v. COHEN.

(Circuit Court, S. D. New York. July 16, 1906.)

PATENTS—INFRINGEMENT—HOSE SUPPORTER.

The Young patent, No. 638,540, for a combined abdominal pad and hose supporter, *held* not anticipated, valid, and infringed, on motion for preliminary injunction.

In Equity. On motion for preliminary injunction.

Phillip, Sawyer, Rice & Kennedy, for complainant.
Herbert Knight, for defendant.

THOMAS, District Judge. The existing decision of this court and the Circuit Court of Appeals fix complainant's patent No. 638,540 in the art to which it belongs. The defendant's device clearly infringes, and it is not thought that defendant's new reference, Woolfolk & Ney No. 572,465, shows such anticipation, as to require modification of the former decision respecting the Young patent.

The motion for an injunction is granted.

In re LLOYD et al.

(District Court, E. D. Wisconsin. May 29, 1906.)

BANKRUPTCY—ELECTION OF TRUSTEE—RIGHT TO VOTE CLAIMS.

The giving out of a list of creditors by a bankrupt to attorneys, before the filing of his schedule, is a practice to be severely condemned, and no attorney should be permitted to vote any claim in the election of a trustee which has come to him through the instrumentality of the bankrupt; but the fact that he so received claims is not sufficient ground for excluding his vote on claims which came to him unsolicited.

In Bankruptcy. On review of decision of referee.

This is a review of the action of Charles H. Forward, referee, in confirming the appointment of the trustee. It appears by the return that on the 26th day of March, 1906, the first meeting of creditors was held. Fifty-five claims had been proven, amounting in the aggregate to $2,079.45. Messrs. Bouck & Hilton had powers of attorney to represent 40 of such claims, aggregating $1,590.30; Messrs. Williams & Williams, 11 claims, $216.61; and C. H. Slocomb, Esq., 1 claim for $95.86. Before any vote was taken for trustee, Messrs. Williams & Williams, representing certain creditors, made the following objection: "Williams & Williams, attorneys, representing 11 creditors, whose claims amount to about $216, for and in behalf of said creditors, object to George Hilton, John Kluwin and William Bouck voting the claims filed by them, and for which they have proxies on behalf of certain creditors, for the reason that said parties have acted in conjunction with W. E. Hurlburt, attorney for the bankrupts, in securing a large portion of the claims represented by them; that said attorney for the bankrupts has personally solicited a large number of the claims represented by said parties on behalf of himself; that the proofs which were sent by said attorney for the bankrupts were sent upon blanks furnished by said Bouck & Hilton, with power of attorney running directly to them. Upon information and belief said attorney for the bankrupts furnished Bouck & Hilton a list of the creditors of said bankrupt prior to the filing of the same; that a large number of the claims filed by said Bouck & Hilton were made and acknowledged before the bankrupts' attorney, on blanks some of which had the printed form of Bouck & Hilton in the power of attorney, etc.; that we verily believe that the allowance of Bouck & Hilton to vote said claims

will be to the detriment of the unsecured creditors." Thereupon a hearing was had upon such objection. The testimony of W. E. Hurlburt and George Hilton was taken. Thereupon the referee found that said Bouck & Hilton were not entitled to vote any of such claims turned over to them by W. E. Hurlburt, attorney for the bankrupts, but that said Bouck & Hilton were entitled to vote 13 claims, aggregating $451.54, that were not obnoxious to the objection. Upon the vote for trustee, C. H. Slocomb, representing 1 claim, voted for J. S. Shelp; Williams & Williams, representing 9 claims, voted for B. J. Daly; Bouck & Hilton voted their 13 claims for J. S. Shelp. Objection was then made to the confirmation of the appointment of trustee by the referee, by reason of the facts set forth in the objections of Williams & Williams. The referee overruled the objections and confirmed the appointment of J. S. Shelp as trustee.

Williams & Williams, for opposing creditors.
Bouck & Hilton, for trustee.

QUARLES, District Judge. It appeared in evidence that it has been customary for bankrupts to furnish lists of creditors to some certain lawyer before the schedules are filed. The referee, in his opinion, denounces this practice as reprehensible. I fully concur in that opinion. By applying to the bankruptcy court, the bankrupt voluntarily surrenders all control over his estate, and the same passes to the officers of the law, under the act. Any effort on his part to control the selection of a trustee, or to shape any of the proceedings of the court, must be resented and rebuked. It is a pernicious intermeddling which cannot be too strongly condemned. Referees should be vigilant to detect, and take all lawful means to prevent, any such interference by the bankrupt in court proceedings. No attorney should be permitted to vote any claim that has come to him through the instrumentality of the bankrupt. The following cases have dealt with this question: In re McGill, 5 Am. Bankr. Rep. 155, 106 Fed. 57, 45 C. C. A. 218; In re Henschel, 5 Am. Bankr. Rep. 25; In re Wooten (D. C.) 118 Fed. 670; In re Lewensohn (D. C.) 98 Fed. 576. It is not professional, but is not unlawful, for lawyers to solicit claims. The ethics and best thought of the profession are opposed to any solicitation of business. But there is no doubt that the practice is common, and perhaps more prevalent in bankruptcy than in other departments. The habit is not to be commended, but matters of taste or etiquette must be left largely to the good sense of the individual attorney. In re Law, 13 Am. Bankr. Rep. 650.

If it appears that any disclosure of the contents of the schedules has been made before the same are filed, the presumption arises that the bankrupt is seeking thereby to accomplish some ulterior purpose, and any claims secured through such illicit practice should not be allowed any part in the selection of a trustee. It must be remembered, however, that, by the terms of the act, the creditors are empowered to select a trustee. It is a serious matter to disfranchise creditors and deprive them of rights expressly conferred by the bankruptcy act. I do not think the referee had power to disqualify the 13 creditors who appear to have employed Bouck & Hilton in the regular way, and who had no concern with the bankrupts in the matter, simply because Bouck & Hilton had received certain other claims through

the instrumentality of the bankrupt. This would in effect be to punish creditors who were innocent in the premises. In re Blue Ridge Packing Co., 11 Am. Bankr. Rep. 36, 125 Fed. 619.

I think the referee could not have done more or less than he did. It appears that the gentleman who was selected as trustee is entirely competent and a man of integrity, and the referee certifies that no injury will accrue to the creditors by reason of his selection. If, in the administration of his office, it should appear that he was guilty of undue partiality to the bankrupts, he may be removed from office upon a proper showing.

For these reasons the ruling of the referee is affirmed.

THE MARTHA E. WALLACE.

DUNNING et al. v. BUCKALOO et al.

(District Court, S. D. New York. June 5, 1906.)

COLLISION—SCHOONERS CROSSING AT SEA—NEGLIGENT LOOKOUT.

A collision at sea in the night between the schooners Reiche and Wallace, which approached each nearly head on but on slightly crossing courses, *held*, on conflicting evidence, due solely to the fault of the Reiche, which was sailing free, and therefore bound to keep out of the way, and held the burden of proof, on the ground that she failed to see the lights of the Wallace until just before the collision, when the vessels were not more than a cable's length apart and then starboarded her helm, although the Wallace was showing her red light, when, the night being clear and the sea smooth, she should have seen the lights some 20 minutes before and observed them from that time. The Wallace *held* not in fault for not showing a flare-up, as permitted but not required, by article 12 of the international navigation rules (Act Aug. 19, 1890, c. 802, 26 Stat. 320 et seq. [U. S. Comp. St. 1901, p. 2867]), but showing a lantern instead, having the right to suppose that her lights were seen until almost the last minute, nor because of a change of course immediately before the collision.

In Admiralty.

Robinson, Biddle & Ward and William S. Montgomery, for Buckaloo and others.

Wing, Putnam & Burlingham, for Dunning and others.

ADAMS, District Judge. These are cross-actions to recover the damages caused by a collision which occurred between the schooners Martha E. Wallace and Fannie Reiche, about 14 miles to the northward and eastward of the Winter Quarter Shoal Light, off the coast of Virginia, on the 23rd day of December, 1905, about 7.40 o'clock P. M. The night was dark but clear. A north north-west wind prevailed, of moderate force. The Wallace was bound from Brunswick, Georgia, to New York, with a cargo of lumber, under and on deck. The Reiche was bound from Philadelphia to Savannah, Georgia, with a cargo of acid phosphate, all under deck. The Wallace struck the Reiche on the starboard side between the main and mizzen rigging, causing her to sink within a few minutes. Damages are claimed on

her behalf of $26,129.25. The Wallace was also injured by the blow to a small extent. Damages are claimed on her behalf of $1,300.

The Reiche was a three masted schooner, 146 feet long and of 440 tons net register. She was making between 4 and 5 knots per hour. The libel, and the answer in the cross suit of the Reiche, allege that for some time before 7.40 P. M. she was approaching the neighborhood of the Winter Quarter Shoal, with her regulation lights set and burning brightly, carrying all sail and steering by compass S. S. W. with the wind N. N. W., the sea being calm; that the night was not foggy but very dark; that the master of the Reiche was on watch, having a competent man at the wheel and a competent lookout stationed on the forecastle head diligently attending to his duty; that shortly before 7.40 P. M. a white light was seen by the lookout on the starboard bow but immediately afterward it disappeared and the schooner held her course; that a short time thereafter a red and white light were also seen on the starboard side and almost immediately thereafter the loom of the sails of the Wallace came into view, as said Wallace swinging to the eastward bore rapidly down on the starboard side of the Reiche; that the master of the Reiche immediately ordered her helm put up and the boom tackle of her fore and mainsails loosened, but before the latter order could be fully obeyed the Wallace struck the Reiche and on the starboard side forward of the mizzen rigging, almost at right angles, inflicting such damage that the crew of the Reiche had barely time to escape with their lives from their own rigging over the bowsprit of the Wallace, while the Reiche subsequently sank and became with all her cargo and equipment a total loss. It is further alleged that the Wallace was in fault for the collision because (1) she did not hold her course, (2) she had no, or no sufficient lights, (3) she, when approaching the Reiche, exhibited an illegal and unauthorized light, to wit, a white light, (4) she maintained no, or no proper, lookout.

The Wallace was a 4 masted schooner 201 feet long and of 1007 tons net register. She had all her sails set and was making between 3 and 4 miles an hour. Her answer, and her libel in the cross suit, allege that she left Brunswick on November 29th, 1905, fully manned and equipped, and on the night of December 23rd, which was clear but dark, she was on the port tack, close hauled, heading about N. E. with the wind about N. N. W.; that her regulation lights were properly set in the fore rigging, and were burning brightly at all times before the collision; that she was under easy sail; that a little after 7 o'clock a light was reported on the port bow which appeared to be a sailing vessel running free, but yawing so much as at times to show the green light, and then at intervals the red light; that the Wallace kept her course as required, but, seeing the approaching vessel had changed her course showing only a green light very close aboard, so that she would not go clear, the master ordered the second mate to show a lantern, under Article 12 of the Regulations to Prevent Collisions at Sea, so as to attract the attention of the other vessel; that the lantern was promptly waved on the port side of the deck of the Wallace, abaft the fore rigging, to warn the people on

the other schooner; that the approaching schooner, however, continued to starboard her helm, coming directly across the Wallace's bow, making a collision unavoidable; that the master of the Wallace then ordered the wheel hard down to deaden the vessel's way and ease the blow, but before this could be completely executed, the vessels came together, the Wallace coming in contact with the other vessel between the main and the mizzen rigging, nearly at right angles; that those on the latter vessel then came over the Wallace's bow and reported that the vessel in collision was the Reiche, which soon disappeared and presumably sank. It is further alleged that the collision was due to faults of those on board the Reiche (1) in not keeping out of the way of the Wallace, (2) in not keeping a competent officer on deck, (3) in not having a sufficient lookout, or one able to speak the language of the officers and (4) in starboarding the helm, throwing herself in front of the Wallace, instead of seasonably porting her helm.

The vessels were approaching each other so that the Wallace exhibited her port side to the Reiche. The latter was yawing so that she exhibited first one and then the other of her side lights to the Wallace. If the Wallace exhibited her red light to the Reiche it was the latter's duty to avoid her, but she contends that at first the Wallace's red light was out so that it was not visible to the Reiche, and a close approach was made before she knew or could have known until too late that there was a vessel in her path. The determination of the question also involves one of proper lookout on the Reiche. The questions have been presented with great skill on both sides.

The argument for the Reiche may be summarized as follows:

There are three reasons why the Wallace should be held solely in fault for the collision: (1) because her port light was not properly burning, (2) because she changed her course, and (3) because she took no timely measures to avert the collision.

(1) The Wallace's port light was not burning.

While it is true that all the witnesses who were on the deck of the Wallace say that her lights were burning or were reported to be burning and that they never knew of the port light having gone out before the collision, the curious coincidence exists that the light was found to be out some hours after the collision and no one seems to know what was the cause of its going out.

The witnesses do not deny, as it might be expected they would, that the port light of the Wallace was seen before the collision but they say it was a bright light, i. e., that a white light was first seen some minutes before the collision and that just before the collision, they saw a red and white light and the lookout says that the white light was higher than the red. This story of the Reiche's seems to be corroborated by the fact that the Wallace admits that a lantern was used, especially so when the use of a lantern under circumstances such as the Wallace claims the situation presented is an absolute violation of the very article of the Rules, taken in connection with Article 1 of the Rules, under which the Wallace claims the lantern was shown.

We think that if the truth were told about the lights on the Wal-

lace, it would be, that when the Reiche was sighted the lookout was asked about the lights and he reported that the port light either was out or not burning brightly, that the second mate then went forward to see what the matter was and finding the light not showing, he went to the engine room, got a lantern and went up into the rigging to see what was the matter. It was then that the lookout of the Reiche saw a white light. The mate finding the light out, or needing attention, took it below. It was then that the white light disappeared to those on the Reiche. The side light was hurriedly attended to and again taken to the rigging with a white lantern to assist in putting it into place, and those on the Reiche then saw a red and white light. No one on the Wallace could explain why the light went out after the collision. The second mate was quite sure it was not because it needed filling, as he took it down and gave it to a man to be lighted and the man was not long enough away to allow it to be filled, and the man who lit it testified that he could see no reason why it went out and he did not fill it again.

Lights do not go out without some reason and the reason here is perfectly plain. When the light went out before the collision it was because there was no oil in it. In the hurry to get it back into place very little oil was put in and so it went out again. Curiously enough the man in charge of the lights does not say he filled the red lantern on the day of the collision but merely that he trimmed it.

As a general rule the testimony of a vessel regarding the events which took place there are to be accepted rather than the testimony of those from the other vessel but it has been said otherwise in some cases relating to lights, citing The Roman (C. C.) 14 Fed. 61, and The Monmouthshire (D. C.) 44 Fed. 697.

The Reiche was looking for lights because she was expecting soon to make the Winter Quarter Shoal Lightship, in about the direction from which the Wallace was coming. If the Wallace's port light was burning, it should have been seen by those on the Reiche as soon as the Reiche's green light is said to have been by those on the Wallace, i. e., some 20 or 25 minutes before the collision. The lookout did report a white light in about the direction from which the Wallace was advancing, and the master went forward and looked through his night glasses but saw no light. The whole testimony shows that the Reiche was navigated without reference to any red light and the men on her discovered the red and white lights at the same time, the Wallace being then close aboard on the port bow and all the Reiche could do was to go off. Had she luffed she would have gone right up into the Wallace. This red light when it was discovered was burning brightly and it is admitted by those on the Wallace that a white light was shown before the collision. They had to explain the presence of this white light and they do so by saying that it was shown under the authority of Article 12. This article does not permit the use of a lantern but confines it to a flare up light. The torch was there but the Wallace explains that it was not used because there was no time to light it. It is curious that the rule should say a flare up light when, according to the Wallace, it takes so long to light one.

On the whole it seems that the only satisfactory explanation is that the port light of the Wallace was taken down after the Reiche's lights were seen and was replaced just before the collision. It is further urged that the Wallace changed her course and the collision can not be explained unless the Wallace changed her course to the starboard; that she was in fault for not taking some steps to avert the collision sooner than she did, as it is contended by the Wallace that those on the Reiche must have been asleep and the master of the former should have taken some action under Article 12 sooner than he did and it necessarily follows that the Reiche was not at fault, notwithstanding it was elicited what appeared to be an admission from the master of the Reiche that he starboarded because he thought the red light was the Winter Quarter Shoal Light, which is red, not red and white, and visible 12 miles. A captain would hardly begin to starboard for a light 12 miles away, especially as it was known to be stationary. The Reiche could not very well port to a red light close aboard and nearly broad on the starboard bow, such an action would inevitably throw her right up into the other vessel.

2. The Wallace changed her course.

The testimony of those on the Wallace is that she was steering a little higher than N. E. with the wind N. N. W. and that she did not change her course until the Reiche was seen to be across her bow, when her helm was put hard down and she came up into the wind 1 or 1½ points when the vessel struck.

Taking into consideration the evidence as to the Reiche's yawing and the distance and the bearing of her lights when first seen by the Wallace, and also the speed of the vessels, it is quite plain that they were on slightly crossing courses, being nearly head and head. It will be seen that the Reiche was yawing as much as one point on each side, that as the vessels approached she would at times show her red light. It was also apparent that had each held her course, the angle of the blow would have been 2½ points, whereas all agree that the vessels came together at right angles.

Obviously one, or both vessels, changed its course. The Reiche admits that she changed hers some 2 or 3 points, to the southward, but this would still only make the angle of the blow some 4½ or 5 points instead of 8. The Wallace says she only changed her course at the last moment and then to the windward about 1 or 1½ points. If this be true of course it would lessen the angle of the blow so that with the Reiche's change of 2 or 3 points to the southward and the Wallace's change of 1 or 1½ points to the northward, the angle of the blow would have been about 4 points.

The Wallace of course argues that the Reiche changed her course very much more than she admits. For a moment accept the Wallace's story that she changed about a point to the northward, then at the time of the collision she must have been heading about N. N. E. and in order that the vessels might come together at right angles the Reiche must have been heading E. S. E.; that is she must have changed her course about 8 points, from S. S. W. to E. S. E. But the wind was N. N. W. and the booms of the Reiche were held out

to starboard by the boom tackles and the witnesses say the sails of the Reiche except the spanker were aback. Such being the fact it would have been impossible for the Reiche to swing around to the eastward against the wind, the head sails would not have allowed her to do so.

The Reiche did not change her course until after she saw the white light on the Wallace, and the master of the Wallace says that this light was not shown until 30 or 40 seconds before the collision. It is inconceivable that a schooner of the size of the Reiche could jibe and come up into the wind, changing her course 8 points in 30 or 40 seconds.

There is testimony from the Wallace that is absolutely unexplainable if it be true that the Wallace only changed her course at the last moment and that change was to the northward.

The master of the Wallace says that when he first saw the Reiche's light, it was some 2 points on the Wallace's port bow and although he sometimes saw the red, yet all the time the lights of the Reiche were drawing ahead and narrowing in.

The master is supported in this statement by the second mate and lookout.

When vessels are on crossing courses as they were here, a light drawing ahead means but one thing, viz.: that the vessel which is drawing ahead will cross ahead of the other.

Then, in this case had each vessel kept her course the Reiche must have crossed ahead of the Wallace, but the Wallace says the Reiche changed her course to port just before the collision and the Reiche admits she did. Such a change of course on the part of the Reiche should have made the point of crossing further ahead, yet as a matter of fact the vessels collided.

The only way in which this state of affairs can be explained is that the Wallace changed her course to starboard; that she did not change her course was shown by the way the vessels came together.

3. The Wallace was at fault for not taking some steps to avert the collision before she did.

It is a very significant fact that immediately before the collision there was exactly the same excitement on the Wallace as there was upon the Reiche. What was done on the Wallace is more consistent with the supposition that she did not discover the Reiche sooner than the Reiche discovered her. But if we adopt her story that she had been watching the Reiche approaching without material change of course for 20 minutes until she was within one or two lengths, then the failure to take earlier or more effective precautions to avoid the collision was a gross fault, especially if the master thought, as he says he did, that everybody was asleep on the Reiche.

The very answer of the Wallace convicts her of this fault. It says:

"The 'Wallace' kept her course as required, but, seeing that the approaching vessel had changed her course showing only a green light very close aboard so that she would not go clear, the master ordered the second mate to show a lantern, under Article 12 of the Regulations to Prevent Collisions at Sea, so as to attract the attention of the other vessel. The lantern was promptly waved on the port side of the deck of the 'Wallace' abaft the fore

rigging, to warn the people on the other schooner. The approaching schooner however continued to starboard her helm, coming directly across the 'Wallace's' bow, making a collision unavoidable. The master of the 'Wallace' then directed to put the wheel hard down, to deaden the vessel's headway and ease the blow; but before this could be completely executed the two vessels came together, the 'Wallace' coming in contact with the other vessel between the main and mizzen rigging nearly at right angles."

This does not agree with counsel's original statement which says the lantern was shown before the Reiche changed her course; but the statement in the answer and the master's testimony show the fault of the Wallace even more clearly than the original statement, because it would hardly be expected that the Wallace would starboard her helm to a red light slightly on the port bow.

It is clear from the testimony of the Wallace that the Reiche was nearly ahead when the Wallace showed the lantern, and if the answer is to be accepted, it is equally clear that those on the Wallace knew that the Reiche was attempting to cross her bows. What good would showing a lantern or even a flare up do then? The Reiche had already starboarded. The story of waving a lantern is a mere subterfuge to cover the real reason it was there.

When the master ordered the lantern shown he says the vessels would not go clear. What he should have done was to have acted at once with his helm, instead of fooling around with a lantern which could not possibly have any effect as the other vessel had already changed her course. He should have ordered his helm hard down when he saw the Reiche shut in her red light and show her green instead of waiting until the vessels were practically together as he did. Can there be any doubt, considering the Reiche was struck only 50 feet forward of the stern, that the Wallace would have cleared the Reiche had her helm, when the red of the Reiche was shut in and the green shown, been ordered hard down, thus deadening her headway and throwing her astern of the Reiche.

It is true that the privileged vessel must keep her course and speed but this she can not do to the extremity of collision when she has noticed that the burdened vessel will fail in her duty.

All the testimony of the master of the Wallace shows that he had ample notice of the failure of the Reiche to do her duty (though such failure was due to the fact that the red light on the Wallace was out) he should have acted in a seamanlike way. This he failed to do. Even if the Wallace did not change her course to starboard, she at least failed to change to port when she saw that if she kept her course a collision would be unavoidable.

Article 12 permits the use of a flare up when necessary to attract attention. The master of the Wallace constantly reiterates the accusation that from her actions he thought every one on the Reiche was asleep. If this is true he should have taken some action about showing a light under Article 12 sooner than he did. Had he done so there would have been plenty of time to light the torch and thus have attracted the attention of the Reiche and so have avoided the collision.

The Reiche was not at fault.

This necessarily follows if what we have said about the Wallace's faults be true and it only remains for us to notice counsel's argument that the Reiche changed her course because she thought the red light of the Wallace was the Winter Quarter Shoal Lightship.

Counsel for the Wallace by some very clever questioning obtained what appears to be an admission from the master of the Reiche that he starboarded because he thought the red light was Winter Quarter, and then based a fanciful argument upon it.

Winter Quarter is visible 12 miles and the character of the light is red not red and white. The captain would hardly begin to starboard for a light 12 miles away. Why too should he starboard to a lightship on his starboard bow? The lightship was stationary and if it were on the starboard bow, there would be no danger of running into it. Counsel says the schooner did not wish to get inside of the light on account of the shoal water, but there is over 5 fathoms for 6 or 7 miles inshore of the lightship, Winter Quarter being to the N. W. of the lightship and certainly the schooner could not get inshore of the lightship with the light broad on her starboard bow, and the schooner steering S. S. W.

Counsel also argues that the starboarding of the Reiche to a red light was an unusual thing to do but she could not very well port to a red light close aboard and nearly broad on the starboard bow. Such an action would inevitably throw her right up into the other vessel.

An additional brief in reply to the Wallace's brief was filed and has been considered, but it does not seem advisable to occupy the space necessary to summarize it. The substance of the brief of the Wallace is hereinafter set forth and forms the basis of the conclusion to which I have come, somewhat doubtfully, it is true, but sufficently persuaded to reach the result that the Wallace should succeed in her general contention that she was not, and that the Reiche was, in fault for the collision, especially as the latter was sailing free and failed to avoid a vessel sailing on the wind with the right of way, The Freddie L. Porter (C. C.) 8 Fed. 170; The Gypsum Prince, 67 Fed. 612, 14 C. C. A. 573.

The Wallace had a full complement of officers and crew, of whom six were, or came, on deck, as the Reiche approached. These were the master, two mates, the lookout, the wheelsman, the engineer and steward, all of whom were examined, either by deposition or on the trial in court. The masters of both vessels were examined before me.

The Wallace was on the wind, her booms having been hauled flat aft at about 6.10 o'clock. Thereafter she did not steer a compass course but was kept by the wind, which earlier was N. W., then came N. W. by N. and gradually canted more northerly being about N. N. W. at the time of collision. The Wallace could sail within 5½ points of the wind. Before the collision, she headed about N. E. ½ N. While this was her compass course she was probably making a ½ point of leeway.

The lookout of the Wallace saw and reported the Reiche some 20 minutes before the collision. She was then about 3 points on the

Wallace's port bow. She was from that time steadily under observation by the master and 2nd mate and lookout of the Wallace, which held her course. The Reiche as she approached first showed her green light, then a red light, then both lights, then a green, then a red, then both and at last the green alone, always on the Wallace's port bow, but narrowing in as she got nearer, and drawing somewhat ahead. It was evident that the approaching vessel was yawing considerably and not apparently paying attention to the Wallace and the master of the latter, who had come on deck when the lookout reported the first light, sent the 2nd mate to examine the Wallace's lights. He went and did so, found the lights burning brightly, and so reported.

As the Reiche approached the Wallace, the latter was about ahead, with her port light in view. Those on the Reiche did not, however, see this light until the vessels were within a distance of probably 1000 feet, when the red light of the Wallace was seen and the Reiche put her helm up and fell off, keeping the helm so till the collision occurred, at substantially right angles.

No flare up light was shown or detonating signal used by the Wallace, because it is alleged that there was no time for compliance with the terms of Article 12. Instead thereof, an ordinary globe lamp, which was already lighted and hanging in the engine room forward, was taken by the mate to the port side of the vessel and waved to the Reiche for some little time, estimated by him at 2 or 3 minutes, but probably much less.

The doubt in the case, mentioned above, is due to the exhibition of this light as well as the question of the burning of the red light of the Wallace. It appears that at about 11 o'clock, the red light went out without any apparent cause and it is argued for the Reiche, as appears above, that it was out when the vessels came within a distance which permitted a view of lights and hence was not seen, and that it was relighted just before the collision.

With respect to the torch, its exhibition is not mandatory, and while doubtless as a matter of precaution it should be used whenever it appears to those on board of a vessel that another is approaching so that danger of collision exists, yet here there was no way of knowing that the Reiche did not see the red light, and hence no reason for the use of a torch until the collision was practically unavoidable. The use of the additional light did not apparently do any harm.

While the circumstances relating to the red light are suggestive of there being some trouble with it so that it may not have been showing properly, yet the evidence that it was burning at all times during the Reiche's approach is too clear to admit of reasonable doubt of such being the fact. The lookout of the Wallace, a seaman of 21 years of age, testified that he looked at the Wallace's lights during the approach of the Reiche and they were burning brightly. The second mate also testified that he looked at them during the approach and found them so. These witnesses so reported the light at the time to the master, and the fact that the light was actually seen on the Reiche before the collision corroborates these witnesses to some ex-

tent. It does not seem that the testimony can be overcome by suppositions that the light was not burning unless they find strong corroboration from some source.

If such corroboration exists, it would naturally be found in the testimony of the Reiche. The only witness from her who was advantageously placed to see lights on the Wallace was the lookout. He was a boy of 19 years of age, a Finn, with an insufficient knowledge of English to testify without an interpreter, although the master said of him that when directed concerning sea terms and navigation, he understood them very well. He had had about 5 years experience at sea but only 7 months on American vessels. He said that he went on lookout duty on the forecastle head at 6 o'clock; that the first light he saw from there was a fixed white light more than 3 points on the starboard bow; that he continued to see for about 5 minutes when he could not see it any more; that he reported it by singing out "Light on the starboard" and the master came forward with the glasses and asked what the bearing of the light was but he could not see it, nor could the witness then. In response to a question what he meant by saying that he saw it for 5 minutes, he said that it was impossible for him to say how long it was but the master came at once. He further testified that afterwards he saw a red and fixed white light but could not tell which was nearer to him but the white light was a great deal higher than the red; that he sung out to the master "Light on the starboard" and then ran aft because it might be that the master could not hear him; that he thought the lights were a steamboat's; that the master then told him to call all hands on deck, which he did, and they came up; that at that time the head gear of the other vessel was over the deck of his vessel and the captain ordered all hands to jump on the other vessel and they did so by going over the head gear. On the cross, he said that the master stayed forward about 10 minutes, then went straight aft again; that when the witness got aft he was close to the man at the wheel who was turning it when he arrived and got it hard up; that he continued to see the red and the white light when he got aft. He explains that he saw the red light close at hand and thought the master could not hear him call out on account of the wind. So he ran aft to be sure of the master hearing him; that he knew the master was 10 minutes on the forecastle head, but could not otherwise give reliable estimates of time.

Taken altogether the lookout's testimony does not give much help in solving this difficult question, and the other testimony from the Reiche also is not of appreciable aid.

The master said that when the lookout first reported a white light about 3 points on the weather bow, he (the master) looked all around the horizon with the glasses but could not see it and went forward to ask the lookout about it; that the lookout could not then see it and he (the master), after looking around again, cautioned him to keep a good lookout and went aft; that the view on the weather side was perfectly unobstructed and the next thing that occurred was the lookout reported a light on the weather bow and simultaneously he and the man at the wheel saw a white light and then a red light so

close together that those aft could see them together; that the lights were distant about 2 ships' lengths and he ordered the wheel put up and helped in the operation; that the wheel had the effect of keeping the vessel off before the wind, so that the foresail and mainsail had become becalmed and were only prevented from going over on the other side by the boom tackles which still held them, but the spanker was full on the port side. The master estimates the time of the first report about 5 or 7 minutes before the collision and the last report a minute or two.

The master's testimony is corroborated in a general way by the man who was at the wheel.

The mate of the Reiche who was below during the approach, came up when the master ordered all hands on deck and then saw a red light right on the beam of his ship, a cable's length, about 600 feet away.

The Reiche was yawing considerably, it is said from ½ to a full point, possibly more, so that if the Wallace's light got on the lee side of the Reiche, it may have been obscured by her sails to those aft and the only person on the Reiche who had a continued view was the lookout. I do not, however, attach much importance to such suggestion, as it is probable that the light was always far enough on the weather side of the Reiche to give all on deck a continued view.

It seems to be a case justly falling within the principle stated by Dr. Lushington, The Vivid, 7 Notes of Cases, 127, 130, as follows:

"Parties may swear that they did not see a light, but that never can be received as evidence in opposition to those who say that they showed a light; because both statements may be true. The light may have been exhibited, and those on board the steamer may not have seen it."

In a collision between sailing vessels, one sailing free and the other close hauled, the circuit court of appeals for this circuit, held that the vessel sailing free was solely in fault. The Queen Elizabeth, 122 Fed. 406, 59 C. C. A. 345. An extract from the opinion of Coxe, J., is as follows (page 408 of 122 Fed., page 347, of 59 C. C. A.):

"We have no doubt as to the negligence of the Birdsall. If her crew had been competent, alert and watchful they certainly would have seen the ship's red light before it was 'right abreast' on the 'starboard beam.' Danger of collision was then imminent, the time was, probably, less than two minutes, the distance less than four lengths. The evidence that the ship's lights were burning brightly is overwhelming and if the lookout had been attentive he could have seen the red light twenty minutes prior to the collision and when the ship was miles distant. His failure to do this on a clear night was unquestionably a fault."

Even if the several persons on the Reiche had been observant, still their failure to see the red light of the Wallace which has, I think, been proved to have been shown, would not exculpate the Reiche from blame. It has recently been said in the circuit court of appeals, in The Helen G. Moseley, 128 Fed. 402, 403, 63 C. C. A. 144, 145, opinion by Lacombe, J., as follows:

"Manifestly the proximate cause of the accident was the failure of those on the steamer to discover the red light of the schooner until she was within one length of them. Judging from the event, the navigator of the steamer would have used better judgment, had he at once ported to the

schooner's red light, but that bit of navigation came so close to the collision that it need not be considered. The brief moment left in which to navigate was primarily responsible, and its briefness was the result of failure to make out the schooner earlier. The second officer was in charge of the steamer's navigation. The boatswain was on the bridge with him, performing there the duties of a junior officer. The quartermaster had served in the German navy; the lookout, in the German army. All were experienced men, and had undergone special eyesight examination. The captain was also on deck, but he had returned so recently after a momentary absence in the chartroom to work out an observation, taken to ascertain location off shore, that he should not be counted among the watchers for lights. It is difficult to understand how such a body of officers and men, at the beginning of their watch, could have failed to see the red light earlier, if it had been visible. The circumstance that it was lower than the plane of observation of the lookouts, that there was still an easterly sea, that several other lights had recently been seen and kept under observation, thus tending to distract attention, seem hardly sufficient to account for a temporary aberration, lasting some minutes, on the part of four competent observers simultaneously. Nevertheless individual aberrations of sight and attention do occur, even among the ordinarily careful, and, however, enormous the odds may be against such a simultaneous occurrence among four persons, the combination is possible. Therefore, under well-settled principles, unless there can be shown some cause, due to the schooner, why her red light was not shown to the steamer until in the very jaws of the collision, the conclusion must be that the steamer was in fault."

Those on the Wallace had a right to assume that her lights would be seen by the approaching vessel up to nearly the last minute. Article 12 did not impose a burden upon the Wallace. That article has recently been discussed in this circuit in The Robert Graham Dun, 107 Fed. 994, 47 C. C. A. 120. The court there said, in an opinion by Wallace, J. (page 995 of 107 Fed., page 121 of 47 C. C. A.):

"It is contended in behalf of the steamship that the schooner was in fault for not displaying to the steamship a flare-up light, and for that reason, even though the steamship was in fault for the collision, the loss should have been apportioned by the decree between the two vessels. The contention is founded upon article 12 of the international regulations of 1890 for preventing collisions at sea. It provides as follows:

'Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light or use any detonating signals that cannot be mistaken for a distress signal.'

This rule is not imperative by its terms, but permissive. Possibly it was enacted to relieve a vessel not being overtaken by another from imputation of fault for displaying a signal which an overtaken vessel is required to display by the provision of article 10. It is the duty of every vessel to exercise any precaution known to the ordinary practice of seamen for preventing a collision or alleviating its consequences, as well as those which are specifically prescribed by the rules. If those in charge of the schooner had known that her lights had not been seen by the steamship, and had apprehended that the latter would not, for that reason, seasonably undertake to perform her obligations, it would have been their duty to adopt any of these precautions which lay within their power. But they had no reason to apprehend this until the steamship shut out her red light and showed both her lights. Then the schooner's master, who was on deck, went forward and looked at his lights. Having found them showing brightly, he was reassured, and had a right to expect that they would be observed by the steamship, and to assume that she would make the necessary maneuvers to avoid his vessel, until he saw that it was too late for her to do so. If she had made such maneuvers two minutes before the vessels came together, there would not have been a collision, as the vessels, at the rate of speed at which they were approaching one another, would have been about 2,800 feet apart. If there had been time

for him to have procured and exhibited a flashlight after he ought to have assumed that the steamship would not perform her duty and avoid his vessel, it is not surprising that in the excitement and confusion of the moment he did not think of doing so, and the omission to do so would have been excusable as an error in extremis. The argument made in behalf of the steamship, that he was bound to apprehend danger throughout the 15 minutes preceding the collision does not commend itself to us as having any reasonable basis."

In the cases cited by the Reiche on the question of the red light burning, there was no testimony to show that the light was actually seen to be burning by those on the other vessel before the collision, as was the case here. Of course it is insisted by the Reiche that the red light of the Wallace must have been out or it would have been seen sooner by those on the Reiche but it appears that the fact of its not having been at all times seen is more consistent with some inattention on the part of those on the Reiche then its being out at any time during the approach of the vessels.

With respect to the alleged fault of the Wallace's change of course, it appears that she did not change till just before the collision. Her original heading was about N. E. It may have varied slightly from that, but probably not more than ¼ of a point, so that when the Reiche approached, the Wallace was sailing substantially N. E. and so continued until it was seen that a collision was unavoidable, when she put her wheel up and turned somewhat to the eastward, probably 1½ points. The Reiche swung from a heading of S. S. W., or S. by W. ½ W., until the collision when she was heading at about right angles to the Wallace's heading of N. E. by E. ½ E., or S. S. E. ½ E. This seems to be shown by the fact that the swing of the Reiche was continued until her sails were aback, although some of them were still held to port by the tackles. As her sails in this condition naturally ceased to propel her this might easily mislead those on the Reiche into supposing that the Wallace was suddenly drawing closer. The wheelsman of the Reiche said that her heading was S. by W. ½ W. when he put the wheel up, but still when his vessel was struck she was headed exactly S. ½ W. just one point off the course of S. by W. ½ W. This was apparently not truthful on the part of the wheelsman and tended to discredit his general testimony.

There is a feature of the case that has not been adverted to herein and may be of some importance. It is urged by the Wallace that the Reiche was in fault for starboarding her helm. It does not seem that this was in extremis. As has just been said the Reiche probably fell off to about S. E. in order to bring the wind on the port side of the sails and put them aback, a change of about 6 points. When this change began, it is conceded that the red light of the Wallace was a cable's length off. It is, of course, fatal to starboard to a red light upon a moving vessel and the master recognized this but said that if he had ported his helm he would have run into the Wallace, they were so close. Subsequently, however, he said that he was expecting to make the light of Winter Quarter Shoal, a red light, and that when he saw this light he did not know whether it might be that Light Ship or not; that if it were that light it would be natural for him to go outside

of it to the eastward and such would be a good reason for him to put his wheel up and leave the light on his starboard side. He was then asked: "Q. When you first saw the red light you put your wheel up, partly with that in view, didn't you?" and said: "Yes, Sir." It may be that this was the real reason for starboarding the helm. The place of collision was only about 14 miles N. E. of the light on the shoals, and the range of visibility of that light is 12 miles. If the master thought the light was on the shoal, it affords a probable explanation of what was otherwise an unseamanlike thing to do, that is to turn his vessel in the direction of a light he was required to avoid.

While the case is a difficult one to determine, the law, in connection with foregoing considerations, seems to require a decision in favor of the Wallace.

There will be a decree dismissing the libel of the Reiche and one providing for a recovery of the Wallace's damages.

ROBINSON v. HOLBROOK et al.

(Circuit Court, D. Rhode Island. May 23, 1906.)

No. 2,693.

1. CORPORATIONS—CHARTER POWERS—CREATION OF NEW CORPORATION.
   Where the G. Company, a corporation, was organized with power to manufacture goods made of gold and silver or other metallic substances, for the transaction of other business connected therewith, and with power to invest in the shares of other corporations, such power to invest did not prima facie confer on the G. Company, power to change another corporation having a present capital of $100,000, the majority of which was held by the G. Company, into a holding corporation with a capital of $10,000,000 for the purpose of acquiring stocks in other companies to the extent of nearly $7,000,000 which was nearly $5,000,000 in excess of the authorized capital of the G. Company.
2. SAME—INJUNCTION.
   A minority stockholder was entitled to a preliminary injunction to restrain the carrying out of such scheme pendente lite.

On Petition for Preliminary Injunction. Granted.

Guggenheimer, Untermyer & Marshall (Samuel Untermyer and Walter B. Vincent, of counsel), for complainant.

Richard B. Comstock, and Comstock & Canning, for defendants.

BROWN, District Judge. In disposing of this petition for a preliminary injunction, we may pass all questions as to the regularity of the call for the special meeting of the shareholders of the Gorham Manufacturing Company, and as to the breadth of the powers conferred upon the directors, and proceed at once to the substantial questions presented by the resolution of the board of directors of the Gorham Manufacturing Company, passed May 1, 1906. This resolution instructed Mr. Holbrook, the treasurer of the Gorham Company, to vote upon the shares of stock of the Silversmiths' Company held by the Gorham Company, in favor of an increase of the capital stock of the Silversmiths' Company from $100,000 to $10,000,000, divided in-

to 100,000 shares at $100 each; for an issue of 70,000 shares at par, as follows: $1,750,000, or 17,500 shares, at par for cash to holders of preferred and common stock of the Gorham Company in proportion to their holdings, any portion of said 17,500 shares not taken by the Gorham Company shareholders to be sold to the public; $5,250,000, or 52,500 shares, or so much thereof as may be taken in exchange at par, to holders of the common stock of the Gorham Company, in exchange for their holdings in the Gorham Company at a valuation of $210 per share for the common stock of the Gorham Company. The treasurer was further instructed to sell to the Silversmiths' Company, the Gorham Company's holdings of shares of stock of the Whiting Manufacturing Company, of the William B. Durgin Company, of the Silversmiths' Company of New Jersey, of the Siversmiths' Company of New York, and all the assets late of W. B. Kerr & Company, Inc., at a price not less than the cost thereof to the Gorham Company to the date of sale.

The complainant, a nonassenting shareholder of the Gorham Company, seeks to enjoin the carrying out of this plan, contending that it is beyond the corporate powers of the Gorham Company, is offensive to the principle that a person occupying a fiduciary relation, who is authorized to sell property for another, cannot himself become the purchaser, directly or indirectly, and is against the rights and financial interest of the complainant. It is also alleged that this plan is not in pursuance of any need or purpose of the Gorham Company, but is solely for the purposes of the majority of shareholders, and especially of Mr. Holbrook; and contemplates and will result in a control of the Gorham Company's affairs by the Silversmiths' Company, as a holding company.

After a careful consideration of the complainant's bill, of the affidavits, and of the authorities cited, I am of the opinion that the controversy is of a substantial character, involving important questions of law as to the corporate powers of the Gorham Manufacturing Company, and as to the legal right of a majority of the shareholders of the Gorham Company to effect or to aid in this manner the transfer of important assets of the Gorham Company to the Silversmiths' Company, or to provide for the ownership by the Silversmiths' Company of shares of Gorham Company stock. There is reason for thinking that the plan disclosed by the resolutions of the directors may comprehend purposes which hardly can be regarded as corporate purposes of the Gorham Company, or as properly incident thereto.

Assuming that it may be for the interest of the Gorham Company to dispose of its shareholdings in other corporations, though this is disputed by the complainant, there are serious doubts of the right to do this at a price fixed arbitrarily by persons who are to become shareholders in the Silversmiths' Company, which is to acquire these shares of stock; and it is questionable, at least, whether it is a corporate purpose of the Gorham Company to promote, to provide for, or to lend the sanction of its corporate vote to the acquisition by the Silversmiths' Company of a considerable proportion of the shares of stock in the Gorham Company, so that the Silversmiths' Company is

to have a considerable voice in, if not control of, the management of the Gorham Company.

It is apparently the purpose of the majority of shareholders of the Gorham Company that the Silversmiths' Company shall be a holding company which shall hold not only the shares of stock in other companies now owned by the Gorham Company, but also shares of stock to the amount of 25,000 shares in the Gorham Company itself. A holding of this amount of shares by the Silversmiths' Company would give it an equal voice with all other shareholders of the Gorham Company in the management of the affairs of the Gorham Company; and but a single additional share, acquired either by the Silversmiths' Company or by a person interested in the Silversmiths' Company, would be sufficient to constitute a complete control of the Gorham Company.

Ordinarily, corporate combinations effected through a holding corporation are organized by dealings which are entirely between the holding corporation and the shareholders of the several companies whose shares are to be held. Noyes on Intercorporate Relations, § 310, par. 1.

In the present case, substantially all the shares of stock of the Silversmiths' Company, whose present capital is $100,000, are owned by the Gorham Company, which is to be the author of a conversion of the $100,000 corporation into a $10,000,000 corporation which is to acquire stocks in other companies to the extent of nearly $7,000,000. The Gorham Company's authorized capital stock is $5,000,000. It is permitted to purchase, own, hold, and dispose of shares of the capital stock of other corporations to the extent of 35 per cent. of its capital stock. It is intended to base upon corporate action of the Gorham Company, the practical creation of a distinct corporation holding nearly $7,000,000 of said stock, or about $5,000,000 in excess of what the Gorham Company is authorized by its own charter to hold. The fact that the Silversmiths' Company is already incorporated does not alter the fact that it is intended that the Gorham Company is to institute a substantially new corporation.

Assuming that the amendment to the charter of the Gorham Company, which authorizes it to hold stock in other corporations, gives to the Gorham Company the ordinary rights of a shareholder to vote upon the shares of stock which it holds, can it be said that the voting power which is incident to its right to hold shares of stock in other corporations enables it to take such corporate action as will convert a subsidiary company into a corporation of larger capital stock than itself? Was it the intention of the Rhode Island Legislature, in granting to the Gorham Company the right to be a stockholder, to confer upon it, as an incident to that right, the unlimited right to create, by increase of capital stock of its subordinate companies, an indefinite and unlimited amount of shares? If the right exists to enlarge the Silversmiths' Company from a $100,000 to a $10,000,000 corporation, it equally exists as to every other company whose shares of stock are now owned by the Gorham Company.

Looking to the substance of the complainant's rights as a large shareholder in the Gorham Company, there certainly is force in the complainant's objection that the Gorham Company, by its stockholders' vote and by the action of its board of directors in pursuance thereof, has embarked in the promotion of an enterprise foreign to that for which it was created, and which, if effected, will leave the complainant the choice of investing a considerable amount of additional capital in the Silversmiths' Company and of parting with his shares in the Gorham Company in exchange for shares in the Silversmiths' Company, a holding corporation, or, on the other hand, of remaining a shareholder in the Gorham Company with the risk that it shall be managed not solely for its own interests, but with regard to the interests of other corporations controlled by the Silversmiths' Company.

One of the advantages of the plan which was specifically urged at the stockholders' meeting was, "providing a central control which shall be exercised over the different properties." It will be for the interest of the shareholders of the Silversmiths' Company to so operate the various corporations as to yield the largest result from their aggregate operations. There is a substantial difference between the present status of the Gorham Company, as a prosperous and independent corporation, and its proposed status as a corporation controlled by a holding company, and managed with regard to the interests of other distinct corporations under the control of the same holding company.

The defendants' contention is that the right to purchase, own, hold, and dispose of shares in other corporations gives the Gorham Company the ordinary right of a shareholder to vote upon these shares, and also an unlimited right as a shareholder to initiate whatever corporate action of the Silversmiths' Company the Gorham Company as a shareholder may see fit. The conclusion to which this argument logically leads arouses a suspicion of its soundness. No limitation is placed upon the kinds of shares which the Gorham Company may hold. It may own shares in railroads and manufacturing companies, and corporate shares of every kind. If, by virtue of its share holdings, it may create holding companies for the silversmith business, the same argument would authorize it to create holding companies for other branches of industry.

The power to invest in shares of other corporations must, however, be regarded as incidental to the charter purposes of the Gorham Company; i. e., "manufacturing goods made of gold, silver, or other metallic substance, and for the transaction of other business connected therewith." The incidental power to invest granted by amendments to the charter is to be narrowly construed, being in derogation of the ordinary rule that one corporation cannot invest in shares of stock of another. It would involve great practical difficulties were we to hold that the power to invest in shares of other corporations can be construed as an unlimited power to initiate or to promote new enterprises different in character and scope, perhaps exceeding in magnitude, that for which original charter powers were granted. It seems

probable that the power of holding shares is a subordinate power, not to be so exercised as to enlarge the general scope of the business of the corporation by promoting other distinct corporate enterprises, whether in a different field or in the same field. It is very doubtful whether, by giving the Gorham Company power to invest in the shares of other corporations, the Legislature intended to confer the power to set up and practically create a new corporation in the same line of business which should control its creator.

In deciding upon this petition, I do not proceed upon the ground that a fraudulent intention is exhibited in any of the acts of the defendants. Apparently it was not regarded by a majority of the shareholders of the Gorham Company as undesirable that Mr. Holbrook should have a large or controlling voice in the Silversmiths' Company. But whether or not this plan is preferred by a majority of the shareholders is not the question. Giving due consideration to the fact that a majority of shareholders may regard this action as for their pecuniary advantage, and to the rule that all problems of business judgment are to be determined by a majority vote, yet it must be remembered that the majority are limited in their powers by the charter, and that this cannot be overridden however profitable it might be for the majority to carry out what they apparently, in good faith, regard as a sound business proposition.

In view of the importance of the questions which have been presented, I am of the opinion that the complainant presents a proper case for a preliminary injunction. Having regard to the interests of a majority of the shareholders, it seems to me highly undesirable that this plan should proceed; that the Silversmiths' Company should put forth the new issue of shares, and the exchange of Gorham Company shares be made and the assets of the Gorham Company transferred to the Silversmiths' Company, while this bill is pending. Should an injunction be refused at this time, and the complainant's bill subsequently be sustained, the injury to the complainant from a failure to grant temporary relief would be great, and perhaps irreparable; and the injury to the defendants which would result from undoing what had been done would doubtless be great. The best interests of all parties will be subserved by granting this preliminary injunction. Having in mind the statements of complainant's counsel as to his willingness to proceed speedily to a hearing on the merits, I think that if the defendants desire a shorter time than that allowed by the rules should be fixed for the taking of testimony, in order that the case may be finally determined on full hearing as speedily as possible.

The petition for a preliminary injunction is granted.

UNITED STATES v. BOOTH.

(Circuit Court, D. Oregon. July 18, 1906.)

No. 2,942.

1. UNITED STATES—CRIMINAL RESPONSIBILITY OF OFFICERS—RECEIVING COMPENSATION FOR SERVICES TO PERSON.

The provision of Rev. St. § 1782 [U. S. Comp. St. 1901, p. 1212], making it unlawful for any officer in the employ of the government to "receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered or to be rendered to any person either by himself or another in relation to any proceeding * * * or other matter or thing in which the United States is a party or directly or indirectly interested before any department, court-martial, bureau, officer or any civil, military or naval commission whatever," applies to a receiver of a land office in respect to matters before his own office or which may come before it for his action thereon either judicial, executive, or merely clerical, and without regard to the question whether the service rendered or to be rendered is proper or improper, and a receiver commits an offense under said section by receiving compensation for giving advance information to the person paying the same of the restoration of lands to the public domain through the action of the Land Department, which lands thereby become subject to entry by means of scrip or otherwise in his district.

2. SAME—MATTER IN WHICH UNITED STATES IS INTERESTED—PUBLIC LANDS.

The United States has a direct interest, within the meaning of Rev. St. § 1782 [U. S. Comp. St. 1901, p. 1212], in all its public lands and in the right of entry or purchase thereof through proceedings to be had at any of its land offices.

On Demurrer to Indictment. The following is the indictment demurred to:

"District of Oregon—ss.:

"The grand jurors for the United States of America, inquiring for the district of Oregon, upon their oath present that before and at times of the committing of the offense hereinafter in this indictment mentioned, that Frederick A. Kribs was engaged in the business of scripping divers tracts of public lands belonging to the United States and lying in the Roseburg land district, in the state and district of Oregon aforesaid, under the laws of the said United States relating to the selection of lieu lands, and of procuring such public lands of the United States by filing in the land office of said United States, in the said land and judicial districts, certain paper writings required by law to be filed therein by any person making application to exchange other lands of which he was then and there the owner for such public lands of the United States. And that before and at the time of committing the offense hereinafter in this indictment mentioned, said James Henry Booth was the duly appointed, qualified and acting receiver for the United States at and for the district of lands of the United States subject to entry at the United States Land Office located at the city of Roseburg, in said district of Oregon, and as such receiver was in a position to know, and did know, in advance of the general public, and in advance of all parties desiring or authorized to acquire, purchase or scrip the same, under the laws of the United States, when certain public lands of the United States became open to entry under the laws thereof, by reason of the fact that prior selections and entries of said lands had been finally rejected and canceled by the proper officer of the United States possessing authority to conclusively determine that question, and which said public lands of the United States upon which prior entries had so been rejected and canceled were located in the Roseburg land district of the United States, in said district of Oregon; and that the said Frederick A. Kribs, contriving and intending to secure an advantage and pref-

erence over all other persons, who might desire to enter any tract or tracts of said public lands so becoming open to entry by purchase, settlement and scripping, by reason of the rejection and cancellation of prior entries thereon, and so lying within said Roseburg land district of the United States, by unlawfully inducing and procuring the said James Henry Booth, as receiver of said land office, to wrongfully, and contrary to his, the said James Henry Booth's, duty as such receiver of said United States Land Office, advise and inform said Frederick A. Kribs, in advance of all other persons, who might desire to enter the same under the laws of the United States, by purchase, settlement or scripping, when any tracts of public lands belonging to the United States, and lying within said Roseburg land district of the United States, would become open to entry by purchase, settlement and scripping, by reason of the rejection and cancellation of prior entries thereof, had secured and accepted for himself, the said Frederick A. Kribs, and had contracted for the services of said James Henry Booth, and had agreed to pay for the same, and these services had been rendered in part, and were to be rendered in part, to him by said James Henry Booth, in giving the aforesaid information to said Frederick A. Kribs, in advance of all other persons, who might be desirous of knowing, and entitled to know, the same; and that the said James Henry Booth did before and at the time of the committing of the offense hereinafter in this indictment mentioned, and within three years last past, give to said Frederick A. Kribs information in advance of all other persons, of the fact that certain public lands of the United States lying within said Roseburg land district of the United States, had become open to entry, by purchase, settlement and scripping, under the land laws of the United States, by reason of the fact that prior entries thereof had been rejected and canceled by the proper officers of the United States, possessing authority to conclusively and finally determine that question, and that said James Henry Booth, when so rendering and agreeing to render the said service to the said Frederick A. Kribs, well knew that the said United States was then directly interested in said public lands so becoming open to entry, and in the proceedings, claims, matters and things in which the said James Henry Booth was then so rendering and agreeing to render the said service to the said Frederick A. Kribs.

"And the grand jurors aforesaid, upon their oath aforesaid do further present that the said James Henry Booth, on the fifth day of October, 1903, at and in the said district of Oregon and during his continuance in office as such receiver of the United States for said Roseburg land district of the United States, unlawfully did receive certain compensation from the said Frederick A. Kribs, that is to say, eight hundred dollars, for the services so rendered, and to be rendered, by him to the said Frederick A. Kribs, as aforesaid, in relation to certain of the public lands of the United States, and proceedings, claims, matters and things aforesaid, in which the said United States was directly interested, and thereby the said James Henry Booth did then and there offend against section seventeen hundred and eighty-two of the Revised Statutes of the said United States [U. S. Comp. St. 1901, p. 1212]; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such cases made and prepared.

"Dated at Portland, Oregon, this eighth day of April, 1905.

"Francis J. Heney,
"United States Attorney District of Oregon.
"W. H. H. Wade,
"Foreman of U. S. Grand Jury.

"Witnesses sworn and examined before the grand jury: Frederick A. Kribs.
"A true bill. W. H. H. Wade, Foreman of the Grand Jury.
"Filed April 8, 1905. J. A. Sladen,
"Clerk U. S. Circuit Court District of Oregon."

Francis J. Heney, Special Assistant to the Attorney General.
A. C. Woodcock and Lionel R. Webster, for defendant.

HUNT, District Judge. The demurrer is general, so that the question for decision is: Does the indictment state facts which constitute a crime under section 1782, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1212]? If there are objections which may be available to the defendant by way of defense on the trial only, they are not to be considered now. Nor are mere defects of form involved, unless they so affect the substance of the pleading as to make the whole indictment fatally defective. The statute under which the indictment is drawn reads as follows:

"No Senator, Representative, or delegate, after his election and during his continuance in office, and no head of a department, or other officer or clerk in the employ of the government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever. Every person offending against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the government of the United States."

Now, let us see what this indictment charges.

The allegation is plain that, about October 5, 1903, Frederick A. Kribs was engaged in the business of scripping divers tracts of the public lands, belonging to the United States, lying in the Roseburg land district, within the state of Oregon, and that the scripping was being done, under the laws of the United States relating to the selection of lieu lands and of procuring such public lands, by filing in the land office of the United States, in the Roseburg land district, certain paper writings required by law to be filed by any person making application to exchange other lands, of which he was then and there the owner, for such public lands of the United States. It is next charged that, before and at the time of committing the offense alleged in the indictment, to wit, October 5, 1903, the defendant, James Henry Booth, was the duly-appointed, qualified, and acting receiver for the United States, for the district where the lands of the United States were subject to entry at the land office at the city of Roseburg, in the state of Oregon. It is also plainly averred that, as such receiver, Booth was in a position to know, and did know, in advance of the general public, and in advance of all parties desiring or authorized to acquire, purchase, or scrip the same under the laws of the United States, when certain public lands became open to entry by reason of the fact that prior selections and entries of said lands had been finally rejected and canceled by the proper officer of the United States, possessing authority to determine that question conclusively, and which said public lands of the United States upon which prior entries had been so rejected and canceled were located in the Roseburg land district.

It is also sufficiently well alleged that Frederick A. Kribs, contriving and intending to secure an advantage over all other persons who

might desire to enter any tract or tracts of said public lands so becoming open to entry by purchase, settlement, and scripping, by reason of the rejection and cancellation of prior entries thereon, so lying within the Roseburg land district, by unlawfully inducing and procuring the said Booth, receiver, wrongfully and contrary to his (Booth's) duty as such receiver, to advise and inform Kribs, in advance of all other persons who might desire to enter the same, under the laws of the United States, by purchase, settlement, or scripping, when any tracts of public lands lying within the Roseburg land district would become open to entry by purchase, settlement, and scripping, by reason of the rejection and cancellation of prior entries thereof, had secured and accepted for himself (Kribs), and had agreed to pay for the same, and these services had been rendered in part, and were to be rendered in part, to him (Kribs) by Booth, by giving the aforesaid information to Kribs in advance of all persons who might be desirous of knowing, and entitled to know, the same. It is next charged that, before and on October 5, 1903, Booth, the defendant, did give to Frederick A. Kribs information in advance of all others of the fact that certain public lands of the United States within the Roseburg land district had become open to entry, by purchase, settlement, and scripping, under the land laws of the United States, by reason of the fact that prior entries thereof had been rejected and canceled by the proper officers of the United States, who had authority to determine that question finally. It is also averred that Booth, when so rendering and agreeing to render the said service to the said Kribs, well knew that the United States was then directly interested in the said public lands so becoming open to entry, and in the proceedings, claims, matters, and things in which the said Booth was then so rendering and agreeing to render the said services to the said Kribs.

Next follows a direct and positive charge that, on the 5th of October, 1903, Booth, the defendant, in the district of Oregon, and during his continuance in office as receiver of the Roseburg land district, unlawfully did receive certain compensation from the said Kribs—that is, $800—for the services so rendered and to be rendered by him to the said Kribs, as aforesaid, in relation to certain of the public lands of the United States, and proceedings, claims, matters, and things aforesaid, in which the said United States was directly interested; and thereby the said Booth offended against section 1782 of the Revised Statutes of the United States.

A careful reading of the several opinions of the justices of the Supreme Court in Burton v. United States (decided May 21, 1906) 26 Sup. Ct. 688, 50 L. Ed. 1057, discloses that the framers of the statute under consideration had in mind the enactment of a law to secure honesty of executive acts. To help attain this object it is made a crime for government officers to agree to receive compensation, or to receive it, for services rendered or to be rendered in the matters embraced within the statute. Justice Harlan, considering the law in its relation to members of Congress, said:

"Evidently the statute has for its main object to secure the integrity of executive action against undue influence upon the part of members of that branch of the government, whose favor may have much to do with the ap-

pointment to, or retention in, public position of those whose official action it is sought to control or direct. The evils attending such a situation are apparent, and are increased when those seeking to influence executive officers are spurred to action by hopes of pecuniary reward. There can be no reason why the government may not, by legislation, protect each department against such evils, indeed, against everything, from whatever source it proceeds, that tends or may tend to corruption or inefficiency in the management of public affairs."

But, while one of the principal purposes of the statute was to prevent influence upon the part of members of that branch of the government whose favor may have much to do with the appointment of certain officials in public position, yet the scope of the statute is even wider than that. Eliminating the particular words referring to Senators, Representatives, or delegates, and to heads of departments, we still find that it is unlawful for any officer or clerk in the employ of the government to receive, or agree to receive, any compensation whatever, directly or indirectly, for any service rendered or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, or other matter or thing, in which the United States is directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever. In this language there is no restriction limiting the operation of the law to those who may hold higher positions, as Senators, Representatives, or heads of departments. Any officer—any clerk, no matter how subordinate may be his clerical position, if he be in the employ of the government—is expressly included, and forbidden to do those things which are made unlawful by the comprehensive language of the law. Congress proceeded evidently in recognition of the principle that "No man can serve two masters," and that it was not right that an officer should agree to accept fees for doing services in matters where the United States is interested, before any officer of the government. The performance of duty by an officer is compensated by the salary or fees regularly allowed by law. To permit agreements for other compensation for services, to be paid by those interested in matters before government officers, would be to countenance the rendering of services oftentimes inconsistent with fidelity to the best interests of the government, to which the employé owes his first and highest obligation.

A receiver of a land office of the United States belongs within one of the great departments of the government. In his official capacity he has a control over very important interests connected with the public lands of the United States. He, together with the register, exercises a quasi judicial power in certain land contests which are brought before the local land office. He receipts for entries for the public lands, advises those who appear before the local land office of the conditions existing concerning the lands inquired about, is a custodian of public funds, and, generally, may be said to be an immediate representative of the General Land Office, which, in turn, is part of the Interior Department of the government of the United States. As an officer in the employ of the government, he is

limited to certain compensation, to be his under the law, and, under section 1782, is forbidden to receive or to agree to receive any compensation, whatever, directly or indirectly, for any services rendered or to be rendered to any person by himself, in relation to any proceeding or other matter or thing in which the United States is directly or indirectly interested, before any department or officer.

The defendant, as receiver, being an officer in the employ of the government, received, according to the allegations of this indictment, $800 from one Kribs, as compensation for rendering a service. This service was the giving to Kribs knowledge, ahead of that to be given generally to people, that certain lands of the United States were subject to entry by purchase, settlement, or scripping, at the land office of the district in which the defendant was receiver. I am very clearly of the opinion that this was an agreement to receive compensation for the rendition of a service. Whether the service in itself was of a proper or improper nature is not now very material; that is to say, I do not regard it as of vital importance to ascertain whether it was the duty of the defendant to give to any and to all persons the information that he is charged with having given to Kribs, inasmuch as the essence of the statutory offense is, not receiving, or agreeing to receive, compensation for proper or improper acts, but the receiving, or the agreeing to receive, compensation for service of any kind, rendered or to be rendered by himself in relation to any proceeding or other matter or thing, without regard to its character, in which the United States is directly or indirectly interested, before any department or officer. So that we have here the case of an officer of the United States charged with receiving, or agreeing to receive, $800 for services rendered or to be rendered to one Kribs by himself, the receiver. Now, the services pertained or related to public lands, which would be open to settlement and purchase; that is, lands which belonged to the United States, concerning which action had been taken by those in authority. Let it stand as correct that the question of the opening to entry of these public lands referred to in the indictment had been conclusively determined by the higher divisions of the Interior Department at Washington, and that the acts of the receiver at Roseburg were largely ministerial. Still I do not think that is of concern, provided the service to be rendered, or that was rendered, for compensation, by the defendant as receiver, related to matters or things in which the United States was directly or indirectly interested, and provided they were matters or things before any department or officer of the United States.

It needs no argument to demonstrate that the United States has a direct interest in all its public lands, and in the disposition of the same pursuant to law, and that this interest does not cease until there have been at least some steps properly taken to divest title. There was no way by which there could have been entry or purchase of the lands open to entry and purchase within the land district of the Roseburg land office, except by appropriate steps initiated and had through the United States land office situated there. And, as

long as the United States held its lands as its own, it had a direct interest in them, and the giving of knowledge of the fact that they or portions of them were or were not subject to entry or purchase was of direct interest to the United States; the status of the lands being a matter before the land office and the officers thereof.

In the Burton Case, heretofore cited, the Supreme Court considered the argument that the United States could not be interested in any proceeding or matter pending before an executive department, unless it has a direct moneyed or pecuniary interest in the result; but the court said that such a view rests upon an interpretation of the statute which is wholly inadmissible. And, in accord with the general view of the Supreme Court, I hold that the United States has a direct interest in all its public lands, and in the right of entry or purchase thereof through proceedings to be had at any of its regularly constituted land offices.

By far the most difficult point for decision is whether the statute quoted makes it criminal for an officer to render a service for compensation in relation to a matter before the particular office over which he may preside, or in which he is an employé and where the matter may be before himself officially.

It may be that, where an officer knowingly accepts compensation not allowed by law for a service to be performed by him, in a matter before his own office and himself as an officer, penal responsibility can be fixed only under the bribery statute. Yet an officer may unlawfully accept compensation for a service perfectly proper in itself, which he performs, and still be wholly innocent of the crime of bribery as defined by the statutes of the United States. The bribery statute (section 5501 [U. S. Comp. St. 1901, p. 3709]) covers the acceptance of money or other thing where there is an intent on the part of the officer to have his decision or action in a matter pending influenced thereby. In the bribery statute we find the word "influence" used; it being essential that the consideration shall have been received with the purpose on the part of the officer to have his action or decision influenced thereby. It does not always follow, however, that the mere acceptance by an officer of compensation or gratuity for doing a service which he intends to, and ought by law to do, in a matter in his own office, carries with it an intent on his part that his action in such matter shall be influenced thereby. Such cases do not appear to be within the purview of the bribery law (section 5501), for the wrong in such instances lies, not in an intent to be influenced by the compensation, but in unlawfully and knowingly agreeing to receive or receiving the compensation for doing the service, and this without regard to the question of whether the officer intended to have his action influenced in any way by the compensation or agreement for it. If there can be no criminal liability except under the bribery statute, then there appears to be no way to punish officials who may do what is clearly wrong by accepting compensation for the performance of services before their own offices in matters in which the government is interested. I cannot believe that a construction is accurate which assumes that Congress has omitted to provide for the punishment of such viola-

tions of duty on the part of government officers. Hence it is that reflection directs me to the opinion that offenders of the latter class are properly indictable, under section 1782, for unlawfully receiving compensation. By the very terms of the statute, if any service has been rendered by any officer or clerk, in relation to a matter or thing in which the United States is directly or indirectly interested, before any officer, the offense may have been committed. The matter must be before any department, bureau, officer, or tribunal or body specified by the letter of the law. Here the case is that of an agreement to render, and the rendering of, a service for a compensation by an officer, in a matter before a land office and its officers, one of whom was defendant himself. The matter related to the public lands, and in these public lands and their disposition, as shown, the United States was directly interested.

The language of the statute to the effect that the matter must be one, and the service must be performed, "before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever," does not necessarily mean that there must be a controversial matter. Advocacy of one side as against another in a contest or matter is comprehended, but not exclusively so by text or reasonable intendment. For example, it may be of very great value to have first knowledge from land officials concerning the opening for entry of certain public lands over which no controversy whatsoever has arisen or is likely to arise. Indeed, in many cases no possible controversy can arise over the acquisition of public lands until it is known that the lands have become subject to entry or purchase; yet, if an officer of the land office agrees to accept compensation for the service of notifying one person over others, in order to give such person a preferential opportunity to acquire the lands of the United States, he has done what is prohibited in relation to a matter of direct interest to the government, and done it in a matter still before the local land office and its officers, and it is none the less a transgression that it is before the office over which the officer who does the service presides. So, too, if the agreement for compensation for the service exists, or the compensation is had, it is immaterial whether the service or act to be done, or done, relates to a matter executive or quasi judicial in its nature, or whether the officer before whom the matter pends is properly performing executive or judicial or quasi judicial functions. The service need not be the decision of a disputed question, or an act calling for discretionary conduct.

If this indictment had distinctly charged the acceptance of money for a service performed by the receiver in a land entry pending before the register of the land office, it would be quite plain that general demurrer would not be good. And, if an offense would have been completely stated under such allegation of fact, it would seem to me to be sufficient in its present form as against the receiver, charging him with receiving compensation for rendering services before the land office, even though he is himself an officer of such land office; provided, always, the matter is one in which the United States is interested.

In conclusion, it is proper to say that I regard the legal questions presented by the demurrer as very close; but, as I understand the general doctrine of the opinion of the Supreme Court in the Burton Case, supra, this indictment states an offense under section 1782, Rev. St. U. S. It sufficiently charges the official capacity of the defendant that he received compensation for services which were rendered by himself, that the matter related to lands in which the United States has direct interest, and that the matter was before a land office of the United States and the receiver thereof.

It follows that the general demurrer must be overruled.

In re DOWNING.

(District Court, W. D. Kentucky. November 18, 1905.)

1. BANKRUPTCY—EXEMPTIONS—LAW GOVERNING.

A bankrupt's right to exemptions is governed by the law of the state as construed by the state courts.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, §§ 664–670.]

2. SAME—KENTUCKY HOMESTEAD STATUTE.

Under Ky. St. 1903, § 1702, which, as construed by the state Court of Appeals, exempts a debtor's homestead if occupied by him in good faith "at the time an attempt is made" to subject it by execution, regardless of whether or not it was so occupied when the debt was contracted, if it was then owned by the debtor, a bankrupt is entitled to the exemption of property so occupied by him prior to the bankruptcy, as against a creditor who procured an attachment on the ground of insolvency before such occupancy, which was later levied on the property, but was dissolved by the adjudication by virtue of Bankr. Act July 1, 1898, c. 541, § 67, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], and the creditor proved his claim as an unsecured debt.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 668.]

In Bankruptcy. On petition for review of referee's decision

Clayton B. Blakey, for petitioner.

W. L. Porter and Geo. T. Duff, for bankrupt.

EVANS, District Judge. The petition in this case was filed February 15, 1904, and the adjudication was made on the same day. The petition for discharge was filed May 2d, and a discharge, without opposition having been made thereto, was granted on the 25th day of June, 1904. Upon this state of fact it might be said that under the ruling of the Supreme Court in Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, 10 Am. Bankr. Rep. 107, the matter had probably passed out of our jurisdiction, if the Louisville Tobacco Warehouse Company had acquired such a right to subject the homestead of the bankrupt to its particular debt as that creditor now contends for, though the right of the creditor, if any, might be defeated by pleading the discharge, which had been granted without opposition; the creditor not having asked for a postponement of the question of discharge until its right to a lien upon the homestead could be determined by the state court. But in the actual state of the

record different and more far-reaching rules are applicable. On the 27th day of April, 1904, the trustee in this case proceeded to set apart the homestead as exempt. He made no claim to it on behalf of the general creditors of the bankrupt. The Louisville Tobacco Warehouse Company took exceptions to this action, and insisted that the trustee ought, and moved that he be required, to administer it as part of the bankrupt's assets, upon the ground that the bankrupt was not entitled to a homestead in the land under section 1702 of the Kentucky Statutes of 1903. Exception was also taken to the action of the trustee in setting apart as exempt certain personal property; but this seems to be abandoned, leaving only questions as to the homestead to be determined. Under the express provisions of the bankruptcy act this determination must depend upon the Kentucky statute as construed by the state courts. In re Falls City Shirt Mfg. Co. (D. C.) 3 Am. Bankr. Rep. 437, 98 Fed. 592.

It is claimed, inasmuch as the bankrupt had been living for several years in adultery with the woman he married about the time of the attachment presently to be mentioned, and by whom he had had several children, that he was not entitled to the exemption; but the exact proposition was ruled adversely to this contention by the Kentucky Court of Appeals in Bell v. Keach, 80 Ky. 42. Section 1702 of the Kentucky Statutes of 1903 is in this language:

"In addition to the personal property exempted by this article, there shall, on all debts or liabilities created or incurred after the first day of June, one thousand eight hundred and sixty-six, be exempt from sale under execution, attachment or judgment, except to foreclose a mortgage given by the owner of a homestead, or for purchase money due therefor, so much land, including the dwelling-house and appurtenances owned by debtors, who are actual bona fide housekeepers with a family, resident in this commonwealth, as shall not exceed in value one thousand dollars; but this exemption shall not apply to sales under execution, attachment or judgment, if the debt or liability existed prior to the purchase of the land, or the erection of the improvements thereon."

In the case at bar, the title to the land appears to have descended to the bankrupt from his father some years before the adjudication in bankruptcy, but he only began his occupation of it as a home with his family on the 15th day of December, 1903. He has so occupied it ever since that date. He was married on the 12th day of December, 1903, to the woman with whom he had lived for years while his family was increasing and growing up. For some months previous to his marriage he had been intending and preparing to move to and live upon the land. On December 11, 1903, the Louisville Tobacco Warehouse Company instituted its action in the Monroe circuit court against the bankrupt to recover $1,469.06, claimed by it upon an indebtedness created in 1903, after the title to the land had devolved upon the bankrupt, and upon an allegation practically to the effect that the defendant was insolvent and without sufficient property to pay his debts obtained an attachment which, on December 12th, was placed in the hands of the sheriff, and was by that officer, on the 30th day of the same month, levied upon the land in question. No action was taken in the state court upon the attachment, though judgment in personam was rendered upon the claim on the 5th day of February, 1904. The

warehouse company proved its claim in this proceeding, not as a secured, but only as a general, creditor. It made no claim in its proof of debt to any lien on the land, either by virtue of its attachment or otherwise, and I think must consequently be held to have abandoned any such claim to a lien. This, however, should be regarded as not very material, because the attachment, having been obtained and permitted within four months of the adjudication in bankruptcy, and upon grounds which showed that the debtor was then insolvent, and which attachment, if sustained, would necessarily work a preference, was dissolved by the adjudication under the express provision of section 67 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]). In re Arnold (D. C.) 2 Am. Bankr. Rep. 180, 94 Fed. 1001. The warehouse company being, therefore, only a general creditor, only having that status, and not in its proof of debt insisting upon any lien under an attachment which, in contemplation of law, was dissolved by the adjudication, the question of the right of the bankrupt to have the land exempt as a homestead is much simplified. In Nichols v. Sennitt, 78 Ky., at page 632, the Court of Appeals fixed the test to be applied in cases like the one before us in this language:

"We will not stop to inquire how far the decisions in the states mentioned are authority here by reason of the similarity of the statutes, because it appears to us that the homestead statute in this state is subject to but one construction, and that is that, if the land was purchased or the improvements made prior to the creation of the debt, the homestead right attaches when the claimant is in occupancy as a housekeeper in good faith at the time the attempt is made by execution to subject the land. The clause of the statute giving the homestead is general in terms, allowing the exemption to all bona fide housekeepers with families, and without reference to the time at which the homestead may have been created by actual occupancy."

The proof of debt of the warehouse company was presented to the referee and allowed on April 30, 1904, and any lien under the attachment, by operation of law, having previously been dissolved, this proof of its debt must be regarded as the first appearance of the warehouse company in this proceeding. The trustee set apart the homestead on the 27th day of April, 1904, and the warehouse company made its objections thereto on the 30th day of the same month. These last steps, it appears to us, must be regarded as the beginning of the attempt of the warehouse company to have the homestead subjected to the debts of the bankrupt, and, as the occupancy of the land by the bankrupt with his family began in December previous, the bankrupt clearly appears to be entitled to the homestead under the rule in Nichols v. Sennitt, above cited. We see no escape from this conclusion.

Besides, it might be that while a general attachment was issued from the state court on December 11th, 1903, and placed in the sheriff's hands on the 12th, still such process was not necessarily to be levied on exempt property, but only on property not exempt, and the issuing and placing in the sheriff's hands of the attachment may not, per se, have been the beginning of the attempt to make a claim upon exempt property within the purview of the rule in Nichols v. Sennitt. Not until December 30th, when the attachment was in fact levied upon the homestead, might the creditor be regarded as actually asserting a

claim upon exempt property. But, meantime, on the 15th of the same month, the bankrupt, with his family, had moved upon the land and begun to occupy it as a homestead. We incline to think, though it is not necessary to say more in view of what has been previously said, that the Court of Appeals of the state would hold that there was no actual attempt to subject the homestead until the attachment was in fact levied on December 30th, and that, as at that time the property was occupied by the bankrupt and his family as a homestead, he was entitled not to be disturbed.

At all events, from what has been briefly stated, it results that the petition for a review must be dismissed.

MURRAY v. GEORGE W. JUMP CO.

(District Court, S. D. New York. June 12, 1906.)

1. SHIPPING—ACTION FOR FREIGHT—QUANTITY OF LUMBER CARGO.
   An estimate of the quantity of lumber in a cargo, based on the carrying capacity of the vessel, should not be accepted in an action for the freight as against what appears to have been a reasonably accurate tally, made when the lumber was loaded; but such tally may be corrected by evidence that the shipper received a greater quantity from the vessel at the place of delivery.
2. SAME—DELAY IN RECEIVING CARGO—LIABILITY FOR EXPENSES OF SHIPPER.
   Where libelant, after agreeing to furnish a vessel to transport a cargo of lumber in the harbor of New York, but without any definite contract as to time, was delayed in procuring a vessel, but respondent, having failed to secure one elsewhere, accepted libelant's when tendered, libelant cannot be held liable for expenses incurred by respondent in consequence of the delay.
3. SAME—DEMURRAGE.
   The claim of a boat owner for demurrage on account of delay in discharging disallowed, where it appeared that he could have secured quick discharge by moving to a different location in the same yard.
   [Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 576–581.
   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.]
4. SAME.
   A boat owner is not entitled to demurrage for the time during which he refused to continue unloading because of the pendency of negotiations for security for the freight, where he might have discharged, and preserved his lien on the cargo by refusing to deliver.
   [Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 587, 588.]

In Admiralty. Suit for freight and demurrage.

Hyland & Zabriskie, for libellant.

Louis H. Reynolds, for respondent.

ADAMS, District Judge. This action is to recover the freight on 180,000 feet of lumber from 98th Street, East River, to the foot of Noble Street, Brooklyn.

There is no dispute that the rate was $1.00 per thousand but a controversy has arisen as to the quantity transported, the libellant basing

his claim on an estimate founded upon the usual capacity of the vessel and the respondent relying upon a tally of the lumber made at the place of shipment. While there is much to support the libellant's estimate, I do not think it should be permitted to prevail against a reasonably accurate tally, which the testimony tends to show was made by the respondent and the auctioneer at the yard. The auctioneer's tallies were not complete but there was no difference between them and the respondent's so far as they went and after the auctioneer's clerks ceased making tallies, because of the necessity for vacating the premises, the respondent's clerks, who had verified the auctioneer's up to that point, went on and completed the tally of the lumber that went on the boat. Their statements showed that the quantity on board of the boat was 130,796 feet and that is the quantity that should be paid for. Doubtless the discrepancy between the libellant's estimate and the respondent's tally is accounted for by the kind of lumber that the cargo consisted of, it being cut up into small and irregular pieces, which would occupy more space than uniform pieces.

Another disputed question is as to whether the libellant by delay in sending his boat to receive the lumber rendered himself liable for certain expenses said to have been incurred by the respondent. The testimony does not satisfy me that any such definite arrangement was made as to warrant allowing the respondent to recover damages for delay. There was a scarcity of boats in the harbor and the libellant sent about the harbor to obtain one as soon as practicable. The respondent was by the efforts of its manager unable to secure any other boat and returned to the libellant and accepted his boat at the time he tendered it. I do not see how any damages could be properly allowed against him under the circumstances.

Another disputed question is as to what occurred when the boat reached the respondent's yard in Brooklyn. It appears that the libellant could have secured an earlier delivery of the lumber by taking his boat to other places at the yard where similar boats went and secured quick discharge.

Another claim is that the discharge was interrupted and ceased for several days while parties were negotiating about security for the libellant's freight. For this detention of the boat, he claims demurrage. He was entitled to a lien on the lumber for his proper charges for transporting it but it does not appear that there was any necessity for resorting to it as the respondent was apparently amply responsible. Instead of delaying for several days, while the matter of security was being arranged, he could have put the lumber ashore but refuse delivery and thus secured himself for any proper charges he might have. He could not properly make his boat a warehouse for the purpose and thus collect hire while waiting under the guise of demurrage. I therefore hold that the claim for demurrage should be rejected.

Additional Opinion.

The foregoing was prepared at the expiration of the trial, April 6, 1906, and it only remains to consider the additional evidence adduced by the libellant with respect to the quantity of lumber on the boat. As appears above, the probable amount was in excess of the tallies made

by the respondent but it was not allowed because the tallies were the best evidence then before the court. Since that time, however, the libellant has caused the production of a paper by the respondent, which shows that it received 170,192 feet through the boat. The further testimony with respect to an additional quantity is made of estimates and computations based thereon and can not be considered. The libellant, however, has established the quantity of 170,192 feet transported and is entitled to recover on that amount. Otherwise the decision will stand as originally made.

STRATTON V. KOMADA & CO.

(Circuit Court, N. D. California. July 11, 1906.)

No. 13,838 (1,783).

1. CUSTOMS DUTIES—CLASSIFICATION—SAKE—SIMILITUDE.
"Sake" does not have a substantial resemblance to either wine or beer, so as to be dutiable as such by similitude under the provisions of Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], but is dutiable as an unenumerated manufactured article, under section 6, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693].

2. SAME—SIMILITUDE—TEXTURE.
In the provision in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], that unenumerated articles shall be dutiable at the rate applicable to enumerated articles which they resemble in "texture," etc., "texture" does not relate to liquids, but only to the structure of woven fabrics.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 6,182 (T. D. 26,810), which reversed the assessment of duty by Frederick S. Stratton, collector of customs at the port of San Francisco.

Robert T. Devlin, U. S. Atty., Benjamin A. Levett, Special Asst. U. S. Atty. (Benjamin McKinley, Asst. U. S. Atty., on brief), for collector.

Stanley Jackson and Thomas Fitch (Percy W. Crane, on the brief), for importers.

MORROW, Circuit Judge (orally). This is an application for the review of a decision of the Board of United States General Appraisers, rendered October 26, 1905, respecting the classification of a Japanese beverage known as "sake," under the customs revenue laws. The article is not mentioned by name in the tariff act, and the question is whether it is dutiable by similitude, either in material, quality, texture, or use, under the provisions of section 7 of the tariff act (Act July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]), as a still wine containing more than 14 per centum of absolute alcohol, at 50 cents per gallon under paragraph 296 of the act (30 Stat. 174, c. 11, § 1, Schedule H [U. S. Comp. St. 1901, p. 1654]), or as ale or beer otherwise than in bottles or kegs, at 20 cents per gallon under paragraph 297 of the act (30 Stat. 174, c. 11, § 1, Schedule H [U. S. Comp.

St. 1901, p. 1655]), or whether it is to be classed as a nonenumerated article under section 6 of the act (30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]).

Texture is defined as relating to the structure of woven fabric and has no quality relating to liquid. The similitude in this case must, therefore, be either in material, quality, or use to bring the article in question within the statute. It appears from the evidence that "sake" is manufactured from rice by a peculiar process of fermentation and in this respect resembles beer, in being made from a cereal. It appears, also, that the first stage of this process resembles the manufacture of beer; but the subsequent manipulation of the material is wholly different, and the article itself, when ready for use, aside from color, is entirely unlike ale or beer in quality and taste. The process of fermentation does not resemble that of wine. The alcoholic strength of "sake" is developed from the sugar in the starch contained in the rice, while the alcoholic strength of wine is developed from the sugar contained in the juice of the grape. The process is different and the product is a different material. Sake resembles wine in color, as it does beer, but differs in every other respect.

"Sake" is not imported either as wine or beer, and the evidence does not show that it is used in place of either. It is distinctively a Japanese beverage, and there is no evidence that those who drink wine or beer as a beverage use "sake" as a substitute. There is some evidence that "sake" has the quality of a poor sherry wine in taste and color; but it does not appear that the wine referred to in the evidence is imported in any quantity to this country, or that "sake" is used for that wine, either in this country or elsewhere. The two beverages are not in competition with each other. "Sake" has a distinct, uniform quality of its own—that is to say, all "sake" is alike in color, taste, and substance —while wines differ in all their various qualities of color, taste, and substance. Wine is made from different kinds of grapes and from grapes grown in different localities. We have, therefore, claret, burgundy, sherry, port, riesling, and various other kinds of wine, made in different localities and from different kinds of fruit, and having different quality, taste, color, and substance, while "sake" is uniform in character and in material, and unlike any known wine, except the poor quality of sherry referred to in the evidence and produced in court. Moreover, still wines, if properly handled, improve by age, while "sake," like beer, deteriorates after it has been made a few months. In some of these elements I have mentioned, "sake" resembles beer more than it does wine; but in the final comparison in material, quality, and use, a substantial resemblance to either wine or beer disappears.

This question was before the Circuit Court for the Southern District of New York in Nishimiya v. United States, 131 Fed. 650. After considering the various qualities of "sake," as compared with wine and beer, the court reached the conclusion that it was so radically different from those articles that it should have been classified for duty as a nonenumerated manufactured article, under section 6 of the act of July 24, 1897. This case was appealed to the Circuit Court of Appeals for the Second Circuit, where the question was further considered, and

the decision of the Circuit Court affirmed. United States v. Nishimiya, 137 Fed. 396, 69 C. C. A. 588. It is now claimed on behalf of the United States that the evidence in this case distinguishes it from the New York case, but all the elements of difference found in that case have been established in this case. There is more evidence on both sides in the present case than there was in the Nishimiya Case, but I do not find that it has any more weight in establishing a similitude to either wine or beer. The general case presented seems to me to be substantially the same, and the decision of the Circuit Court and Circuit Court of Appeals in the Nishimiya Case is entitled to very great respect, if not of binding force upon this court in the present case. It at least raises a doubt which should be resolved in favor of the importer.

The decision of the Board of United States General Appraisers is affirmed.

VICTOR G. BLOEDE CO. OF BALTIMORE CITY v. CARTER et al.

(Circuit Court, S. D. New York. August 1, 1906.)

1. DISCOVERY—INTERROGATORIES—ANSWER UNDER OATH—WAIVER.
   Where, in a bill for discovery in aid of an action for damages for conspiracy, complainant attached interrogatories to the bill, but waived answer thereto under oath, defendants were entitled to decline to answer.
   [Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Discovery, § 16 vol. 19, Cent. Dig. Equity, § 702.]

2. SAME—ANSWER.
   Where defendants undertook to answer a bill for discovery, they were required to state whether they had knowledge or information respecting the matter alleged in the bill, and, if they had no knowledge or information sufficient to form a belief, they were not required to state their belief.
   [Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Discovery, § 29; vol. 19, Cent. Dig. Equity, § 427.]

3. EQUITY—PLEADING—INFORMATION AND BELIEF—DENIAL.
   An answer that defendants did not know and could not set forth as to their belief or otherwise whether, etc., was insufficient, since, though it denied knowledge, it did not deny information.
   [Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 427.]

White & Blackford, for complainant.
Gifford, Hobbs, Haskell & Beard, for defendants.

THOMAS, District Judge. This is a bill of discovery in aid of an action at law for damages for conspiracy. The defendants refuse to answer any of the interrogatories attached to the bill upon the ground that complainant, by waiving oath to the answers thereto, is not entitled to such answers. The complainant urges that the court should order the defendants to answer such interrogatories and relies upon Slessinger v. Buckingham (C. C.) 17 Fed. 454, Uhlmann v. Arnholt, etc., Co. (C. C.) 41 Fed. 369, and the forty-first equity rule. In the Slessinger Case Judge Sawyer points out, under the present system of obtaining evidence, the advantage of waiving an answer under oath in

equity cases, and expresses his surprise that solicitors for complainants often throw away this advantage. He shows that an answer, when the oath thereto is not waived by defendant, has certain probative force, while an answer not under oath becomes a mere pleading. The opinion makes no suggestion that interrogatories, when the oath thereto is waived, must be answered, and the case has no bearing on the present question. The Uhlmann Case fully supports the complainant's contention that the defendants are not excused from answering interrogatories, when the oath thereto is waived; that the answers have no inherent force as evidence, but become admissions that the complainant may at his option use as evidence. The holding is that the complainant can extort from the defendant statements that have and can have no evidentiary status, unless the complainant chooses to confer it. Judge Butler criticises cases to which an opposite holding is ascribed, but gives no authority for his own holding, save that of Colgate v. Compagnie Francaise, etc. (C. C.) 23 Fed. 83. There Judge Wallace held, in answer to the contention that a corporation could not be compelled to make discovery, that the corporation could be compelled to answer the bill, but not under oath, "although the value of the answer as evidence may not be worth the experiment." He adds:

"Although no officer or agent is made a party to the bill, it is the duty of the corporation to cause diligent examination to be made, and give in its answer all the information derived from such examination."

This is faint support for the doctrine that the defendant must answer interrogatories where the oath is waived. It holds that a corporation, although not able to give evidence, save through its officers, was subject to and must answer the bill of discovery. The case might be cited as authority that a bill of discovery must be answered although the oath be waived. There is much later authority to the contrary effect. Rule 41 states in effect that, so far as answers to interrogatories are waived, the answers thereto, although under oath, shall not be evidence in favor of the defendant, unless the cause "be set down for hearing on bill and answer only." This apparently was to prevent a defendant from answering under oath, when an oath was not required, and claiming thereby the advantage of answering under oath. The defendants rely upon Tillinghast v. Chase (C. C.) 121 Fed. 435; McFarland v. State Savings Bank (C. C.) 132 Fed. 399. These cases hold precisely that the defendants may properly decline to answer the interrogatories seeking discovery attached to complainant's bill, where the complainant expressly waives an answer under oath. It is considered that they state the rule as it is and of right should be.

The motion to compel the defendant to answer the interrogatories is denied.

The complainant files many exceptions to the answer to the bill of discovery. It is concluded that the defendant has not answered to the best of knowledge, information, and belief, in paragraphs 14 and 15 (exceptions 6 and 7). Paragraph 29 does not answer paragraph 28 as to whether Hopkins went West (exception 19). Paragraph 34 does not fully answer paragraph 33 of the complaint, in that it does not answer whether all the acts charged in the bill (paragraph 33)

were done, and separately whether they, or any of them, were done pursuant to a conspiracy as charged (exception 22). Answer paragraph 36 omits to answer paragraph 35 of the bill as to the words "as it had therefore each year" (exception 23), although the complainant of all persons has the best knowledge of the fact, if it be such.

Exceptions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 23 do not relate to acts charged in the bill as being the acts of the defendants, or as having been within their own personal knowledge. Many of the facts as alleged are peculiarly within the knowledge of the complainant, and as between the parties the complainant has had superior opportunities of knowledge and information. But as the defendants have undertaken to answer, they should state whether they have knowledge or information respecting the matter alleged in the bill. If they have not knowledge or information sufficient to form a belief, they need not state their belief. In this regard the answers subject to the exceptions last above enumerated are faulty, as the defendants do not state what information, if any, they have, or whether they have a belief. Their form of answer is "that they do not know and cannot set forth as to their belief or otherwise whether," etc. This denies knowledge. It does not deny information, and scarcely denies the belief. If the defendants have neither knowledge nor information, of course there is no opportunity for belief.

Therefore the above exceptions must be sustained, as are exceptions 6, 7, 19, 22, and 23.

CONKLIN et al. v. UNITED STATES SHIPBUILDING CO.

(Circuit Court, D. New Jersey. August 27, 1906.)

CORPORATIONS—INSOLVENCY—LIABILITY OF RECEIVER FOR STATE FRANCHISE TAX.

The annual franchise tax imposed on corporations by the New Jersey statute, which provides that such tax shall be a preferred debt in case of insolvency, is a valid preferred charge against the assets of an insolvent corporation being administered by a receiver of a court of equity within the state, whether state or federal, so long as the corporation remains undissolved.

In Equity. On rule to show cause.

See 143 Fed. 631.

Lindabury, Depue & Faulks, for receiver of defendant company.

Robert H. McCarter and Edward D. Duffield, for the state of New Jersey.

LANNING, District Judge. The receiver of the United States Shipbuilding Company seeks instruction as to whether it is his duty to pay to the state of New Jersey, as a preferred debt, the franchise tax assessed by the state against that company for the year 1905. I think he must do so. The case is controlled by Duryea v. American Woodworking Mach. Co. (C. C.) 133 Fed. 329, notwithstanding the fact that this court (C. C.) 140 Fed. 219, and the Court of Chancery of New Jersey have each decided that it has no power to dissolve the

shipbuilding company and thereby put an end to its corporate existence and to the receiver's liability for franchise taxes. The trust-fund doctrine, which the counsel for the receiver invokes in supposed aid of the general creditors, will not help them. The act authorizing the imposition of the tax in question declares that it "shall be a preferred debt in case of insolvency" (Gen. St. p. 3335, § 6.) And in the opinion of Chief Justice Gummere in the United States Car Company's Case, 60 N. J. Eq. 514, 43 Atl. 673, it was held that such an imposition is not, properly speaking, a tax but a debt, and that it is a preferred debt as to each and every franchise tax imposed upon an insolvent corporation during the period of its corporate existence, even after its assets have passed into the hands of a duly appointed receiver. Such a debt may not be allowed as a preferred one in a bankruptcy case, because of the provisions of the bankruptcy act (see In re Cosmopolitan Power Co. [C. C. A.] 137 Fed. 858), or by any state or federal court outside of New Jersey administering a New Jersey insolvent corporation's assets which never had a situs in New Jersey, because of the general rule that a court will not enforce a principle opposed to the law or policy established within its territorial jurisdiction concerning matters of local administration. Rogers v. Riley (C. C.) 80 Fed. 759; Fletcher v. Harney Peak Tin Min. Co. (C. C.) 84 Fed. 555; Sands v. E. S. Greeley & Co., 88 Fed. 130, 31 C. C. A. 424; Kirker v. Owings, 98 Fed. 499, 39 C. C. A. 132; Ballou v. Flour Milling Co., 67 N. J. Eq. 188, 59 Atl. 331. The trust-fund doctrine, however, accords to all preferred creditors their full legal rights. In speaking of this doctrine, Mr. Justice Brewer, in Hollins v. Brierfield Coal & Iron Co., 150 U. S. 383, 14 Sup. Ct. 130, 37 L. Ed. 1113, said:

"Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to property, as such, for the direct benefit of either creditor or stockholder."

This court, in administering through its receiver the trust thus referred to, must have due regard to the rights of preferred creditors as they are fixed by the law. The terms of the contract between the state of New Jersey and the shipbuilding company, one of which was that the company should pay to the state annually a certain license fee or franchise tax, were embodied in a public statute, and were assented to by the shipbuilding company when it voluntarily accepted from the state its chartered powers. Knowledge of those terms, furthermore, must be imputed to the general creditors of the company. Called on, as this court now is, to instruct its receiver as to his duty concerning the claim of the state of New Jersey, it cannot impair the state's contractual right. If such a rule is a hard one for the general creditors of insolvent corporations, it can be changed only by legislative action.

The receiver is instructed that it is his duty to pay the tax.

THE OCEANO.

(District Court, S. D. New York. August 2, 1906.)

1. ADMIRALTY—SET-OFF—MATTERS ARISING OUT OF OTHER TRANSACTIONS.
Matters arising out of independent transactions not connected with the one on which a suit is brought cannot be pleaded as a set-off in admiralty.
[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Admiralty, §§ 327–333.]

2. SAME—JURISDICTION.
Where a contract sued on is not maritime, a court of admiralty is without jurisdiction of the subject-matter, which cannot be conferred by consent, and the objection may be taken at any time.
[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Admiralty, §§ 1–14, 131–135.
Jurisdiction as to matters of contract, see notes to the Richard Winslow, 18 C. C. A. 347; Boutin v. Rudd, 27 C. C. A. 530.]

3. SAME—SUIT FOR BREACH OF CHARTER—PROCEEDING IN REM.
Libelant chartered a vessel and made advances for her disbursements to the master, pursuant to the terms of the charter party, which provided that such advances should be deducted in all cases from the freight and should be so receipted for by the master on the bills of lading. They were so receipted for, but in settling the freight at the end of the voyage, through oversight or mistake, a part of such advances were not deducted, and the owner of the vessel refused to repay the same. *Held*, that a suit to recover the same was one for breach of the charter, of which a court of admiralty had jurisdiction, and that it might be brought in rem against the vessel, which was bound for the performance of the contract.

In Admiralty. On exceptions to report of Herbert Green, Esq., commissioner.

Wing, Putnam & Burlingham, for the libelant.
Convers & Kirlin (John M. Woolsey, of counsel), for claimant.

HOUGH, District Judge. The libelant chartered the Oceano for a voyage from Philadelphia to Japan. The charter party provided that "funds for the vessel's disbursements" * * * shall be "advanced by the charterer, on account of the freight, to the master, at the port of loading" * * * "such advance to be deducted in all cases from the freight earned under this charter party; and the master shall so receipt for the advance on the bills of lading." Funds for necessary disbursements were accordingly furnished by the libelant, a bill of lading duly issued for the cargo, and a receipt for the advances spread thereon and signed by the master, reciting that certain moneys had been provided "on account of the freight under this bill of lading," and stating that such moneys should be "deducted in all cases from the freight earned" under the same.

The Oceano having arrived in Japan, the libelant's agent in Kobe settled her accounts, and paid over the balance of the freight moneys; but by some unexplained error, instead of deducting on final settlement the whole amount advanced in Philadelphia he deducted £300 less than that sum. This erroneous settlement was reduced to writing and signed by the same master who had receipted for the

actual advance. For the sum thus remaining unpaid, after due demand, the libelant brings this action in rem.

The claimant interposes three defenses, all of which have been overruled by the commissioners. (1) It is asserted that Weir & Co., who are managers of the joint-stock company owning and claiming the Oceano, are also owners of certain other vessels recently chartered to the libelant, and that by reason of such chartering the libelant is indebted to Weir & Co. in an amount exceeding that sued for in this action. Such a set-off not only has no relation to the transaction out of which this litigation arose, but is not even owned by the claimant herein. It cannot be allowed. Emery v. Tweedie Trading Co. (D. C.) 143 Fed. 144. This is the only defense contained in the answer. But the claimant now urges by its exceptions, (2) that the commissioner should have found that the subject-matter of this controversy was not within the jurisdiction of admiralty, and (3) should have further found that the demand in suit created no maritime lien even if it be considered enforceable by an admiralty action in personam.

The libelant rejoins that the claimant by appearing, filing claim, executing the usual stipulation for value, and admitting the jurisdictional averments of the libel, has waived whatever advantage these defenses might have conferred if duly pleaded. Consent, however, cannot give jurisdiction, if it does not exist as to the subject-matter of the suit; if the contract sued on be not maritime, jurisdiction of the subject-matter is lacking; while if there be no maritime lien there is no foundation for a decree in rem. The Monte A. (D. C.) 12 Fed. 333.

The claimant's method of presenting these jurisdictional points is certainly unusual, but sufficient to require their consideration. The John C. Sweeney (D. C.) 55 Fed. 540. The claimant's real objection to the demand in suit is that libelant is in truth suing for money had and received; that all the occurrences on which the suit is based arose after the fulfillment of the charter party, that the action is really therefore in assumpsit and lies only at common law. It appears to me, however, that the facts found herein constitute on the part of the claimant a breach of its charter party obligation to repay to the libelant the entire amount of the Philadelphia advance. Whether the settlement at Kobe be regarded as an overpayment by the libelant or an underpayment by the claimant, the fact remains that the claimant procured an advance of its chartered freight, promised by its charter party to repay it, and has persistently refused to do so. In my opinion, therefore, this is really a cause of affreightment, and admiralty has "jurisdiction of all contracts of affreightment though the damages may in any case be somewhat indirect." The A. M. Bliss, 2 Low. 103, Fed. Cas. No. 274. The damages here arise in a singular manner, but the same doctrine is laid down in Church v. Shelton, 2 Curt. 271, Fed. Cas. No. 2714, where the "indirection" is even more marked. It follows from the view taken of the subject-matter of this action that the cause may be brought in rem. The charter party especially provides that to the due execu-

tion thereof there shall be bound not only the parties themselves, but also "the vessel's freight, tackle and appurtenances, and the merchandise to be laden on board." It is truly pointed out by the commissioner that these words taken literally create a conventional lien on "tackle and appurtenances" even if there be no lien upon the steamer. The quoted expression is possibly, if not probably, a misprint for "vessel, freight, tackle and appurtenances." But whether this be true or not I think jurisdiction should be sustained on broader grounds. As soon as the performance of a charter party is commenced a lien exists on the vessel in favor of the shipper or charterer, and a suit in rem may be maintained for any liability of the master or owner arising therefrom. The Director (D. C.) 26 Fed. 708. Damages sustained by a charterer through breach of a charter contract constitute a lien on the vessel. The Panama, Olcott, 343, Fed. Cas. No. 10,703.

It cannot be denied that unless explicitly excluded by the contract of charter party both shipper and owner may pursue their remedies for breach of contract by actions in rem. I think that much stronger words than those last quoted from this charter party should be required to oust the charterer of his usual remedy. It is strongly urged that the A. M. Bliss, supra, is inconsistent with recognition of a right of action in rem. But the learned court there drew a distinction between "loans made on a pledge of the freight" and "advances of freight." The former do not imply a pledge of the ship, and failure to pay constitutes no breach of the charter party. But a failure to repay an "advance of freight" on the completion of the voyage was there distinctly recognized as being a breach of the charter party. As above stated, I consider the claimant's action herein as amounting to a deliberate refusal to repay an "advance of freight" and therefore constituting a breach of the charter party that gave birth to the freight.

Let the commissioner's report be confirmed, and a decree entered in accordance with his recommendations.

THE LUZERNE.

(District Court, S. D. New York. September 21, 1906.)

1. COLLISION—TUGS WITH TOWS MEETING—INEVITABLE ACCIDENT.

The tug Luzerne with a car float 100 feet long on her port side was proceeding up the East river on a slack tide and at moderate speed when she met another tug with tows on a hawser coming down on a parallel course about 300 feet distant to port, and, the Luzerne sheering from her course to port, the float struck and sunk one of the descending tows. The evidence showed that just before the sheer an overtaking schooner came up on the starboard side of the Luzerne, which changed her course slightly to port to avoid a collision, but a collision immediately followed, and the impact of the schooner caused the Luzerne and her tow to sheer still further until the float struck the descending tow. The Luzerne was in no way in fault for the collision with the schooner. *Held*, that the collision between the float and libelants' vessel was due to inevitable accident, for which the Luzerne was not liable.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 19, 236½, 296.]

2. SAME—VIOLATION OF STAND-BY ACT.

The failure of a vessel to stand by after collision, as required by Act Sept. 4, 1890, c. 875, 26 Stat. 425 [U. S. Comp. St. 1901, p. 2902], merely places upon her the burden of proof in a suit for the collision.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 232.]

In Admiralty. Suit for collision.

James J. Macklin, for libellant.
Butler, Notman & Mynderse, for the Luzerne.

ADAMS, District Judge. This action was brought by William Butler, the owner of the boat Anna Daly, to recover the damages sustained through the sinking of that boat from a collision in the East River, about opposite pier 4, on the 12th day of October, 1905, about 2:30 o'clock in the afternoon. The tide was slack and there was a strong wind blowing from the north-west.

The Daly was in tow of the tug Walter Tracy, on a hawser of about 75 fathoms in length, in company with three other boats, the Daly being the port boat in the second tier. They were proceeding at the rate of 4 or 5 miles. The Luzerne, with a carfloat about 200 feet long, extending about 100 feet ahead of the tug's stem, the latter's stern being even with the float's, was proceeding up the river at the rate of 6 or 7 miles. Both tows were near the middle of the river, the Luzerne and tow being about 300 feet nearer the Brooklyn shore than the Tracy and tow, which was following straight behind the tug. The float struck the Daly a severe blow on the port side, which caused her to sink almost immediately.

No fault is shown or alleged against the Daly or Tracy, but the Luzerne claims that the accident was inevitable because an overtaking schooner caused her to sheer to port, first by the use of her helm, about 150 feet, and the remainder of the distance through an impetus given to the Luzerne and float by collision with the schooner, which was sailing much faster than the tug and tow were going, and sheered towards them by reason of losing control of her movements through the head sails becoming becalmed and the after sails in the strong wind turning her to port.

This account of the collision is sustained by several persons on the tug and tow but it seemed that the claim of the tow being pushed by a relatively small schooner was so improbable, especially as the impact of the collision was between the bows of the schooner and the tug, that I was first disinclined to believe such account. Since the trial, however, I have examined the testimony of an East River and Long Island Sound pilot navigating on a towed schooner behind the tug and tow, taken out of court, and he fully corroborates the contention. No reason appears in the record for discrediting this witness and what he says seems to be true. The situation appears to have been that the Luzerne was proceeding properly up the river without danger of collision with the Tracy's tow when the overtaking schooner suddenly appeared and came too close to the Luzerne. Danger of collision was thus at once created and actual collision almost immediately followed with the disastrous results. It is strongly urged that the accident was inevitable and the tug without fault.

I think this claim must be sustained. The fact of the float being forced against the Daly is shown by too many witnesses to be disregarded. It does seem improbable that collision with a small schooner could have produced the effect claimed yet that it did so is proved not only by the testimony of the witnesses, one of whom was a competent observer and entirely disinterested, but by other circumstances. The libel states that the collision happened by the Luzerne proceeding across the river and invokes the starboard hand rule as a fault on the part of the Luzerne. This also shows the change to port and I now have no doubt about the turning of the tug and float somewhat across the river. Their turning slightly to port under the helm was not sufficient to bring about the contact but the striking of the schooner apparently did turn them several more points and the collision with the Daly was thus produced.

No fault appears upon the part of the tug. She was put in a critical and dangerous position by the tortious act of a third vessel and did the best she could under the circumstances. She attempted to warn the schooner off by whistle signals without effect, and just in the collision she stopped her engines. She could not reverse before because it would have thrown her tow across the schooner's bow and perhaps produced a more harmful collision in that way. The schooner would then have struck the float or tug a head on, or nearly head on, blow with perhaps fatal results to both vessels.

The contention for the exoneration of the tug is supported by several well considered English cases (The Thornley, 7 Jurist. pt. 1, 659; The Hibernia, 4 Id. N. S. pt. 1, 1244; The Marpesia, L. R. 4 Privy Council Appeals, 212) and it is in accord with general principles. The libellant cites The Surf (D. C.) 132 Fed. 880, where the plea of inevitable accident was rejected but there the vessel on whose behalf the plea was urged was originally in fault for being too close to the shore and it was held that she could not under such circumstances be excused because she was forced out from the shore into a proper position.

The libellant also urges the Act of September 4, 1890, c. 875, 26 Stat. 425 [U. S. Comp. St. 1901, p. 2902], requiring colliding vessels to stand by until it appears that assistance is not required. The Luzerne here did not comply with the terms of the Act but that merely put upon the vessel failing to stand by the burden of showing that she was not responsible for the collision, The Hercules, 80 Fed. 998, 26 C. C. A. 301, and the evidence here is sufficient to sustain that burden.

Libel dismissed.

KING v. CONNABEER.

(District Court, S. D. New York. September 25, 1906.)

SHIPPING—INJURY TO VESSEL—NEGLIGENT MOVING OF BARGE.

Evidence considered, and *held* to establish the claim of a libelant that an injury to his coal barge was due to the fault of respondent in moving her while discharging in Harlem river at a time when the tide was too strong, in consequence of which she broke the lines and drifted against a bridge pier.

In Admiralty.

John F. Foley, for libellant.
James J. Macklin, for respondent.

ADAMS, District Judge. This action was brought by John F. H. King, the owner of coal barge No. 1 K, against John S. Connabeer, the consignee of the coal laden on board, doing business at the foot of 137th Street, Harlem River, for injuries alleged to have been sustained by the boat in moving her to effect a change of position during the progress of the discharge, on the 24th day of February, 1905. The boat reached the respondent's place on the 23rd and discharging was then commenced. On the 24th, while being moved, she escaped from the men doing the work and drifting down stream with a strong flood tide, struck the bridge pier in the center of the river, opposite a point between 135th and 136th Streets, doing herself some damage.

The controversy arises out of the question of responsibility for such damage, the libellant claiming that it was due to the moving of the boat by the respondent for its convenience, at an improper time, when the tide was too strong for such an attempt, and in an improper manner; while the respondent contends that the moving was necessarily done and that the trouble arose from the libellant's carelessness in fastening a line which ran from the respondent's steam winch on the wharf to the barge, as requested by those in charge on the wharf.

It appears that when the boat reached the respondent's place she was made fast on the southern side of a slip at the end of 137th Street. Her length being 102 feet, it was somewhat greater than the depth of the slip and she extended a few feet outside into the river. The discharge was being made by the respondent. During the first day she remained where first made fast, during which time the coal was taken from the 2d and 3d beams from the bow, the boat being an open one. This continued the next morning for about 2 hours. At the end of this time, there was a strong flood tide prevailing, running at the rate of at least 4 miles an hour, towards the southern end of the river. At that time, the respondent wished to shift the boat, and undertook to do so, by making fast some of the boat's lines to his own line, running from the drum of a steam winch located in a small elevated engine room on the southern side of the wharf, about two thirds of the distance from the bulkhead to the end of the wharf. A number of tons of the coal located in the forward part of the boat had been taken out, probably about 75 tons out of a total load of between 350

and 400 tons and the respondent urges that the boat was then shifted because the libellant wished it done to preserve the proper trim of his boat. The libellant denies this and says that more coal could have been taken from that end without injury to the boat, which was unusually strong and staunch. A good deal of discussion ensued upon this point and for whose benefit the moving of the boat was done, but the respondent's contention is opposed by the libellant's testimony and inconsistent with the pleadings, which as above shown, allege fault on the boat's part, not because she was moved for her own purposes, when it became necessary to have it done, but because it was improperly done. The defense is set forth as follows:

"Seventh: Respondent further answering alleges upon information and belief that the facts as to the matter of damage referred to in the libel herein are as hereinafter stated; That in the course of the discharging of the cargo it became necessary to move the said barge and the same is done by fastening a line from a steam winch on the wharf to the said barge; that the master of the said barge refused to fasten the line as requested from the dock and attempted to fasten the said line upon the said barge himself, but that the said master of the barge so negligently, carelessly and improperly fastened the said line on the said barge, that when she was partly turned around one of the lines was allowed by said master to slip off the said barge, permitting her to drift with the tide and bringing so much strain on the other line as to pull it from its fastening on the wharf permitting the boat to go down the stream; that thereupon a line was passed from the steam winch to the barge to pull her back to the dock, but the master of the barge wholly failed to make fast the line upon the barge in a proper and safe manner and as he was directed by those on the wharf, and insisted upon having his own way and improperly and unskilfully fastening the line to the side of the barge, thus permitting the barge to turn at an angle instead of pulling straight ahead, causing the line finally to part by reason of which the said barge received the damages complained of in the libel.

Eighth: That the said damage was not caused by any fault or negligence on the part of the respondent or his servants, but was wholly caused by and through the fault, and negligence of the master of the said barge in the following respects:

(1) In carelessly, negligently and improperly fastening the line from the dock to said barge.

(2) In carelessly, negligently and improperly making fast the line from the dock to the side of the said barge instead of to the end of said barge as he was requested, and as he ought to have done."

The weight of the testimony shows that the respondent sought to move the boat for his own purposes, notwithstanding the protest of the master, who recognized the danger at that stage of the tide and said it should have been done at slack water, which was certainly true. The proximate cause of the damage therefore was the moving of the boat at an improper time and unduly exposing her to the effect of the tide.

There is a contention on the part of the respondent that the master of the boat did not handle the lines properly, which was the cause of the boat getting adrift. This the libellant's principal witness, the master of the boat, denies and I think the fact was that he did the best he could. The movement required a greater length of line than the line of the respondent, running from the winch and called the steam line, afforded and in making some of the boat's lines fast to it, a defect existed. It may be that the master of the boat participated in

some negligence in this respect, but if it be assumed that such is the fact, I do not see how it imposes any liability upon the libellant, as the master in such respect was acting for the respondent and against his own judgment of what was proper with respect to moving the boat at all at the time.

Decree for the libellant, with an order of reference.

THE TRANSIT.

(District Court, S. D. New York. October 1, 1906.)

COLLISION—STEAMTUGS NEAR JERSEY CITY DOCKS—NEGLIGENT LOOKOUT.

A collision between two tugs off Jersey City, near the ends of the piers, *held* due solely to the fault of one, which had just left a slip and taken a circling course, in not maintaining a proper lookout and keeping out of the way of the other, which was on a course straight up the river to a nearby wharf, and necessarily near the end of the piers, and which was unable to determine the course of the first, but gave her two signals, which were not heard.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 203.]

In Admiralty. Suit for collision.

James J. Macklin, for libellant.
Armstrong, Brown & Boland, for the Transit.

ADAMS, District Judge. On the 2nd day of February, 1906, a collision occurred between the steamtug Stella and the steamtug Transit off the Morris Canal Basin, Jersey City. The Stella was going up the river in the vicinity of the ends of the piers, being bound for a wharf near by to attend a dredge lying at the foot of Morris Street. The Transit had taken a tow of loaded canal boats to the Gamecock Dock and made them fast, from where the tow trailed down the river with an ebb tide, bringing the stern of the tow about opposite the Packer Dock. She then went up to Morris Street for orders and having obtained them, circled around from Morris Street to rejoin her tow, at an average speed of 5 or 6 miles per hour. At this time the Stella was coming up the river, at the rate of about 3½ miles per hour, and the boats came into collision off the basin about 150 feet outside of the ends of the piers, the Transit striking the Stella a severe blow on the starboard side about amidships and cutting into her to such an extent that sinking was only averted by her being beached on the flats in the Morris Canal Basin.

The Stella was a small tug, 74 feet long. She had her master and engineer on duty at the time, the master both running the engine, which was arranged so as to be operated in the pilot house, and steering the boat, the engineer doing the firing. The Transit was a large and powerful tug, then under command of her pilot, with two deck hands on deck, but neither specially assigned to lookout duty. There was also an engineer on duty in the engine room.

The Stella urges that the collision was caused by the Transit not

seeing the Stella in time. The Transit claims that the Stella was in fault (1) for not keeping out of the way of the Transit; (2) in following the pier ends closely for a half to three quarters of a mile; (3) in not reversing.

It appears that the Stella saw the movements of the Transit and blew her two signals of two blasts each as the Transit was circling around to indicate that the Stella would pass inshore. The Transit, however, did not hear the Stella's signals, nor see her until they were about in collision, when she reversed but too late to be of any avail. I think the Transit was in fault in this respect. If she had been more observant she could easily have seen what the Stella was intending to do and performed her own duty of keeping out of the way.

With reference to the alleged faults of the Stella: (1) It does not appear how it was her duty to keep out of the way. While she had the Transit on her starboard hand, after the latter crossed her bow in leaving Morris Street, the Transit had no course which the Stella could depend upon for the purpose of avoiding her. (2) The Stella was unavoidably near the ends of the piers in performing her necessary movements. She could not be expected to go out into the river, considering the short distance she had to traverse. (3) It did not appear that it could be seen on the Stella that reversing would have been of any avail. If she committed any error in this respect, it was not such as to amount to a legal fault. She could not correctly determine where the Transit would go in her circling course, even if it could be supposed that she would continue it into collision. The Stella was justified in believing that the Transit would exercise ordinary prudence in trying to avoid her.

Decree for the libellant, with an order of reference.

THE CLAVERBURN.

(District Court, S. D. New York. October 4, 1906.)

ADMIRALTY—COSTS—EFFECT OF OFFER BY RESPONDENT.

Where an offer is made by a respondent in admiralty before trial, and the money paid into court in conformity to admiralty rule 36 of the Southern district of New York, it is not necessary that such offer should include a proctor's docket fee or deposition fees; and when on the trial the offer is found sufficient respondent is entitled to tax such fees, and also disbursements made in the taking of testimony used on the trial, although the expense was incurred before the offer.

In Admiralty. On exceptions to clerk's taxation of costs.

Stimson & Williams and Avery F. Cushman, for libelants.
Convers & Kirlin and Orville C. Sanborn, for claimant.

ADAMS, District Judge. The present controversy in this action arises out of a question of the taxation of costs and disbursements. The action was brought by Louis C. Gillespie and others against the steamship Claverburn to recover the loss sustained through some damage to a consignment of Wood Oil on a voyage from China to New

York. Part of the damage was caused by some Gambier stowed above it. Pending the action, on the 4th of December, 1905, the claimant tendered and paid into court the following:

"Damages to casks by gambier		$ 76 80
Interest thereon from Jan'y 6, 1905 to Dec. 5, 1905		4 30
Costs as per Statute:		
Proctors' docket fee		20 00
Proctors' deposition fee for 5 depositions @ $2.50 each		12 50
Taxable disbursements heretofore made herein by libellants and not re-paid to them:		
Clerk's fees filing libel		2 80
" " " note of issue		1 00
Notary's fees		1 00
The Clerk's fees and commissions on deposit		1 75
Total sum deposited and tendered herein		$120 15"

On the 19th of September, 1906, the libel was dismissed and the libellants' costs were taxed as follows:

"Libellants Bill of Costs up to December 4th, 1905, the date of payment of tender:

Proctors' docket fee		$20 00
Depositions (5)		12 50
Disbursements.		
Filing libel	$2 80	
Note of issue	1 00	
Notary fees	1 00	
Clerk's fees and commissions on deposit	1 75	
Taxing costs	1 10	7 65
		$40 15"

The claimant then sought to tax the following:

"Costs.

Proctor's Docket fee	$20 00
Proctor's fee, $2.50 for each 5 depositions read on trial * * *	12 50
	$32 50

Disbursements.

Clerk's fees filing answer and stipulation & claim	$ 1 85
Marshal's fees serving process	4 90
Marshal's fees on bonding	8 53
Notary's fees	2 00
Stenographer's fees taking depositions taxable by consent	96 95"

The clerk disallowed the first two items of costs but allowed the disbursements, whereupon exceptions were duly taken to save the claimed rights of both parties, the disputed points being (1) as to the claimant's docket fee ($20.00) and deposition fees ($12.50), and (2) as to the disbursements mentioned.

Rule 36 is as follows:

"* * * At any time not less than 14 days before a trial the respondent or claimant may serve upon the libellant's proctor a written offer to allow a decree to be taken against him for the sum of money therein specified, with costs to the date of the offer to be taxed, which the libellants may within ten days thereafter accept and enter judgment accordingly; if not so accepted, and the libellant fail to obtain a more favorable decree, he cannot recover costs from

the time of the offer; but if the respondent or claimant deposits the amount of his offer, or tender, and the clerk's fees for paying out the same, with the clerk, the respondent shall recover costs from the time of deposit if the libellant does not recover a more favorable decree."

1. With reference to the docket and deposition fees, it has been heretofore held in this court that it is not necessary to offer a docket fee in making a tender, because one does not become due before trial and where one is not tendered it becomes the clerk's duty to tax one for the respondent when he is successful in establishing that the amount tendered and paid into court was sufficient to meet the libellant's claim. Merrit & Chapman Derrick & Wrecking Company v. Catskill & N. Y. Steamboat Co. (C. C.) 112 Fed. 442. Apparently the payment of the docket fee into court was unnecessary and the claimant is entitled to tax it and it seems the deposition fees should not have been tendered. They were not due to the libellants at the time, as the depositions could not be used before a trial. It has been decided that the charge for them only becomes taxable when they are admitted in evidence. Kaempfer v. Taylor (C. C.) 78 Fed. 795.

No exception was taken by the claimant to the clerk's taxation of the libellants' costs, therefore it must stand. Also for the further reason that upon payment into court, the fees became the libellants' property, and they were liable to be withdrawn at any time subject to the retention in court of such sum as might be necessary to secure the claimant's subsequent costs. Califarno et al. v. MacAndrews et al. (D. C.) 51 Fed. 300.

The claimant is entitled to tax these fees.

This exception is sustained.

2. With regard to the disbursements made in taking testimony, it is urged by the libellants that as it and the other expenses up to that time were incurred before the tender and the payment into court, they were merged in the admitted recovery of costs and cannot now be allowed to the claimant. Although they were so taken, they were not used until the time of the trial and were a part of the basis of the defeat of the libellants' action. It is but just, as it is usual, to allow a taxation of these necessary disbursements to the successful party and the clerk's action in this matter is sustained.

This exception is overruled.

MIGLIAVACCA WINE CO. v. UNITED STATES.

(Circuit Court, W. D. Washington, N. D. July 24, 1905.)

No. 1,265 (1,710).

1. CUSTOMS DUTIES—RECIPROCITY AGREEMENTS—RIGHT TO REDUCED DUTY.
In order to be entitled to the benefits of the reciprocal commercial agreements negotiated with foreign countries, under Tariff Act July 24, 1897, c. 11, § 3, 30 Stat. 203 [U. S. Comp. St. 1901, p. 1690], importers must furnish satisfactory evidence that their importations were both produced in and exported from the country with which the agreement was made.

2. SAME—EVIDENCE OF ORIGIN OF GOODS—ESSENTIALS.
With respect to merchandise alleged to be within the reciprocal commercial agreement with France (30 Stat. 1774), as having been both produced in and exported from that country, *held*, that evidence of those facts should be furnished by a witness who knows them, or from his position may be presumed to know them, and that a deposition by an importer to the effect that he had ordered the goods through a New York agency and that they were consigned to him direct by the exporting establishment in France, but which did not show that he had any further personal knowledge, was incompetent.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision below affirmed the assessment of duty by the collector of customs at the port of Port Townsend with reference to merchandise claimed by the importers to be subjected to the reduced duty provided in the reciprocal commercial agreement with France (30 Stat. 1774), negotiated under Tariff Act July 24, 1897, c. 11, § 3, 30 Stat. 203 [U. S. Comp. St. 1901, p. 1690].

Vince L. Faben and John L. Stout, for importers.
Jesse A. Frye, U. S. Atty.

HANFORD, District Judge. It appears from the report of the Board of General Appraisers that in the administration of the customs laws evidence is required to support a claim for the admission of foreign merchandise at a reduced rate under the various reciprocity treaties between our government and foreign countries, and that the claim of the importer in the case now under consideration was disallowed by the collector and by the Board of Appraisers, because not supported by evidence. Since the decision of the Board of General Appraisers was rendered, a deposition of the importer has been taken at Seattle for the purpose of proving that the goods in question were imported by him direct from manufacturers in France; and his testimony is to the effect that he sent an order for the goods through an agency in New York, and that the goods were consigned to him direct, and billed to him as purchaser and consignee. It is reasonable, and, indeed, necessary, to require importers claiming benefits under the reciprocity treaties to furnish satisfactory evidence to prove that the conditions exist which the law makes essential. Therefore the ruling of the Board of General Appraisers, in the absence of the required evidence, was correct.

I hold, also, that the deposition of the importer submitted to this court is insufficient to justify a reversal, because it is necessary to prove that the merchandise was produced in France, in addition to the fact of a direct importation from France. The reciprocity treaties do not entitle importers in this country to the benefit of reduced tariff rates on importations from France other than the productions of that country; and this material fact should be proved by the testimony of a witness who knows the facts, or who from his position may be presumed to possess the required information. The deponent in this case has his domicile and place of business in Seattle, and it does not appear that he has any personal knowledge, other than the fact that he ordered the goods from the foreign establishment and that they were sent to him in pursuance of his order from the place in France in which said establishment is located.

I consider the evidence incompetent, and therefore affirm the decision of the Board of General Appraisers.

In re KARNS.

(District Court, S. D. Ohio, W. D. November 27, 1905.)

BANKRUPTCY—JURISDICTION OF COURT—WAGES EARNED AFTER BANKRUPTCY.

Wages earned by a bankrupt after his adjudication belong to him, and are not a part of his estate in bankruptcy, and the court of bankruptcy has no jurisdiction to take action against a creditor who has wrongfully collected such wages on an assignment made prior to the bankruptcy; the remedy being an action by the bankrupt for their recovery.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, §§ 410, 625, 194.

Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

In Bankruptcy. On motion for a rule for contempt.

Deal & Orebaugh, for petitioner.
K. H. Caldwell, for defendant.

THOMPSON, District Judge. October 7, 1904, Karns, an employé of the Norfolk & Western Railway Company, for a valuable consideration, assigned to the Boyd Investment Company his future wages, to the amount of $67.50. Prior to April, 1905, $32.50 had been paid to the Boyd Investment Company out of Karns' wages. In April, 1905, Karns was adjudicated a bankrupt. After the adjudication, and on August 10, 1905, the railway company paid the Boyd Investment Company, out of the wages earned by Karns in July, 1905, the further sum of $35, being the balance due upon the assignment. Boyd at the time of the last payment knew that Karns had been adjudicated a bankrupt. August 26, 1905, a motion was filed by the bankrupt for an order requiring the Boyd Investment Company to show cause why it should not be punished for con-

tempt of court for collecting the said $35 from the Norfolk & Western Railway Company.

The lien, equity, or title of the Boyd Investment Company, under the assignment, could only attach as the wages became due. Before the July wages became due, Karns had been adjudicated a bankrupt, and he was afterwards discharged by the bankruptcy court from his debts, including the debt due the Boyd Investment Company; the discharge relating back to the date of the filing of the petition in bankruptcy. His earnings, after the adjudication in bankruptcy, belonged to him; but debts thereafter contracted, prior to the granting of the discharge, were not released. In Mitchell v. Winslow, 2 Story, 630, 17 Fed. Cas. 527, the creditor had taken possession, under the terms of the contract, of property not in existence when the contract was made, before the petition in bankruptcy was filed. In this case the equity, lien, or title had not attached to the July wages and the debt due was an unsecured claim entitled to its distributive share of the estate of the bankrupt; the estate being the property belonging to him at the date of the filing of the petition in bankruptcy. The bankrupt has a right of action to recover the $35 from the railway company and the Boyd Investment Company, which, however, must be prosecuted in the state courts. The July wages were not a part of the estate being administered in bankruptcy, and this court has no power to compel the Boyd Investment Company to pay the money into this court, nor to Karns.

The motion for a rule to show cause will be overruled.

MARINE IRON WORKS v. WIESS.*

(Circuit Court of Appeals, Fifth Circuit. October 1, 1906.)

No. 1,480.

1. ESTOPPEL—EQUITABLE ESTOPPEL—ACTS AND CONDUCT OF PARTY.
Where plaintiff, for whom defendant had contracted to build a pleasure boat, to have a draft when completed not to exceed 23 inches, was present in person during a considerable part of the time while the boat was being built, and had a representative present during all of the time, if during such time he obtained knowledge that the boat when completed would exceed such draft, and about the amount of the excess, whether it was due to changes made by his request or to fault in the original plans, and thereafter, without announcing to defendant his intention to reject the boat on that ground, continued to make suggestions as to the construction and equipment, and of changes therein, which were carried out by defendant, which made substantial expenditures, in the reasonable belief that plaintiff intended to accept the boat, plaintiff thereby waived the objection of excessive draft, and was estopped to reject the boat on that ground; but such estoppel would not extend to matters of which he had at the time no knowledge, as to a guaranty of speed, which could only be determined after the boat was completed, unless he knew or should have known that the changes made at his request would affect the speed.

2. SAME—ENFORCEMENT AT LAW.
The principles of equitable estoppel are now applied and enforced as liberally in courts of law as in courts of equity, and where equitable estoppel is available as a defense in equity it is equally available at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 291.]

3. SAME—ELEMENTS.
It is not necessary that acts or declarations should be made to mislead in order to work an estoppel, but it is sufficient if they were calculated to and did in fact mislead.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 126.]

4. CONTRACTS—ACTION FOR BREACH—INSTRUCTIONS.
Instructions given and refused considered, in an action against the builder of a boat for breach of contract and to recover payments made thereunder.

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

George C. Greer, for plaintiff in error.

J. W. Terry, C. B. Martin, J. F. Lanier, and R. C. Duff, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. This is an action brought by William Wiess, the defendant in error, to recover from the Marine Iron Works, the plaintiff in error, three several installments paid on a contract by which the plaintiff in error agreed to construct for the defendant in error a stern wheel pleasure boat. The contract is embraced in several

*Rehearing denied January 15, 1907.

communications passed between the parties, the portions of which necessary to the present consideration are as follows:

"Chicago, April 10, 1902.

"Capt. Wm. Wiess, P. O. Box 747, Beaumont, Texas—Dear Sir: We hereby confirm, but more in detail, the quotation made to you by our general manager under date of March 15th, when in Beaumont, Texas. We submit the following: To build for you on order a modern steamboat of steel construction, strictly first-class in all respects, designed, built, and fitted out especially for private pleasure purposes, to be of the following general description:

"Stern Paddle Wheel Steel Hull Steamboat.

Length of hull	feet, 82
Beam at top of sides, amidships	feet, 17
Width on deck over guards	feet, 20
Draft all complete not to exceed	inches, 23
Flare of sides each 6 inches, total	inches, 12
Length over all, including paddle wheel	feet, 97½

"The entire hull of the boat to be of the finest steel construction, containing five water-tight bulkheads. * * * We guaranty to make this a staunch and in all respects dependable boat, containing the best of modern design, material, workmanship, and fittings throughout. * * * All work guaranteed strictly A-1 throughout; to be painted inside and outside, and as little cement as possible to be used. * * * One horizontal return flue, internally self-contained Clyde baffle back marine boiler, to be 6 feet diameter by 8 feet long. To contain Adamson ring circular furnace, 36 inches diameter, 77 inches long. Eighty-five lap-welded charcoal iron tubes, each 3 inches diameter by 77 inches long. Steam dome 36 inches diameter by 30 inches high. Grates arranged for burning soft coal. This boiler to be built by us under the U. S. rules and regulations, permitting the use of salt feed water where on occasion it may be necessary to use it. We guaranty the licensed steam pressure to be not less than 165 lbs., and that the hydrostatic pressure test be not less than 248 pounds, at which pressures said boiler is to be sound and tight. Fittings of best marine grade throughout, including double smokestack, telescoped, one inside the other, with air space between, and this to be hinged stack, counterbalanced for easily raising or lowering. * * * The equipment to be very complete, and in keeping with a private steam yacht of the character herein described, to include: * * * One hardwood steering wheel, 4 feet diameter over the handles, well mounted, and connected up to three balanced rudders. * * * It is our intention to make you this offer, to furnish a complete boat, ready for service in all respects, complete and A-1 throughout, and to deliver her to you with all requisite government papers, at Sabine Pass, Texas, for the sum of seventeen thousand eight hundred and fifty dollars ($17,850), in funds bankable at par in Chicago. We guaranty this boat running at a rate of over fourteen miles per hour, under good conditions as to water, wind, and operation. Every minute detail of the most modern method of best steel hull construction will be carefully considered, and such as in our judgment is best for the boat will be incorporated into the work. Completion latter part of August next. Name of steamer and hailing port will be put on in artistic shape and in position as required under the marine rules and regulations. Terms of payment as follows: Twenty-five per cent. cash guaranty payment; twenty-five per cent. additional when work is fully one-half completed; twenty-five per cent. additional when work is completed and passed inspection at our dock; final twenty-five per cent. when delivery is made. We submit this to you in duplicate, asking that you kindly date, sign, and return the duplicate to us. We reserve the privilege of modifying minor details per drawings and specifications if such action on our part improves the boat or enhances its practical value. It is further agreed that any changes or alterations or additions that you may wish to make as pertain to the furnishings may be made on a debit and credit basis, without affecting the validity of this agreement. In due course a list of the small articles, such as

knives, forks, spoons, linen, etc., will be made up and sent to you, but it is the distinct understanding that these are to be complete throughout and of all good quality.

"Respectfully, [Signed] Marine Iron Works,
"W. G. Nourse, Manager."

"Beaumont, Texas, April 14, 1902.

"Mr. W. G. Nourse, Chicago, Ill.—Dear Sir: The contract for the boat in duplicate received Sunday morning, and I believe you have practically covered everything in the contract, including your drawing SPS.82o, as forming a part of the contract. However, you do not get a clause in this contract quite as broad as the one you left with me March 15th, in which you say that anything that may be overlooked shall form a part and parcel of the contract. The last paragraph on the first page, which is finished on the second page, is intended to cover that, but I do not think it quite covers it; hence, I take it that anything that particularly belongs to the boat that has been overlooked will be furnished by you, as per your agreement of March 15th, and I desire to say in this connection that I shall not be very exacting in anything that may have been left off. * * * There may be some other items overlooked, but I only want what properly belongs to the boat. I herewith return you duplicate contract, duly accepted by me, and also inclose you exchange of Beaumont National Bank on the Continental National Bank of Chicago for $4,462.50, which please pass to my credit. I also note that you will send me itemized list of furnishings mentioned by you. I also note that you think it will be the last of August before you can complete the boat. I truly hope that it will be early in August, so that the boat will arrive here the latter part of August, if it is possible for you to do so. Please acknowledge receipt, and oblige,

"Yours truly, [Signed] W. Wiess."

Chicago, April 17th, 1902.

"Capt. Wm. Wiess, P. O. Box 747, Beaumont, Texas—Dear Sir: Your valued favor of the 14th inst. received, inclosing your formal acceptance of our offer for steamboat; also, first payment on account of $4,462.50, which sum is placed to the credit of your account, with thanks. In regard to the completeness of the work, it was the writer's intention to make that statement in our specifications of April 10th fully as broad as in that of the offer of March 15th; but by a close comparison find that it was not quite as thorough in that regard as it should have been. However, the intention is there, and our offer to you of April 10th carries with it, as forming a part of it, our quotation of March 15th, and is so accepted by you. * * *

"Very truly yours, [Signed] Marine Iron Works,
"W. G. Nourse, Manager."

While the contract contained no provision therefor, it was understood and agreed by the parties that the defendant in error, Wiess, should be represented during the construction by a supervisor or inspector, who should overlook and observe the entire process of building and furnishing the boat in question; and the proof shows that all during the construction one Capt. Loving so represented the defendant in error. There is some contention as to the authority of the said inspector, the iron works contending that the said inspector was the lawfully authorized agent of Wiess, and duly authorized to represent him in the premises, and to ask and request and consent to all changes and modifications that were or might be made in the construction and furnishing of said boat, and Wiess contending that he employed the inspector to merely watch the construction of the boat, and that he was in nowise accorded the right of superintending, and that he had no authority to change any single thing in the contract. The evi-

dence, however, shows that Capt. Loving, the Wiess inspector, was present on the part of Wiess, and observed the entire construction of the boat, making suggestions as to changes, which were complied with by the iron works, and, if not complied with, reference was made to Wiess, and the matter then settled. The evidence shows that Wiess himself was present from time to time—in all, over three weeks—while the boat was under construction in Chicago, just before and after the boat was launched; and there is evidence tending to show that he then learned that the draft of the boat, when equipped and finished, would decidedly exceed the stipulated draft of 23 inches, and also tending to show that about that time, when changes were suggested by Wiess and Loving in the construction of the deck and cabin and in the machinery and furnishings, Wiess' attention was called to the fact that such changes would necessarily increase the draft of the boat. There is also evidence tending to show that Wiess at that time had formed the intention of rejecting the boat on account, among other things, of the draft. The evidence shows that, subsequent to the launching of the boat and the discovery that the draft would exceed 23 inches, Wiess encouraged the iron works to go on with the construction of the boat, and asked for and obtained many additions and furnishings and changes not called for in the contract; and in further encouragement and inducement for the iron works to go on and finish the boat paid the balance due on the third installment, which he now seeks to recover in this suit.

The evidence shows beyond any reasonable controversy that after the boat reached La Salle, Ill., on its trip to Sabine Pass, the defendant in error was fully informed and well knew, as acknowledged in his letter of November 10, 1902, that the draft of the boat was some 29 inches; and, after having that information, the evidence shows that he continued to call for and obtained many changes in the outfitting, machinery, and furnishings of the boat, at large expense to the iron works. In this connection it may be noticed that the original contract called for a hardwood steering wheel, four feet in diameter over the handles; that in Chicago this steering wheel was changed, at the suggestion of Capt. Loving, to a five feet wheel, and that two days after Wiess had informed the iron works that the draft of the boat was six to six and a half inches over the stipulated draft he complained of and called for changes in the steering wheel, and at his request then made, and at the expense of the iron works, a new seven feet wheel was substituted.

In regard to the steering wheel, Wiess, in his letter of November 15th, says:

"Now, in regard to the steering gear, that must be fixed. Taking into consideration a boat of that size and the wheel, a boy of Harry's age ought to be able to steer that boat with perfect ease; hence, there is something wrong in the arrangement. Now, in this connection, I am willing to say this: if you will fix the steering gear as Capt. Loving wants it, I will be satisfied, be it right or wrong. It seems to me that this is only about a day's work, but it should be done, and done at once."

The contract guarantied a speed of over 14 miles per hour, under good conditions as to water, wind, and operation. The evidence shows

that in regard to this matter it was contemplated by the parties, and practically so understood, that the speed guarantied was to be determined by a test common in such cases, and in relation thereto Wiess, in a letter to the iron works dated November 10, 1902, says:

"I think it well to call your attention to the fact, though you are aware of it, that the boat's draft is 6 to 6½ inches more than guarantied draught, which is very disappointing to me, as I am very much afraid that it will also have a tendency to reduce her speed, as well as being too much draught of water. As there was no place or opportunity of trying the boat's speed up to this time, I will ask where that will be determined. For the moment, I don't know of any better place than from the mouth of the Neches river to Beaumont, as the river is wide and deep, and we have the exact distances from Neches Bar to Beaumont. Should there be any current, the average current could be determined, or the boat could make the run on the fly up and down, dividing the time both ways and the distance both ways, which would give the speed fairly accurate; and in this connection I am willing to do all in my power to give the boat the full advantage of making the required speed. If necessary on the trial trip, in order to have full steam, a barrel of rosin might be put aboard for that occasion. In conclusion, trust everything will be expedited at La Salle.

"Yours truly,

W. Wiess."

The evidence shows that after the changes and furnishings at St. Louis, the boat, with Wiess and family on board, proceeded on its voyage down the Mississippi, via Berwick's Bay, to Sabine Pass, the place of delivery under the contract, where it was at once attached in this suit. Extracts from Wiess' evidence, given on a former trial, were introduced on his own behalf as follows:

"Q. When you found out the fact that the draft of the boat was 29 inches or 29½, as you say there, did you tell the Marine Iron Works that you would not accept the boat with that draft? A. No, sir; I didn't have to. Q. You did not tell them? A. No, sir; I did not. Q. You did not tell them so at St. Louis, did you? A. No, sir. Q. Did you intend, when you found that out, to accept the boat notwithstanding that draft? A. I never made up my mind as to that, Mr. Greer, until after we left Memphis, and got somewhere near the mouth of the Red river. Q. I will ask you on that subject, if you did not testify before Judge Bryant at Sherman, when application was made to sell this boat, that you made up your mind before it left Chicago, not to accept this boat? A. At the price? Q. What is the price? A. At the contract price. Q. Have you not stated on several occasions that you had determined not to accept this boat even when you left Chicago, and you wanted to get it down to Sabine Pass where you could levy on it? A. No, sir. Q. I will try to refresh your mind. Did you not state to me down near the Opera House some few months since that you had determined not to accept this boat, and had your mind made up at Chicago, but wanted to get the boat down here so you could levy on it? Did you not state to me some few months since, near the time when this boat was sold, or while the application to sell was pending? A. I would not state positively what I stated to you. I will state exactly what I intended to do, if you want to know that. Q. That is exactly what I want to know. A. I did not believe when I left Chicago that I would ever put another dollar in her. I did not believe when we left St. Louis that I would ever put another dollar in her. I thought it possible that if that boat made the time, and was a dependable boat, I might take her for the money I had put in her already. I never made up my mind until we got about the mouth of Red river that I would not take the boat at all. When we got to Morgan City, I telegraphed to my stenographer to come there, and he came, and I dictated a letter to him, and sent him home to my attorney, and told him to come to Sabine Pass and attach the boat. Q. When you learned the draft at Chicago, you did not make up your mind to reject the boat on account of the

draft? A. No, sir. Q. You did not make up your mind to reject it on account of the draft at St. Louis? A. No, sir. Q. Didn't you write Mr. Nourse that you believed that you would accept the boat at Chicago or St. Louis? A. No, sir. Q. Didn't you have Mr. Nourse at St. Louis to put in various furnishings and some extras in that boat? A. Yes, sir. Q. Well, why did you do that? Was it because of a purpose to take the boat at that time? A. I wanted to get as much in there for the value as I could get in. I knew I had lost if they loaded her down with furniture. I wanted to get as near the value as I could. Q. I want to know for what purpose you wanted the value in that boat? A. I had $13,387.50 in the boat, and the more furniture I could get in there the nearer I would come to getting some of the money back. Q. That is, if you attached it, or accepted it at that price? A. I did not expect to have to attach the boat. I expected to have Capt. Pulver stay at Sabine Pass with her, and wait until they adjusted the matter at that time. Q. When you got to Sabine Pass, did you notify Mr. Nourse, the manager of the Marine Iron Works, that there were certain things wrong, and give him an opportunity to fix them up? A. I notified his master and agent. I asked him this question: 'Capt. Pulver, are you the agent of the Marine Iron Works?' He said, 'Yes.' I says, 'Is that the boat that is to be delivered to me under that contract?' He said, 'Yes.' I says, 'I don't want it,' and turned to Mr. Diff, and he told the sheriff to attach it. Q. You had carried the writ of attachment with you? A. Yes, sir. Q. Three or four days previous to that you had left the boat at Wick's, La.—three or four days previous to that? A. Yes, sir. Q. You did not notify Capt. Pulver that you would attach it unless certain things were done? A. No, sir. Q. You went down and asked Capt. Pulver if that was the boat he tendered, and he said yes, and you attached it? A. Yes, sir. Q. You saw everything on that boat, didn't you? A. Well, everything that could be seen: everything that was accessible to my eye I saw. Q. Did you tell Mr. Nourse that you would not accept that boat unless those chocks were galvanized iron at St. Louis? A. No, sir. Q. Did you tell him that you would not accept it unless those cleats were of galvanized iron? A. No, sir. Q. Did you tell him that unless the floors were laid diagonally instead of straight up and down, you would not accept the boat? A. No, sir. Q. Did you tell him that on account of the additional draft, you would not accept the boat? A. No, sir. Q. Did you tell him that as to any of those things you urge? A. No, sir. Q. Did you ask him to remedy any of those things at St. Louis? A. No, sir. For one month, very nearly, before the boat left Chicago, I absolutely quit kicking. I called Capt. Loving to my room, and said to him: 'Capt. Loving, don't you make another kick. We will get nothing. Let them finish the boat, as they have started it.' I quit kicking."

Letters of Wiess read in evidence show that just before the boat left Chicago, and at La Salle and St. Louis, and up to the time the boat, supposed to be fully equipped, furnished, and supplied, left St. Louis, he made many suggestions, requests, and demands for changes in the outfitting and furnishing of the boat, and the undisputed evidence is that most, if not all, were complied with.

In the pleadings Wiess alleged as defects in the boat and violations of the contract the excessive draft, the construction and fittings of the boiler and its inadaptability for use of salt water, and the inability of the boat to make the guarantied speed, and in detail many minor matters of defective construction, outfitting, arrangement, and workmanship, entitling him to reject the boat, and recover the installments paid, and he prayed for suitable relief.

Besides the general denial, the iron works pleaded specifically to all the matters alleged as defects in the boat, and particularly as to the draft and many other matters, a waiver and an estoppel growing out of the knowledge and conduct of Wiess and his inspector while the

work of construction was going on, and as to the speed pleaded the wrongful attachment of the boat at Sabine Pass before tender and an opportunity to put the boat in shape for a speed test, and also a waiver and estoppel growing out of changes in the construction and arrangements, which changes were made at the request of Wiess and his inspector.

In said answer it was averred that Wiess knew at Chicago and St. Louis, before the boat left said places, the draft of the boat and all the other defects of which he now complains, except the speed; that at Chicago he secretly conceived the purpose to reject the boat, regardless of what the speed might be, because of the matters he then knew and of which he now complains, but willfully concealed said purpose, and thereafter induced the iron works to complete the boat, make various expensive additions to and modifications of the boat, and bring it to Sabine Pass at a cost of $3,429.33, intending, by concealing the purpose and calling for further modifications and additions to the boat, to induce the Iron Works Company to pay out such large additional sums of money thereon and bring the boat to Sabine Pass, so that he might have the opportunity to sue in Texas and attach the boat, and thereby get the benefit of such additional expenditures; and that by his acts, conduct, and declarations he gave the Iron Works Company to understand that he would not exact a strict compliance with the terms of said contract, and would accept the boat as constructed as a full compliance with the contract; and that he induced the Iron Works Company to believe that he was fully satisfied with the construction, and to bring the same to Sabine Pass; that with full knowledge of the construction he was urgent and insistent on its being delivered at Sabine Pass, and never at any time indicated a purpose to reject said boat or rescind said contract. The Iron Works Company pleaded as a counterclaim the construction of the boat according to the contract, except as changes were made at Wiess' request, and asserted the right to recover the unpaid installment, for which it prayed judgment.

The bill of exception shows that on the trial before a jury, and over the objections of the Iron Works Company, the court charged the jury in the matter of the waiver and estoppel as follows:

"I do not think the case as developed falls within what might be termed the rule of estoppel. It would probably be a matter of waiver or change of the contract by the parties if the evidence warrants the belief that they did waive any of the matters or change the contract. Now, the defendant is the party that undertook to build this boat, and it is fair to presume that they knew more about the effect of added weight than the plaintiff would, because he was not a boat builder, as shown by the evidence. Therefore, in order to bind the plaintiff on that phase of the case, the evidence must show to your minds that Mr. Wiess understood that the changes would make the draft deeper, and, so knowing it, consented to it and approved it. If the proof goes to that extent, it would be a waiver, otherwise there would be no waiver; in other words, the evidence would have to show that he had such knowledge, and consented to such changes and approved them."

Also, in regard to the question of draft:

"The original contract, as I remember it, was that the draft should be 23 inches. If you believe from all the evidence in this case that if the boat

had been constructed as originally designed, and would still have exceeded the contract draft, this waiver of Mr. Wiess, if there was a waiver, would not operate in a case of that kind, if the boat had been constructed as originally designed and exceeded the draft; but upon that question you are to determine whether or not there were changes, and, if there were changes, did they increase the draft of the boat over what it would have been if constructed as originally designed and contracted for, and if they did increase it over that, did Mr. Wiess know it and agree to it, or by his actions impliedly agree to it, by which defendant had the right, under the circumstances, to infer that he did? These are questions for you to determine from all the evidence in this case."

And that the court refused, among others, the following requested special instructions, to wit:

Special instruction No. 2:

"You are instructed that if you believe the plaintiff, William Wiess, or his agent, W. O. Loving, after the making of the written contract offered in evidence, requested that any part of said boat be modified or changed, or be made in a particular way or of certain material, and a change was made by defendant, or a part was constructed in accordance with such request, then you are instructed that the plaintiff had no right to reject said boat on account of any variance from the written contract or defect caused by such request or authorized change."

Special instruction No. 10:

"You are instructed that if you believe from the evidence that the plaintiff, William Wiess, either at Chicago or St. Louis, had full knowledge of any part of the steamer John H. Kirby which he now charges as being at variance with the contract, and if you further believe that, notwithstanding such knowledge, the plaintiff, William Wiess, by his subsequent acts, conduct, or declarations, led the defendant to believe that he would accept the boat notwithstanding such variance, and that the defendant, the Marine Iron Works, was reasonably warranted in such belief, and acting on such belief incurred further substantial expenses, which it would not have otherwise incurred, either in carrying said vessel to La Salle, or doing work on the same there, or in carrying the same from La Salle to Sabine Pass, or in expenditures at St. Louis, then you are instructed that in respect to such parts of the said boat the plaintiff, William Wiess, cannot claim a breach of contract, and cannot reject the boat and recover on account of such variances, if any exist."

Special instruction No. 9:

"You are instructed that if you believe from the evidence that the plaintiff, William Wiess, knew either at St. Louis or at Chicago that the draft of the steamer John H. Kirby exceeded 23 inches, and knew what the draft was at such places, or either of them, and with full knowledge of said facts, by his subsequent acts, declarations, and conduct, led the defendant to believe that he, plaintiff, would accept said boat, notwithstanding said draft; and if you further believe that the defendant was reasonably warranted in such belief, and acting on such belief incurred further substantial expenses that it would not otherwise have incurred, then you are instructed that the plaintiff, William Wiess, has thereby waived the right to reject the boat, on account of such excessive draft, if any, and that he is estopped to claim a breach of said contract by reason thereof, and cannot recover herein on those grounds."

There is no question but that the instructions refused were seasonably presented, and covered issues presented in the pleadings supported by evidence showing, and tending to show, such issues were material.

The charge of the court as given practically precluded the jury from considering the waiver and equitable estoppel pleaded as applicable

to the main issues in the case, because it eliminates equitable estoppel as such from the case, and defines waiver to be equivalent to consent and approval, without regard to the conduct, acts, or declarations of the plaintiff below; and because it instructed the jury in regard to the issue of excessive draft that if the boat, constructed as originally designed, would have exceeded 23 inches in draft, plaintiff's consent to the increased draft, under such circumstances, could not have precluded him from afterwards rejecting the boat for excessive draft.

We think it clear that the waiver of a right or benefit may be established by the actions, declarations, acquiesence, even silence, of a party, as well as by his expressed consent and approval.

"Waiver, in a general way, may be said to occur wherever one in possession of a right conferred by law or contract, and knowing the attendant facts, does or forbears to do something inconsistent with the right, or of his intention to rely upon it, in which he is said to have waived it; and he is estopped from claiming anything by reason of it afterward." Bishop on Contracts, § 792.

"While a waiver is not in the proper sense of the term a species of estoppel, yet where a party to a transaction induces another to act upon the reasonable belief that he has waived or will waive certain rights, remedies, or objections which he is entitled to assert, he will be estopped to insist upon such rights, remedies, or objections to the prejudice of the one misled." 16 Cyc. 805.

"Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim." Swain v. Seamens, 9 Wall. 274, 19 L. Ed. 554.

In regard to the stipulated draft of the boat, we are unable to see why Wiess could waive it if caused by changes in construction and added outfitting and furniture, but could not waive it if a fault in original design. It seems clear that at any time before tender of the boat under the contract, if Wiess was informed that the draft of the boat was bound to exceed 23 inches, he could have said to the iron works, "I can reject the boat for excessive draft, but while I am disappointed in that matter, still if you will make certain changes in the machinery and outfitting and furniture, I will waive my right to reject on account of excessive draft," and then, if the changes indicated had been made, Wiess would be bound by his waiver. If Wiess could thus waive his right by definite words and promises, why could he not do it by actions commonly said to "speak louder than words?"

"Where a person, with actual or constructive knowledge of the facts, induces another by his words or conduct to believe that he acquiesces in or ratifies a transaction, or that he will offer no opposition thereto, and that other, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction to the other's prejudice." 16 Cyc. 791.

The special instructions requested should have been given to the jury. They certainly were material under the pleadings and evidence, and the points involved were not adequately and correctly covered by the general charge as given.

In special charge No. 2, the proposition seems too clear for discussion. Although the court charges the jury that good faith is immaterial in the performance of a contract of the kind in suit, we cannot sup-

pose that it was meant thereby that if Wiess requested a change from the contract in the construction of machinery or outfitting of the boat, that he could at pleasure thereafter reject the boat when tendered because of the change he had expressly requested. In such a case we are sure that good morals and sound law are found in harmony.

The other charges correctly state the law as it should be applied in this case under the statement of pleadings, facts, and evidence hereinbefore recited. It is immaterial whether we consider the rule to be applied one of equitable estoppel, pure and simple, or as one of waiver from which estoppel results (see definitions of waiver above given); the principles involved are the same. The case shows that under the contract the iron works was to build for Wiess a particular kind of pleasure boat, of full value, perhaps, to Wiess for his purpose, but not likely to be in demand among shipowners or in the general market; that the contract contemplated in the course of construction changes in furnishing and outfitting might be required by Wiess and made by the iron works; that during the construction, furnishing, and outfitting Wiess was present much of the time in person, and was all the time represented by an agent, and both knew before the boat left Chicago that the draft was bound to exceed 23 inches, and yet, knowing this fact, Wiess requested and required changes in many matters, well knowing that thereby the outlays and expenditures of the iron works would be increased; that while the boat was at La Salle, Ill., Wiess was informed and well knew that the draft of the boat was 6 to 6½ inches in excess of the draft stipulated in the contract, and, knowing the same, he then and thereafter called for changes in the outfitting and furnishing at a largely increased expense to the iron works; and that Wiess in his own evidence admits a secret purpose at Chicago, as well as at St. Louis, to ultimately reject the boat, and claim rescission of the contract, and yet called for more furniture and equipment so, as he says, to get more value in the boat, with a view to subsequently acquire the same as part of the contract price, and, failing that, to have the boat attached in the Texas courts. The case thus made, whether strictly one of waiver or not, requires that the principles underlying equitable estoppel should be applied. These principles are now applied and enforced as liberally in courts of law as in courts of equity, and where equitable estoppel is available as a defense in equity, it is equally available at law, and ought to be as liberally applied to promote the ends of justice and secure fair dealing. Dickerson v. Colgrove, 100 U. S. 582, 25 L. Ed. 618; Wehrman v. Conklin, 155 U. S. 327, 15 Sup. Ct. 129, 39 L. Ed. 167. It is not necessary that the acts or declarations should be made to mislead in order to work an estoppel. Mfrs. & Trad. Bank v. Hazard, 30 N. Y. 230; Dickerson v. Colgrove, supra; Continental Nat. Bank v. National Bank of the Commonwealth, 50 N. Y. 575. It is enough that the acts are calculated to mislead, and do mislead, and to permit the contrary to be asserted would subject the party relying on the same to loss or injury. See cases last cited. A mere standing by in silence, and permitting another to alter his position, will sometimes estop one from asserting a right or claim when such assertion would inflict loss or injury on such party. Mor-

gan v. Railroad Co., 96 U. S. 720, 24 L. Ed. 743; and the reports are full of other cases. If the alleged defects in the construction of the boat or breaches of the contract to complete the same grew out of alterations or modifications of the plans and specifications made at the request of Wiess and his agents, Wiess ought certainly to be estopped from asserting the same against the iron works.

"The estoppel here relied upon is known as an equitable estoppel, or estoppel in pais. The law upon the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice. It is available only for protection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit. It is akin to the principle involved in the limitation of actions, and does its work of justice and repose where the statute cannot be invoked." Dickerson v. Colgrove, 100 U. S. 580, 25 L. Ed. 618.

In Lawrence v. Dale, 3 Johns. Ch. (N. Y.) 23, 41, Chancellor Kent, in dealing with a contract for the building of a particular boat for a particular trade, thus forcibly expressed himself:

"If the law allows a party to abandon a contract while in fieri, he ought at least to act promptly and decidedly on the first discovery of the breach. If he negotiates with the party afterwards, and permits the work to go on, he certainly waives all right to abandon. There is not a cause to contradict this doctrine, which is founded on the plainest principles of justice."

And in Pokegama Sugar Pine L. Co. v. Klamath River L. & Imp. Co. (C. C.) 96 Fed. 54, it is forcibly said by Judge Morrow:

"Assuming that the complainant failed to fully perform the conditions of the lease entered into with the respondent, as stated in a former part of this opinion, and that this failure resulted in the right of the respondent to demand a forfeiture of the lease in September, 1897, it is nevertheless clear that the subsequent transactions just related give to the case a different aspect. Every consideration of right and justice required that under the circumstances the forfeiture should have been asserted promptly, and a return of the property demanded as soon as the default of the complainant had become an established fact. But here we have the officers of the respondent standing by while large expenditures were being made for the benefit of the plant and dealing with the manager of the complainant with respect to important matters with every appearance of assenting to the continuance of preparations for the future operation of the plant on a large scale. The fact that John R. Cook persisted in his objections, during the season of 1897, that the plant was not being operated successfully, or to its full capacity, is not sufficient. He knew all the facts, and should have asserted then the right of forfeiture now claimed by the respondent as a defense to this action."

The tenth assignment of error complains of the refusal of the court to charge the jury as follows:

"You are instructed that if you believe from the evidence that the defendant, at the request of the plaintiff, Wm. Wiess, or his agent, W. O. Loving (provided, in the latter instance, you further believe that Mr. Loving was authorized by plaintiff, Wm. Wiess, to request and suggest for plaintiff how particular parts of said boat should be made), constructed parts of said boat of heavier material than that required under the written contract offered in evidence, and if you further believe that by reason thereof the draft of the boat

was increased or the speed decreased, then you are instructed that the plaintiff cannot, on account of such added draft or decreased speed, recover in this suit, nor did he have, on account thereof, the right to reject the said vessel."

So far as this charge refers to the draft of the boat, its equivalent has been hereinbefore considered. So far as it relates to speed, it is objectionable, because it leaves it immaterial whether Wiess at the time of requesting or suggesting changes of construction knew or ought to have known whether the changes requested would unfavorably affect the speed.

The fourteenth assignment of error complains of a refusal to charge the jury as follows:

"You are instructed that if you believe the steamboat John H. Kirby, as delivered at Sabine Pass, Texas, was capable of running at a rate of over fourteen miles per hour, under good conditions of wind, water, and operation, or if you believe that by remedying minor defects, if any existed, and by adjusting the parts of the machinery and putting the boat in proper condition for a speed test, said boat would have been capable of running at a rate of over fourteen miles per hour under good conditions as to wind, water, and operation, then you are instructed that the plaintiff could not, on account of the speed, reject said boat, if it in other respects substantially complied with the contract, and complied with it except in such particulars as may have been waived by plaintiff, according to what is necessary to constitute waiver as given you in other portions of my charge."

On the question of speed, the court charges the jury as follows:

"The contract was that the boat furnished should be capable of making over 14 miles per hour, under good conditions as to wind, water, and operation. Now, if this boat, under the conditions named in the contract, was not capable of making that speed, and you should so find from the testimony, then you should find for the plaintiff for the amount sued for by him in this case. If you find from the evidence that the boat, under the conditions named in the contract, would make the speed contracted for, then that issue would be in favor of the defendant in the case. You are to determine it from all the evidence. It appears that the parties had not made a trial test of the speed of the boat. Of course, it was necessary that the speed of the boat should be decided, although the contract had not provided for where the test should be made, and had not provided for the test. The defendant contracted to build a boat that would make this speed under the conditions named in the contract; that is, good conditions as to wind, water, and operation would make a speed of over 14 miles per hour. Both parties to the contract are bound by that provision, and it is for you to determine whether or not, under the conditions named in the contract, that boat was capable of that speed. If not, then the boat was not in substantial compliance with the contract, and plaintiff was not bound to take it. If it was, the plaintiff would not have the right to reject it on that account. * * * Of course, in order to fairly test the boat, the conditions of the contract should be complied with; that is, as to proper adjustment of the machinery and favorable conditions as to wind, water, and operation. Downstream with strong current was not to be the test, nor was the test to be upstream against a strong current, but, under the evidence in this case, such test would ordinarily be made in practically still water, with the machinery in proper condition, with proper fuel and proper co-operation between the engineer and foreman, and with proper adjustment of the machinery. But, gentlemen, the question remains, was this boat capable, under good conditions as to wind, water, and operation, of making a speed of over 14 miles per hour? If it was, then in that particular it was a substantial and literal compliance with the contract, and you will find for the plaintiff."

These directions fairly include the substance of the charge requested, and, as there were no objections taken to them on the trial, plaintiff in error ought not to complain.

The fifteenth assignment of error complains of the refusal to give a special charge as follows:

"You are further instructed that if you believe from the evidence that the plaintiff, William Wiess, either at Chicago or St. Louis, had made up his mind to reject said boat on account of defects or variance from the contract then appearing to him and then known to him, and he, subsequent to so making up his mind, induced the defendant to make changes in said boat and to bring the boat to Sabine Pass at the expense of the defendant, or to do work at its expense that it would not have incurred had it been promptly notified of the purpose of the plaintiff, and if you believe from the evidence that his purpose to reject existed regardless of what the speed might be of the said boat, then you are instructed that the plaintiff would be estopped by reason of such conduct from rejecting the boat, and in such case you will find for the defendant for the balance due on the contract price, less such allowance or deductions as the plaintiff would be entitled to under the evidence for remedying any defects that may have existed."

In the matter of speed, the iron works guarantied the boat to be capable of running over 14 miles per hour under good conditions as to water, wind, and operation. This guaranty was a distinct and substantive proposition, in regard to which nothing could be definitely and certainly known until after completion of the boat, and a test under proper conditions was made, and although Wiess during construction may have had an intention to reject the boat on account of defects in the boat and variances from the contract then known to him, and thereafter induced the Iron Works Company to make changes in the boat and incur expenses in carrying out the contract, he could only have misled them into the belief that, notwithstanding the variances then known to both parties, he would accept the boat when finished; and it would seem that he ought not to be estopped thereby from thereafter insisting on his warranty as to speed, unless he knew or ought to have known that the changes he requested would affect the speed. Certainly, Wiess cannot be held to have waived defects that he did know existed, and in this connection it may be said that whether or not the boat could make the guarantied speed is not known up to this time. In the matters wherein Wiess, by declarations and acts, misled the iron works to its injury, let him be estopped, but the estoppel should not be extended to cover matters not then under consideration or being dealt with. That Wiess intended to insist on the warranty of speed, and that therein he did not mislead the iron works, is shown by his letter of November 10, 1902, wherein he complains of the excessive draft, and proposes a speed test, suggesting the kind and place. This letter is a standing notice that Wiess would insist on the speed test, and is a sufficient answer to counsel's contention in brief and argument that in objecting to receive the boat on account of deficient speed Wiess is changing his position, getting another and better hold.

Under this assignment of error, counsel further contend that the warranty of speed was a continuing warranty, and not a condition precedent, and that failure therein did not authorize the rejection of the

boat, but left Wiess to an action for damages; and also, that before the boat could be rejected on account of speed, a test should have been made under favorable conditions, and that, as Wiess attached the boat before a test could be made, he was equitably estopped from rejecting the boat on account of speed. Neither one of these questions is fairly presented on the record as made or in the errors assigned. The fifteenth assignment of error is not well taken.

The fifth assignment of error complains of the refusal of the court to give the following instructions:

"It is a question of fact presented to you as to whether or not W. O. Loving, as agent for William Wiess, was authorized to suggest and request changes or modifications in the construction of the boat John H. Kirby, or to suggest and request how parts of same should be constructed in points where the contract was silent, and if you believe from the evidence that W. O. Loving was the agent of William Wiess, clothed in such authority, then his acts in making suggestions and requests would have the same legal effect as if they were made by the plaintiff, William Wiess, himself; and in this connection, if you believe from the evidence that the plaintiff, William Wiess, requested any changes or modifications in the parts of said boat, or requested that certain parts should be made in a certain way or of material heavier than that required under the contract, or that his agent, W. O. Loving, made such suggestions and requests (if you find that said Loving was such agent), then plaintiff, William Wiess, could not be heard to object to any such modifications, changes, or parts as he or his agent either suggested or requested. However, if you believe from the evidence that the said Loving was not authorized as the agent of said William Wiess to make suggestions and requests for modifications or changes in said boat, or as to the construction of parts of same, then you are instructed that the plaintiff, William Wiess, would not be bound by such suggestions or requests of W. O. Loving, if any, unless the plaintiff afterwards knew of and approved the same, in which event his approval would amount to a ratification, and would have the same legal effect as though he had in the first instance authorized such requests or suggestions for changes or modifications."

This requested instruction seems to embrace the law of principal and agent as applicable to the facts of this case, and we see no reason for the refusal to give it to the jury, unless the substance was embraced in the general charge. In the general charge it is assumed that Loving was the agent of Wiess, but no instructions on the issue as to whether Loving was the agent of Wiess, and, if such agent, the scope of his agency, were given to the jury.

The seventeenth assignment of error complains of the refusal of the court to give the special instruction as follows:

"If you believe from the evidence that the defendant, Marine Iron Works, used proper care and diligence in selecting and installing the cylinders in the engines of the steamboat John H. Kirby, and without fraud and in good faith installed the cylinders in said engines, believing them to be sound, and in which sand holes or other defects afterwards appeared, but which were hidden or latent at the time same were installed, you are charged that such defects, if any, would not entitle the plaintiff, William Wiess, to rescind said contract and refuse to receive said boat, but such defects would only entitle said defendant to an abatement of the contract price for said boat in the amount reasonably necessary to purchase and install proper cylinders in said engines, unless you further believe from the evidence that said defects were developed before said boat was tendered, if it was tendered to the plaintiff, William

Wiess, and the defendant, Marine Iron Works, refused to install the proper cylinders in said boat within a reasonable time thereafter."

The propositions contained in this request seem to be sound in law and pertinent under the evidence. The general charge treats the issue on defective cylinders as immaterial, but, as it was made in the pleadings, and much evidence taken thereon, we think the defendant below was entitled to the instruction asked, or else one to the effect that the issue was immaterial.

This disposes of all the errors assigned considered material here or on a new trial.

The judgment of the Circuit Court is reversed, and the cause is remanded, with instructions to set aside the verdict of the jury, and award a new trial.

SCHAEFFER PIANO MFG. CO. v. NATIONAL FIRE EXTINGUISHER CO.

NATIONAL FIRE EXTINGUISHER CO. v. SCHAEFFER PIANO MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. August 11, 1906.)

Nos. 1,257, 1,258.

1. PLEADING—VARIANCE—AIDER BY JUDGMENT—ASSUMPSIT.

In an action of assumpsit, in which the declaration contained special counts upon a written contract, where the proof showed a breach of the contract by plaintiff, but also a waiver of such breach by defendant, which constituted in effect a modification of the contract by consent of parties, a judgment for plaintiff is not reversible because such waiver was not pleaded, in view of Rev. St. § 954 [U. S. Comp. St. 1901, p. 696], relating to amendments, and supplemented by 1 Starr & C. Ann. St. Ill. 1896, c. 7, §§ 6, 7, which contain liberal provisions for curing or disregarding errors or defects in pleading and variances in proof after verdict and judgment.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 1451–1474.]

2. CONTRACTS—CONSTRUCTION—LIABILITY FOR FIRE LOSS DURING PERFORMANCE—PROPERTY IN MATERIALS.

Plaintiff contracted to equip the plant of defendant with a sprinkler system, furnishing all materials, and erecting the system; the contract providing that plaintiff should have a lien upon the materials and equipment until full payment, with right to enter upon the premises and remove the same in case of default, and also that any loss or damage by fire which might occur to its "material and equipment" while on the premises should be borne by defendant. *Held* that, under such provisions, title to the equipment remained in plaintiff until completion of the work, and that defendant was liable for equipment destroyed by fire before the completion of the contract, although it had been attached to the building.

3. DAMAGES—BREACH OF CONTRACT—PROXIMATE RESULTS.

In an action on a contract by which plaintiff undertook to equip defendant's plant with a sprinkler system as a protection against fire, defendant cannot set off damages sustained by reason of the destruction of its plant by fire before the equipment was installed, on the ground that such loss resulted from plaintiff's failure to complete the contract within a reasonable time.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 37.]

4. CONTRACTS—CONSTRUCTION—SUBJECT-MATTER—LIABILITY FOR FIRE LOSS.
Under a provision of a contract by which defendant agreed to bear any loss or damage by fire on its premises to plaintiff's material and equipment while engaged in equipping defendant's plant with a system of sprinklers, where the system so far as completed was destroyed by fire during the progress of the work, plaintiff was entitled to recover the value of all of the equipment which had been so installed, even though parts of it were not actually destroyed.

5. CORPORATIONS—POWERS—ASSUMPTION OF RISK FROM FIRE TO PROPERTY OF CONTRACTOR.
A manufacturing corporation, as incidental to a contract for an equipment to its plant, has power to assume the risk of any loss by fire to the property of the contractor while on its premises.
[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 1517.]

6. EVIDENCE—RELEVANCY—VALUE.
Where the labor of installing an equipment in a building enters into its value recoverable on its loss by fire, evidence of the amount expended for such labor is not admissible to establish such value, in the absence of proof that the amount so expended was reasonable.
[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 271.]

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

The writ of error No. 1,257 is prosecuted by Schaeffer Piano Manufacturing Company, as the defendant below, in an action of assumpsit, brought by National Fire Extinguisher Company, as plaintiff, upon express contract, to recover the value of its property destroyed by fire, while engaged in equipping the defendant's plant with a fire extinguishing apparatus. Judgment was entered upon findings of a referee, adopted by the court with modifications disallowing certain amounts, and awards recovery against the defendant (plaintiff in error) for $1,685.98 as damages.

No. 1,258 is a cross-writ of error on behalf of the plaintiff below, and error is assigned upon the disallowance of items reported by the referee as recoverable, and judgment accordingly for $1,685.98, instead of $3,963.01, allowed by the referee.

The declaration of the plaintiff below consists of a special count upon the contract, together with the common counts, and additional counts upon the contract. Pleas of general issue and set-off were filed, and demurrers to the pleas of set-off were sustained. Upon waiver of a jury the cause was submitted to the court for trial, and upon consent of counsel was referred to Max H. Whitney, as referee, to take the proofs "and report the same to the court with his conclusions as to the law and the evidence."

The report of the referee is preserved in a bill of exceptions, but without the evidence taken, excepting such portions as are stated in the findings and in a stipulation of facts which is in the record. The referee reported substantially the following findings of fact:

(1) That on the 11th day of July, 1902, the parties entered into a written contract on one of plaintiff's printed forms, as follows:

"Proposal for Equipping the Property of the Schaeffer Piano Company's Plant, Riverview, Illinois, with an Approved System of Fire Extinguishing Apparatus. The work under this proposal consists in furnishing and erecting a system of 1,823 automatic sprinklers, including the necessary piping, and starting with the main upright supply pipes, each of which has an indicator gate and draw-off valve. Also such other materials and labor as are described and enumerated in the within specifications. All the materials to be first class, and all work herein specified to be done in a thorough and workmanlike manner, and in conformity with the Chicago Underwriters' requirements, standard for automatic sprinkler installations. It is agreed that space for materials, light and bench room and facilities for the prosecution of the work

will be accorded on the premises by you, and that the National Fire Extinguisher Company shall have a lien upon the materials and equipment until full payment shall have been made therefor, with right to enter upon the premises and remove the same in case of any default of payment. It is explicitly understood and agreed that no obligations other than herein set forth and made a part of this proposal and acceptance shall be binding upon either party. It is also agreed that any loss or damage by fire which may occur to our materials and equipment while in your premises shall be borne by you. Our price for the work herein specified will be nine thousand two hundred and thirty one ($9,231.00) dollars. Should more or less than 1,823 spriklers be required, they will be charged or credited at $3.25 each. Any additional work or apparatus which may be required, not included in our specification, shall be supplied by you, or if by us, at prices agreed upon. If delay on your part in supplying such additional work or apparatus causes us additional expense, you are to pay such expense.

"National Fire Extinguisher Co., by Wm. Grimshaw.

"We hereby accept the above proposal and agree to pay the National Fire Extinguisher Co., as follows: One third (⅓) when material is on the ground and work begun. One third (⅓) when water is turned into the systems. One third (⅓) when approved by the Chicago Underwriters' Asso. All agreements are contingent upon strikes, accidents, and all delays beyond our control.

"Proposition for Sprinkler Equipment in the Schaeffer Piano Company's Plant, Riverview, Ill.

"Chicago, Ill. July 1st, 1902.

"To Mr. T. E. Dougherty, Prest., 215 Wabash Ave., Chicago—Dear Sir: This proposition in the sum of nine thousand two hundred and thirty one ($9,231.00) dollars, is for a complete 1,823 head sprinkler equipment, divided into eight (8) separate and distinct systems (7 wet and 1 dry), to be installed in the Schaeffer Piano Company's plant, Riverview, Illinois, in strict accordance with the Chicago Underwriters' requirements governing said equipment, issued June 10th, 1902, signed by Mr. Fred W. Southard, engineer, and includes all labor and materials necessary thereto, except as noted below.

"Under this proposition we do not furnish tank foundations or supports, do no carpentry, masonary or earthwork.

"Respectfully submitted.

"National Fire Extinguisher Company, Wm. Grimshaw.

"Accepted, July 11, 1902. Schaeffer Piano Mfg. Co., T. E. Dougherty, Pres. All materials to be on ground, Sept. 1st, 1902.

"This contract modified before signing to read nine thousand one hundred and thirty one ($9,131.00) dollars and it is agreed that in case the underwriters will waive placing the heads in basement section C. a further credit of two hundred and ninety-six ($296.00) dollars is to be made.

"Nat. Fire Extg. Co., Wm. Grimshaw."

"O. K.——T. E. Dougherty."

"(2) That plaintiff without cause failed to have any of the material covered by said contract on the premises of defendant by September 1, 1902, but that this breach of said contract by the plaintiff was condoned and waived by the defendant by its payment of October 4, 1902, and letters of October 4, and 7, 1902," which letters appear in the report and refer to delay in payment because all materials were not yet delivered, so that they considered the first payment not due; but that they now send it and "trust you will push the work to completion as soon as possible." That "said breach was also condoned and waived by the conduct of defendant in repeatedly urging plaintiff to complete said contract without suggesting or intimating that defendant would ask to terminate the contract or claim damages for delay thereunder."

"(3) That defendant during the month of September, 1902, caused the materials for the underground work to be delivered, and this part of the work was proceeded with during the months of September and October, and by the 20th of October the same had been tested by the plaintiff.

"(4) That plaintiff did not prosecute or complete said contract within a rea-

sonable time, but that this unreasonable delay was not the proximate cause of the loss sued for herein and was contributed to by the defendant through its failure to provide tank foundations and supports.

"(5) That some of the plans for the superstructure were not presented to and approved by the board of underwriters until October 2, 1902, although it was not required that any of the plans be approved before construction was undertaken, and during the month of October most of the materials for the superstructure were delivered upon the ground. The plaintiff caused the superstructure to be installed during the latter part of October and the months of November and December, and by the 24th day of December the superstructure had been installed with the exception of the attaching pressure tanks and the gravity tank. This latter tank was never delivered on the premises, although it had been completed and ready for shipment for considerable period. Its nonshipment did not affect the ultimate completion of the contract. The pressure tanks were shipped and received at the defendant's factory on December 12, 1902. The period consumed in the erection of the superstructure was materially prolonged by the inability of the plaintiff to obtain access to certain rooms except at times designated by defendant.

"(6) That the tank foundations were, under the contract, to be constructed by the defendant, and on or about September 1, 1902, the parties agreed where these foundations should be placed, and the agent of the plaintiff promised to give to the defendant dimensions and measurements of the several tanks. This agent had previously agreed personally, and not as an agent of plaintiff, to give to defendant the measurements and requirements to enable defendant to put in tank foundations. There was no duty on plaintiff to furnish plans and specifications to defendant for tank foundations, and said agent for plaintiff had previously stated to the same agent of defendant, with whom the conversation of about September 1st was had, that plaintiff company would not be responsible in any manner for the building of the foundations, nor for plans and specifications therefor. The pressure tanks required by the contract might vary in length from 14 to 32 feet, and that of the gravity tank from 6 to 14 feet, and it is customary for the parties to agree as to the place where the foundations are to go, as well as to the size and dimensions of the several tanks. The defendant on several occasions requested of plaintiff the dimensions of the several tanks in connection with request to plaintiff's agent for measurements and requirements for the tank foundations, although defendant never specifically distinguished between dimensions of the tanks and other measurements when making such requests. It was not until October 24, 1902, that plaintiff's agent furnished defendant with such tank dimensions, and then only in connection with the other measurements he had personally agreed to furnish.

"(7) The defendant was guilty of unreasonable delay in the preparation of foundations and supports for tanks, which delay contributed to plaintiff's delay in the completion of said contract.

"(8) That the defendant did not complete the construction of the tank foundations until the day before the fire, which occurred during the night of January 19, 1903, and this delay was contributed to by its waiting for the dimensions of the several tanks and the work being prolonged by the cold weather. I find, however, that the defendant could have gone on with said work of constructing the tank foundations prior to the time of receiving such measurements.

"(9) That on the 19th day of January, 1903, the defendant's factory and the equipment placed thereon by the plaintiff was destroyed by fire, and this fire happened without the fault of either party.

"(10) That plaintiff can only recover herein on the following clauses of the contract sued on: 'It is also agreed that any loss or damage by fire which may occur to our materials and equipment while on your premises shall be borne by you.'

"(11) That by reason of fire occurring on defendant's premises before the completion of said contract, plaintiff suffered a loss to its materials and equipment on said premises as follows:

Material erected as stipulated		$3,950 50
Tools		156 00
Forbes Curtis Threader (Tools)		165 00
Freight		96 63
Labor	$1,482 94	
Superintendence	127 61	1,610 55
9 4″ valves at $24.00	$ 216 00	
1 5″ valve	29 00	245 00
1,823 sprinkler heads		783 00
		$ 7,006 68
Less payment of Oct. 4, 1902		3,043 67
Balance		$3,963 01

"(12) That, subsequent to December 24th, the plaintiff entered into another contract with the defendant to equip an addition which was then being built by the defendant with a fire extinguishing apparatus, and used its tools upon the premises, partially for the purpose of completing this work. At the time of the fire, there was upon the premises tools belonging to the plaintiff of the value of $321. There is evidence tending to show that underground materials of the value of $597.50 could be taken up and reused, but no evidence of the cost of taking up such material and preparing the same for reuse. There is also evidence tending to show that the entire equipment was destroyed by said fire of January 19, 1903. These items of tools and underground materials are included in the statement covered by the eleventh finding of fact."

The stipulated facts are consistent with these findings.

The judgment as entered recites as follows: "This cause coming on for hearing on the referee's report, the exceptions thereto, and the evidence and proofs in the case, and the court being duly advised in the premises, doth order and adjudge that the exceptions of the plaintiff to the report of the referee be, and the same are hereby, overruled, and the exceptions of the defendant to the findings of fact contained in the report of the referee be, and the same are hereby, overruled, and that the findings of fact contained in said report be, and the same are, in all respects approved and affirmed. And the court, as a conclusion of law, doth find and doth further order and adjudge that, under the contract sued upon in this case, the plaintiff cannot recover any part of the cost and value of labor, amounting to $1,610.55, specified in the eleventh finding of said report of said referee; neither any part of the value of tools, amounting to $321.00, specified in said eleventh finding; that of the item of $783 for 1,823 sprinkler heads, specified in said eleventh finding, the plaintiff can recover only the sum of $437.52, and that from said sum of $783 there be deducted the sum of $345.48; that from the sum of $3,963.01 specified in the third conclusion of law in the said report of said referee there be deducted the said several sums of $1,610.55 for labor, $321 for tools, and $345.43 for sprinkler heads, leaving the sum of $1,685.98, instead of said sum of $3,963.01; that to the extent of said deductions the exceptions of the defendant to the conclusions of law of said report of said referee are sustained; and that, as so altered and modified by the court, the said report of the referee be, and the same is in all respects, approved and affirmed, and the findings of the said referee, when so altered, stand as the findings of the court, and, as a conclusion of law thereon, the court awards judgment to the plaintiff and against the defendant in the sum of $1,685.98." And judgment is entered accordingly for the recovery of said sum together with costs.

W. S. Oppenheim, for Schaeffer Piano Mfg. Co.
Archibald Cattell, for National Fire Extinguisher Co.

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

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

The plaintiff in error in the original suit, who was the defendant below, is designated in this opinion as the "Piano Company," while the plantiff below is referred to as the "Sprinkler Company." As each prosecutes a writ of error, their contentions under one and the other writ are respectively so considered.

I. On the Writ of the Piano Company.

Upon the finding of facts the sprinkler company recovered judgment for $1,685.98, as damages caused by fire and recoverable against the piano company under a clause of the contract between them for a sprinkler equipment. Reversal is sought by the piano company upon various assignments of error, which are summarized and discussed in the brief of counsel under five propositions, substantially as follows: (1) That the findings of the referee establish nonperformance by the sprinkler company of the terms of the contract in suit, both in the time fixed for delivery of the materials on the ground and in the prosecution and completion of its work within a reasonable time, and thus preclude recovery upon the contract; (2) that the agreement as to loss or damage by fire is not applicable to equipment affixed to the premises of the piano company; (3) that error was committed in sustaining the demurrer to the plea of set-off; (4) that the sum of $597.50 "for underground materials not destroyed by fire" was erroneously included in the judgment; (5) that the contract for indemnity against loss by fire was ultra vires the charter of the piano company.

1. The first proposition is untenable, unless the want of an amended declaration of record, setting up the waiver and excuse found by the referee, constitutes reversible error, under the Illinois rules of pleading and practice which govern the solution. It is true that the contract in writing, which was declared upon and produced, obligated the sprinkler company to have all materials "on ground September 1, 1902," and that the referee states (in the second finding) that it failed, without cause, to have any such materials on the premises at the date so fixed. The referee further finds, however (Id.) that the breach "was condoned and waived by the defendant," by payments made and letters written subsequently (which appear in and sustain the finding), and by its conduct "in repeatedly urging plaintiff to complete said contract without suggesting or intimating" that it would terminate the contract or claim damages. So, the referee further reports (in the fourth finding) that:

"Plaintiff did not prosecute or complete said contract within a reasonable time, but that this unreasonable delay was not the proximate cause of the loss sued for herein and was contributed to by the defendant, through its failure to provide tank foundations and supports."

Assuming that the breaches on the part of the sprinkler company thus reported were of conditions precedent in each instance—promises which were dependent and not independent, under the

rule defined in Dermoth v. Jones, 23 How. 220, 231, 16 L. Ed. 442—the facts settled by these findings (and not reviewable) absolve the sprinkler company from each of the breaches referred to, if such facts of waiver or excuse are open to consideration upon this review. In other words, the findings are, in effect, that the contract was modified in respect of these terms by consent of parties, with no breach of the ultimate contract on the part of the sprinkler company. Nevertheless, it is contended, in effect, that the declaration and additional counts present issue only upon the contract as written, and the finding of breach thereof is conclusive against recovery.

The declaration contains a special count upon the contract as written and the common counts. Under the rules at common law, preserved in Illinois, respecting the forms of pleading, it is unquestionable that waiver of a breach is not provable under this special count, and that, without full performance on the part of the plaintiff, the count upon such contract will not authorize recovery. Crane Elevator Co. v. Clark, 80 Fed. 705, 711, 26 C. C. A. 100, and authorities cited. The additional counts filed declare upon the written contract, with allegations of delay caused by the defendant which authorize proof of the facts found by the referee excusing completion of the work within the time contemplated by the contract; but no allegations appear touching the failure to deliver all materials at the time stipulated. Thus issue was not tendered of waiver or consent to later delivery, by either of the special counts, and the question arises: On this state of the record, must the referee's finding of waiver be set aside, and judgment be reversed upon the finding of delay in the delivery which then remains? Reference to the provisions and policy of the Illinois statutes, regulating the practice—and supplementing the provisions of section 954, Rev. St. U. S. [U. S. Comp. St. p. 696]—frees the inquiry from the strict common-law rule which would otherwise stand in the way, and authorizes a solution, as we believe, in conformity with the issues which were in truth submitted.

While the forms and general rules of pleading at common law are in force in Illinois, the provisions for "amendments and jeofails" in chapter 7 of the Revised Statutes of the state (1 Starr & C. Ann. St. 1896, c. 7) are extremely liberal, both for the allowance of amendments in furtherance of justice, before or after judgment (paragraphs 1 and 2), and for curing or disregarding errors or defects in pleading and variances in proof, after verdict and judgment (paragraphs 6 and 7), and they impress us as equally comprehensive with the Code provisions for like object in neighboring states. The fact that no amendment of the declaration appears of record is not material upon this review, as it was plainly amendable to conform to the proofs, were objection raised in the trial court at any stage, and the submission, with or without amendment, leaves the finding and judgment unassailable (Id., par. 6) for the variance or omission on which they are now challenged. I. & St. L. R. R. Co. v. Estes, 96 Ill. 470, 473; Dick v. Eddings, 42 Ill. App. 488, 489. The general rule in such case, under like statutes of jeofails, is to treat the

pleading as having been amended in conformity with the proof (Columbus Const. Co. v. Crane Co., 98 Fed. 946, 951, 40 C. C. A. 35; 1 Ency. Pleading & Prac. 609, 611), but in any view the objection is not available to reverse the judgment.

2. The second contention rests on the theory that equipment affixed to the premises under the contract became the property of the piano company, and thus not within the clause on which recovery for fire loss is awarded. The sprinkler company contracted to equip the plant of the piano company with a sprinkler system, under a proposal by the former, written on one of its printed forms, which contains (in print) this clause:

"It is also agreed that any loss or damage by fire which may occur to our materials and equipment while in your premises shall be borne by you."

When the equipment was nearly completed, with materials furnished by the sprinkler company, and in so far as concerns the present inquiry affixed to the premises, the entire plant was destroyed by fire, together with the materials and equipment so furnished under the contract. The loss thus suffered by the sprinkler company is the main element of the recovery, and, if the above-mentioned agreement does not plainly extend to equipment affixed in the course of performance, error is well assigned.

The subject-matter of the contract, as recited, was "equipping the property" of the piano company with a sprinkler system; the sprinkler company furnishing all materials and "erecting a system." In the light of the description so given to the undertaking, we are of opinion that the terms of the proposal for indemnity against fire loss, "to our materials and equipment while in your premises," are unmistakable in their meaning, as applicable both to "materials" brought to the premises and to the "equipment" as it was constructed; that each term was appropriately used in such sense—without reference to the technical status of equipment at any stage as a fixture in the plant—and was not ambiguous; and that the contention for excluding the equipment, as affixed to the realty and no longer the property of the sprinkler company, is unsound.

The propositions that the agreement must be strictly construed, both as one in derogation of the general rule and as one proposed and drafted by the sprinkler company, are unquestionable and consistent with the view above stated. The contention, however, that the equipment as it progressed became realty, passing title to the piano company, is untenable, as we believe, within the terms of the contract and under the established doctrine applicable to property so annexed. While it is true that the contract provides for a lien in favor of the sprinkler company "upon the materials and equipment until full payment," it stipulates, as well, "the right to enter upon the premises and remove the same in case of any default." The rule is well recognized that personal property does not become realty through annexation alone, and that, when one contracting party affixes it to the realty of another, the title to the fixture is either reserved in the one or passes to the other, as the nature and terms of the contract intend. This contract was entire, not sever-

able as the work proceeded, and under the general rule applicable to it, irrespective of the provision for removal, there was no severance of ownership, but title to his work remained in the contractor until completion. Huyett & Smith Co. v. Edison Co., 167 Ill. 233, 236, 239, 47 N. E. 384, 59 Am. St. Rep. 272; Tompkins v. Dudley, 25 N. Y. 272, 273, 82 Am. Dec. 349. With the above-mentioned express reservation of right to remove equipment in case of default, it is clear that no passing of title in the course of performance was intended or effected. The other provision for lien until full payment is not inconsistent with this view, as each provided an alternative remedy. While the lien presupposes the passing of title, the waiver of other remedies for its exercise was optional, and it was open to the contractor to waive one or both of these provisions for suit upon the contract.

3. The demurrer to the amended plea of set-off was rightly sustained. The plea avers, in substance, nonperformance by the sprinkler company, within reasonable time, of its contract to equip the plant of the piano company with the sprinkler system, the sole object of which was protection of the plant against fire; that the plant of the value of $200,000 was destroyed by fire, pending performance of such contract, and the defendant suffered damage to the amount of such value by reason of such nonperformance; and judgment is demanded therefor, less any damages awarded the plaintiff. The defense of nonperformance clearly arose under the general issue and is concluded by the findings. Evidence admissible under this plea was equally admissible under that issue, except in reference to establishing the alleged cause of action on behalf of the piano company for its loss by fire, and the allegations of the plea are plainly insufficient for such recovery. The rule is elementary that damages to be recoverable must be the natural and proximate result of the breach or act complained of. Its application to the multitudinous phases of contract obligations—involving, directly or indirectly, anticipated profits and like contingencies—is not always free from difficulty, and it may well appear that the decisions are not harmonious in observing the limitations of the rule; but the general doctrine above mentioned is settled. Howard v. Stillwell & Pierce Mfg. Co., 139 U. S. 199, 206, 11 Sup. Ct. 500, 35 L. Ed. 147. Or, as further defined in Primrose v. Western Union Telegraph, 154 U. S. 1, 29, 14 Sup. Ct. 1098, 38 L. Ed. 883, the damages under any contract are "limited to those which may be fairly considered as arising according to the usual course of things from the breach of the very contract in question, or which both parties must reasonably have understood and contemplated, when making the contract, as likely to result from a breach." The plea states no ground for recovery of the fire loss within either definition, even were it assumed to be a credible and provable fact, as averred, that destruction of the plant "would have been impossible" had the equipment been completed.

4. Error is assigned for including in the judgment "$597.50 for underground materials." The referee expressly finds (eleventh finding) that the fire caused loss to materials and equipment, in "mate-

rials erected as stipulated, $3,950.50"; and in a subsequent (twelfth) finding states:

"There is evidence tending to show that underground materials of the value of $597.50 could be taken up and reused, but no evidence of the cost of taking up such material and preparing the same for reuse. There is also evidence tending to show that the entire equipment was destroyed by said fire of January 19, 1903."

Also (eleventh finding), that "the underground materials are included in the statement" above mentioned. The stipulation of facts is "that the value of the pipe valves and fittings placed underground and included in the above item of $3,950.50 was and is $597.50."

Thus the loss caused by the fire is positively found, in the item referred to, and the confusion arises from the irrelevant reference to evidence which is not preserved. It it unnecessary, however, to rest support for the judgment on the first-mentioned finding, as controlling, for the reason that the fact appears from all the recitals that the so-called "underground materials" were completed portions of the equipment, and, as such, became useless for the purposes of the contract when the plant was destroyed. The contractor had converted his materials into equipment in performance of his contract, and thus brought it within the stipulated liability for "loss or damage by fire which may occur." With its identity and value as a sprinkler equipment lost by fire, his loss was total in the sense of the contract, and liability therefor was not dependent upon actual destruction by fire of the materials in the structure. 2 May on Insurance, § 421a. The contract imposed no duty upon the sprinkler company to recover materials so used, and it is not chargeable with their value as wreckage. Any value they may have for use in a restored plant does not concern the sprinkler company after payment of its loss. No reversible error appears in this allowance.

5. The remaining contention, that the agreement to pay the loss was ultra vires the corporation, is without merit. That the piano company, a manufacturing corporation, cannot embark in the business of insurance, banking, or other lines not authorized by the statute under which it is organized (section 1, c. 32, 1 Starr & C. Ann. St. Ill.), is unquestionable. Within the lines of business for which it is incorporated, however, the power to enter into contracts is commensurate with that of natural persons. Incidental to the contract for the sprinkler equipment is the assumption of risk for any loss by fire to the contractor's property while engaged in the work. The right to contract for the work extends to the incidental terms and obligations, and the agreement in question is of this character whether named an insurance promise or otherwise. It appears to be unobjectionable for other cause, and is not ultra vires.

II. On the Cross-Writ of the Sprinkler Company.

Errors are assigned for the several deductions made by the trial court from the allowance by the referee, in entering judgment, namely: (1) The sum of $1,610.55 for "labor" and "superintendence"; (2) $321 for "tools" on the premises when the fire occurred; (3)

$345.48 deducted from the finding of $783, as the value of "sprinkler heads."

The first and second items referred to were rightly excluded, as there are no facts found to bring either within the contract in suit. Assuming that the item of $1,610.55 inferentially represents the expenditure for labor and superintendence, the actual value only of "materials and equipment" lost by fire is recoverable. Upon such bare statement, in the absence of evidence to fix the value of the product, the fact of expenditure is insufficient to that end—cannot be accepted as primary evidence of value, and if admissible in any view must be accompanied with proof of reasonableness. The charge of $321, as stated in the finding (twelfth), applies, without discrimination, to tools used in performing another contract, and no fact is found to authorize recovery under the contract in suit, in any view of its terms. So the question discussed in the briefs, whether tools are within the meaning of the terms "materials and equipment," does not require solution. The deduction of $345.48 from the valuation of sprinkler heads in the finding impresses us to be unauthorized. The judgment recites that all exceptions to the report of the referee are overruled, that the findings of fact "are in all respects approved and affirmed," and that, "as a conclusion of law," the above-mentioned deduction is made from the value fixed by the referee. The referee states the single valuation of $783, together with the fact of loss. No other facts appearing, the value was purely a question of fact. So, if the cost of labor entered into that valuation (as stated in the opinion filed at the hearing below), such fact—were consideration of its value deemed erroneous, which we do not intimate—is not preserved in the record and with the findings of fact adopted by the court, the conclusion to deduct $345.48 cannot be upheld.

Upon the original writ of error the judgment is affirmed. Upon the cross-writ the various assignments of error are overruled, except that in reference to the above-mentioned deduction of $345.48. Such assignment is sustained, and the judgment will be corrected accordingly. The cause is remanded for further proceedings in conformity with this opinion.

CORAM et al. v. INGERSOLL.

(Circuit Court of Appeals, First Circuit. October 16, 1906.)

No. 610.

1. JUDGMENTS—RES JUDICATA—JUDGMENT ON THE MERITS.

A judgment of dismissal by a state court of Montana, entered on the sustaining of a statutory objection to the admission of any evidence under the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, is equivalent to one upon general demurrer, and is a judgment on the merits which is a conclusive bar to further litigation of the subject-matter of the action between the parties or their privies in another jurisdiction.

2. SAME.

In an action on a contract in a state court, the court sustained a statutory objection to the introduction of any evidence under the complaint,

on the ground that it did not state facts constituting a cause of action, and entered a judgment of dismissal. On appeal the Supreme Court of the state affirmed such judgment in an opinion which construed the contract and held that the facts alleged in the complaint did not show a performance which entitled the plaintiff to recover. *Held*, that the judgment was on the merits, and was a bar to a second action on the contract between the parties or their privies.

3. SAME—PRIVITY OF PARTIES—ADMINISTRATORS.

Where an ancillary administrator brings an action on a chose in action properly deemed assets of the estate in his jurisdiction, and a judgment is rendered against him on the merits, such judgment is conclusive in favor of the defendants everywhere, and a second suit cannot be maintained against them on the same cause of action by an ancillary administrator of the estate in another jurisdiction.

Aldrich, District Judge, dissenting.

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

For opinion below, see 136 Fed. 689.

See 132 Fed. 168.

Louis D. Brandeis (Thaddeus D. Kenneson and William H. Dunbar, on the brief), for appellants.

Edgar N. Harwood (John H. Hazelton and Hollis R. Bailey, on the brief), for appellee.

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

LOWELL, Circuit Judge. Andrew J. Davis died a citizen of Montana, leaving property both in Montana and in Massachusetts. John A. Davis, one of his next of kin, offered for probate in Montana a will which gave to him nearly the whole of this property. Certain other next of kin, desiring to contest the will, retained as counsel Robert G. Ingersoll, a citizen of New York, the plaintiff's intestate. Shortly afterwards two of these clients agreed with him in writing for his employment, and for a fee of $100,000 conditioned upon the defeat of the will.

The validity of the will was tried in Montana, and the jury disagreed. Thereafter a compromise was entered into, by which Ingersoll's clients became entitled to a larger share of the Davis estate than would have fallen to them in intestacy. Only $5.000 was paid to Ingersoll. His widow, as ancillary administratrix of his estate in Massachusetts, brought this bill in equity to obtain a decree against one of the defendants personally for the payment of the contingent fee. and to establish a lien upon some part of the Davis estate in Massachusetts. On final hearing, the Circuit Court entered a decree for the complainant, from which the defendants have appealed. We need consider only one of their contentions, viz., that the complainant is barred by a judgment in their favor entered in Montana. In order that this defense shall avail them, the defendants must show that the Montana judgment relied on was rendered (1) for the same cause of action; (2) upon the merits; (3) between the same parties or their privies.

The present complainant, as administratrix of Ingersoll in New York, brought an action in Montana against the defendants in the

case at bar. In addition to an allegation of the facts above stated, her complaint set out that Ingersoll had rendered the services for which the fee was to be paid, that his services had procured the compromise, and had defeated the will of Andrew J. Davis, so far as the defendants were concerned, whereby Ingersoll became entitled to the contingent fee as provided in the agreement, and to an equitable lien on the defendant's interest in the estate. An amendment added an allegation that, by reason of Ingersoll's prosecution of the suit to break the will, the representatives of John A. Davis were constrained to consent to the compromise, and that Ingersoll "counselled, advised, and aided in the making and effectuating the said compromise agreement." The plaintiff in the Montana suit made substantially the same case as that set out in the present bill. The cause of action was the same in both suits.

After Mrs. Ingersoll had begun suit in Montana, Harris was duly appointed Ingersoll's administrator in that state, and, on motion of Mrs. Ingersoll, the original plaintiff in the Montana proceeding and the complainant here, he was substituted for her as plaintiff in the former suit.

The defendant's answer in that suit denied that Ingersoll performed the services contemplated in the agreement, that his services procured the compromise, and that his prosecution of the suit to break the will constrained the representatives of Davis to consent thereto. It set up the statute of limitations of Montana, and further alleged that during Ingersoll's lifetime he, together with Root and Coram, two of the defendants, upon a valuable consideration paid to Ingersoll by Root and Coram, "canceled, revoked, satisfied, and held for naught" the agreement upon which the suit in Montana and this bill are founded. The plaintiff Harris in his "reply" denied that the contract was canceled or revoked in any sense. In the district court of the Second judicial district of the state of Montana, in and for the county of Silver Bow—

"The parties hereto being present in court as on Wednesday, December 10, 1902, and the jury being present and answering to their names, the further trial herein is by the court resumed now, the opening statement on the behalf of plaintiff is resumed, and, being concluded, the introduction of testimony on behalf of plaintiff is commenced. Come now defendants, and object to the introduction of any and all testimony on behalf of plaintiff upon the grounds that the complaint does not state facts sufficient to constitute a cause of action. After argument of counsel the motion to exclude testimony is by the court sustained, to which ruling of the court plaintiff by counsel duly excepts and is by the court granted 30 days' additional time to prepare and serve bill of exceptions herein, and upon motion of counsel for defendants the complaint herein is by the court ordered dismissed. * * * Whereupon the jury herein is discharged from further attendance of this cause."

Thereafter judgment was rendered as follows:

"This cause having come on regularly for trial on the eleventh day of December, 1902, the parties appearing by their respective attorneys, and an objection having been made to the introduction of any evidence on the ground and for the reason that the amended complaint in said cause does not state facts sufficient to constitute a cause of action, and said objection having been considered by the court and sustained: Now, therefore, in consideration of the premises aforesaid and the law, it is ordered, adjudged, and decreed that

the said action be dismissed and that the defendants recover of and from the plaintiff their costs and disbursements incurred herein, amounting to the sum of $12.50. Done in open court this twelfth day of December, 1902."

The bill of exceptions does not appear in our record, but the case was taken to the Supreme Court of Montana.

The only question presented to that court, under the ruling of the court below and the plaintiff's exception thereto, was this: Did the complaint set forth facts sufficient to constitute a cause of action? On the one hand, the plaintiff contended that the compromise of the litigation was a defeat of the will, so far as Ingersoll's clients were concerned, and that the final decree which provided for a payment to the contestants of all they had claimed, although brought about by a compromise, was yet a complete performance by Ingersoll of the condition of the contract, and so entitled him to recover the stipulated fee. On the other hand, the defendants contended that the contract was conditioned upon a decree for the contestants setting aside the will; that the complaint itself showed that the payment to the contestants resulted, not from a successful contest, but from a compromise of the contest—in other words, that the contract gave Ingersoll his contingent fee only if he conducted the contest to a successful termination, and that it did not provide for his payment in case the litigation was compromised by the parties, and the will admitted to probate—that the failure to continue the litigation and the subsequent resort to negotiation and compromise, as set forth in the bill, were in effect an abandonment of the contract, and left to the plaintiff only the right to recover upon a quantum meruit for services other than those mentioned therein.

After stating the facts as alleged in the complaint, the opinion of the Supreme Court of Montana began thus:

"The action of the court in sustaining the defendants' objections to the evidence presents for decision the question whether the allegations in the complaint, which we have stated in substance, warrant recovery by the plaintiff. The complaint declares upon the contract, and unless it appears therefrom that the plaintiff's intestate fully performed the contract on his part, or facts and circumstances are alleged justifying a failure in any particular, a recovery cannot be had."

The court analyzed the contract and adopted the defendants' construction of it. The opinion went on to declare that neither by his general retainer nor by the terms of the contract had Ingersoll authority to compromise the controversy, but only to prosecute the suit. Therefore his fee was payable only upon a favorable decree, followed by an actual distribution. When authority to compromise was conferred upon him, there was "a mutual abandonment of the contract," and "when the compromise was consummated the contract could not be performed." "The allegations of the complaint fall very far short of showing an entire performance of the contract." The mutual abandonment of the contract to which the court referred was that exhibited by the allegations of the complaint itself, and had nothing to do with the alleged cancellation of the contract for a valuable consideration set up in the answer and denied in the replication. From the opinion of the Supreme Court it thus plainly appears that the judgment of that court in favor of the defendants was based altogether upon the case

presented by the complaint. No evidence and no amendment consistent with that complaint could have altered that judgment. If the contract made Ingersoll's fee contingent upon a defeat of the will by a successful contest (which was the interpretation put upon the contract by the Montana court), then Ingersoll never performed his contract, and could not maintain suit for the $100,000 fee. The Montana judgment was therefore based upon no formal defect in the plaintiff's pleadings, but upon the substantial want of merit in his cause of action.

If we pass to more technical considerations, we shall find that the defendants' objection "to the introduction of any and all testimony on behalf of plaintiff upon the grounds that that complaint does not state facts sufficient to constitute a cause of action" was in effect a demurrer; and, at common law, a judgment upon a demurrer is deemed to be a judgment upon the merits. Gould v. Railroad, 91 U. S. 526, 533, 23 L. Ed. 416; Bissell v. Spring Valley Township, 124 U. S. 225, 8 Sup. Ct. 495, 31 L. Ed. 411; Green v. Sanborn, 150 Mass. 454, 23 N. E. 224. This is also the law of Montana, provided the demurrer goes to the merits. Kleinschmidt v. Binzel, 14 Mont. 31, 52, 35 Pac. 460, 43 Am. St. Rep. 604. Sections 1004 and 1005 of the Montana Code of Civil Procedure provide that, with exceptions inapplicable here, all judgments shall be upon the merits. In U. S. v. Parker, 120 U. S. 89, 96, 7 Sup. Ct. 454, 30 L. Ed. 601, a statute of Nevada was construed, similar to the Montana statute mentioned above, and the Supreme Court held that all judgments, save those specifically excepted, were rendered on the merits. That the defendants' objection above referred to is deemed a demurrer in Montana further appears from the decided cases. Wilson v. Harris, 21 Mont. 374, 54 Pac. 76; Haupt v. Indian Teleg. Co., 25 Mont. 122, 63 Pac. 1033. So, also, the similar practice by which, after answer, the plaintiff prays for "judgment on the pleadings." Horsky v. Moran, 13 Mont. 250, 34 Pac. 360; Floyd v. Johnson, 17 Mont. 469, 43 Pac. 631; Hibernia S. & L. Soc. v. Thornton, 117 Cal. 481, 482, 49 Pac. 573; Wangenheim v. Graham, 39 Cal. 169, 175. In Haug v. Great Northern Railroad, 102 Fed. 74, 42 C. C. A. 167, decided by the Circuit Court of Appeals in a case coming from North Dakota, where the practice seems to be like that in Montana, the court treated a motion to dismiss for the reason that the "complaint does not state facts sufficient to constitute a cause of action" as a judgment upon the pleadings, and put itself in agreement with the Supreme Court of Montana by stating that "a motion for judgment on the pleadings is in effect a demurrer, and, if sustained by the court and final judgment entered thereon, it has the same effect as if the demurrer to the complaint had been sustained and final judgment entered in favor of the party demurring." The court went on to observe that a judgment on the pleadings is a final judgment, which cannot be collaterally attacked, and it held that a judgment of dismissal like that rendered by the court in Montana in the case at bar could be set up as res judicata to an action subsequently brought. To like effect is In re Reynolds (D. C.) 133 Fed. 585, 127 Fed. 760, decided by the United States District Court in Montana. The judgment of the Montana court was rendered upon

the merits. On this point we find ourselves in agreement with the learned judge in the Circuit Court.

We next consider if the judgment was rendered in a proceeding between the parties here before us. The defendants in the Montana suit were the defendants in the case before us. The complainant there defeated was Harris, Ingersoll's administrator, appointed in Montana. As has been stated, the complainant here is Mrs. Ingersoll, his administratrix appointed in Massachusetts. Is the former in privity with the latter so that a judgment against him binds her? To answer the question we must examine in some detail the doctrine of the privity of parties. If Ingersoll had sued these defendants in Montana in a court of competent jurisdiction, or had there been sued by them, a judgment in his favor or against him, either as plaintiff or as defendant, would have bound him and the defendants everywhere. After his death his executors and administrators everywhere, speaking generally, would take the benefit or the burden of the judgment, as the case might be, because all of them would be in privity with him as their testator or intestate.

Let us next suppose that Ingersoll had died before suit brought in Montana, leaving no judgment in his favor or against him, but only a chose in action wherein he was debtor or creditor. Let us suppose that his executor or administrator appointed in Montana sued there on this chose in action and recovered judgment as plaintiff. What would be the effect of this judgment upon the rights of his executor or administrator appointed in Massachusetts? The executor and the administrator represent their testator or intestate, so that both are in privity with him. But there may be several executors and administrators, each appointed in a different jurisdiction. The authority of the executor to represent his testator and administer his goods is derived from the concurrent operation of the will and of the court of probate. The authority of the administrator is derived from the latter only. Every probate court, speaking generally, has jurisdiction of property found in its state. How far is administration in the several states independent, and how far does the act of one executor or administrator bind another?

That an executor in one jurisdiction is to some extent in privity with an executor appointed in another jurisdiction has been decided. Hill v. Tucker, 13 How. 458, 14 L. Ed. 223; Goodall v. Tucker, 13 How. 469, 14 L. Ed. 227; Carpenter v. Strange, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. Ed. 640. How far this privity extends we need not here consider. Here we are dealing not with executors, but with administrators.

The case of an administrator is not that of an executor. In Stacy v. Thrasher, 6 How. 44, 12 L. Ed. 337, it was said:

"An administrator under grant of administration in one state stands in none of these relations to an administrator in another. Each is privy to the testator, and would be estopped by a judgment against him; but they have no privity with each other, in law or in estate. They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the other. Each is accountable to the ordinary from whom he receives his authority. Nor does the one come by succession to the other into

the trust of the same property, incumbered by the same debts, as in the case of an administrator de bonis non, who may be truly said to have an official privity with his predecessor in the same trust, and therefore liable to the same duties." 6 How. 59, 60.

The law regards the estate of an intestate as divided between the different jurisdictions in which it is situated. The administrator represents his intestate only as to the property within the jurisdiction of the court which appointed him. Thus in Stacy v. Thrasher the court said further:

"Each administrator is severally liable to pay the debts of the deceased out of the assets committed to him, and therein they resemble joint and several co-obligors in a bond. A judgment against one is no merger of the bond, nor is it evidence in a suit against the other. Their common liability to pay the same debt creates no privity between them, either in law or in estate. It is for those who assert this privity to show wherein it lies, and the argument for it seems to be this: That the judgment against the administrator is against the estate of the intestate, and that his estate, wheresoever situate, is liable to pay his debts. Therefore the plaintiff, having once established his claim against the estate by the judgment of a court, should not be called on to make proof of it again. This argument assumes that the judgment is in rem, and not in personam, or that the estate has a sort of corporate entity and unity. But this is not true, either in fact or in legal construction. The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another state, liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a stranger. A judgment may have the 'effect' of a lien upon all the defendant's lands in the state where it is rendered, yet it cannot have that effect on lands in another state by virtue of the faith and credit given to it by the Constitution and act of Congress. The laws and courts of a state can only affect persons and things within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another state is res inter alios acta. It cannot be even prima facie evidence of a debt; for, if it have any effect at all, it must be as a judgment, and operate by way of estoppel." 6 How. 60, 61.

To the same effect are McLean v. Meek, 18 How. 16, 15 L. Ed. 277; Johnson v. Powers, 139 U S. 156, 159, 11 Sup. Ct. 525, 35 L. Ed. 112; Low v. Bartlett, 8 Allen, 259.

Had Ingersoll been indebted to these defendants, and had they recovered judgment in Montana against Harris, his administrator appointed there, they could not have enforced that judgment here against Mrs. Ingersoll, the Massachusetts administratrix. If judgment had gone in favor of Harris in a suit brought by them against him in Montana, it would not have availed Mrs. Ingersoll, sued by them on the same claim in Massachusetts.

But within his jurisdiction, and as to the property there situated, the "authority of each is paramount to the other." 6 How. 59. All property, according to its locality, is deemed to pass to some one administrator, and, having been taken into his possession, it is wholly within his contro and beyond the control of any other. His dealing with that property binds it not only in his jurisdiction, but everywhere it may be carried. If he sells a horse, the vendee may take it to another jurisdiction, and may hold it against the administrator appointed there. If property situated in the jurisdiction of his appointment be taken

from an administrator, the courts have held that he may follow it into another jurisdiction and there sue to recover it. Crawford v. Graves, 15 La. Ann. 243; Adams v. Batchelder, 173 Mass. 258, 259, 53 N. E. 824, 73 Am. St. Rep. 282. If the Montana administrator had transferred a note due from a resident of Montana, the transfer would be valid as against all other administrators appointed elsewhere. Wilkins v. Ellett, 108 U. S. 256, 259, 2 Sup. Ct. 641, 27 L. Ed. 718. If the Montana administrator had discharged a note which was assets in his hands, no administrator elsewhere could have sued upon it. Slocum v. Sanford, 2 Conn. 533.

Accordingly, if an administrator sues upon a chose in action which is deemed to be assets in his jurisdiction, and by recovery merges the chose in action in a judgment, that judgment is assets in his hands, and may be sued upon elsewhere, even in a jurisdiction where he could not have brought suit upon the original claim. Biddle v. Wilkins, 1 Pet. 686, 7 L. Ed. 315; Moore v. Petty, 135 Fed. 668, 68 C. C. A. 306; Talmage v. Chapel, 16 Mass. 71. That the administrator's suit upon the judgment recovered may or must be brought in his own name, without qualification as administrator, is a requirement merely formal. Hence it follows that, if Harris had recovered judgment in the Montana suit, he could have sued thereon in Massachusetts, notwithstanding the present complainant's appointment as administratrix here.

Furthermore, it has been held that, if one administrator has brought suit upon a chose in action situated in his jurisdiction, this suit is a bar to a suit brought upon the same claim by another administrator in his jurisdiction. Sulz v. Mutual Reserve Fund, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379; Merrill v. New England Mutual Life Insurance Co., 103 Mass. 245, 249, 4 Am. Rep. 548. This is true, though the original chose in action might have been deemed assets indifferently in either jurisdiction. 145 N. Y. 572, 573, 40 N. E. 242, 28 L. R. A. 379. The New York case in effect is like the case at bar; for, if the pendency of the suit brought in Montana by Harris would defeat this proceeding, a judgment against him in that suit must have the same effect a fortiori.

It remains only to consider if the chose in action sued on by Harris in Montana was there assets of Ingersoll's estate in his hands. Dicey on the Conflict of Laws (Am. Ed.) p. 460. The defendants appeared there, and there carried on the litigation. Some of them were citizens of that state. The proposition has not been disputed in argument, but has been everywhere assumed, and especially by the present complainant, who there began the suit which Harris carried on. Though she did not herself continue the Montana suit, yet, having procured Harris's substitution in her place in the suit which she had begun, she cannot well say that the chose in action had not its situs in Montana and was not assets there.

Most of the cases cited by the defendant and by the learned judge of the court below have been already referred to. The debt of a person deceased, speaking generally, is due and may be sued on wherever his property is found. Every administrator, wherever appointed, is

in privity with his intestate, and so is liable to pay his intestate's debt out of the funds in his hands. Until the debt is discharged, the creditor may sue administrators in as many jurisdictions as he can find them, since the debts of the intestate are owed, and so have their situs, in each and every one of these jurisdictions; but a given article of the testator's property, generally speaking, is not assets everywhere. It is ordinarily limited to a situs in one jurisdiction, and thus passes under the control of a single administrator. Even if its situs be deemed originally indifferent as between two jurisdictions, yet, if it is brought into suit in one of these by an administrator appointed there, the suit is taken to fix its situs and to exclude any other administrator from its control. Sulz v. Mutual Reserve Fund, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379. This is the necessary result of the independence of administrators appointed in different jurisdictions. One cannot sue upon a judgment obtained by another, because administrators have no privity with each other, and every article of their intestate's property belongs to one or another of them independently, without right of interference in the rest. But the inability of one administrator to sue upon a judgment obtained by another does not empower the former to sue upon the original chose in action, which was the basis of the judgment. Debts owed to an intestate are not multiplied by the number of his administrators. There is but one debt, and when it has come into the hands of the appropriate administrator other administrators are excluded from its control. If he reduces it to judgment, it is merged in that judgment, not only in his jurisdiction, but everywhere. Conversely, if he seeks to collect an alleged debt found in his jurisdiction and judgment goes against him, the defendant is everywhere relieved. A judgment for the plaintiff in a given suit is binding only so far as a judgment for the defendant in the same suit has the like effect.

Any other result would be intolerable. Had Harris obtained judgment against these defendants in the Montana suit, he could have sued on it in Massachusetts in his own name, and the Massachusetts administratrix could not have sued on it in her representative capacity. If the complainant's theory is sound, these defendants would then be liable in Massachusetts to two suits at the same time, one brought against them by Harris individually upon the Montana judgment, and another brought against them by Mrs. Ingersoll, as the Massachusetts administratrix, upon the original claim which had been merged in that judgment.

It follows that the matter herein litigated was adjudicated in Montana, inasmuch as the cause of action in the two proceedings was the same, the Montana judgment was rendered on the merits, and was so far between privies that the administratrix in Massachusetts is bound by the judgment rendered against the administrator in Montana.

The decree of the Circuit Court is reversed, and the case is remanded to that court, with directions to dismiss the bill, with costs, and the appellants recover costs of appeal.

ALDRICH, District Judge (dissenting). I cannot agree with the result reached in this case. I do not question, however, the general proposition that a judgment upon the merits by a state court having jurisdiction of the parties and the subject-matter is entitled to full credit, and conclusive as a bar to further litigation in another jurisdiction. This rule unquestionably applies, not only to cases where the judgment is upon actual trial, but to cases heard upon demurrer going to the merits, and to cases set down for hearing upon bill and answer.

In my view the case under consideration is not fairly in either class, or in any class of cases to which the rule of res judicata applies. It is a fundamental and familiar principle that it is only in cases where it is clearly beyond question that a party's rights have been determined upon the full merits that the rule of res judicata holds good.

The majority opinion accepts the situation as one to be solved as though it were a judgment in a case standing upon general demurrer. I do not think it is at all like that. In a case on general demurrer, the defendant in effect says, take all the plaintiff alleges to be true, still he is not entitled to recover.

In the Montana case the defendants did not and could not stand upon general demurrer, for the reason that the complaint as amended contained general allegations of the plaintiff's rights, which, upon his theory, entitled him to judgment if all alleged was to be accepted as true. This was so because the plaintiff alleged the fact of the contest, which involved vast preparation and a six weeks' jury trial, in which the jury disagreed. He also alleged the compromise in which it was claimed that Col. Ingersoll and the other parties to the contract participated, and which it is alleged was an expedient and effective means adopted by the parties for defeating the substantial provisions of the will, and of giving Col. Ingersoll's clients all and more than they would have received if the contract had been literally and technically fulfilled and the estate administered intestate.

Under these allegations, uninfluenced by the probative force of an answer, the plaintiff might have fairly contended that the contest and the disagreement of the jury at least suspended the probate of the will, and rendered it inoperative as an instrument to pass the property according to its terms, and that his evidence would show that the parties verbally accepted the compromise result in lieu of performance according to the strict letter of the contract.

To all intents and purposes, so far as the interests of those who employed Col. Ingersoll were concerned, the will was defeated because it did not under the compromise operate in any substantial sense according to its terms. Its substantial provisions were defeated.

Where allegations are general in the assertion of a right, it is permissible to explain them by evidence, and, if there is any view upon which the allegations can be accepted as sufficient in law, judgment will not go against the plaintiff upon demurrer.

Although the allegations of a complaint may not show performance strictly like that provided for in the contract, if the allegation is that that kind of a performance was performance under the contract, it necessarily presents a situation to be aided by subsequent pleadings and

by proofs, as, for instance, where it is claimed that the alleged performance was to be accepted and paid for as a better, though technically somewhat different, performance than that contemplated by the original contract. Like a contract to build a house or a bridge according to written specifications, and where the parties by agreement, and in order to meet exigencies developed in the progress of performance, substitute a different way of doing it at and for the contract price. The allegations of performance must be aided in such a case by proofs upon issues properly joined by subsequent pleadings. At all events, the defendants did not demur, but answered, alleging certain facts and setting forth their side of the controversy, and, among other things, they alleged that the consideration for the contract was not truly stated in the complaint; that Col. Ingersoll received $5,000 in full for his services and expenses and in revocation of the contract; that the compromise was not effectual in defeating the will, so far as the rights of Root and the other Ingersoll clients were concerned; that the compromises were negotiated by the parties and counsel other than Ingersoll; and that Col. Ingersoll did not perform any services other than those in assisting in and endeavoring to enforce the contest of Root and others.

To the answers, and upon all these matters, the plaintiff filed a replication, joining issue, and denied that the contract for the $100,000 fee was ever abandoned, and alleged that it was in force and fully performed as alleged.

To the answers, thus raising mixed questions of law and fact as to performance, and as to other aspects of the case, as well as the question of fact as to Col. Ingersoll's service in procuring the compromise, which, it is alleged, was effectual in defeating the will, the plaintiff had the right to reply, and to controvert the various matters alleged therein. United States v. Dalles Military Road Co., 140 U. S. 599, 616, 617, 11 Sup. Ct. 988, 35 L. Ed. 560.

The Montana court ignored the issues raised by the answer and the replication, denied to the plaintiff his right of trial and all opportunity to introduce proofs, and assumed to decide the case upon the bill of complaint, notwithstanding the fact that the bill had been answered and issues joined by replication upon questions of fact and upon mixed questions of law and fact.

It is quite difficult to find warrant for this, or for basing the decision, as was done, upon the ground of mutual abandonment in view of the emphatic allegations of the replication to the contrary effect. This is, however, a question not to be discussed here except so far as it bears upon the question, which we must consider, whether there was a determination of the rights of the parties in Montana upon the full merits.

The case was never set down for determination upon demurrer. The case was never set down for hearing upon bill and answer, nor was it a case where the defendant moved for judgment on all the pleadings. The plaintiff never waived his constitutional right to a trial or his right to introduce proofs, but, on the contrary, insisted upon his rights in that respect. Issues of fact being joined, it was the funda-

mental right of the plaintiff to introduce his proofs, explaining the allegations of performance and his proofs controverting the allegations of the answer.

In Martin v. Texas, 200 U. S. 316, 26 Sup. Ct. 338, 50 L. Ed. 497, the right to introduce proofs in support of a material allegation was recognized as an essential right, and it was there said if the court had refused to admit evidence, or if the opportunity to establish the alleged facts had been denied, the judgment would be reversed.

The state law as applied in the Montana case did not accord to the plaintiff "due process of law." It is said in Howard v. Kentucky, 200 U. S. 164, 173, 26 Sup. Ct. 189, 50 L. Ed. 421, that it may be admitted that the words "due process of law," as used in the fourteenth amendment, protect fundamental rights, and that the inquiry is, did the state law as applied afford due process as those words are used in the fourteenth amendment? Therefore, under the circumstances, it is not so much a question here as to what the Montana law and practice is as whether the kind of a trial had in Montana afforded to the plaintiff the opportunities usually accorded to a party under "due process of law" in courts administering justice and establishing rights according to the general course of law and equity. Still, while saying this, I by no means concede that the Montana law is correctly stated in the majority opinion, or that the Montana Code practice is such as justifies what was done in this case in that state.

The Montana record shows, as will be seen by reference to the statement which precedes the opinion of the Montana Supreme Court, that the case regularly came on for trial in Montana upon the issues raised by the bill and answer, and that the plaintiff offered to introduce proofs in support of his allegations, yet the motion and the order of court, as already pointed out, entirely ignored the issues joined, and denied to the plaintiff the fundamental right of an opportunity to prove his case, which was taken from the jury and judgment rendered therein against him upon the ground that the complaint in the abstract did not state a cause of action.

It is one thing to hold against a plaintiff upon demurrer where the plaintiff after demurrer elects to stand upon his declaration. That is regular and involves "due process of law." It is, however, quite another thing to ignore an answer and the replication and to deny the plaintiff all opportunity of explaining and sustaining his allegations of fact by proofs, or even of explaining and sustaining allegations which involve mixed questions of law and fact. That would not be regular and would not be according to a party "due process of law."

We should assume here that the plaintiff was prepared upon the trial, for which he contended and to which he was entitled under "due process of law," to offer proofs tending to show that Col. Ingersoll, as alleged, advised about and actively participated in the effective and beneficial compromise, and that the substantial defeat of the terms of the will, as the result of the contest, the trial, and the compromise which secured to the Ingersoll clients greater beneficial results than would the technical defeat which it is contended was contemplated by the original

contract, was accepted by the Ingersoll clients in lieu of the kind of a defeat perhaps originally intended, and that his evidence would tend to show that it was a result or a defeat, as in effect alleged in the bill before us, upon which Root and Coram had in interviews and correspondence admitted their indebtedness under the contract.

In that part of the contest involving the preparation and trial Col. Ingersoll performed valuable and effective service—service which left the probate of the will at least suspended. Having incurred expense and so far entered upon performance, his rights under the contract were substantive, and he was entitled to an opportunity to continue the contest to defeat the will. The Montana answer contained an allegation, which was denied by the plaintiff, that the favorable compromise was effected by counsel other than Col. Ingersoll. When and where and upon what trial, pray, was this issue determined upon "due process of law," and upon what process and what trial was it determined that Root and Coram, after part performance and the creation of substantive rights, might compromise and might exercise the right to withdraw from Col. Ingersoll the opportunity to perform the contract according to its terms, and that nonfulfillment of the contract should, under such circumstances, be their defense, which should leave the Ingersoll interests and rights remediless?

The decision of the Montana Supreme Court is grounded upon the idea that duty required Col. Ingersoll to contest, and that the compromise in which he participated created a situation which made performance impossible. In this connection, it is interesting to note that the defendants' answer alleges that Ingersoll did not participate in the compromise, that the parties and other counsel made the compromise without his help or assistance, and thus, if the defendants' allegation be true, the defendants themselves, and not Ingersoll, made strict and literal performance impossible.

The decision also proceeds upon the idea of a mutual arrangement between Col. Ingersoll and his clients, a mutual arrangement which, according to the decision, in effect amounted to an abandonment of the contract. Whether there was a mutual arrangement and abandonment was largely a question of fact, upon which the plaintiff took issue and about which the plaintiff was never heard or allowed to produce his proofs. There was no hint or suggestion in the complaint of an abandonment. The allegations in effect are that the desirable result was reached upon different lines than those contemplated by the contract, and that that was done under an arrangement between the parties.

The very nature of the controversy which involved mixed conditions relating to the question whether there was a substantial defeat of the will; the question of fact whether Col. Ingersoll received $5,000 in full for his services, and whether the contract was abandoned and rescinded, or whether what was done by way of compromise was under an arrangement between the parties with the idea that it was to be accepted in lieu of literal performance and the technical defeat, perhaps, contemplated by the original contract; the question whether the parties acknowledged indebtedness under the contract and agreed to pay—made it peculiarly a case for issues of fact through an answer

and a replication upon which the plaintiff was entitled to such a trial as would allow the questions of fact to be settled under instructions, and, this being denied, it follows that the "due process of law" contemplated by the Constitution was not accorded to him.

I think it quite clear, and so clear that it needs no extended elaboration, that the Montana court had no right to disregard the issues joined and to foreclose the plaintiff's rights upon assumptions of fact, and upon assumptions upon mixed questions of law and fact, which were contrary to the allegations of the complaint upon which issue had been joined.

Moreover, the conclusion is irresistible, upon a critical examination of the reasoning of the Montana Supreme Court, that the court, having denied to the plaintiff the right to be heard upon proofs in support of the allegations of the complaint and in support of his side of the issues raised by the replication, which was a denial of "due process of law," proceeded to determine the rights of the parties under the influence of the probative force of the answer, though the case was never submitted for hearing on bill and answer. I say this because the reasoning of the Montana court is based upon substantial matter contained in the answer, matter contrary to the express allegations of the complaint.

The majority opinion here is based upon the assumption that no evidence consistent with the complaint could have changed the result in Montana, and upon the further assumption that, if the fee was contingent, there was no cause of action. The fundamental error in the Montana judgment, and in the majority opinion here as well, resides in these assumptions in respect to controverted questions involving law and fact, and in deciding against the plaintiff without hearing his evidence. It is plainly deciding against a party without hearing him. How was it possible for the Montana court, without hearing the proofs, to rightfully pass upon the controverted question of waiver of contract, or upon the controverted questions relating to the waiver of the contingency and to the agreement to pay, and how is it possible for this court to rightfully say that no evidence would have changed the result in Montana?

As has already been observed, the subject-matter of the controversy was such that the rights of the parties could not fairly or intelligently be ultimately concluded by a court except upon pleadings and proofs, and upon such a trial as would give the parties an opportunity to be heard, a trial conducted under such conditions as would allow the disputed questions of fact to be determined by the court upon evidence, or by a jury upon evidence under proper instructions to that end. This is so, because under the changed conditions resulting from the admitted departure from the contract in respect to literal performance, and under the issues joined in respect to the circumstances which varied the kind of performance, the situation became such that the rights of the parties could not be ascertained and established, under reasonable rules of interpretation, by taking the contract by its four corners. From the very nature of the resultant situation the plaintiff was entitled under due process and procedure to introduce his explanatory proofs.

It results, therefore, in my view, that the Montana judgment was not based upon such a trial as entitles it to be accepted as conclusive of the merits, and as one which settles the ultimate rights of the parties and becomes a bar to proceedings involving the merits in another jurisdiction.

Judge Putnam, in an elaborate opinion in the Circuit Court (Ingersoll v. Coram [C. C.] 127 Fed. 418; Id., 136 Fed. 689), decided the question of res judicata against the defendants upon an application of the rule that an ancillary administrator in one jurisdiction is not in privity with an ancillary administrator in another jurisdiction, and upon the ground that the parties in this case are not the same as the parties in the Montana case. Holding the view, as I do, that the Montana case was never determined upon its full merits, and that the plaintiff was denied the constitutional right of "due process of law," I have no occasion to discuss that position, and therefore leave that phase of the case upon the reasoning of Judge Putnam and the authorities cited in his opinion in the Circuit Court.

Moreover, and entirely aside from the questions discussed in the majority opinion, there is another phase of the situation which should be taken into consideration. Upon this phase of the case I urge, as strenuously as I properly may, that the Circuit Court should not be directed to dismiss the bill in the equitable proceeding pending here, and it is upon this ground. The Montana Supreme Court, as will be seen by referring to its opinion, only undertook to determine the rights of the parties under the special contract in respect to the contingent fee, expressly leaving open and unadjudicated the quantum meruit rights of the plaintiff to recover for services other than those provided for by the contract. It is clear that the Montana court intended to leave open the question as to the meritorious service, which, though actually performed, did not, according to the views of that court, accomplish the literal defeat of the will; that is to say, that what was done did not amount to the particular performance which in its view was contemplated by the special contract. The services thus referred to were at least substantial. They were services which were potential in staying a verdict sustaining the will, thereby paving the way for the favorable compromises (in which it is alleged Col. Ingersoll participated and about which the issue of fact raised by the pleadings has never been determined), through which, as is claimed, the Ingersoll clients, these defendants, received something like $5,500,000 in money and real estate titles—assets admitted to be in excess of their shares and which were apparently, in fact vastly, in excess—which they would not have received if the will had not been contested and had been probated in its original form and according to its terms. Therefore, if it shall be determined, upon the theory of the majority opinion, that the rights of the parties in respect to the contingent fee under the contract have been concluded by the Montana courts, still the questions relating to the quantum meruit are fairly open, and the plaintiff in this equitable proceeding should be allowed to recast her bill and have the question as to what she ought to recover upon quantum meruit and all questions of lien ascertained and established. That,

at all events, is something which has never been actually determined or adjudicated here or elsewhere. No one pretends that it has. Manifestly, as before pointed out, the reference of the Montana court was to services for which the plaintiff could not, in the view of that court, recover under the contract. Accepting the theory of that court for the purpose of stating the question, the reference was to a service for which Col. Ingersoll, according to the plaintiff's allegation, was never compensated, and this allegation holds for purposes of equitable considerations in respect to an amendment without regard to the question whether the services were under or aside from the contract. If the plaintiff, under the operation of the rule of res judicata, must accept as final the theory of the Montana court that recovery of the contingent fee cannot be had under the contract, then, as an equitable alternative in this equitable proceeding to recover upon a contract and to establish a lien, she should be allowed to turn her bill into an equitable proceeding to recover upon quantum meruit what is right and just for the manifestly important service for which, according to the allegations and the theory of the plaintiff, compensation has never in fact been made. If it shall be determined here that the question of the right to recover under the contract is foreclosed by the Montana judgment, and if, in that event, opportunity is not given in this proceeding to recast the bill and have the value of the professional services actually rendered, ascertained and established, the plaintiff will go hence with an important and at least equitable claim defeated upon the somewhat technical, and under the circumstances inequitable, ground of nonfulfillment of a special contract, and the underlying equitable question as to the value of the services actually performed in respect to the subject-matter of the contract will be wholly unconsidered, and as a result the real value of the alleged meritorious services, in preparation for the contest, upon the trial and in connection with the compromises, through which the enormous financial returns were realized by these defendants, must forever remain untold and unrewarded, and thus the plaintiff will have lost a well-known and familiar equitable right founded upon the principle that, if a laborer labors well and fails to perform the strict letter of the bond, he may still have what his labor merits.

Under all the circumstances, if the Circuit Court is peremptorily directed to dismiss the bill and the plaintiff is turned away under the rule of res judicata drastically founded upon the Montana situation, where the court only pretended to deal with the right of the plaintiff to recover the contingent fee under the special contract, she will not have been accorded the opportunities in this court which modern practice and procedure usually extend to a plaintiff whose case manifestly involves a right, and who, through inadvertence or oversight, has failed in the first instance to place the case upon the right ground. It is for this reason, if the Circuit Court is reversed upon the ground stated in the majority opinion, that the plaintiff should have an opportunity in that court to move to amend her bill.

OHIO TRANSP. CO. et al. v. DAVIDSON S. S. CO.

DAVIDSON S. S. CO. v. OHIO TRANSP. CO. et al.

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

Nos. 1,220, 1,232.

1. SHIPPING—PROCEEDING FOR LIMITATION OF LIABILITY—SURRENDER OF VESSEL.

Rev. St. §§ 4283, 4285 [U. S. Comp. St. 1901, pp. 2943, 2944], clearly give the owner of any vessel the right to personal exemption from liability for any damage occasioned by such vessel without his privity or knowledge by transferring her and her pending freight to a trustee to be appointed by a court of admiralty, and although admiralty rule 54, prescribing the procedure under said sections, permits him at his option to retain the vessel by having her appraised and paying her appraised value, and pending freight into court or giving a stipulation therefor, he still has the right before an appraisement made on his petition has been accepted, or any order has been made thereon, to dismiss that part of his petition, and, instead, to ask for the appointment of a trustee to whom he may transfer the vessel and her freight.

[Ed. Note.—Limitation of liability of vessel owner, see note to The Longfellow, 45 C. C. A. 387.]

2. COLLISION—STEAM VESSELS MEETING.

Evidence considered, and *held* to support a finding that a collision between two steamers in Lake Erie, off the mouth of Detroit river, was due solely to the fault of one in failing to conform to a passing agreement and for her negligent navigation.

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

See 131 Fed. 373.

F. H. Canfield and Chas. E. Kremer, for Davidson Steamship Company.

William E. Church, Frank S. Masten, and Harvey G. Goulder, for Ohio Transp. Company and others.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. About 9 o'clock in the night of November 20, 1903, the steamer Sacramento, bound from Erie to Milwaukee, and the steamer Gladstone, bound from Manitowoc to Buffalo, collided on Lake Erie, near the Detroit River Light. The Sacramento, practically uninjured, continued on to Milwaukee. The Gladstone sank; and her cargo of about 132,000 bushels of barley and oats was abandoned to the underwriters.

On November 27, 1903, the Davidson Company, owner of the Sacramento, in the court below filed its petition to limit its liability to the value of the vessel and her pending freight, and asked that appraisers be appointed. On December 2d appraisers reported the value of the vessel to be $65,000 and her pending freight $1,678.67. While the original petition stood, the court never confirmed, nor was asked to confirm, this appraisement; never ordered, nor was asked to order, the payment of the appraised value into court or the giving of a stipulation with sureties for the payment thereof. On December 7th the

Davidson Company, by leave of court, filed a supplemental petition, praying that the Sacramento be sold and the proceeds put into the registry to abide further orders. By leave of court on April 4, 1904, an amendment to the petition was filed, asking that the vessel and her pending freight might be transferred to a trustee to be appointed by the court. Objections were filed by the Ohio Company, as owner of the Gladstone and as trustee of cargo underwriters, and by four underwriters for themselves. In support thereof affidavits were presented to the effect that in April, 1904, vessels of the Sacramento type were less valuable than in November and December, 1903, by reason of higher rates for marine insurance, increased cost of operation, and poor outlook for the season's business. On the hearing of the supplemental petition and the amendment to the petition, the court, on May 21, 1904, ordered that the Sacramento and her pending freight be transferred to a commissioner named. Subsequently the vessel was sold for $26,000.

On issues framed respecting the responsibility for the collision and the amount of damages occasioned thereby, the court found and adjudged that the Sacramento was solely at fault, but without the privity or knowledge of the Davidson Company, and that the Gladstone and her cargo were damaged to the extent of $79,530. The final decree provided that the liability of the Davidson Company be limited to the freight and the value of the Sacramento as established by the sale, and distributed the freight and net proceeds of the sale ratably among the claimants.

The Ohio Company and the insurers challenge the correctness of that part of the decree which limits the liability of the Davidson Company, while the latter charges that the court erred in applying the freight and proceeds of sale toward the payment of the damages.

1. Section 4283 of the Revised Statutes [U. S. Comp. St. 1901, p. 2943] provides that the liability of the owner of a vessel for any damage occasioned without his privity or knowledge "shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending." By section 4284 [U. S. Comp. St. 1901, p. 2943], whenever the whole value is not sufficient to compensate all who are damnified, they shall receive payment "in proportion to their respective losses, and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto." In section 4285 [U. S. Comp. St. 1901, p. 2944] Congress has declared that it shall be a sufficient compliance with the requirements for limiting liability if the owner "shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease."

General admiralty rule 54, providing for the filing of a petition to limit liability and for the ascertainment of values by appraisement, says:

"And thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel and her freight for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with sureties, for the payment thereof into court whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight to a trustee to be appointed by the court."

Though statutes in derogation of the common law must be construed strictly, the limitation applies only to the ascertainment of the lawmakers' intent, which, when found and measured, should be effectuated as thoroughly as in remedial legislation. Looking alone to the sections quoted, it seems unquestionable that Congress gave the unoffending owner of an offending vessel the absolute right to relieve himself of personal liability by turning over the vessel and her freight, for the benefit of claimants, to a trustee to be appointed by any court of competent jurisdiction. To treat rule 54 as being in pari materia for determining the nature and extent of the right is impermissible; for, though sections of a statute may color or limit what else might be deemed the meaning of other sections of the same statute, a rule of court can only be taken properly as aiding the exercise of the right, not as derogating from the right itself. In this view the rule affords the unoffending owner who might be greatly damaged by his inability to fulfill existing contracts for future service a means of exercising the right by surrendering the vessel virtually and then buying her in at a price that is fair to claimants. Undoubtedly, if the "due appraisement" of the rule were had and accepted by the owner, and if the court should thereupon order payment into the registry or the giving of a stipulation, the owner would be bound by that method of surrender and its consequences. Whether the owner, after an order for payment or stipulation has been entered upon an appraisement which he has not accepted, may or may not have the right to transfer the vessel to a trustee for public sale, is a question to which this record does not necessitate an answer. Here the court made no such order. The supplemental petition and the amendment to the petition apprised the court that the owner was dissatisfied with and purposed to withdraw from the method of surrender through appraisement. By granting leave to file these and by acting thereon, the court recognized the owner's right, before the appraisement was accepted by him or acted upon by the court, to dismiss that part of his petition which asked for an appraisement and to substitute therefor the method of transfer to a trustee. Of a petitioner's right to dismiss before any order is made on an unaccepted appraisement we have no doubt.

The owner's attitude was manifested promptly. Delay beyond the fall of 1903 seems to have been due wholly to the attempt of the claimants to hold the owner to the payment of the amount of the appraisement. Further, in the spring of 1904, the vessel remained unchanged in condition. She lay untouched from the termination of the voyage until the sale. Higher insurance rates, greater cost of operation, and

poor business were not the fault of the owner and did not alter the vessel's structural worth.

2. On the appeal of the Davidson Company the inquiry will be limited to the conduct of the Sacramento; for, if it were true that she was responsible for only half the damages, her owner ought not to be heard to complain of a decree which limits his liability to less than a third.

The Detroit River Lighthouse is half a mile south of the Red Gas buoy which marks the east side of the south end of the river channel. The night was clear, and no condition of sea or weather interfered with safe navigation. The Gladstone was coming down the river at a speed of 6½ to 7 miles an hour. The Sacramento, following the Flower at a distance of about one mile, was proceeding westwardly on the lake towards the lighthouse at a speed of 9 to 9½ miles per hour. The Flower turned north and passed the Gladstone opposite the gas buoy under starboard to starboard signals. The claim of the Gladstone is that immediately after passing the Flower she signaled the Sacramento to pass port to port; that, not receiving a prompt answer, she repeated the signal, when the vessels were about three-quarters of a mile apart, whereupon the Sacramento promptly signaled her acceptance; that the Gladstone's course was laid well over to the westward, leaving ample room in which the Sacramento might turn; that the Sacramento, with the vessels in plain sight of each other, with unabated speed, and without signaling, continued her course directly towards the lighthouse, at right angles with the Gladstone's course, until the vessels were within 900 feet, within 3 lengths, within 40 seconds of each other, when she reversed her engines and tried to swing under a port helm, while the Gladstone increased her speed and hard ported her helm in the endeavor to swing out of the channel as the only possible chance of escape, the result being that the Gladstone was struck a glancing blow on the port side. Our examination of the evidence confirms the correctness of the court's adoption of the Gladstone's account. And the very explanation of the Sacramento that, because the Gladstone and the Flower had passed starboard to starboard, she continued her course without signaling, assuming that the Gladstone would not give a port to port signal, that she did not hear the first signal if it was given, that the second signal was not sounded until the vessels were within three lengths of each other, and that then she could do nothing but accept the proffered passing arrangement, we regard as a substantial confession of most palpable negligence.

The decree is affirmed.

MORGAN v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1906. Rehearing Denied September 3, 1906.)

No. 2,281.

1. INDICTMENT—DUPLICITY IN INDICTMENT—MOTION IN ARREST.
An objection to an indictment on the ground of duplicity cannot be raised for the first time after verdict by motion in arrest of judgment.
[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 648.]

2. SAME—DUPLICITY—PREJUDICE.
Where, in a prosecution for cutting timber from the public domain, defendant was not prejudiced by the fact that the indictment charged that he cut the timber with intent unlawfully to export and with intent to dispose of the same, the conviction could not be set aside because of such duplicity under Rev. St. § 1025 [U. S. Comp. St. 1901, p. 720], providing that no indictment shall be deemed insufficient or the proceedings under it affected by any defect in matter of form which does not tend to prejudice defendant.

3. BILL OF EXCEPTIONS—INSTRUCTIONS—REVIEW.
Instructions given in a criminal case cannot be reviewed on a writ of error unless brought into the record by a bill of exceptions signed by the trial judge; a mere certificate of the clerk that he has annexed to the record and transmitted to the court a copy of all the instructions given to the jury and filed in the case being insufficient.

4. PUBLIC LANDS—CUTTING TIMBER—STATUTES—REPEAL.
Rev. St. § 2461 [U. S. Comp. St. 1901, p. 1527], prohibits the cutting of timber on purchased or reserved lands of the United States, the wanton destruction of such timber, its removal from such lands, except by authority of a competent officer, and for use in the navy, the cutting of timber from any other lands of the United States and with intent to export, dispose of, use, or employ the same in any manner whatsoever other than the use of the navy, and the removal of the timber with like intent, and imposes punishment for violation by a fine and imprisonment. Act June 3, 1878, c. 151, 20 Stat. 89, was extended to all public land states by Act August 4, 1892, c. 375, 27 Stat. 348 [U. S. Comp. St. 1901, p. 1545]. Section 4, 20 Stat. 90 [U. S. Comp. St. 1901, p. 1529], declared that it should be unlawful to cut, procure to be cut, or wantonly destroy any timber on lands of the United States, etc., and that any person violating the same should be guilty of a misdemeanor, and on conviction should be fined, provided that the section should not prevent the cutting of timber for mining and agricultural purposes, and section 5, 20 Stat. 90 [U. S. Comp. St. 1901, p. 1530], provided that any person prosecuted for violation of Rev. St. § 2461 [U. S. Comp. St. 1901, p. 1527], might be relieved by paying $2.50 per acre for lands from which he cut timber. *Held*, that such acts repealed so much of section 2461 as related to the cutting or removing of timber from the public domain with intent to export or dispose of the same, together with the penalty of imprisonment.

5. SAME—APPEAL—CORRECTION OF SENTENCE.
Where, in a prosecution for cutting timber from government land with intent to export or dispose of the same, the jury might have found under the indictment that defendant cut the timber innocently with intent to use and employ the same for permissible building, agriculture, mining, or other domestic purposes, the Circuit Court of Appeals could not, where the sentence to a fine and imprisonment was illegal because the provision of the statute providing for imprisonment had been repealed, correct the sentence by eliminating the portion providing for

imprisonment; it being impossible to say that the jury found defendant guilty of cutting timber with intent to export and dispose of the same.

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

W. G. Simonson (J. E. Simonson, on the brief), for plaintiff in error.

Earl M. Cranston (George P. Steele, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. The charge laid in the indictment against the defendant is that on a given date, in the district of Colorado, he "unlawfully did cut and cause and procure to be cut" certain timber upon public lands situate in the state of Colorado, "with intent then and there unlawfully to export, dispose of, use and employ said timber in manner other than for the use of the navy of the United States," against the peace and dignity, etc. The sufficiency of the indictment was not challenged by demurrer or otherwise, but a plea of not guilty was entered, a jury trial had, a verdict of guilty rendered, and the value of the timber cut fixed at $95. Afterwards a motion in arrest of judgment was filed for the reason, as alleged, that the indictment in charging defendant with cutting timber with the intent to export and with the intent to dispose of the same charged two different offenses in one count. This motion was overruled by the trial court, and defendant was sentenced to 10 days' imprisonment and to pay a fine of $285. By this writ of error he challenges the action of the trial court in overruling his motion in arrest, in giving certain instructions to the jury, and in imposing the sentence of imprisonment upon him.

It was too late to raise the question of duplicity after verdict by motion in arrest of judgment. Bishop's New Criminal Procedure, vol. 1, §§ 442, 443; United States v. Bayaud (C. C.) 16 Fed. 376; Pooler v. United States, 127 Fed. 509, 515, 62 C. C. A. 307; Connors v. United States, 158 U. S. 408, 411, 15 Sup. Ct. 951, 39 L. Ed. 1033. Nothing appears in the record before us to show that the substantial rights of the accused were prejudiced by the joinder of the two intents complained of in the motion in arrest of judgment. Accordingly, applying the provisions of section 1025, Rev. St. [U. S. Comp. St. 1901, p. 720], the judgment as rendered should not be disturbed. The clerk of the trial court, after certifying to the record proper, further certifies that he has annexed and transmitted to this court a copy of all instructions given to the jury filed in the cause. There is no bill of exceptions showing either the evidence taken or the charge, or instructions given by the court to the jury. The certificate by the clerk as to the instructions is of no avail. The only way to preserve or make them part of the record is by bill of exceptions. The certificate of the trial judge, and not of the clerk, is required for that purpose. We therefore cannot consider the errors assigned on

the instructions refused. Case v. Hall, 94 Fed. 300, 36 C. C. A. 259; Carson v. Commercial Nat. Bank, 104 Fed. 733, 44 C. C. A. 184.

The indictment was indorsed as found under section 2461, Rev. St. [U. S. Comp. St. 1901, p. 1527]. That section reads as follows:

"If any person shall cut, or cause or procure to be cut, or aid, assist, or be employed in cutting, or shall wantonly destroy, or cause or procure to be wantonly destroyed, or aid, assist, or be employed in wantonly destroying any live-oak or red-cedar trees, or other timber standing, growing, or being on any lands of the United States, which, in pursuance of any law passed, or hereafter to be passed, have been reserved or purchased for the use of the United States, for supplying or furnishing therefrom timber for the navy of the United States, or if any person shall remove, or cause or procure to be removed, or aid, or assist, or be employed in removing from any such lands which have been reserved or purchased, any live-oak or red-cedar trees, or other timber, unless duly authorized so to do, by order in writing, of a competent officer, and for the use of the navy of the United States; or if any person shall cut, or cause or procure to be cut, or aid, or assist, or be employed in cutting any live-oak or red-cedar trees or other timber, from any other lands of the United States, acquired, or hereafter to be acquired, with intent to export, dispose of, use, or employ the same in any manner whatsoever, other than for the use of the navy of the United States; every such person shall pay a fine not less than triple the value of the trees or timber so cut, destroyed, or removed, and shall be imprisoned not exceeding twelve months."

The contention of defendant's counsel is that this section was repealed so far as concerns the imposition of imprisonment as a part of the punishment for the offense charged against him by Act June 3, 1878, c. 151, 20 Stat. 89, as amended by Act August 4, 1892, c. 375, 27 Stat. 348 [U. S. Comp. St. 1901, p. 1545], extending its provisions to all public land states.

Section 4, Act 1878, 20 Stat. 90 [U. S. Comp. St. 1901, p. 1529], is as follows:

"After the passage of this act it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy, any timber growing on any lands of the United States, in said states and territory or remove, or cause to be removed, any timber from said public lands, with intent to export or dispose of the same; * * * and any person violating the provisions of this section shall be guilty of a misdemeanor, and on conviction, shall be fined for every such offense a sum not less than one hundred nor more than one thousand dollars: provided, that nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States."

Section 5 provides:

"That any person prosecuted in said states and territories for violating section two thousand four hundred and sixty-one of the Revised Statutes of the United States who is not prosecuted for cutting timber for export from the United States, may be relieved from further prosecution and liability therefor upon payment, into the court wherein said action is pending, of the sum of two dollars and fifty cents per acre, for all lands on which he shall have cut or caused to be cut, timber or removed or caused to be removed the same."

Section 6 provides "that all acts and parts of acts inconsistent with the provisions of this act are hereby repealed."

Section 2461, 5 Rev. St. [U. S. Comp. St. 1901, p. 1527], which was enacted in 1831, denounces several offenses generally described as follows: (1) The cutting of timber on lands of the United States purchased or reserved for the use of the navy of the United States. (2) The wanton destruction of such timber. (3) The removal of timber from such lands unless by authority of a competent officer and for the use of the navy. (4) The cutting of timber from any other lands of the United States with intent to export, dispose of, use or employ the same in any manner whatsoever other than for the use of the navy. (5) The removal of timber last referred to with like intent.

The fourth and fifth offenses just referred to prohibit the cutting or removal of timber from any of the public lands with the intent specified. The growing agricultural and mining industries of some of the western states, in course of time, seem to have suggested a relaxation of that rule of prohibition. Accordingly, by the provisions of Act June 3, 1878, c. 150, 20 Stat. 88, citizens of the United States and residents of the states of Colorado and Nevada, and of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, and Montana, and other mineral districts of the United States, were permitted to cut and use the timber growing on mineral lands of the United States "for building, agricultural, mining or other domestic purposes," under and subject to such rules and regulations as the Secretary of the Interior might prescribe for its protection. Congress seems to have thought that the last-mentioned act enlarging the uses which might be made of timber taken from public lands required some modification of section 2461. Accordingly the second Act June 3, 1878, c. 151 (20 Stat. 89), was adopted. It originally concerned and affected the states of California, Oregon, Nevada, and Washington Territory only, but by the act of August 4, 1892, as already seen, its provisions were extended to all public land states, and as so extended was in force at the time the offense involved in the cause before us was committed. By the provisions of the last two mentioned acts the scope and operation of the three offenses first denounced by section 2461 were extended from cutting, removing, or wanton destruction of timber growing on lands purchased or reserved by the United States for the uses of the navy, so as to embrace within their denunciation the cutting, removing, or wanton destruction of timber growing on any of the public lands of the United States.

They denounce as an offense (not included in section 2461) the transportation of such timber or lumber manufactured therefrom by owners, officers, or agents of any vessel or railroad. They also deal with the subject of the two offenses last denounced by section 2461. They prohibit the cutting or removing of timber from the public lands, but limit the intent required to make the act of cutting or removal criminal to that of exporting or disposing of the same. They excise from section 2461 the intent "to use or employ the same in any manner whatsoever, other than for the use of the navy of the United States." Until the act of 1892 extended the provisions of the

second act of 1878 to all public land states, it is obvious that the latter act did not repeal any of the provisions of section 2461 so far as Colorado and other states or territories not embraced within its provisions were concerned. They remained subject to the provisions of that section as modified or affected by the provisions of the first Act of June 3, 1878. But after the passage of the act of 1892 it is equally clear that many of the provisions of section 2461, so far as concerned Colorado and other states and territories not originally mentioned in the act of 1878, were materially modified. It is not necessary for the purposes of this opinion to hold that section 2461 was totally repealed by the act of 1878 as expanded by the act of 1892, but it certainly was repealed in part. That act, as expanded, contains provisions totally inconsistent with those of section 2461. It modifies the intent necessary to make cutting or removing of timber from the public lands an offense. Before its enactment an intent "to use or employ the same in any manner whatsoever other than for the use of the navy" constituted an offense. The cutting or removing of timber from the public lands with almost any intent constituted a crime. Afterwards the intent was narrowly limited to a purpose "to export or dispose of the same." This change was doubtless made in view of the expanded use of timber permitted by the first act of June 3, 1878, and also by the proviso of section 4 of the second act of June 3, 1878, which made provision for still further expanded use.

Not only so, but the penalty prescribed for the offense of cutting or removing timber "with intent to export or dispose of," by the act of 1878 was different from that prescribed by section 2461. By the latter section fine and imprisonment were imposed upon the offender. By the act of 1878 a fine only was imposed. Moreover, section 5 of the act of 1878 shows that Congress intended to differentiate the "cutting of timber for export from the United States" from all other provisions of section 2461. This appears by not permitting persons guilty of that offense to do what persons guilty of other offenses denounced by section 2461 might do—pay into court $2.50 for each acre of land from which cutting had been done and thereby secure relief from prosecution. A statute which changes the elements of an existing statutory offense or the punishment or penalties prescribed therefor, by implication operates as a repeal pro tanto of the former statute. Endlich on Interpretation of Statutes, §§ 238, 239; Lewis' Sutherland, Stat. Con. vol. 1 (2d Ed.) §§ 251, 252. This is specially true where by the amended acts the penalty for an offense is reduced. People v. Tisdale, 57 Cal. 104; Commonwealth v. Kimball, 21 Pick. (Mass.) 373; Commonwealth v. Davis, 11 Gray (Mass.) 48. So far, therefore, as section 2461 relates to the cutting or removing of timber from the public lands with intent to export or dispose of the same, it was repealed by the second act of June 3, 1878, as expanded by the act of August 4, 1892.

Shortly after the passage of the acts of 1878 Attorney General Devens addressed a letter to the then Secretary of the Interior, Hon. Carl Schurz, concerning certain rules and regulations for the protec-

tion of timber made by the Secretary in connection with section 2461, Rev. St., and the two Acts of 1878. He says:

"Section 4 of the longer of these two acts merely singles out the offenses described in section 2461—that of cutting or removing timber 'with intent to export or dispose of it' and affixes to it a new and different penalty."

"Section 5 simply allows all persons prosecuted for the cutting or removal of timber, 'except those who cut or remove with intent to export,' to relieve themselves from the penalties prescribed in section 2461 by the payment at the rate of $2.50 an acre of the land on which the trespasses were committed. * * * Those who cut or remove 'with intent to export' being expressly excluded from the benefit of the provision. * * * It is a necessary implication from these special provisions that the former law continues in force in respect to all cases to which they do not apply." Opinions of Attorneys General, vol. 16, p. 189.

This opinion, placing an interpretation upon legislation or executive purposes, is entitled to respectful and persuasive consideration, and, as it is in strict accord with our view of the law, we more unhesitatingly adopt that view. The defendant was indicted for cutting timber "with intent then and there unlawfully to export, dispose of, use and employ said timber in a manner other than for use of the navy of the United States." The pleader, in drafting the indictment, undoubtedly had in mind section 2461 only, and noted that section on the back of the indictment. Nevertheless, if the indictment is good under the act of 1878, under which alone it could have been found, the fact just stated would be of no consequence.

The indictment charged more than was necessary to constitute an offense under the act of 1878. Whether this fact, if seasonably availed of, would have subjected the indictment to assault, need not now be considered. The judgment must be reversed because the punishment of imprisonment imposed upon the defendant was in excess of that authorized by the act of 1878.

We are unable to conform to the suggestion of the United States Attorney that we should correct the sentence by eliminating from it the unwarranted imprisonment, for the reason that it is impossible to say that the jury found defendant guilty of cutting timber with intent to export or dispose of it. The jury might have found under the charge laid in the indictment that the defendant cut the timber innocently, with intent to use and employ the same for permissible building, agriculture, mining, or other domestic purposes. If so, the verdict and sentence did him a great wrong. In this state of necessary doubt as to the meaning of the verdict, it is impossible to conform the punishment to the provisions of the act of 1878.

The judgment must be reversed, with instructions to grant a new trial.

SHANKWEILER v. BALTIMORE & O. R. CO.

(Circuit Court of Appeals, Sixth Circuit. November 8, 1906.)

No. 1,529.

1. MASTER AND SERVANT—ACTION FOR INJURY OF RAILROAD EMPLOYÉ—OHIO STATUTE.

Under section 2 of Ohio act of April 2, 1890 (87 Ohio Laws, p. 149), which provides that in an action against a railroad company to recover for an injury to an employé resulting from any defect in a car or locomotive or machinery, or attachments thereto belonging, proof of the defect shall be prima facie evidence of defendant's negligence, the prima facie case so made does not shift the burden of proof so as to compel the company to satisfy the jury by a preponderance of evidence that it was not negligent, but all that is required is a degree of proof that will counterbalance the presumption; the burden of establishing negligence still resting upon the plaintiff.

2. SAME—DEFECTIVE CAR—DUTY OF INSPECTION.

A railroad company is not chargeable with negligence which will render it liable for an injury to an employé caused by the breaking of a defective brake rod, where the defect was latent and in a place where it was not discoverable by such an inspection as is customarily made by well-regulated and prudently conducted railroads, which inspection was made and was the only kind which was practicable, or which could be made without seriously interfering with the operation of trains.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 233.]

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

Chas. Koonce, Jr., for plaintiff in error.

A. E. Foote, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. On May 16, 1904, the plaintiff in error, a brakeman at work in the yards of the defendant company at New Castle Junction, Pa., was thrown from a box car by the breaking of a brake rod, run over, and lost a leg. The defendant company is a Maryland corporation, and was at the time engaged in operating a railroad partly in Pennsylvania and partly in Ohio. The accident occurred in Pennsylvania, of which state the brakeman was a citizen. When it occurred, the brakeman was standing on a shelf or small platform located at the end of the car, about 3 feet below its roof and 10 or 12 feet above the ground. He had given two or three turns to the brake wheel when the rod broke. The rod was defective; there being at the point of fracture an old break, shown by the rust, extending about half way through, but this defect was covered and concealed by the ratchet wheel and the floor of the platform, it being at a point on the rod within or just below the ratchet wheel.

The evidence was clear that no visual inspection would have discovered this defect. To disclose the same, it would have been necessary to strip or remove the brake rod from its place. A visual inspection of the car, including the brake rod, had been made a short time before the accident occurred. This inspection was such as is

usually made by well-regulated railroads operating in Pennsylvania and Ohio while a car is in transit. The officers in charge of the inspection of cars on a number of such railroads were witnesses, and they testified, without exception, that a visual inspection of the brake rod when in place is all that is ever made while the car is in use, and that to strip the brake rod or remove it from its place, so that every part might be open to the eye, is impracticable; for, if ordinary care require such an examination of the brake rod, it would require a similar examination of every rod, chain, or iron used on the car, which would cause such delay as seriously to cripple the operation of trains. There was some testimony to the effect that, if the inspector had set the brake hard enough before the accident, he might have disclosed the defect by breaking the rod himself. This seems obvious, but there was no testimony that such a method of testing brake rods was in use or could be relied upon as effective in disclosing such defects. Such being substantially the state of the testimony, the court below directed a verdict for the defendant.

The plaintiff in error contends that the case should have gone to the jury for two reasons: First, because the Ohio act of April 2, 1890, applied, making a prima facie case in favor of the plaintiff; and, second, because, in view of the evidence, the question should have been submitted to the jury whether there had been a proper inspection of the brake rod. Section 1 of the act of April 2, 1890 (87 Ohio Laws, p. 149), contains certain regulations for the protection of railroad employés, which are made applicable to any company operating a railroad in whole or in part in Ohio, and section 2 provides that it shall be unlawful for—

"Any such corporation to knowingly or negligently use or operate * * * any car or locomotive on which the machinery or attachments thereto belonging are in any manner defective. If an employé of any such corporation shall receive any injury by reason of any defect in any car or locomotive, or the machinery or attachments thereto belonging, * * * such corporation shall be deemed to have had knowledge of such defect before and at the time such injury was so sustained, and when the fact of such defect shall be made to appear in the trial of any action in the courts of this state, brought by such employé, or his legal representatives, against any railroad corporation for damages, on account of such injuries so received, the same shall be prima facie evidence of negligence on the part of such corporation."

It is submitted on the authority of Pennsylvania Co. v. McCann, 54 Ohio St. 10, 42 N. E. 768, 31 L. R. A. 651, 56 Am. St. Rep. 695, that the presumption of knowledge and negligence provided by this section applies in the trial in Ohio of every action by an employé against a railroad company on account of injuries caused by defective machinery or appliances where a part of the railroad is in Ohio, although the cause of action arose outside of Ohio, and the plaintiff is a citizen of another state; the contention being that the section is remedial merely, providing a rule of evidence, applicable in the trial of all such actions in Ohio, regardless of where the cause arose, or the citizenship of the plaintiff.

On the other hand, it is urged that since the McCann Case was determined by a divided court, three judges concurring in the opinion,

two dissenting, and one not sitting, the decision does not represent a settled and conclusive construction of the statute, so as to be binding upon this court; and we are urged to consider and determine for ourselves the construction and application of this law in the particular mentioned. We have repeatedly recognized the rule that the construction of a statute of a state ought to be determined by the highest court of the state, and such construction followed by the courts of the United States. It is not necessary, however, either to determine the authority of the McCann Case or the construction and application of this Ohio law, for, as we view the matter, whether the law be applicable or not, the result is the same. This statute provides that, where an employé receives an injury by reason of a defective appliance, the railroad company shall be deemed to have had knowledge of the defect, and when the fact of such defect shall be made to appear in the trial the same shall be prima facie evidence of negligence on the part of the company. In other words, knowledge of a proven defect is presumed, so that proof of the defect makes a prima facie case of negligence against the company. Obviously, the reason of the rule rests in the duty of a railroad company to provide reasonably safe machinery and appliances for the use of its employés. If a defect exists in the same, the company must know of it, if by a proper inspection, through the exercise of ordinary care, such knowledge may be obtained.

Of course, the presumption of knowledge is but a presumption. It is not conclusive. The prima facie case based upon it does not shift the burden of proof so as to compel the company to satisfy the jury by a preponderance of the evidence that it was not negligent. All that is required to overcome the prima facie case is a degree of proof which will counterbalance the presumption; the burden of establishing negligence still resting upon the plaintiff. Klunk v. Hocking Valley Ry. Co., 74 Ohio St. 125, 77 N. E. 752; T., St. L. & W. R. R. Co. v. Star Flouring Mills Co., 146 Fed. 953. In the present case it was sufficient for the railway company to show that it had used ordinary care by making an actual and proper inspection of the appliance and yet failed to discover the defect. Railway Co. v. Erick, 51 Ohio St. 146, 162, 37 N. E. 128; Felton v. Bullard, 94 Fed. 781, 37 C. C. A. 1, 4; Ill. Cent. R. R. Co. v. Coughlin, 132 Fed. 801, 65 C. C. A. 101.

But it is urged that, since the visual inspection employed did not disclose the defect, it was not a proper inspection, and that, in view of the dispute upon this point, the jury should have been permitted to decide whether it was or not. The box car on which the rod broke was in course of transportation, and there is no question but that the inspection made was all that is customarily made by well-regulated and prudently conducted railroads. Against such an inspection, the defect was latent, undiscoverable. We think it would be going too far to say that, because the inspection did not disclose the defect, it was not a proper one and ordinary care required something more. Ordinary care does not require an impracticable inspection, one which will cripple and embarrass a railroad company in the operation of its

trains. Ill. Cent. R. R. Co. v. Coughlin, 132 Fed. 801, 65 C. C. A. 101; Labatt, Master & Servant, § 162; Louisville, etc., R. R. Co. v. Bates, 146 Ind. 564, 45 N. E. 108; L. & N. R. R. Co. v. Campbell, 97 Ala. 147, 12 South. 574; Campbell v. L. & N. R. R. Co., 109 Ala. 520, 19 South. 975; De Graff v. N. Y. C. & H. R. R. Co., 76 N. Y. 125; Read v. N. Y., N. H. & H. R. R. Co., 20 R. I. 209, 37 Atl. 947; Kramer v. Willy, 109 Wis. 602, 85 N. W. 499.

There was no testimony whatever tending to show that there was any practicable method of inspection of this car while in use which would have disclosed the defect in the brake rod. The court could not have properly permitted the jury to indulge in mere speculation, finding the railroad company guilty of negligence, because, although it used the ordinary method of inspection, it did not use this method suggested by one person or that method suggested by another, when there was an utter lack of testimony showing or tending to show that either had ever been used by any prudently conducted company, or, if used, would prove effectual.

The judgment is affirmed.

CRAWFORD v. McCARTHY.

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

No. 1,240.

COURTS—SUPREME COURT AND CIRCUIT COURT OF APPEALS—JURISDICTION.

Where a demurrer to a bill in a circuit court assigned as grounds want of jurisdiction in the court as a federal court, because neither diversity of citizenship nor any federal question was disclosed, and also want of "jurisdiction" as a court of equity for lack of equity in the bill, a decree sustaining the demurrer and dismissing the bill "for want of jurisdiction" must be construed to refer to the real jurisdictional grounds, and an appeal therefrom lies to the Supreme Court, and not to the Circuit Court of Appeals, under sections 5 and 6 of Act March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549].

[Ed. Note.—Jurisdiction of Circuit Court of Appeals in general, see notes to Lau Ow Bew v. United States, 1 C. C. A. 6, and United States Freehold Land & Immigration Co. v. Gallegos, 32 C. C. A. 475.]

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

On motion to dismiss appeal.

On November 7, 1905, appellant filed his bill of complaint in the office of the clerk of the Circuit Court. A subpœna was issued and served upon appellee, who in due time appeared and demurred to the bill. The demurrer was sustained, appellant refused to amend, and the court entered a decree that "said bill be and the same is hereby dismissed for want of jurisdiction." Appellee has filed a motion to dismiss on the ground that this court has no jurisdiction to entertain the appeal.

The bill, in outline, averred that in April, 1903, on a creditors' bill filed by the Guaranty Trust Company of New York, the Circuit Court for the Northern District of Illinois appointed receivers of the property of the Chicago Union Traction Company; that the receivers took and now hold possession; that the suit is pending, undetermined; that in July, 1903, on petition of the Guaranty Trust Company, the Circuit Court entered a decretal order authorizing the

receivers to audit claims against the traction company and on each valid claim to issue a certificate that the claim had been audited and approved, and that the lawful holder thereof was entitled to share in the distribution on an equality with the Guaranty Trust Company; that complainant Crawford was a creditor of the traction company; that in July, 1905, the receivers audited and approved his claim and issued to him their certificate; that he has always been and is now the owner of the certificate and of the claim on which it was founded; that about September 1, 1905, he employed Whipple & Co., Chicago brokers, to sell the certificate for him at a designated price, and for that purpose delivered to them the certificate assigned in blank; that the brokers failed to sell, and on October 9, 1905, he demanded the return of his certificate; that the brokers made false excuses, and on October 13, 1905, were adjudged bankrupts; that in August, 1905, defendant, McCarthy, had employed Whipple & Co. to purchase for him certain stocks and gave them the money to pay therefor; that the brokers embezzled the money, but reported to McCarthy that they had filled his order; that, being pressed by McCarthy for delivery of the stock, they turned over to him Crawford's certificate to hold until they should produce the stock; that this transaction was not in the usual course of business, but was an unauthorized and fraudulent bailment of the certificate in connection with the past due debt of the brokers to McCarthy; that, after the brokers' bankruptcy, McCarthy, with express notice of Crawford's rights, filled in the blank assignment so that it falsely declared that Crawford had transferred the certificate to McCarthy; that Crawford has demanded the return of the certificate, and McCarthy refuses to surrender it. The prayer was that the pretended assignment be canceled, that complainant be declared the lawful owner of the certificate, that possession be awarded him, that McCarthy be enjoined until the final hearing from selling or in any way disposing of the certificate.

The grounds of demurrer were stated as follows:

"First. That this court as a federal court has no jurisdiction of this controversy, because it does not appear therefrom that there is any diversity of citizenship between the plaintiff and the defendant.

"Second. That this court as a federal court has no jurisdiction of this controversy as an ancillary suit, because it does not appear that the subject-matter of this suit is the same as the subject-matter of the suit to which the plaintiff claims in his bill of complaint that this suit is ancillary.

"Third. That this court as a federal court has no jurisdiction of this controversy as an ancillary suit, because it does not appear from the bill of complaint that the defendant denies or in any manner questions the validity or authority of any act performed by any court of the United States or by any receiver or other officer or agent of any United States court; but, on the contrary, it affirmatively appears from the bill of complaint that this defendant, as well as the plaintiff, asserts the validity of all the acts of the United States court, the officers thereof, and the certificate issued by the receivers thereof, and the only controversy is as to the title of said certificate depending upon transactions occurring between two citizens of this state wholly within this state and wholly outside of the controversy involved in the suit in the United States court to which plaintiff in his bill of complaint claims that this suit is ancillary.

"Fourth. That this court as a federal court has no jurisdiction of this controversy, because the bill of complaint does not show that the controversy arises out of any construction of the Constitution or laws of the United States, or of any act done by any of its officers.

"Fifth. That this court as a court of equity has no jurisdiction of this controversy, because the plaintiff has a complete remedy in the premises by possessory action or action of trover in a court of common law.

"Sixth. That this court as a court of equity has no jurisdiction of this controversy, because all the questions arising upon the bill of complaint concern purely legal titles, upon which defendant is entitled to a trial by jury.

"Seventh. The bill of complaint shows no equity in favor of plaintiff against this defendant."

Charles H. Aldrich, for appellant.
Jule F. Brower, for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge, having stated the case as above, delivered the opinion of the court.

By section 6 of the organic act (Act March 3, 1891, 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549]) the Circuit Courts of Appeals are given jurisdiction to entertain "all cases other than those provided for in the preceding section." Cases in which the right of immediate review is conferred upon the Supreme Court by section 5 (26 Stat. 827 [U. S. Comp. St. 1901, p. 549]) include those "in which the jurisdiction of the (trial) court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

The latter part of the provision refers only to the way in which the record must be gotten up in order that the case in the Supreme Court may withstand a motion to dismiss for informality. Courtney v. Pradt, 196 U. S. 89, 25 Sup. Ct. 208, 49 L. Ed. 398; Excelsior Co. v. Pacific Bridge Co., 185 U. S. 282, 22 Sup. Ct. 681, 46 L. Ed. 910.

Except in cases where the question is whether the trial court ever obtained jurisdiction of the defendant by proper process (Board of Trade v. Hammond Elevator Co., 198 U. S. 424, 25 Sup. Ct. 740, 49 L. Ed. 1111), the word "jurisdiction" in section 5 is interpreted to refer exclusively to the jurisdiction of the trial court as a court of the United States—a court sharply restricted both as to persons and as to subject-matters. Courtney v. Pradt, 196 U. S. 89, 25 Sup. Ct. 208, 49 L. Ed. 398; Bache v. Hunt, 193 U. S. 525, 24 Sup. Ct. 547, 48 L. Ed. 774; Louisville Trust Co. v. Knott, 191 U. S. 225, 24 Sup. Ct. 119, 48 L. Ed. 159; Blythe v. Hinckley, 173 U. S. 501, 19 Sup. Ct. 497, 43 L. Ed. 783; Smith v. McKay, 161 U. S. 355, 16 Sup. Ct. 490, 40 L. Ed. 731.

In the case at bar the defendant by his first four grounds of demurrer asserted that the bill, by its averments and omissions, showed that the court as a federal court was without jurisdiction, because no federal question was involved, because the nonfederal controversy was between citizens of the same state, and because the nonfederal controversy could not be created a handmaiden of the suit of the trust company against the traction company simply by labeling the bill "ancillary." This challenge required consideration, and, if the court deemed it well founded, it was the court's duty to dismiss the bill "for want of jurisdiction."

Of course, if the court believed that the challenge of its jurisdiction as a federal court was not sustained, it was the court's duty, under the remaining grounds of demurrer, to proceed and determine whether the bill stated a case requiring or justifying its interposition. Now, because the fifth and sixth causes of demurrer also mention "jurisdiction," the motion to dismiss is resisted on the contention that the decree is ambiguous, that it cannot be told therefrom for what want of jurisdiction the bill was dismissed. Even so, it remains true that

the jurisdiction of the trial court as a federal court was and is in issue. But the fifth and sixth causes of demurrer, in their essential nature, do not deny, but rather invoke, the authority of the court to hear and determine. Under them the question was whether the case required equitable relief.

Those causes, therefore, were but specific instances of the general objection covered by the seventh cause, namely, that the facts set forth in the bill were not sufficient to constitute a cause of action in equity. In Smith v. McKay, 161 U. S. 355, 16 Sup. Ct. 490, 40 L. Ed. 731, as in this case, objection was raised to the bill on the ground that the complainant had a plain and adequate remedy at law. Of this the court said: "The objection was not to the want of power in the Circuit Court to entertain the suit, but to the want of equity in complainant's bill." This view was again upheld in Louisville Trust Co. v. Knott, 191 U. S. 225, 24 Sup. Ct. 119, 48 L. Ed. 159.

As, therefore, the only objections to the court's power to hear and decide the merits of the bill were contained in the first four grounds of demurrer, and as these denied the jurisdiction of the court as a federal court, the record unequivocally demonstrates that the bill was dismissed "for want of jurisdiction" within the meaning of section 5.

The motion accordingly is sustained, and the appeal dismissed.

OFFNER v. CHICAGO & E. R. CO. et al.

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

No. 1,241.

REMOVAL OF CAUSES—SUFFICIENCY OF PETITION—FRAUDULENT JOINDER OF DEFENDANTS.

In a petition for removal of a cause in which the declaration stated a joint cause of action in tort against a local and a nonresident corporation, filed by the nonresident defendant alone, on the ground of diversity of citizenship, an allegation merely that its codefendant was not a party to the alleged negligence, and was fraudulently joined for the purpose of defeating petitioner's right of removal, does not render the petition sufficient, either as a pleading or as evidence to warrant a removal; the burden resting upon the petitioner to both allege and prove the facts showing such fraudulent joinder.

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

This action, to recover damages on account of the death of Jacob Offner through the negligence of the railroad companies, was begun in the Circuit Court of Cook County, Ill. On petition of the Chicago & Erie, it was removed into the court below. There the plaintiff was defeated on the merits. In this court assignments of alleged errors of law occurring at the trial were presented, but during the argument the legality of the removal was questioned.

The declaration charged that the defendants owned, controlled, and used a certain railroad yard in Chicago; that Offner was employed by the Chicago & Erie as a car inspector; that while he was properly at work, repairing a car in said yard, the Chicago & Erie, with knowledge of his dangerous position and without warning him, negligently permitted a Western Indiana engine to be run with great violence against the car under which he was at work, and the Western Indiana, with like knowledge of his danger and without warning,

negligently ran its engine against the car; that Offner was free from fault; and that the negligent acts of the defendants concurred in causing his death.

Plaintiff was a citizen of Illinois, the Western Indiana a corporation of Illinois, and the Chicago & Erie of Indiana. Separable controversy was the ground of removal. The petition, verified by an attorney, averred that the Western Indiana "was not a party to the alleged negligence," and "was fraudulently joined as a party defendant solely for the purpose of defeating your petitioner's right to remove this cause."

In the Circuit Court no motion to remand was presented

Cyrus Wood, for plaintiff in error.

George C. Gale, for defendants in error.

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

BAKER, Circuit Judge, having stated the case, delivered the opinion of the court.

The fact that there was no motion to remand is irrelevant to the question. Federal courts are strictly limited in their authority to hear controversies. Agreement of parties cannot enlarge the Constitution and laws of the United States; much less can omission or oversight.

"It has often been decided that an action brought in a state court against two jointly for a tort cannot be removed by either of them into the Circuit Court of the United States upon the ground of a separable controversy between the plaintiff and himself, although the defendants have pleaded severally, and the plaintiff might have brought the action against either alone.

"It is equally well settled that in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition or in the affidavits of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court." Louisville & Nashville R. Co. v. Wangelin, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 473; Alabama Southern Ry. Co. v. Thompson, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, and cases therein reviewed.

1. The averment of the petition that the Western Indiana "was not a party to the alleged negligence" is of no avail in the face of the charge in the declaration that that company, with knowledge of Offner's peril, and without giving him any warning, ran its engine upon him, because that averment comes under the general rule, and not under the exception.

2. Respecting the averment of the petition that the Western Indiana "was fraudulently joined as a party defendant solely for the purpose of defeating your petitioner's right to remove this cause," the exception stated in the authorities requires both proper pleading and due proof of fraudulent joinder.

In a case involving the sufficiency of a petition for removal, which alleged that the action arose under the laws of the United States, the

Supreme Court laid down rules of pleading which apply to every ground of removal:

"For the purposes of the transfer of a cause, the petition for removal, which the statute requires, performs the office of pleading. * * * It should therefore set forth the essential facts, not otherwise appearing in the case, which the statute has made conditions precedent to the change of jurisdiction. If it fails in this, it is defective in substance, and must be treated accordingly. * * * The office of pleading is to state facts, not conclusions of law. It is the duty of the court to declare the conclusions, and of the parties to state the premises." Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. Ed. 656.

And so, the cause was ordered to be remanded, because neither the complaint nor the petition for removal stated facts from which the conclusion flowed that the action arose under the laws of the United States. The rules, though stated in a case involving another ground of removal, in terms are broad enough to apply to a petition for removal on the ground that the controversy between the plaintiff and the petitioner is separable on account of the fraudulent joinder of a local defendant; and they should be so applied, because they rightly accord with the general rule that fraud cannot be pleaded simply by crying fraud.

In this case the verified petition (and good practice requires that petitions for removal be verified, Kansas City R. Co. v. Daughtry, 138 U. S. 298, 11 Sup. Ct. 306, 34 L. Ed. 963) was the only evidence offered by the petitioner, upon whom lay the burden. If the statement that the Western Indiana "was fraudulently joined as a party defendant" is bad as pleading, it is worse as proof. On a question of fraud the opinion of a witness is not admissible. Certainly, the erroneous admission, without the statement of a single fact to warrant the entertainment of such an opinion, cannot make out a prima facie case.

In Plymouth Mining Co. v. Amador Canal Co., 118 U. S. 264, 6 Sup. Ct. 1034, 30 L. Ed. 232, a joint tort was counted on, and the petition for removal on the ground of a separable controversy charged that the local defendants were fraudulently joined for the purpose of preventing a removal. The cause was remanded; the court holding that the charge in the petition, presumably verified in accordance with good practice, was unavailing in the absence of proof of facts which would establish fraud as a conclusion.

Where motions to remand have been overruled in the Circuit Courts, the removing petitioners have supplied the premises of facts, from which the courts have declared the conclusions. Arrowsmith v. Nashville & D. R. Co. (C. C.) 57 Fed. 165; Shepherd v. Bradstreet Co. (C. C.) 65 Fed. 142; Diday v. New York, P. & O. R. Co. (C. C.) 107 Fed. 565.

The petitioner assumes the burden of establishing "that the allegations of joint liability were unfounded in fact, were not made in good faith with the expectation of proving them at the trial, and were made solely for the purpose of evading the jurisdiction of the federal court." Hukill v. Maysville & B. S. R. Co. (C. C.) 72 Fed. 745.

The judgment is reversed with the direction to remand the cause to the Circuit Court of Cook County, Ill.

McKNIGHT et al. v. DUDLEY.

(Circuit Court of Appeals, Sixth Circuit. November 8, 1906.)

No. 1,552.

1. DOMICILE—HUSBAND AND WIFE—INSANITY OF HUSBAND—RIGHT OF WIFE TO CHANGE RESIDENCE.

Upon the insanity of a husband and his confinement in an asylum, his wife becomes the head of family, and may change her place of residence to another state, regardless of the fact that her husband remains in confinement in the state of her former residence.

2. TAXATION—SUIT TO RESTRAIN COLLECTION OF TAXES—OHIO STATUTE.

A complainant may maintain a suit, under Rev. St. Ohio 1906, § 5848, to restrain the collection of taxes on credits, where the question at issue is not one of valuation but of the legality of the tax; the contention being that the complainant was not at the time a resident of the county so as to render the credits taxable therein under Rev. St. Ohio 1906, § 2735.

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

R. B. Miller, for appellants.

Jones & James (Rankin D. Jones, Francis B. James, and Spencer M. Jones, of counsel), for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. On the 21st of October, 1899, the auditor of Lawrence county, Ohio, acting under authority of sections 2781 and 2782 of the Revised Statutes of Ohio of 1906, placed upon the tax duplicate of Lawrence county, against Mary A. Dudley, certain credits (being notes and mortgages alleged to be outstanding) for the years 1894, 1895, 1896, 1897, 1898, and 1899, with the statutory penalties added, upon which he assessed taxes aggregating $5,471.50, and certified the same to the treasurer for collection. This was done upon the ground that Mrs. Dudley was a resident of Ironton, Lawrence county, during the years mentioned, and had evaded returning the alleged credits. On the same day, the treasurer brought suit against Mrs. Dudley in the state court to collect these back taxes, and secured an attachment against her property in Lawrence county by making affidavit that she was at that time a nonresident. This suit was removed to the court below by Mrs. Dudley on the ground she was not a citizen of Ohio, and thereafter the present action was instituted to enjoin the treasurer and auditor from further prosecuting the suit brought by the former, and from maintaining said claim for taxes on the tax duplicate, or attempting to collect the same. The court below, after a full hearing, granted the relief prayed for, from which action an appeal has been taken.

Several grounds of relief are set out in the bill of complaint; the principal being: First, that Mrs. Dudley was a nonresident of Ironton during the years 1894 to 1899, inclusive; second, that the auditor acted without any evidence in charging her with taxes for these years, and that, in point of fact, during this time her debts equaled or exceeded her

actual credits; and, third, that sections 2781 and 2782 of the Revised Statutes of Ohio of 1906 were unconstitutional.

The court below found it necessary to consider the first ground alone; the finding being: "The weight of the evidence shows that she was not a resident of Ironton during the years in which it is sought to tax her credits." We have heard the arguments and examined the record, which is voluminous, and we concur in the conclusion reached by the court below.

Mrs. Dudley was born in England, twice married there, and came to Ironton in 1870 to join her second husband, John Dudley. Mr. and Mrs. Dudley kept house in Ironton from 1870 to 1880, when he became insane and was sent to the asylum at Athens, Ohio, where he died in 1896. Mrs. Dudley continued to keep house in Ironton until 1886, when she removed to Philadelphia, where her son William was attending a medical college. When she broke up housekeeping in Ironton, she disposed of her household goods, except enough to furnish two rooms in Philadelphia, which she took with her. She, her daughter Frances, and her son William lived in Philadelphia, or its suburbs, from 1886 to 1892. By this time her son had completed his medical course, and her daughter Frances had married and removed to Indianapolis. Another daughter, Maud, after a preparatory course of two years, had entered the dramatic professsion and established herself in New York. It is Mrs. Dudley's claim, and there was some testimony to support it, that when she left Philadelphia she joined her daughter Maud in New York, and has since made her home there. In 1897 Maud was married and left the stage. She has since spent practically all her time in New York. Before, she was "on the road"; her engagements taking her from New York a large part of each year. The testimony as to Mrs. Dudley's movements after she left Philadelphia is not entirely satisfactory. Her recollection of places and dates is poor, but this is to be expected, as she is a woman advanced in years. Moreover, we take the view that the burden was not upon her to show precisely where she was during each month or year of the period from 1894 to 1899, inclusive. The testimony is practically uncontradicted that she broke up housekeeping in Ironton in 1886, and moved to Philadelphia, with the intention of changing her residence. She lived there until 1892. The change of residence, thus clearly established, put the burden upon the defendants to satisfy the court that, after leaving Ironton with the intention of acquiring another domicile, she subsequently returned for the purpose of again taking up her residence there. No proof to that effect was introduced. After leaving in 1886, she never again made Ironton her home. She came there occasionally for business purposes, to look after her investments. At these times she visited her daughter Mrs. Fisher, so long as the latter lived there, and afterwards stopped with friends; but her stays were short, and she always came with the intention of soon returning to the East.

The fact that Mrs. Dudley's husband was an inmate of the asylum for the insane at Athens, Ohio, in 1886, could not deprive her of the right to change her residence as her interests and those of her children might seem to require. In Ohio, a married woman may own property

and enter into contracts as if she were unmarried. Rev. St. 1906, §§ 3108–3117, inclusive. It is true the husband is designated as the head of the family and given the right to choose a reasonable place of abode, but, of course, this right exists only while he is sane. When he was placed in the asylum, his wife became the head of the family, the burden of support fell upon her, and the right to choose a place of abode went with it. Haddock v. Haddock, 201 U. S. 562, 571, 583, 26 Sup. Ct. 525, 50 L. Ed. 867.

But it is insisted the court below was without jurisdiction, that the action of the auditor was final and could not be reviewed in a suit to restrain the collection of the taxes thus assessed. We recognize the existence in Ohio of the general rule that the decisions of taxing officers and tribunals charged with the duty of valuing property for taxation are final and conclusive. Wagoner v. Loomis, 37 Ohio St. 571. But this is not a case of valuation. There is no attempt to review the action of the auditor in valuing property. The attempt is to set aside his action in placing certain property on the duplicate for taxation. Mrs. Dudley's credits were taxable in Lawrence county from 1894 to 1899, only in case she was during those years a resident thereof. Rev. St. 1906, § 2735. The dispute as to her residence therefore raised the question of the legality of the taxes assessed by the auditor. It was not the valuation placed upon her credits, but their inclusion, the right to tax them at all, which was assailed. The legality of the levy being involved, it was open to the complainant below to avail herself of the remedy afforded by section 5848 of the Revised Statutes of Ohio. Rev. St. 1906, § 5848; Musser v. Adair, 55 Ohio St. 466, 45 N. E. 903; Hagerty v. Huddleston, 60 Ohio St. 149, 165, 53 N. E. 960; Cummings v. Bank, 101 U. S. 153, 25 L. Ed. 903; Grether v. Wright, 75 Fed. 742, 23 C. C. A. 498.

The judgment is affirmed.

UNITED STATES FIDELITY & GUARANTY CO. v. RICE.

(Circuit Court of Appeals, Eighth Circuit. October 4, 1906.)

PRINCIPAL AND SURETY—BOND OF BUILDING CONTRACTOR—CONDITION PRECEDENT TO LIABILITY OF SURETY.

A provision in a bond given by a contractor for the construction of a building that no liability shall attach to the surety, unless it shall receive notice from the owner of any default on the part of the contractor promptly on knowledge thereof by the owner, and, in any event, not later than 30 days after any such default, and giving the surety in such case the right to assume and complete the contract and to receive any sums then, or which shall become, due thereunder, creates a valid and enforceable condition precedent to the liability of the surety, and it is discharged from any liability by the failure of the owner to notify it of the noncompletion of the building by the date required by the contract within 30 days after such default.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, §§ 304–311.]

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

C. A. Ballreich (W. L. Hartman, on the brief), for plaintiff in error.
M. G. Saunders (E. E. Hubbell, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. On June 15, 1901, Rice, the defendant in error, employed one Davis to furnish material and construct in the city of Pueblo a certain brick and frame building, and a contract was entered into between them to that end. The contract, among other things, required the contractor, Davis, to complete the building on or before December 1, 1901, and provided that the owner should pay him for his work and materials used the total sum of $14,465, of which 85 per cent. was payable as the work progressed and the remaining 15 per cent. within 10 days after the building should be completed and accepted by the owner. Simultaneously with the execution of the contract the contractor, as principal, and the United States Fidelity & Guaranty Company, the plaintiff in error, as surety, executed and delivered to Rice, the owner, a bond, in the penal sum of $5,000, indemnifying him against loss or damage which might result from any breach of the contract by the contractor. The obligation of the bond, however, was subject to the following conditions and provisions:

"First. That no liability shall attach to the surety hereunder unless, in the event of any default on the part of the principal in the performance of any of the terms, covenants or conditions of the said contract, the obligee shall promptly upon knowledge thereof, and in any event not later than thirty days after the occurrence of such default, deliver to the surety at its office in the city of Baltimore, written notice thereof with a statement of the principal facts showing such default and the date thereof. * * * Second. That in case of such default on the part of the principal, the surety shall have the right, if it so desires, to assume and complete or procure the completion of said contract, and in case of such default, the surety shall be subrogated and entitled to all the rights and properties of the principal arising out of the said contract and otherwise, including all securities and indemnities theretofore received by the obligee, and all deferred payments, retained percentages and credits, due to the principal at the time of such default, or to become due thereafter by the terms and dates of the contract."

The contractor failed to perform his contract, and suit was brought against the surety on the bond. One of the defenses interposed by the surety company was that the contractor failed to complete the building on or before December 1, 1901, as required by the contract, and that plaintiff, the owner, failed promptly or within 30 days thereafter to notify it of such failure or default. The record shows that the facts constituting this defense are fully proved. In other words, it was shown that the building was not completed on December 1st as required by the contract, and that no notice of any kind was given by the owner to the surety company of that default as required by the bond. The Circuit Court entertaining the opinion that the time within which notice of default was to be given was not of the essence of the contract submitted the issues to the jury, which returned a verdict on which judgment was entered for the plaintiff below for $3,462.73. Defenses other than that above referred to were interposed by the surety company, and other assignments of error have been urged upon our attention; but, as we are unanimously of opinion that the defense above

referred to was conclusive of the rights of the parties and that the court below erred in not instructing a verdict for the defendant as requested, we find no occasion for considering any other questions.

The parties, by clear and unambiguous language, contracted that no liability should attach to the surety company unless it received notice of any default on the part of the contractor promptly upon knowledge thereof by the owner, and, in any event, not later than 30 days after any such default to the end that it might avail itself, if it desired, of the opportunities furnished by the bond for protecting itself. We think that stipulation of the contract was as binding upon the owner as the obligation to pay was upon the surety company. It was a most reasonable stipulation. Its purpose was to protect the surety company against the consequences of any default by providing that, on the occasion of any default whatsoever, it might have the opportunity of determining its effect upon its own liability and of acting accordingly. It may well be that if the surety company had been notified promptly, as required by the bond, of the default by the contractor in failing to complete the building by December 1st, it would have assumed the completion of the building, prevented further payments by the owner to the contractor, and at least secured the sum of $2,899.50, which was paid to the contractor after the default, and to that extent have diminished its own liability. However that may be, the parties contracted for no liability on the bond unless such notice should be given. It was not given, and, in our opinion, that fact conclusively exonerates the surety company from liability. The time for giving the notice, at any rate the ultimatum of 30 days after any default, was from the nature of the case intended to be and was of the essence of the contract. Whether the notice should be given before the expiration of 30 days might depend upon the owner's knowledge of an existing default, and whether it was "promptly" given after such knowledge had been acquired might depend on many considerations, and be a debatable question of fact. But obviously the surety company had a purpose in binding the owner to give notice of any default—at the latest —within 30 days thereafter. The imposition of that duty upon the owner tended to insure inspection of the work by the owner, prevent indifference on his part concerning its progress, and to afford the surety company an opportunity to protect itself as provided in its bond. That ultimatum was, in our opinion, reasonable and enforceable. But whether it was reasonable or not is of no consequence. The parties were sui juris, capable of making their own contracts and undertook to do so, and whatever they clearly and distinctly agreed upon is binding upon them. This court recently had occasion in National Surety Company v. Long, 60 C. C. A. 623, 125 Fed. 887, to consider and determine the question just discussed, and the conclusion there reached is reinforced and confirmed by further reflection given to the question in this case. On the authority of that case, as well as on the general principles of the law of contracts, we are unable to sustain the judgment rendered in the Circuit Court.

It is accordingly reversed, with directions to grant a new trial.

WRIGHT v. VOCALION ORGAN CO.

(Circuit Court of Appeals, First Circuit. October 31, 1906.)

No. 644.

1. CONTRACTS—VALIDITY—SALE OF FUTURE INVENTIONS.
The rule applied that a contract by an inventor, in consideration of his employment for a term of years at a salary, to assign to his employer a half interest in all inventions made by him during the term, is not contrary to public policy.

2. SPECIFIC PERFORMANCE—POWERS OF COURT—MODIFICATION OF CONTRACT.
In decreeing the specific performace of a contract, a court of equity may adapt it to conditions which were not foreseen by the parties when it was made, by requiring the complainant to assent to such modifications and limitations as justice requires in view of such new conditions.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 424.]

3. CONTRACTS—CONSTRUCTION—CONTRACT FOR INTEREST IN FUTURE INVENTIONS.
Complainant was a corporation engaged in the manufacture of musical instruments, including organs, and defendant was its superintendent of factories and had made certain inventions relating to organs. A new contract was made between them by which, in consideration of an increased salary for a term of five years, it was provided, in clause 2, that a one-half interest in all improvements or inventions made by defendant during the term "in or relative to organs, both keyed and automatic," should be assigned to complainant, and they should be patented at complainant's cost. By clause 4 it was provided that complainant should have the exclusive right to purchase and use improvements and inventions made by defendant during the term "in self-playing pianos or self-playing devices for playing pianos," on such terms as should be agreed upon. Defendant during the term made and patented certain inventions which were applicable alike to organs and to self-playing pianos. *Held*, that such inventions were within the contract, and complainant was entitled to an assignment of a half interest therein, or a perpetual license to use the same without further payment, but only in so far as they related to organs, as expressed in the second clause of the contract.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 859.]

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

For opinion below, see 137 Fed. 313.

Benjamin Phillips (Alfred H. Hildredth, on the brief), for appellant.

George B. B. Lamb and George D. Beattys (Alexander P. Browne, on the brief), for appellee.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. This bill was brought in the Circuit Court by the Vocalion Organ Company, a corporation organized under the laws of the state of New Jersey, against Morris S. Wright, a citizen of the state of Massachusetts. The decree was for the complainant, and the respondent below appealed to us. It is somewhat difficult to make a concise statement of the facts; and therefore, for that pur-

pose, we adopt that given in various extracts from the opinion of the learned judge of the Circuit Court as follows:

"This suit in equity is brought to compel the defendant to assign to the complainant a one-half interest in certain improvements, inventions, and patents in or relative to organs, in accordance with the terms of a written contract made by the parties on May 15, 1901. The suit is brought also to restrain the defendant, his heirs, executors, administrators, or assigns, from selling or assigning any interest in said inventions, improvements, and patents to any person other than the complainant during the life of the contract.

"At the time of entering into the contract the complainant was engaged in the business of manufacturing and selling musical instruments, including organs, both keyed and automatic. The defendant was the superintendent of the complainant corporation at a salary of $3,600 per year.

"Although only the second and fourth paragraphs of the contract are brought before the court for construction, it is material for certain purposes of the inquiry to examine the whole contract. The contract is as follows:

" 'Agreement made this fifteenth day of May, in the year nineteen hundred and one, between the Vocalion Organ Company, a corporation organized and existing under the laws of the state of New Jersey, transacting business at Worcester, in the county of Worcester, commonwealth of Massachusetts, and in the city of New York, state of New York, party of the first part, and Morris S. Wright of Worcester, aforesaid, party of the second part, witnesseth:

" 'That for and in consideration of the mutual covenants and other consideration hereinafter expressed the parties hereto covenant and agree as follows:

" 'First. The party of the first part covenants and agrees to employ the party of the second part and does hereby employ the party of the second part, and the party of the second part covenants and agrees to accept and hereby does accept exclusive employment of the party of the first part as superintendent of factories of the party of the first part.

" 'Second. The party of the second part covenants and agrees that an undivided one-half part of the whole right, title and interest in and to all inventions or improvements made by him during the term of this agreement, in or relative to organs, both keyed and automatic, shall be the property of the first part, and, immediately upon making any such inventions or improvements, the party of the second part covenants to apply for letters patent of the United States therefor, and for such foreign patents therefor as the party of the first part may desire, and to make, execute and deliver all such applications, specifications, drawings and other documents as may be necessary to obtain such letters patent; and the party of the second part further covenants to execute, acknowledge and deliver to the party of the first part a proper assignment for record of an undivided one-half interest in each such invention and in the letters patent when issued—all, however, at the proper cost and expense of the party of the first part or its successors and assigns. The party of the second part further covenants not to sell or assign his undivided one-half part in and to any of the above-mentioned inventions, improvements and letters patent, which part shall be and remain the exclusive property of the party of the second part, his heirs, executors and administrators, until the expiration of the term of this agreement.

" 'Third. The party of the second part further covenants and agrees that he will without further consideration than is herein expressed assign and transfer to the party of the first part letters patent of the United States number 509,506 for improvements in reed and pipe organs and will upon request of the party of the first part execute and deliver to the party of the first part a proper assignment of said patent for record.

" 'Fourth. The party of the second part further covenants and agrees to grant and does hereby grant unto the party of the first part the exclusive right to purchase and use inventions or improvements made by him during the term of this agreement, in self-playing pianos or self-playing devices for playing pianos, upon such terms as to price or royalty and other conditions as may be mutually agreed upon; and the party of the second part further covenants that he will not sell, assign, transfer or in any way dispose of any

such invention or improvement to any other corporation or persons than the party of the first part during the term of this agreement.

* * * * * * * * * * *

" 'Seventh. It is further covenanted and agreed that this agreement shall be deemed to be in full force and effect from and after the first day of July, nineteen hundred, and until the first day of July, nineteen hundred and five, and shall terminate on said first day of July, nineteen hundred and five.

" 'In witness whereof,' " etc.

"The testimony tends to show that, previous to making the contract, Mr. Tremaine, the president of the complainant company, had many conversations with the defendant in regard to his experience and ability in manufacturing, improving, and inventing musical instruments; that the defendant gave the assurance that he could develop and improve the different instruments manufactured by the complainant company; that, in view of these representations made by the defendant, the complainant company was induced to make the agreement now in suit, providing for the increase of the defendant's salary from $3,600 per year to $5,000 per year, with an added percentage based on the value of the output; and that the arrangement under the contract was to continue from July 1, 1900, to July 1, 1905.

"The testimony tends to show that the defendant made improvements and inventions during the term of the agreement, and applied for and obtained letters patent. The complainant requested the defendant to assign to it an undivided one-half interest in these improvements and letters patent, alleging that they were improvements or inventions in or relative to organs both keyed and automatic. The defendant refused to do this.

"The evidence tends to show that the defendant made certain inventions in the musical art, for which application for letters patent was made and allowed. The testimony also tends to show that all these alleged improvements and inventions were applicable equally as well to organs as to piano-players. The complainant contends that all these improvements and inventions come under the terms of the second paragraph of the agreement, because they are improvements and inventions 'in or relative to organs both keyed and automatic.' And the complainant insists that these inventions and patents should be transferred to it, notwithstanding the fact that they also relate to self-playing devices for playing pianos. The defendant insists that, so far as these inventions relate to organs both keyed and automatic, and also to self-playing pianos or self-playing devices for playing pianos, they should be excluded from the consideration of the contract; that the second paragraph should be held to embrace inventions which relate exclusively to organs both keyed and automatic; and that the fourth paragraph should be held to embrace exclusively inventions in self-playing pianos or self-playing devices for playing pianos."

After thus stating the case, the learned judge concluded as follows:

"The patents put in evidence in the case do not seem to us to embody inventions simply and only upon piano-players according to their terms and their titles. They appear to relate as distinctly to organs as to pianos or piano-players or devices for playing pianos. The interpretation sought by the defendant would eliminate all or nearly all the alleged inventions made by the defendant, and leave no improvements or patents upon which the contract is to operate. It seems to us this is an unreasonable interpretation of the contract, and an interpretation not warranted by the evidence in the case. We believe the interpretation which we have given in consonant with the terms of the whole contract, the evident intention of the parties and with their action in the premises.

"Under this interpretation an undivided half part of all inventions or improvements made by defendant during the term of the agreement, namely, from July 1, 1900, to July 1, 1905, in or relative to organs, both keyed and automatic, must be transferred to the complainant, even though those improvements and inventions may also relate to other musical instruments. The defendant should also assign to complainant an undivided half part of all such inventions or improvements, for which applications for letters patent have

been made, as set forth in paragraph 4 of defendant's answer, except those on which letters patent have been already issued. The defendant should also assign to complainant all inventions for which any other applications for letters patent have been made both in the United States and foreign countries during such term. He should also assign to complainant a half interest in the letters patent named in the stipulation of the parties in the case, and all other letters patent embodying such inventions or improvements. The defendant should also apply for letters patent, both foreign and domestic, and should execute assignments of his applications to the complainant."

The decree entered in accordance with this opinion was so phrased as, to use its own language, to enjoin the respondent "from directly or indirectly interfering with, or preventing or hindering or annoying, the Vocalion Organ Company, complainant herein, or its successors or assigns, in the manufacture or sale of any musical instrument or instruments, or any part or parts thereof, containing or embodying in whole or in part any one or more of the defendant's inventions or improvements hereinbefore set forth, or any portion of the same; and also in the use of said inventions and improvements, or any of them, in any way complainant may see fit." The fifth error assigned makes this phraseology the basis of an alleged distinct error. It was too broad, in that it in effect protected the Vocalion Organ Company, not only so far as its lawful rights were concerned, but to such an extent as to cover organs and pianos which might contain elements which the Vocalion Organ Company had no lawful right to use, if only they contained some of which it was the proprietor. Whatever difficulty there is in this part of the decree can be obviated on a reframing of it by the Circuit Court in pursuance of the judgment which will be entered in this case. Probably what is apparently objected to was a mere inadvertence which would not have occurred if the respondent below had insisted on his right to have a draft decree in accordance with the rules of the Circuit Court, thus giving an opportunity for correcting any mere matters of phraseology.

The other errors assigned are of so general a character that it is difficult for us to apply them. With the rest, they relate to numerous patents the peculiarities of which have not been categorically explained; and, consequently, for us to attempt to investigate them would throw on us a burden which, on the whole, we do not find it necessary to assume, as we are of the opinion that the substantial case comes down to a single proposition.

Nevertheless, we are, perhaps, justified in giving some attention to incidental propositions which were argued before us. Any suggestion that a contract of the character in question is ordinarily contrary to public policy, and therefore cannot properly be enforced, is contrary to the rules of law as now settled, as shown by us, in Reece Folding Mach. Co. v. Fenwick, 140 Fed. 287, 2 L. R. A. (N. S.) 1094. Various propositions made by the appellant, and grouped under the more general one that the Circuit Court erred in ordering the respondent alone to perform, are not only not to be regarded as within the terms of assignments of errors of the general character we have before us, but, as applied to the proofs in this record, they are purely academic. The claim that the Vocalion Organ Company has not performed its

own covenants contained in the contract in litigation, to which so much attention is given by the appellant, is, on this record, a mere question of the burden of proof, without the slightest indication that the topic was brought to the attention of the Circuit Court. Therefore it cannot merit any discussion here. One of the errors assigned relates to four specific patents named therein, and alleges they were not put in evidence. There does not seem to have been any formal putting in evidence; but, as the Circuit Court regarded them as in evidence, and as no objection was there made on that point so far as the record shows, this point cannot be made here. Indeed, there can be no question that a fair understanding of an agreement found in the record indicates that the parties regarded them as in the case. Some of the patents are referred to by the appellant with a claim that they do not make any mention of organs. It will appear further along in this opinion that this would be immaterial so long as they cover musical instruments, and it is plain on their face that they may be available for organs. Also, it is objected that one of the patents is merely for inclosing cases; but it is shown that these are peculiarly for use with automatic instruments, so that it is entirely within the expression in the contract "relative to organs."

This brings us to the only substantial question, and this the appellant introduces to our attention by the just assumption that there is foundation for a finding that, at least, some of the inventions in question are applicable as well to pianos as to organs. He claims that the contract, so far as it is important for us, covered only inventions which related exclusively to organs, and that it made no express provision for those which related both to organs and pianos. It is to the latter class of inventions, that is, those which are useful for both organs and pianos, that he contends that some, if not all, of those in controversy belong. As we have already observed, the case, as submitted to us, does not sift out categorically the various improvements in question, so as to enable us, without too much labor, to ascertain whether all the patents and applications in controversy are of that class, or only a portion, and, if a portion, what portion. It being plain that at least some of them are, we will remit to the Circuit Court the working out of the details in reference thereto.

The complainant contended in the Circuit Court that all the inventions of the class in question came under the terms of the contract in litigation. The respondent contended that such inventions should be entirely excluded, and that the contract has no relation to them whatever. In the course of the opinion, the court stated that the interpretation of the respondent was too narrow, and contrary to the intention of the parties, which was undoubtedly correct. On the other hand, the decree directed that an undivided half of each of all such inventions must be assigned, and the injunction was ordered accordingly. This was, perhaps unintentionally, too broad.

Paragraph 4 of the contract makes it plain that the complainant was not to have the free use of the respondent's inventions, except "in or relative to organs," as expressly set out in the second paragraph; and there is nothing to show that the complainant has made any offer

for compensation with reference to pianos according to paragraph 4, so as to entitle it to use the respondent's inventions in connection with them.

The solution is a simple one. Apparently the position is one which the contract did not foresee, as often occurs; that is, that there would be inventions covering organs which were also appropriate for other musical instruments. Under such circumstances, whatever the common law might do, equity has no difficulty in adjusting itself to the unexpected conditions. Here it can decree that there should be given assignments, or perpetual licenses, so far only as concerns what is expressed in the second paragraph of the contract; that is, "in or relative to organs, both keyed and automatic." In doing this, equity does not make a new contract, but it merely applies the existing one to the unexpected conditions. It also avails itself of the fundamental rule that those seeking equity must do equity, and so it grants relief to the complainant only on its assent to such limitations and qualifications as will prevent injustice. The practical application of this maxim to cases of the class before us has been illustrated an indefinite number of times. Oddly enough, two decisions at the same early term of the Supreme Court give such an illustration and also a qualification. Hunt v. Rousmanier, 1 Pet. 1, 7 L. Ed. 27, declares that equity cannot make a new contract; but Mechanics' Bank v. Lynn, 1 Pet. 376, 383, 7 L. Ed. 185, states the general rule which controls this case, as follows:

"But the court ought not to decree performance according to the letter when, from change of circumstances, mistake, or misapprehension, it would be unconscientious so to do. The court may so modify the agreement as to do justice as far as circumstances will permit, and refuse specific execution, unless the party seeking it will comply with such modification as justice requires."

Our conclusion is that the phraseology of the decree which is complained of in the fifth alleged error assigned should be corrected as we have stated, and that, so far as concerns the second paragraph of the contract in issue, the decree should be so modified that assignments, or, if found necessary, perpetual licenses, be ordered, and that whichever are ordered, licenses or assignments, they be so limited as not to go beyond the purposes of the contract as we have already explained them; and all injunctions must be likewise so limited.

The decree of the Circuit Court is reversed; the case is remanded to that court, with directions to enter a modified decree in accordance with our opinion passed down this day; and the appellant recovers his costs of appeal.

B. F. AVERY & SONS v. J. I. CASE PLOW WORKS.

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

No. 1,242.

PATENTS—VALIDITY AND INFRINGEMENT—PLOWS.

In the Avery patent, No. 650,771, for a double moldboard plow, having adjustable depth-runners and an adjustable rudder, claims 2 to 6, inclusive, which are broad claims, are void for anticipation, their language

being such that they may be read upon prior structures. Claims 7 and 8, which disclose the specific invention, cover a combination of old elements, not merely new in specific construction, but new in kind, and which produces a new result, and they disclose invention, and are valid. Such claims also *held* infringed by a structure which differs from that of the patent only in the location of one of the parts, the change being immaterial to the result.

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

For opinion below, see 139 Fed. 878.

In this suit for infringement of claims 2 to 8, inclusive, of patent No. 650,771, issued on May 29, 1900, to appellants as assignees of George C. Avery, claims 2 to 6, inclusive, were held to be invalid, and claims 7 and 8 valid, but not infringed.

So far as the claims in suit are concerned, the specification describes the invention as follows: "It consists in a plow having a suitable share and moldboard, a standard carrying the same, an adjustable shoe or depth-runner, comprising divided runners pivoted at their forward ends to the lower end of the standard, and adjustably connected at the rear ends to the moldboard, and a rudder or knife pivotally mounted between the portions of the depth-runner, and means for adjusting the said knife or rudder to different depths with respect to the runner in order to hold the plow steady in its movements. * * * My invention is designed to provide a middle-burster or double moldboard plow of superior quality, and one which shall be provided with a depth-runner and a guiding-rudder, both of which are adjustable. * * * Important features of my inventions are the adjustable depth-runner or shoe and the adjustable knife or rudder mounted thereon. The depth-runner, 10, is composed of two pieces arranged side by side, and of the same shape and applied together, so as to inclose the knife, 11, between them. The forward end of each portion of the runner, 10, is curved upwardly and reduced in thickness, so as to project upon either side of the standard, 2. These forward ends of the shoe-sections are pivoted to the said standard by means of a bolt or pin, as 12, which is preferably held in position by means of a cotter-pin, so that it may easily be removed, if desired. The rear ends of the runner-sections are provided with vertical elongated slots, 14, through which a bolt may be passed, securing the said rear ends to rigid brace-rods, as 13, 13. The other ends of the said brace-rods are securely bolted to the moldboard, 5. The slots, 14, in the shoe-sections permit of the shoe being adjusted upon its pivot-pin to different depths. The upper portions of the runner-sections are preferably made thin, while the lower edges are widened out and slightly rounded upon the lower surface, to form a broad bearing surface for engaging the ground. This broad surface is secured by forming lateral extending flanges, 10a, 10a, upon each side of the runner—one on each section thereof. Pivotally mounted between the sections of the shoe, 10, is the knife or rudder, 11, which is a broad plate curved at its forward end, and pivoted at the said forward end between the shoe-sections upon a bolt, 15. The rear end of the rudder is clamped between the shoe-sections, when the same is bolted to the brace-rods, 13. Thus the knife or rudder is pivoted to the shoe, and the shoe is pivoted to the standard, and one clamping-bolt holds both the knife or rudder and the shoe or depth-runner in their adjusted positions."

The claims read:

"(2) In a plow, the combination with the standard, share, and moldboard of a depth-runner pivoted at its forward end to the standard, a knife or rudder pivoted at its forward end to the depth-runner, and means for independently adjusting the rear ends of the depth-runner and rudder, substantially as described.

"(3) In a plow, the combination with a standard, share, and moldboard of a depth-runner pivoted at its forward end to the standard, a knife or rudder pivoted at its forward end to the depth-runner, and means for adjusting the height of the depth-runner, and clamping the rear end of the rudder thereto, substantially as described.

"(4) In a plow, the combination with a standard, share, and moldboard of a depth-runner, comprising two sections pivoted at their forward ends upon opposite sides of the standard, means for adjusting the height of their rear ends, and a knife or rudder pivoted at its forward end between the sections of the depth-runner, substantially as described.

"(5) In a plow, the combination with a standard, share, and moldboard of a depth-runner, comprising two sections pivoted at their forward ends upon opposite sides of the standard, means for adjusting the height of their rear ends, a knife or rudden pivoted at its forward end between the sections of the depth-runner, and means for adjusting the height of its rear end independently of the adjustment of the depth-runner, substantially as described.

"(6) In a plow, the combination with a standard, share, and moldboard of a depth-runner, comprising two sections pivoted at their forward ends on opposite sides of the standard, a knife or rudder pivoted at its forward end between the sections of the depth-runner, and means for adjusting the height of the rear ends of the depth-runner and clamping the knife or rudder between its sections, substantially as described.

"(7) In a plow, the combination with a suitable standard, moldboard, and share of a depth-runner, comprising two sections of similar shape, applied side by side, and pivoted at their forward ends to each side of the plow-standard, the said sections having vertical slots at their rear ends, brace-rods rigidly secured to the moldboard, and extending toward the runner, a bolt passing through eyes in the said rods and through the slots in the runner, and a knife or rudder pivoted between the said depth-runner sections, whereby the said runner may be clamped in different adjusted positions between the runner-sections, substantially as described.

"(8) A double moldboard plow, comprising a standard, a double frog, a double share secured thereto, and a double moldboard secured to the same, a depth-runner arranged beneath the moldboard and formed of two sections, having their forward ends curved forwardly and pivotally attached on each side of the plow-standard, the said runner-sections being provided with vertical, elongated slots at their rear ends, laterally-extending flanges formed upon the lower edges of the said sections to provide a broad bearing surface, a knife-plate or rudder pivoted between the sections of the runner, the said rudder being curved at its forward end and pivoted between the forward ends of the runner-sections, rigid brace-rods extending from the moldboard to each side of the runner, a clamping-bolt passing through eyes upon the said brace-rods and through the elongated slots in the runner-sections, so as to clamp the runner in different adjusted positions, the knife or rudder being thereby clamped between the said sections in its different adjusted positions, substantially as described."

In the application as originally filed the claims which now appear as 7 and 8 were numbered 3 and 4, and were allowed without objection; and claim 2 read as follows: "In a plow, the combination with a suitable standard, share, and moldboard of a depth-runner, comprising two sections pivoted at their forward ends upon each side of the plow-standard, and provided at their rear ends with adjustable slots, brace-rods rigidly secured to the moldboard, and extending toward the depth-runner from each side, a bolt passing through the adjusting slots for adjustably securing the depth-runner to the said brace-rods, substantially as described." This claim was rejected on reference to Ward, 604,814. Applicant's attorneys thereupon canceled the claim, and substituted therefor claims 2 to 6, inclusive, as they now appear in the patent. The examiner rejected these substituted claims on reference to Billups, 123,858, and Sylvester, 410,218. The attorneys asked for a reconsideration, saying: "While the patents to Billups and Sylvester cited in answer to claims 2 to 6 seem at a glance to meet the constructions set forth in said claims, a close comparison of the claims with these patents will disclose the fact that in every claim the combination with a plow of a pivoted depth-runner and rudder pivoted to said runner is the essential feature, and that the depth-runners or shoes in the patents are not pivoted. This difference in construction permits of a double adjustment, which is impossible in the construction shown in the references," and the application was then allowed.

The state of the art was shown to the court by certain plows which were in public use for more than two years prior to the application, and by the following patents: Burke, 22,013; Billups, 123,858; Brantly, 248,569; Lawrie, 261,001; Laughlin, 297,815; Roberson, 326,591; Moore, 366,597; Landauer, 383,982; Sylvester, 410,218; Holsclaw, 459,204; Montgomery, 459,410; McMillan, 555,327; Dean, 563,752; Ward, 604,814; Ankarstolpe, 607,207.

Edward T. Fenwick and Edward M. Kitchen, for appellants.

George P. Fisher, Jr., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge (after stating the facts). Without going over the details of construction exhibited in prior plows and patents, the state of the art when Avery filed his application may be summarized thus: The middle-burster plow had been in use for more than 30 years. Many inventors had directed their efforts to its improvement, particularly in the way of providing a runner or shoe to regulate the depth of the furrow, and a rudder to prevent veering. There were single runners and double runners, some sustained by rods depending from the moldboards, others by rods from other parts of the plow-structure, some rigid, others adjustable; various rudders, some stationary, others adjustable; runners without rudders, stationary runners with adjustable rudders, stationary rudders with adjustable runners; and, finally, a double runner pivoted at its forward end to the standard, and having its rear end adjustably sustained by rods from the plow-structure, together with a rudder pivoted at its forward end between the members of the runner, and having its rear end adjustably secured to the runner. In this most advanced construction two separate adjustments by two separate means of adjustment were required.

Avery devised for use in a middle-burster plow a combination in which a rigid support extends from the plow-structure to the rear end of the runner, and sustains, by means of a through-bolt, both the runner and the rudder in adjustable relations to each other and to the plow. No prior structure anticipates the combination that Avery actually made. But appellee denies that invention was involved. All of the elements were old, and if Avery had made merely a selection and rearrangement of old elements, without producing any new result, want of invention would be clear. Greist Mfg. Co. v. Parsons, 125 Fed. 116, 60 C. C. A. 34. Or if he were only a detail improver, he could not exclude others from gleaning in the same open fields. Milwaukee Carving Co. v. Brunswick Co., 126 Fed. 171, 61 C. C. A. 175. But, though old elements were used, the combination was not merely new in specific construction, but was new in kind; and in this very ancient and familiar art we do not see that the most gifted inventor could do more than produce a new result by a new mode of operation in some minor adjunct of the main structure. Inasmuch as Avery did this, he was entitled to generic as well as specific claims. Lamson Consolidated Store Service Co. v. Hillman, 123 Fed. 416, 59 C. C. A. 510; Ries v. Barth Mfg. Co., 136 Fed. 850, 69 C. C. A. 528.

We have been speaking of what Avery did with the plow. What he did on paper is another matter. So far as he has failed to claim

distinctly his invention, the public may profit by the disclosure thereof.

It is admitted that the broad claims, 2 to 6, inclusive, are infringed if they are valid. Omitting the general features of the plow, claim 5 calls for a pivoted depth-runner of two sections, means for adjusting the height of the rear ends thereof, a rudder pivoted between the runner-sections, and means for adjusting the height of the rear end of the rudder independently of the adjustment of the runner. This is not limited to the combination, in a middle-burster plow, of a rigid support, a pivoted runner, a pivoted rudder, and a suitable means of securing the runner and the rudder in adjustable relations to each other and to the plow at one operation. It reads exactly upon the old plows, in which two separate adjustments by two separate means were required. And it responds to the general statement of invention in the specification:

"Divided runners pivoted at their forward ends to the standard, and adjustably connected at their rear ends to the moldboard, and a rubber pivotally mounted between the portions of the depth-runner, and means for adjusting the rudder to different depths with respect to the runner. * * * A middle-burster plow which shall be provided with a depth-runner and a guiding-rudder, both of which are adjustable."

As it stands, the claim is anticipated, void, and it is not in our power to redraft the patent.

Similarly, claim 4, calling for a pivoted runner, means for adjusting the height of the rear end thereof and a pivoted runner, is void, because it too may be read upon old structures.

But in claims 2, 3, and 6, disregarding the differentiations as immaterial to the present view, we find a combination of a pivoted runner, a pivoted rudder, and means for adjusting both the runner and the rudder. Appellants insist that these claims cover generically the conception of effecting the two adjustments by one instrumentality at one operation. The word "means" is plural in form. It is frequently and properly used as a plural; likewise as a singular. Here there is no article, no adjective, no predicate to indicate the number. However, if this ambiguity were all we had to face, we might be able to sustain these claims, on the principle that a patent should be construed so as to save rather than to destroy it, by saying that, since each essential element should be named separately, and since the word "means" occurs but once, it points to a single device as performing the two functions. Not only did Avery in his original application fail to state and claim that he had devised a combination which was new in kind as well as new in specific construction, but his attorneys in submitting the substituted claims also failed. They made no distinctions between claims 4 and 5, on the one hand, and claims 2, 3, and 6, on the other. They asserted that the essential feature in each claim was a pivoted runner, with a rudder pivoted thereto, whereby both were adjustable, and they answered the reference patents by pointing out that in them the runners were not pivoted, and therefore a double adjustment was impossible.

The fact that the specific description and specific claims portray a combination in which one means effects the two adjustments at one operation does not alter the case. That fact only establishes that Avery asserted that there was utility, novelty, and invention in the specific

construction. For aught that the patent "particularly points out and distinctly claims," the novelty and invention may have lain wholly in the specific form of some one else's generic combination. It is only by going to the prior art that we learn that Avery might have made and held generic claims. But this information does not enable us to afford protection for what the patent fails to point out particularly and to claim distinctly.

Respecting claims 7 and 8, what we have said in reference to Avery's actual structure establishes their validity.

In appellee's middle-burster plow appears the combination of the runner in two sections, pivoted to the standard, the rudder pivoted between the runner-sections, rigid brace-rods extending to each side of the runner, and the bolt passing through the rods and sustaining the runner and the rudder in adjustable relations to each other and to the plow. The structure is so identical with that of the appellants that the only contention of noninfringement is based on the assertion that appellee's brace-rods do not depend from the moldboard. Claim 7 mentions "brace-rods rigidly secured to the moldboard," and claim 8 "rigid brace-rods extending from the moldboard."

Even if the assertion respecting the character of appellee's construction were true, we do not think infringement would be avoided. It was old to attach the upper ends of the brace-rods to various parts of the plow-structure, including the moldboard. It was old to brace the moldboard by extending rods from it to suitable rigid parts of the plow. It was also old to brace the moldboard by means of a broad plate or frog attached to the standard, and to which the moldboard is fastened. In claims 7 and 8 the new use of the brace-rods is to bring them down as a rigid support for the through-bolt, which holds both the runner and the rudder in adjustable relations to each other and to the plow. This feature, and this feature alone, saves the bringing together of the old elements from being held void for want of invention. This feature may be availed of equally well whether the brace-rods depend from the moldboard or from any other suitable part of the plow-structure. In Adam v. Folger, 120 Fed. 260, 56 C. C. A. 540, one element in Folger's combination was described as being "a supplemental valve, arranged in the plug of the main valve." Folger's invention lay in conceiving and putting into workable form the idea of regulating separately the flow of the water, while preserving the unity of action of the supply valves for both water and gas. The real invention could be put to use, but in a less desirable way, by arranging the supplemental valve, which was an essential element, outside of the plug of the main valve. But we held that such a change did not avoid infringement, saying:

"It is well settled that there is no infringement if any one of the material parts of the combination is omitted, and that a patentee will not be heard to deny the materiality of any element included in his combination claim. If a patentee claims eight elements to produce a certain result, when seven will do it, anybody may use the seven without infringing the claim, and the patentee has practically lost his invention by declaring the materiality of an element that was in fact immaterial. But form, location, and sequence of elements are all immaterial, unless form or location or sequence is essential to the result, or indispensable, by reason of the state of the art, to the novelty of the claims."

Here the result is obtained quite irrespective of the location of the upper ends of the brace-rods. Appellants reach the result by one location of the material element; appellee by another location equally well known, and the state of the art does not require the novelty of the claims to be predicated on a particular location. See, also, Cazier v. Mackie-Lovejoy Mfg. Co., 138 Fed. 654, 71 C. C. A. 104; Machine Co. v. Murphy, 97 U. S. 120, 24 L. Ed. 935; Beach v. American Box Co. (C. C.) 63 Fed. 597; King Ax Co. v. Hubbard, 97 Fed. 795, 38 C. C. A. 423; Calculagraph Co. v. Wilson (C. C.) 132 Fed. 20; Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co. (C. C.) 132 Fed. 614.

But the assertion that the upper ends of appellee's brace-rods are not attached to the moldboard we find to be specious. In using middle-burster plows it is frequently desirable to have a moldboard of less width than that of the moldboard customarily supplied by the various manufacturers. On examining their competitors' plow, the appellee company perceived that they might obtain an advantage by offering a plow with virtually two moldboards. They made the broad plate or frog that is attached to the front of the standard of such a form and width that the regular-sized moldboard might be removed, and the frog used as a smaller moldboard. Their brace-rods depend from the extreme edges of the frog. Literal infringement is as clear as if they had first copied appellants' plow exactly, then trimmed down the moldboard to the points where the brace-rods are attached, and then added the regular-sized moldboard to the structure.

The decree is reversed, with the direction to proceed further in conformity hereto.

HUNT, HELM, FERRIS & CO. v. MILWAUKEE HAY TOOL CO.

(Circuit Court of Appeals, Seventh Circuit. August 11, 1906.)

No. 1,253.

PATENTS—INFRINGEMENT—HOIST.

The Ferris patent No. 584,340 for a hoist, covering a device attached to the sheave block for clamping and unclamping the free end of the rope, conceding invention, is of narrow scope, in view of the prior art, in the way of simplifying the form and cheapening the cost of the device, and must be limited to the particular form shown. As so construed it is not infringed by the device of the Gutenkunst patent No. 785,385, which, while functionally equivalent, employs different mechanical means.

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

The appellant, Hunt, Helm, Ferris & Co.., was the complainant below, and appeals from a decree upon final hearing, dismissing its bill filed for alleged infringment of a patent. The patent involved is No. 584,340, issued to Henry L. Ferris, June 15, 1897, for a "hoist." In the specifications, the invention is stated as relating "to certain improvements in hoists of the class in which means are provided for clamping and releasing the free end of the rope, such means being operated by said free end itself." The patent has three claims, but infringement of the first claim is the only charge, and that reads: "(1) The combination with a sheave-block, pulley and rope, of an oscillating arm pivoted to the sheave-block, having a guiding channel for the free end of the rope, a clamping device pivoted upon said oscillating arm and adapted to

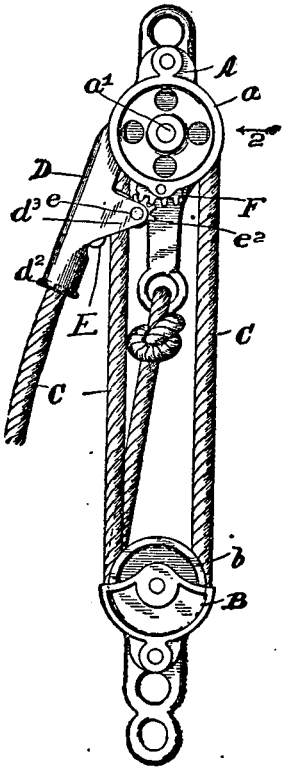
clamp the rope-guide therein, and an operating device rigidly fixed upon the sheave-block, and adapted to engage the clamping device as the arm is oscillated, and operate the same to clamp or unclamp the rope, substantially as described."

The defenses were (1) invalidity of the patent and (2) noninfringement, and the opinion filed in the court below rests the decree upon the last-mentioned ground.

The device of the patent is exhibited in an accompanying drawing (Fig. 1); and the device complained of, used by the defendant, appears in patent No. 785,385 (Fig. 1), issued to William Gutenkunst, March 21, 1905, respectively, as follows:

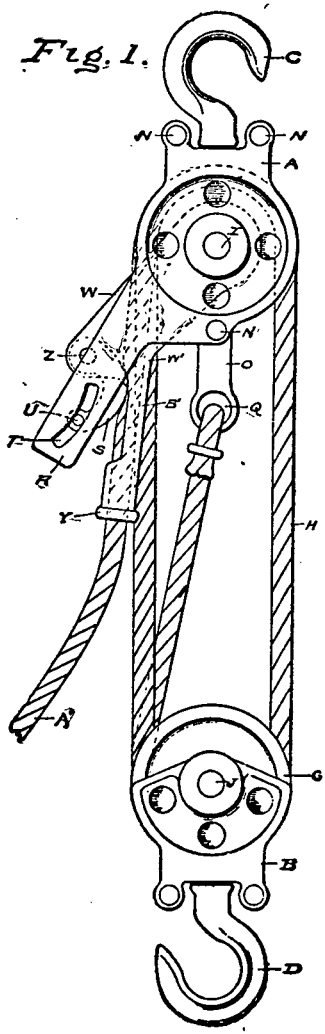
Complainant's Device.

Fig. 1.



Defendant's Device.

Fig. 1.



Russell Wiles, for appellant.
James B. Erwin and Leverett C. Wheeler, for appellee.
Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge. The opinion filed below rests the decree upon a finding of noninfringement, without passing upon the further question raised, whether the "hoist" device of the Ferris patent (No. 584,340) in suit involved patentable invention. Upon the view adopted by the trial court of the appellee's departure from assumed invention in the means of the patent, the issue of validity was rightly left open—especially so on information, referred to in the opinion, of a controversy with another patentee which was pending and involved that issue. In accord with this course, we assume (without so deciding) that invention appears in the patent device, and consider only its scope under the limitations of the prior art, to ascertain whether the claims are infringed by the appellee.

Both devices in suit are of the well-known hoisting provision of sheave-block, pulley, and rope, combined with means for clamping and releasing the rope; and in both the clamp is operated by the free end of the rope, as also appears in prior structures. In simplicity and cheapness of structure, which were objects of the Ferris invention, the devices are alike, but the mere fact of such equivalency is not entitled to the weight, in this inquiry as to identity of means, which seems to be the contention on behalf of the appellant. The claims of invention rest alone upon the introduction and arrangement of the "clamping device" and "operating device," namely, the common form of clamping cam, provided with a series of teeth and pivoted upon the oscillating tubular arm (through which the free end of the rope is threaded to actuate the arm) and thus adapted to clamp the rope, in combination with the so-called "operating device," which is described in the first claim as "rigidly fixed upon the sheave-block and adapted to engage the clamping device as the arm is oscillated," and is specified in the patent as "a segment F, having teeth concentric with the pulley-axle and adapted to engage those upon the cam." These mechanisms are quite simple, and no novel function is disclosed, either in the elements respectively or in the device as an entirety. Like means and functions appear in numerous prior patents in evidence, and it is sufficient to cite four examples, which are not only analogous in purpose and in mechanisms employed—although differing in the specific form and arrangement of the elements—but as well in their general operation and function, namely: Green's patent, No. 406,579, of 1889; Young's No. 447,483, of 1891; Young's No. 524,015, of 1894; and Rowland's, No. 524,403, of 1894. Without reference to the well-known general art, it is obvious, upon inspection of these patents, that the patentee, Ferris, entered a narrow field for either improvement or invention in his device. That he improved upon the prior structures, in the way of simplifying the form and cheapening the casting when made integrally, is undoubted, and such improvement may involve invention; but it is well settled that the patent which may then be granted must be limited to the scope of the actual invention—to his

"particular form of adaptation." Loew Supply & Mfg. Co. v. Fred Miller Brewing Co. (C. C. A.) 138 Fed. 886, 889.

The appellee's device conforms to a subsequent patent (No. 785,385), issued to W. Gutenkunst for an improved "pulley block." In common with that of the appellant, it varies only from prior structures in the form and arrangement of the rope-clamping means, and preserves the old form of oscillating tubular arm to receive and be actuated by the free end of the rope. Instead of the gear-segment means of the appellant for clamping and releasing the rope, however, the appellee provides another form of clamping cam, pivoted on the oscillating arm (on the outer instead of the inner side of the arm, for the new adaptation), and having two laterally projecting pins for engagement with two slotted guide-plates—which are extensions of the sheave-block side-plates and thus "rigidly fixed" thereto—so that these means are adapted to engage for clamping or releasing the rope in response to the movements of arm and rope. The means thus combined performs the function, not alone of the appellant's device, but of several prior devices in evidence. Its departure from the intermeshing gear segments of the former, is unmistakable and undisputed; is substantial and not merely colorable. Rejecting the class of means from which the appellant's adaptation is made, the appellee has taken a means pointed out, for analogous object, in patent No. 212,747, issued to Rosecrants for "hay elevator"; and one which is much nearer the cam-operating means of the above-mentioned Green patent, No. 406,579, for a "hoist" than to the means of the appellant's patent.

Notwithstanding these distinctions in the means for clamping the rope, it is contended that the appellee infringes the first claim of the patent upon various propositions, which may be summarized in three: (1) That the invention authorizes generic claims and their interpretation accordingly; (2) that the appellee's means are invasions of the patent as the mechanical equivalent, although not "the specific gear construction"; and in any view, (3) that the appellee's slotted guide-plates or arms are the "operating device" of the mechanism, "rigidly fixed upon the sheave-block" within the express terms of claim 1.

1. The first proposition is unsound under the view above stated of the utmost scope of invention attributable to the device. Construed generically the claims would be invalid, and each claim in suit must either be limited to the structure specified in the patent, or be set aside as void.

2. With the invention thus narrowed, the doctrine of mechanical equivalents is not applicable in the sense of the interpretation sought, and it is unnecessary to consider whether the means of one and the other device are functionally such equivalents.

3. In the argument on behalf of the appellant there is much discussion by way of defining the so-called "operating device" in the respective structures in suit and in the prior references, in support of the twofold contentions that the patentee, Ferris, was the pioneer in the conception of such device "rigidly fixed upon the sheave-block," and that infringement is thus established. The means re-

ferred to in the patent as "an operating device" is unquestionable from the context. It is equally clear, however, not only that such means was merely one of the members and not the sole operating means in that or either of the other structures discussed, but that the patentee was not entitled to other than the specific means so attached to the sheave-block. As above remarked, the invention was not functional, nor of such character in any sense that a generic claim for such attachment is enforceable. Indeed, analogous provision distinctly appears in the Young patent, No. 524,015, granted in 1894. So the charge of infringement is without support in the fact that the appellee's guide-plates are rigidly fixed upon the sheave-block.

While the grant of the patent to Gutenkunst (No. 785,358), in conformity with which the appellee's device is made, is presumptive of differences which are substantial and not merely colorable (Loew Supply & Mfg. Co. v. Fred Miller Brewing Co., supra), we are of opinion that such distinctions are affirmatively established by the evidence. The decree of the Circuit Court accordingly is affirmed.

NOTE.—The following is the statement and opinion of the Circuit Court (Quarles, District Judge).

Statement.

This is a bill in equity brought by the complainants, based upon letters patent of the United States No. 584,340, granted to Henry L. Ferris, and now the property of the complainants, against the Milwaukee Hay Tool Company for infringement, praying an injunction and accounting.

The answer denies that complainants' patent involves a patentable invention, and avers that said several alleged improvements were the product of mere mechanical skill and the adaptation of previously known mechanical contrivances; that said alleged invention had been anticipated by the prior art; and the answer contains a large number of references in support of such averment, and denies infringement.

The complainants' patent was issued for an improvement upon the tackle hoist. The evidence discloses the fact that Smith (No. 325,983, September 8, 1885) was a pioneer in the sense that he provided a mechanism for operating a clamp by means of the free end of the rope. Many devices had been theretofore resorted to which presented the common features of a sheave-block, rope and pulleys, substantially as now constructed; but it was a decided advance in the art when Smith conceived the idea of controlling the clamping device by the free end of the rope. Smith pivoted his clutch or brake upon a pin rigidly fixed in the hangers above the sheave-block, and when the clamping device engaged the rope it was brought in contact with the pulley, which of course was free to move. It soon became apparent that the mobility of the pulley impaired the efficiency of the clutch, and Young, in his second patent, No. 524,015, August 7, 1894, and Rowland, in his patent No. 524,403, August 14, 1894, devised mechanisms to obviate the above defect, so that the clamping device might press the rope against a fixed, rigid arm. To accomplish this result, both Young and Rowland employed a link pivoted to the clamping device and also to the sheave-block, Rowland making his attachment at the top of the sheave-block and Young at the bottom of the same. During all this time the essential elements of the device, namely, the sheave-block, rope, pulleys, and the clamping device, were substantially the same, and operated in the same way, except only a difference in the means, whereby the clamp was brought in contact with the rope. At this point Ferris first came into the field, in 1897, and presented the same combination as in the prior art, except that he dispensed with the link used by Young and Rowland, and employed a gear-segment which was made integral with the sheave-block and

adapted to enmesh the teeth of the cam, and described by the patentee in his first claim as follows:

"The combination with a sheave-block, pulley and rope, of an oscillating arm pivoted to the sheave-block, having a guiding channel for the free end of the rope, a clamping device pivoted upon said oscillating arm adapted to clamp the rope-guide therein, and an operating device rigidly fixed upon the sheave-block, and adapted to engage the clamping device as the arm is oscillated, and operate the same to clamp or unclamp the rope, substantially as described."

The elements of the combination under his claim are described by complainants' counsel as follows: "First, a sheave-block; second, a pulley; third, a rope; fourth, an oscillating arm pivoted to the sheave-block and having a guiding channel for the free end of the rope; fifth, a clamping device pivoted upon said oscillating arm, adapted to clamp the rope-guide therein; sixth, an operating device rigidly fixed upon the sheave-block and adapted to engage the clamping device as the arm is oscillated and operate the same to clamp or unclamp the rope."

The first claim of the complainants' patent is alone involved in this litigation; it being conceded that there is no infringement as to the other claims.

Opinion.

The first question naturally presented by the record would seem to be whether the employment by Ferris of a gear-segment to impart an oscillating movement to the cam or clamping device involved the inventive faculty, or merely called for mechanical skill in adapting an old device to the other elements of the combination which are also old. In the view we have taken of the case it is not necessary to pass upon this question at this time. It having been brought to the attention of the court, during the argument, that another cause is pending here which will raise this question, we have concluded to leave it as an open question and pass on to the consideration of other propositions involved in the record.

It seems clear that the Ferris invention is in no sense primary or fundamental, but involves only an improvement in one feature of the device. The field was well occupied before Ferris entered it, and we find that there are at last three operative devices for hoisting tackle which are in successful operation, with little substantial difference, the pulley-blocks, pulleys, arm, and cam all mounted and arranged in substantially the same way as in the devices of complainant and defendant, and in all of them the rope is clamped against the rigid sides of the swinging arm. They differ only as to the means employed for rotating the cam to lock or release the rope. The complainants' device accomplishes no new result. It is not contended that it produces a better or more efficient result; but the contention is that by dispensing with one part, namely, the link and the two rivets, and by casting the sheave-block and gearing in one piece, there is a commercial saving which entitles the complainants' invention to favorable consideration. Under these circumstances the law seems to be well settled that, if the inventor "achieve merely a speedier or cheaper mode of operation in the means, only those changes in the details of the art or instrument which are essential to its operation in the speedier or cheaper mode are of the substance of his invention." (1 Robinson, § 310.) In other words, when an invention is merely an improvement on a known machine by a mere change of form or combination of parts, the inventor is only entitled to the specific form of device which he produces, and he cannot invoke the doctrine of equivalents to suppress other improvements which are not colorable invasions of his own. Morley Sewing Machine Co. v. Lancaster (C. C.) 23 Fed. 345; s. c. on appeal, 129 U. S. 263, 274, 9 Sup. Ct. 299, 32 L. Ed. 715.

In Ry. Co. v. Sayles, 97 U. S. 554, 556, 24 L. Ed. 1053, the court say: "But if the advance toward the thing desired is gradual and proceeds step by step, so that no one can claim the complete whole, then each is entitled only to the specific form of device which he produces, and every other inventor is entitled to his own specific form, so long as it differs from those of his competitors and does not include theirs." See, also, Knapp v. Morss, 150 U. S.

221. 230, 14 Sup. Ct. 81, 37 L. Ed. 1059; Miller v. Eagle, 151 U. S. 207, 14 Sup. Ct. 310, 38 L. Ed. 121; Avery v. Case Plow Works (C. C.) 139 Fed. 880, 886.

Construed in the light of these authorities, the complainants' first claim must necessarily be narrow, and cannot be broadened by the use of general language such as the inventor employs at the end of his specifications, "More or less variation in the form, arrangement and construction above described is possible, and I desire therefore, not to limit my invention by the above description of the preferred form in which it has been embodied."

It is difficult to see how the first claim can be substantially broadened without invading the prior art.

This brings us to the question of infringement. The defendant employed all of the old elements precisely as Ferris did, except only that he discarded the gear-segment and teeth, and had cast upon the lower end of the sheave-block what he calls "descending arms," and imparted oscillating motion to the clamping device by means of a pin and slot arrangement in such descending arms. If the invention of Ferris were what is known as a "pioneer," it would be questionable whether the device of the defendant were not a mechanical equivalent; but as we have seen, Ferris, being merely a detail improver, is entitled only to the doctrine of equivalents so far as colorable evasions of his invention are concerned. The defendant appears to have embodied substantially the slot and pin device of Green, No. 406,579. At all events, the means employed are so different from the mechanism of Ferris, that the court is constrained to find that no infringement has been shown of the complainants' device, and for this reason the bill must be dismissed.

WOLD v. THAYER & CHANDLER et al.

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

No. 1,245.

1. PATENTS—ANTICIPATION—AIR-BRUSH.

A patent for an air-brush used for making pictures, in which by a combination device liquid colors are atomized and thrown upon a paper or canvas by a jet of compressed air, was not anticipated by oil burners having concentric oil and steam nozzles; invention being required at least to adapt the principle to use in the different art.

2. SAME—VALIDITY—ESTOPPEL BY ASSIGNMENT.

A patentee who has assigned his patent is estopped to deny its validity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 183.]

3. SAME—OPERATIVENESS OF DEVICE—IMPERFECTIONS IN DRAWINGS.

The drawings of a patent are not required to be working plans, but are merely illustrative, to be read in connection with the specification and claims, and a patented device will not be held inoperative merely because of imperfections in the drawings in respect to the dimensions or relative position of parts of the mechanism.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 140, 170, 171½.]

4. SAME—INFRINGEMENT—AIR-BRUSH.

The Burdick patent, No. 474,158, for an air-brush and the Wold patent, No. 555,669, for improvements thereon, *held* not anticipated, valid, and infringed.

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

For opinion below, see 142 Fed. 776.

Patent No. 474,158, for an air-brush, was issued on May 3, 1892, to appellee Burdick, and he gave an exclusive license to appellees Thayer & Chandler, who since 1893 have been making and selling air-brushes. Appellant Wold from 1893 to 1903 had charge of manufacturing air-brushes for Thayer & Chandler. While so employed Wold made some improvements in the Burdick air-brush, for which patent No. 555,669, March 3, 1896, was issued to him, and was by him assigned to Thayer & Chandler. Since leaving Thayer & Chandler's employment, Wold has set up a business in air-brushes; and the court below found that he was infringing certain claims of each patent.

Burdick patent:

"1. The combination, in air-brushes, of an open receptacle for ink or paint conical at one end and perforated for delivery of the said ink or paint, a valve to close the said perforation and adapted to be operated by hand, a cap covering the conical end of the body and forming an air-space between and perforated in line of said delivery, and means for connecting the said air-space with a source of supply for compressed air, substantially as described.

"2. The combination, in air-brushes, of a receptacle for ink or paint, perforated for delivery thereof, and open to atmospheric pressure from the rear, a finger-valve for the said perforation, and a suction-nozzle forward of the perforation, substantially as described.

"8. The combination, in air-brushes, of a paint-receptacle perforated for delivery, a valve for the perforation, a suction-nozzle forward of the delivery, a connection between the nozzle and compressed-air source, a valve for the said connection, and a finger-lever hung for two movements, substantially as described, whereby the operator's finger may make one movement to control the air-supply and another movement to control the paint-delivery.

"9. The combination, in air-brushes, of a receptacle for paint having a delivery-aperture, a suction-nozzle in front thereof, an air-tube connecting with the nozzle, valves for the delivery-aperture and air-tube, and an operating-

lever fitted to play both longitudinally and transversely to the body and connected with the valves, substantially as described."

Wold patent:

"6. In an air-brush, the combination with a needle, of a tube surrounding the same, an annular opening for the paint being formed between the needle and the tube, a second tube surrounding the first, an annular opening for the air being formed between the two tubes, the end of said first-mentioned tube being extended beyond the end of the second-mentioned tube whereby the annular opening for the paint occupies a position in advance of the annular opening for the air; substantially as described.

"8. In an air-brush, the combination with a needle, of a tube surrounding the needle, means for adjusting the needle to cause the same to project from the tip a greater or less distance, and a cap extending beyond the extreme adjustable position of the needle to prevent the point of the needle from coming in contact with the surface to be painted; substantially as described."

The contentions are that the Burdick patent is void because the device is inoperative, that both patents are void because they were anticipated and were wanting in invention, and that neither patent was infringed.

The record exhibits the following prior patents: 248,579, Curtis; 256,852, Peeler; 285,325, Walkup; 298,138, Walkup; 310,754, Walkup; 311,631, Armstrong; 324,005, Burrell; 345,659, Reichardt; 402,898, Burdick; 426,040, Moore; 434,105, Burdick; 474,157, Burdick; 488,646, Avery; 528,686, Overman & Woolston.

Samuel W. Banning and Thomas A. Banning (Ephraim Banning and Walker Banning, on the brief), for appellant.

Dwight B. Cheever, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

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

Burdick was not the first to devise an instrument for blowing pigment upon paper or canvas. In 1881 Curtis made one substantially like the atomizer used for medicinal purposes, with the nozzles for liquid and for air exterior and nearly at right angles to each other. Armstrong in 1885 by an air-nozzle blew paint or ink from the point of a pen, which could be spread to increase the flow. Burdick himself (Nos. 402,898, 434,105 and 474,157) made endeavors along these same lines, but neither form has proved successful. Peeler and Walkup tried a needle reciprocating continuously through a paint receptacle so as to feed at each stroke a little paint in front of an air-jet. Walkup's final device of this kind (No. 310,754) met with some success; but the Burdick brush of the patent in suit seems to have supplanted it completely.

Burdick was the first to make an air-brush on the plan of concentric nozzles; and the primary character of his invention is not to be destroyed by references to patents for oil-burners (Burrell and Moore) in which an oil-nozzle and a steam-nozzle are concentric. Of course, the oil-burners cannot be used in painting pictures. And, if the arts are analogous enough to charge Burdick with notice of the concentric nozzles in oil-burners, nevertheless it required invention to adapt them to co-operate with other elements, not present in the oil-burners, so as to produce Burdick's unquestionably new combination.

The claim that the brush of the Burdick patent is inoperative is founded upon the contentions, first, that the patent must be held to be

limited to a structure in which the air-nozzle is forward of the paint-nozzle; and, second, that no brush of this type can be operative unless the nozzles, in cross-section, are exactly in the same plane.

Nothing in the prior art compels the limitation. So the question is whether Burdick unnecessarily restricted his claims. Whatever may be said of the other claims, we think the first is not obnoxious to the objection. In that the nozzles are described as "a receptacle for paint conical at one end and perforated for the delivery of the paint" and "a cap covering the conical end of the body and forming an air-space between and perforated in line of the said delivery." Nothing is found in the specification that prescribes the absolute or the relative sizes of the orifices; and, of course, the drawings are merely illustrative, not working, plans. If the orifices are of the same size, the air-discharge is in front of the paint-discharge. But it is evident that the orifice in the air-cap could be cut so that the discharges would be in the same plane.

The second contention is based on appellant's testimony. But his theory is upset by the exhibits and by his own acts in connection with the patent he procured. The air-brush is a small implement, and in determining the relative positions of the nozzles microscopes and micrometers are used. Thayer & Chandler were merchants of artists' supplies, and they employed appellant as an expert in the art to make air-brushes for them under the Burdick patent, which they had purchased. The brushes that were put out under the Burdick patent were very successful. In manufacturing them appellant discovered that, if the orifice in the exterior air-cap was cut back to a point where the paint-discharge was in front of the air-discharge, the brush would work better. He obtained a patent covering that arrangement. By his manufacture under the Burdick patent and by the assignment of his own patent, appellant put himself in a position where he should not be heard to deny the operativeness of the Burdick brush or an interpretation of the Burdick patent which includes all relative positions of the nozzles from any distance of the air-nozzle in front of the paint-nozzle back to a point where they are in the same plane. And, being the assignor, he cannot be permitted to assail the validity of his own patent. Siemens-Halske Electric Co. v. Duncan (C. C. A.) 142 Fed. 157.

Outside of colorable changes, such as reversing movable parts, the claim of noninfringement rests on appellant's insistence that in his brushes the nozzles are always in exactly the same plane, and that this construction is not within either patent. If appellant was uniformly successful in carrying out his declared method, he would infringe only the first claim of the Burdick patent. But the exhibits seem sufficiently to prove that sometimes he fails. Thereby he infringes, according to the direction of his miss, either the other claims of the Burdick patent or the claims of his own.

The decree is affirmed.

FIELDING et al. v. CROUSE-HINDS ELECTRIC CO.

(Circuit Court, S. D. New York. July 5, 1906.)

PATENTS—INFRINGEMENT—RECEPTACLE FOR INCANDESCENT LAMPS.

The Fielding patent, No. 714,290, for improvements in receptacles for incandescent lamps covers a combination of old with two new elements, and, while it must be conceded patentable invention, taking into consideration the immediate acceptance of the device by the public, it must be strictly construed and limited to the precise combination shown in view of the prior art. As so construed and limited, *held* not infringed.

In Equity. On final hearing.

William M. Stockbridge and Hubert Howson, for complainants.
Arthur E. Parsons and William A. Redding, for defendant.

HAZEL, District Judge. The invention relates to improvements in receptacles for incandescent lamps, plugs, and other similar electrical apparatus. The letters patent, No. 714,290, which the defendant corporation is alleged to have infringed, were issued to Philip H. Fielding on the 25th day of November, 1902. The defendant H. T. Paiste Company is licensee under said patent. A patent for an electrical receptacle had previously been issued to the patentee on October 23, 1900, and the patent in suit is alleged to be an improvement thereon. The defendant's alleged infringing devices consist of a so-called electrical receptacle and an electrical rosette. The former comprises stationary lamp socket parts to support the lamp and supply to it the electric current, while the latter is a device from which a flexible cord containing two circuit wires leads to a socket having attached a hanging lamp. The invention in suit is concededly adaptable to both forms of apparatus. Each is capable of attachment to a wiring molding, and, as the patent in terms mentions receptacles or similar electrical devices, it is immaterial that neither the specification nor the claims particularize the contour or function of what is technically known as a "rosette." The patentee, acknowledging as old certain features embodied in his combination, substantially states in his specification that in his earlier patent he claimed and described a receptacle consisting generally of an inner part of porcelain to which the contact devices are attached, and an outer part (also of porcelain) which operates as a shield and completely incloses the inner part. In speaking of the advantages of the earlier patent, he says:

"The conductors are connected with it without cutting and splicing them, as was before necessary; the operation consisting simply in removing a portion of the insulation and looping the wire behind the binding-screw. To adapt this device for a wiring-molding, with which it was to be most commonly used, the inner part carrying the contacts was made of the same or less width as the space between the grooves for the conductors in the molding, and the binding screws, one on each side, were located immediately above or opposite the grooves, so that the conductor would simply have to be lifted from the groove and brought into engagement with the binding-screw."

The prior device, however, was not wholly free from objectionable construction. The open space between the binding-screws and wooden

molding endangered the latter to fire from the sparking of the electricity at that point. In this admitted state of the art the patentee claims to have improved and overcome the objectionable features of the earlier construction. Upon this point the patent in suit states:

"In my improved receptacle I have therefore provided a construction whereby the continuous wire can be looped, as before, through the receptacle, and yet have the space between the binding-screws and the face of the molding closed by a shield of porcelain or other insulating material of which the receptacle is made."

To fully comprehend the chief differences between the Fielding patents it will be helpful to further briefly state the asserted advantages of the prior structure: First, all the metallic parts were inclosed by a porcelain cover, and the danger of fire or shock was thereby claimed to be avoided; and, second, the parts of the receptacle were shaped to utilize a channel formed in the cover which closely fitted the base piece of the inner portion directly over each groove in the molding. Contact between the conductors and the binding-screw, which was adjusted laterally from the socket, was made by raising or deflecting the conductors over the grooves in the molding and clamping them to the binding-screw. Thus direct attachment of the main conductors to the receptacle was enabled, and the branch wire connection, which was necessary in the prior art to make the electrical contact, was obviated. Notwithstanding the improvements claimed the small spaces between the binding-screws and the wiring-molding at the point of electrical contact were left unprotected by insulating material, and therefore danger existed of ignition by electric sparks. To overcome this difficulty, and provide a method of insulating the unprotected spaces referred to, the patentee widened the inner part of the porcelain receptacle on both sides of its base between the binding devices and the face of the molding and closed the unprotected passages or channels, leaving in place thereof two openings which merely afford space or passageway for the electrical conductors. The conductor is lifted from the groove to the binding-screw, where it is looped over the ends of the shielding lip, which, as already observed, projects laterally from the base. The openings in the bottom of the receptacle, at the extremities of the lips, take the form of grooves and hold the conductor, which, after being clamped by the binding device, is led through the opening in the other end of the receptacle.

Having sufficiently described the invention in suit and pointed out the differences in the Fielding patents, the claims in controversy may be considered. The patent has seven claims; the first, second, third, and fifth being involved. As typical thereof it seems necessary to set forth in full only the third:

"(3) The combination of a wiring-molding and an electric appliance adapted to be applied thereto, the latter consisting of an inner and an outer part, the inner part being adapted to be placed between the grooves of the molding and provided with lateral lips extending over said grooves, binding devices carried by said inner part above the lips and an opening at each end of a lip to admit the wire in the groove to the appliance."

Claim 1 broadly provides for a continuous closed passage from one opening to another. The second claim states that the isolating shields or lips are interposed between the opening devices and the face of the molding. The essential element of the fifth claim specifically resides in the connecting openings or passages in the edges of the bottom face of the receptacle which lead through the interior of the apparatus and form a continuous passage for the electrical conductor. In short, the claims, as counsel for complainant concedes, are for a combination of old elements including essentially as new elements the shields or lateral lips on the base of the receptacle, together with the inclosing cover which has openings or passways in the form of grooves, as specifically mentioned in claim 3. Accordingly our attention may be directed to these additional features or new elements, not forgetting, however, that the claims are for specific combinations to produce a new and useful result.

The principal questions for decision are whether in view of the prior art the claims disclose a patentable invention, and, if so, are they sufficiently broad in scope to merit the application of the doctrine of equivalents? This suit is brought upon the later patent; infringement of the earlier not being claimed. Any separate features, therefore, which were embodied in Fielding's earlier patent, though also found in defendant's structure, cannot be considered to establish infringement except as found in combination with the new elements disclosed in the later invention. Such separate features are now old, and, as to them, standing alone, the patent in suit lacks novelty. The patent must be limited to the specific combination described. Underwood v. Gerber, 149 U. S. 224, 13 Sup. Ct. 854, 37 L. Ed. 710; Doig v. Morgan Machine Co., 122 Fed. 460, 59 C. C. A. 616.

Upon the question of novelty of the invention the defendant's expert witness specially places stress upon the prior patent to Fielding, No. 660,154, patent No. 489,682, to Metzger, the Edison receptacle, Prior receptacle No. 9,171, patent No. 369,889 to Stoddard, No. 315,673 to Smith, No. 646,008 to Pfatischer, and the German patent, No. 60,924, to Schwarzlose; and defendant insists that the patent in suit is a mere aggregation of the elements of prior patents. That the improvement resulted in a more ornamental, convenient, or perfect receptacle than before known is not disputed, but this fact is not enough if it lacks patentable novelty.

The question whether the shielding lips of the patent are within the field of patentable invention, or whether their usefulness was perfectly obvious to persons skilled in the art, is thought somewhat doubtful. On this point the testimony of the expert witnesses for complainants and defendant is widely discrepant. The mere addition of lateral lips extending over the grooves and the remodeling of the channels of Fielding's prior device to afford protection from electric sparks, and then leading the conductors continuously through the interior of the receptacle, were, perhaps, slight advances in the art. The testimony indicates that the improvements, though narrow, were quickly appreciated by the public, and therefore any doubt which may exist regarding patentability of the claims embodying the lateral ex-

tension of the base may fairly be resolved in favor of the patent. Thomson-Houston Elec. Co. v. Ohio Brass Co. (C. C.) 130 Fed. 545; Krementz v. S. Cottle Co., 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558. But the prior state of the art constrains me to limit the claims to the precise construction shown. The proofs are that the base, cover, means for attaching the molding, the lateral arrangement of the binding screws to enable hitching the bared conductors thereto, in combination and separately considered, were familiar to the art, and, indeed, were disclosed in the prior Fielding patent. In the patent to Stoddard is shown a rosette having contact connections similar to those used by the defendant: that is, the contacts between the bared wires and the fastening screws are made on the top of the base, which extends entirely across the molding. The conductors run through grooves in the receptacle onto the molding, and a closed passage is formed between the upper and base portions of the receptacle; the binding screw being located in the passages. Manifestly, therefore, it was not original with the patentee to construct closed passages in the interior of an electrical device of the character described in the specification, by means of which the conductors could be continuously led through the interior thereof. True, the openings in the Stoddard structure are not at the bottom face of the receptacle as in that of complainant, and the wires are partially exposed, but these features are not such substantial differences as to warrant broadening the claims to include the defendant's rosette.

A preponderance of the evidence would seem to support the view that the patent in suit is an improvement on the earlier Fielding device only in the two elements pointed out, viz., the lateral lips and the closed passages in the interior of the receptacle; the latter element being similar to that shown by the patents to Stoddard, Pfatischer, and Smith, and obviously attaining the same result. Accordingly the claims must be strictly construed.

This brings me to a consideration of the question whether the defendant's structure infringes the combination which includes as an element the shield of porcelain or lateral lips, e, e. In the defendant's structure the wires are not attached laterally to the binding-screw, which is an important feature of the patent in suit, but extend over the sides of the base and rest in a small narrow groove along the surface to the contact point. In other words, the conductors are carried over the top of the base or insulating block and fastened to the plates a short distance from the ends, and thence they pass down the jotted or notched ends, through the receptacle, to the molding. In view of a strict construction of the claims embodying this feature, it is not thought that the sides of the base of defendant's structure along which the conductors extend are the equivalent of the projecting lips of the patent in suit. The exhibit structures of Metzger and Schwarzlose which disclose a socket arrangement are similar to the Fielding patent in suit, and evidently suggest the lateral projection for insulating the wires at the point of contact. Though the extension described in the Metzger specification refers to an elevation in the center of the base, the lateral extension is produced by making

the central extension smaller than the base, and hence the same result is attained as claimed in the device in suit. The Metzger and Schwarzlose patents, and those to Smith and Pfatischer, though of prior dates and relating to the art under consideration, were not set up in the answer of the defendant, and can only be considered to limit the claims in suit. Jones v. Cyphers, et al. (C. C.) 115 Fed. 324; Waterman v. Shipman, 55 Fed. 982, 5 C. C. A. 371.

For the foregoing reasons I am of the opinion that the claims must be limited to the specific combinations described, and that the defendant has not appropriated the complainant's structure.

The bill is dismissed, with costs.

ARNOLD MONOPHASE ELECTRIC CO. v. WAGNER ELECTRIC MFG. CO. et al.

(Circuit Court, S. D. New York. September 19, 1906.)

PATENTS—SUIT FOR INFRINGEMENT—TITLE OF COMPLAINANT.

A contract between a patentee and complainant's assignors construed in the light of the correspondence between the parties, and *held* not to operate as an assignment of the legal title to patents, because of conditions therein which were precedent to the becoming absolute of the assignment, and which were neither performed by the assignee nor waived, so that complainant was without title to support a suit for infringement against subsequent licensees of the patentee.

In Equity.

Charles E. Hughes and Harold Binney, for complainant.

Lawrence E. Sexton (Albert C. Fowler, of counsel), for defendants Wagner Co. and H. A. Wagner.

HAZEL, District Judge. This is a suit in equity to recover for the infringement of United States letters patent, Nos. 543,836, dated August 6, 1895, and 562,365, dated June 23, 1896, issued to Engelbert Arnold, inventor, of Zurich, Switzerland, for single phase alternating current motors. The complainant claims title to the inventions by assignment from the patentee dated January 2, 1896. The defendants challenging complainant's title assert the rights of the defendant Wagner Electric Manufacturing Company, as exclusive licensee, under license dated December 2, 1898, from the same source. The defendant Herbert A. Wagner, formerly an officer and director in the defendant company, is charged with instigating the infringement, in that, with notice of complainant's prior rights, he assisted the Wagner Company to acquire the inventions in suit.

Two questions are involved here: First, was the unrecorded assignment of the patents from Arnold to J. Paul Gaylord and Lewis R. Schultz (complainant's assignors) valid in law against all persons except purchasers in good faith for value without notice of complainant's rights; and, second, assuming the legal title of the patents in complainant, was such title void under section 4898, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3387], as against the Wagner Company, an exclusive licensee?

According to the statute an assignment of a patent is void as against any subsequent purchaser or mortgagee without notice, unless it is recorded within three months from its date. Considerable discussion was had at the hearing as to whether the word "purchaser," used in the recording act, includes an assignee or licensee, having such rights as were granted by the patentee to the defendant company. But, in the view taken by the court of the assignments in question, it is not deemed necessary to pass upon this point. A decision upon the issue of complainant's legal title is thought to depend upon the construction of the agreements aided by the intendment of the parties as shown by the proofs. The correspondence passing between Prof. Arnold and complainant's predecessors must be read and considered. In fact, each step of the entire transaction must be carefully weighed to the end that the controversy terminate in accordance with equitable principles. Care must be had that the consequences which follow the application of the extraordinary rights of a court of equity are not inflicted on the wrong party in interest. The proofs warrant the view, I think, that, because of the default by complainant's predecessors in complying with the conditions of the contract, the patentee had such an interest in the subject-matter of the controversy as to merit serious consideration of his asserted right to convey the patents to other persons.

There is considerable indefiniteness in the Arnold-Gaylord-Schultz transaction. For instance, the provisions of the assignment in relation to the payment of the "full amount already agreed upon" is not entirely free from ambiguity. What is the fair construction of the agreement? Did Prof. Arnold by the assignment completely and unconditionally divest himself of his American rights in the patents therein described? The problem presented is not free from difficulty. To comprehensively understand the relations of the parties to the agreement, and what they actually intended, it is necessary to state in substance portions of the option agreement and the assignment. In the first agreement, dated January 2, 1894, between Arnold and the Pennsylvania Electric Engineering Company, which concededly was an option to purchase the Arnold patents, it was agreed that in consideration of the assignment $4,000 in cash would be paid, and that a company would be formed and $20,00 of its capital stock issued to the patentee. The option remained in force for one year, and the sale of the patents not being consummated thereunder, the same was extended in writing until January 2, 1896. Thereupon another agreement (the assignment in question) was entered into between patentee and Gaylord and Schultz, who were substituted in place of the Pennsylvania Electric Engineering Company, and subsequently assigned to the complainant. In the latter assignment, which was not recorded until after the grant of the license by Arnold to the defendant company, the terms and conditions of the option agreement were "renewed, * * * except only as modified or altered by the provisions of this agreement and the attached addition and amendment hereto." The language quoted is contained in the first and sixth pargraphs of the assignment, thus clearly indicating, I think, that it was not intended to substitute the later agreement for the earlier, but merely to modify the same in certain

particulars. By the second clause, in consideration of the payment of $800, is transferred or assigned the Arnold United States patents and improvements, together with all applications for patents relating to alternating current motors, but at the end of the paragraph are these words:

"Provided, however, that said assignment shall not take effect as an absolute assignment of said patents and application until the full amount already agreed upon shall have been paid to the party of the first part by the parties of the second part."

This language would seem to modify and restrict the otherwise unconditional grant of the patents. By the third provision it is agreed that the patentee will deliver to the parties of the second part a complete 60-cycle motor, and will supply necessary working drawings to enable the assignees to manufacture any of the motors covered by the patents; that upon receiving the 60-cycle motor, and within six months thereafter, tests were to be made and completed by the parties of the second part, to ascertain whether such motor was suitable for commercial uses, and, if the same was found impracticable, then the assignees were to advise the patentee, pointing out the defects. It was plainly agreed that before the expiration of the six-months period Gaylord and Schultz would either accept said motor and pay Arnold the sum of $1,200, or notify him of the inefficiency of the motor from a commercial standpoint, giving a complete explanation thereof. It was further provided that, if the motor should prove practicable or efficient for commercial purposes, then the parties of the second part were to immediately organize a company with a capital stock of not less than $200,000 or more than $500,000, and deliver to the patentee one-tenth of the same. The title to the motor was to pass by assignment from Arnold to the parties of the second part, including the right of application for obtaining patents thereon in the United States, upon receiving the sum of money mentioned in paragraph 3. The fifth provision reads as follows:

"The parties of the second part agree that if, after acceptance of said 60-cycle motor, they do not proceed with the formation of said corporation or company and successfully develop said inventions to commercial advantage within 12 months from the acceptance of said 60-cycle motor, then, at the option of the party of the first part, this agreement shall cease and determine, and said patents, and all rights and interest therein, shall revert and be reassigned to the party of the first part, his heirs, executors, administrators, and assigns."

Complainant claims that, the phraseology of provision 2 being in form an absolute assignment, the condition in relation to the payment of $1,200 on delivery of the 60-cycle motor was a condition subsequent, the payment of which was enforceable in an action at law. The suggestion is unimportant, and need not be considered; it appearing by the evidence that the amount was actually paid by the parties bound. Such payment under the contract was for the motor, and not as a substitute for the consideration of the assignment. It is insisted, however, by complainant, as I understand the argument and brief submitted, that the provisions of clause 5, whereby it was agreed that, in case a com-

pany or corporation was not formed within the limited period, the agreement at Prof. Arnold's election should cease and determine, and the patent rights revert and be reassigned to him, was voluntarily waived; further, that the acceptance of the motor was a condition precedent to the payment of said $1,200 by the parties of the second part; that such payment was made without "acceptance" of the motor, and accordingly the period limited by the assignment for the organization of a company or corporation was suspended and remained in indefinite abeyance; that the original amount agreed to be paid under the option agreement, namely, the sum of $4,000, was also either waived, or, in the alternative, the provision by which Gaylord and Schultz were required to pay the sum of $1,200 upon their acceptance of the motor was substituted therefor.

From a careful examination of the record I conclude that there is neither justice nor logic in these propositions or claims. Messrs. Gaylord and Schultz were bound to accept the motor within six months from its delivery to them, or to reject it, unless such period was extended or waived by the patentee. The motor was delivered at Philadelphia on April 16, 1896, and the six-months period expired on October 16, 1896. True, the time within which the agreement should have been performed was not definitely stated, and, indeed, there is some inconsistency expressed in the assignment in relation thereto, yet the reasonable import of the language employed, considering the agreement in its entirety, would seem to have given complainant's predecessors 12 months after acceptance of the motor to form a company and to complete the arrangement by transferring the stipulated portion of the capital stock. Furthermore, the assignment was accompanied by a condition precedent—that the assignees "proceed with the formation of said corporation or company and successfully develop said inventions to commercial advantage within 12 months from the acceptance of said 60-cycle motor."

The contention, as already intimated, that the motor was never accepted, is specious. There can be no unfathomable meaning of the term "accepted" in connection with the motor in question, which, as the evidence shows, was commercially satisfactory and in fact was paid for and its possession retained by complainant's predecessors. In a letter to Prof. Arnold, under date of November 16, 1896, Mr. Gaylord, after stating in effect that satisfactory tests of the motor had been made, and that it was not thought expedient by his associates to then undertake the organization of a corporation, proposed depositing the $1,200 mentioned in the assignment with a firm of bankers; such payment and deposit, however, not to be construed as an acceptance of the motor, upon which subject he writes that he will express himself later before the extended time expires. Prof. Arnold replied as follows:

"As the time at which you must decide definitely whether you will pay the sum of $1,200 and fulfill the contract expires on the 1st of January, 1897, I declare myself satisfied with your proposition under the following conditions: (1) You deposit with the banking house of E. Koelle, in Karlsruhe, in Baden, the sum of $1,200, with the condition that this sum must be paid to me on July 1, 1897, at the latest. If, however, before the 1st of July, 1897, you make a written declaration that I get back the free right of disposal

of all the patents mentioned in our agreements of January 2, 1894, and February 27, 1896, and that you waive all further claims, then the deposit of $1,200 shall be paid back to you. (2) These $1,200 take the place of the $1,200 mentioned in section 3 of the agreement of February 27, 1896. In all other respects the entire agreement and also section 3 remains in force."

To this letter complainant's predecessors made no reply. On January 28, 1897, Prof. Arnold wrote:

"As I have been without a reply to my last letter until now, I request you to let me know at once whether you will decide upon the building of the motor and the incorporation of a company or not. In the latter case I would decide to turn my patents to account in another direction."

On February 12, 1897, Mr. Schultz replied as follows:

"Acknowledging your letter of January, would say we are now engaged in making arrangements to build a number of motors, and will write you very soon in detail an answer to your letter, which I think will be satisfactory to you."

In the letter of May 7, 1897, to Prof. Arnold by J. Paul Gaylord, the writer states that he has contracted with the Electro-Dynamic Company for the manufacture of 20 experimental motors. No reference, however, is made to the incorporation of a company or the payment of the $1,200. On April 15, 1897, a communication was addressed to Prof. Arnold, stating in effect that 5,000 marks had been remitted to Messrs. G. Muller & Sons, to be paid to the patentee on July 1, 1897—

"If, after test by sale of 20 of your motors on the market here (as recently proposed by us and consented to by you), their commercial value shall warrant the formation of the company, which we are most anxious to organize for their manufacture and sale. We send the M5,000, as we previously said, as an evidence of our good intentions. As stated in our letter, the above payment is not to be considered as a present acceptance of the motor, upon which we will express ourselves on or before the extended time expires, after above test."

To this communication Prof. Arnold replied on July 30, 1897, that he was "willing to extend the option on the patents stated in the agreements of January 2, 1894, and January 2, 1896, under the conditions named in said agreements, to January 31, 1898." Thus it appears that the performance of an important covenant contained in the assignment was extended by the patentee until January 31, 1898. The letters of Prof. Arnold seem to strictly adhere to the performance of the covenant which bound the assignees to develop the motor, organize a company, and issue to him the capital stock agreed upon. If the letter of November 16, 1896, to Arnold, and his telegraphic reply expressing satisfaction with the proposed modified conditions, alone were to be considered to ascertain the intent of the parties, perhaps complainant's contention that Arnold had waived the covenant relating to the acceptance of the motor and to the formation of the company, might be persuasive. It will be observed, however, that the letters of Prof. Arnold lay stress upon a strict compliance with such covenants. There is some indefiniteness in the correspondence, but the intention gathered from the instruments and subsequent communications from which I have quoted, certainly preclude the claim that

the pertinent conditions of the agreement, to which reference is herein made, have been waived or abandoned.

The point is urged that the title conveyed was absolute, notwithstanding it may have been subject to reassignment for nonperformance of certain conditions. The authorities cited (D. M. Sechler Carriage Co. v. Deere & Mansur Co., 113 Fed. 285, 51 C. C. A. 242, and Boesch v. Graff, 133 U. S. 697, 10 Sup. Ct. 378, 33 L. Ed. 787) to uphold this contention are not in point; they being the result of equities arising from a different state of facts.

Nor was the payment of the sum of $4,000 waived by the patentee, as contended by complainant. Such sum was part of the consideration for the assignment. It is true that in the correspondence passing between the parties this sum is nowhere mentioned, and Prof. Arnold testified that he did not know whether the sum of $1,200 was substituted therefor or whether it was in payment of the motor. In the letter dated November 30, 1896, Prof. Arnold states in substance that the amount which the assignees propose to pay in their letter of November 16, 1896—i. e., $1,200—is to take the place of the amount mentioned in paragraph 3 of the agreement. However, the significance of the proviso contained in clause 2 of the assignment, read in connection with the first and sixth provisions, cannot be ignored, and leaves little room for doubt that in this respect the terms of the option were left unaltered.

The proofs show that the conditions imposed by the agreement, and to which reference has been made, were not performed by complainant's predecessors, and the complainant cannot equitably enforce the rights granted by that agreement. As no subsisting title to the Arnold patents in controversy was acquired by complainant's predecessors, the title to the same remained in Arnold, and after their default he possessed the right to convey the patents to other parties.

The complaint must be dismissed, with costs.

GUNN et al. v. BRIDGEPORT BRASS CO.

(Circuit Court, S. D. New York. July 5, 1906.)

1. PATENTS—ANTICIPATION.

A patent is not anticipated by prior patents for devices which might by slight modifications have been made to perform the functions of that of the later patent, where it does not appear that the patentees had in mind their use or adaption to accomplish such result.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 81.]

2. SAME—INFRINGEMENT—CARD RECORDS.

The Gunn patent, No. 583,227, for a system of card records, claims 1, 2 and 3, were not anticipated, and cover a meritorious improvement over prior systems which involved invention. Also *held* infringed.

In Equity.

Gifford & Bull and Roberts & Mitchell (Livingston Gifford and Odin Roberts, of counsel), for complainants.

Morris W. Seymour and Fred L. Chappell, for defendant.

HAZEL, District Judge. This bill in equity is based upon the alleged infringement of claims 1, 2, and 3 of letters patent No. 583,227, dated May 25, 1897, issued to James N. Gunn, for an improvement in card records. The complainants, Gunn & Stanford, are the owners of the patent; the Library Bureau being exclusive licensee under the same. The proofs show that the patentee conceived the invention in March, 1892, and disclosed the same to others. He cut out by hand a set of record cards in the shape or contour described in the specification and afterwards endeavored to have a supply cut by machinery, but special dies were necessary for this object, and, owing to lack of finances, he was unable to then exploit or patent the invention. The date of invention, therefore, may be considered to have been in the month of March, 1892. The claims relate to a series of record or contour cards, in combination with division or index cards, each card being provided with a projection or so-called "tab," depression, or other distinguishing feature or contour at their upper edges; the distinguishing portions being differently positioned on said cards, whereby they may be collected and suitably arranged into distinct groups or subrecords. The novelty of the invention apparently consists in the arrangement of the record cards in longitudinal series and their classification laterally by means of tabs. The cards when assembled and in combination with the index cards are usually placed in a rectangular drawer or box, and held loosely upon a removable rod extending lengthwise of the receptacle. The cards are ordinarily used to conveniently and systematically enter thereon data, names, accounts, or information desired for ready reference. Claim 1 reads:

"1. A series of record cards distinguished in groups by having distinguishing portions differently positioned on the cards of different groups, similar distinguishing portions being similarly positioned on all of the cards of the same group, combined with division, or index cards arranged at intervals there through as desired, whereby corresponding records may be seen by observing the similar distinguishing portions falling longitudinally in line one behind the other, in whatever order or however arranged the cards may be, substantially as described."

Claim 2 epitomized describes an arrangement of the cards relative to a plurality of groups of records; each group being easily recognized or selected by means of the location of their respective distinguishing portions, as stated in the claim, thus enabling ready use of the cards in connection with the system of indexes. Claim 3 is broadly for the record cards having the contour described in the specification, viz., cards provided with projections, depressions, or other distinguishing feature along their edges, irrespective of serial division cards. The fourth claim, which is not involved, relates to cards of different color to further distinguish the subject of the record. The single defense urged is that the claims in controversy are invalid. Formerly in trade and commerce a reference book or series of pages with alphabetical indexes, or series of cards with guide cards having projections at their upper edges, were used for the purpose of collecting data, facts, and information, the use of which necessitated turning over the pages and often involved an examination of a large number of pages or cards to ascertain the facts or information written thereon. Division cards

with projections at their upper edges were old. Cards with clipped corners were also familiar at the date of the invention. The patentee, after briefly describing and acknowledging the prior art in explanation of its inefficiencies, says:

"For many purposes, however, a subdivision or classification carried one or more steps beyond what is possible with the usual division-cards is desirable, such, for instance, as subdividing one or more times the cards referred to; but such further subdivision has heretofore been considered impracticable, because the usual division cards, constituting the only heretofore recognized means of grouping or subdividing a card record, cannot be used to advantage, owing to the absence of any distinguishing feature or features over and above the record cards other than the one of their greater height. In other words, the usual division cards can be used to any extent for any single kind of subdivision, but never for more than a single kind of subdivision in the same record."

Hence the object of the invention was, first, to provide a method for subdividing the subdivisions and make them easily accessible and distinguishable one from another, so that a multiplicity of records relating to different matters could be kept; and, second, to arrange the cards so that a record, auxiliary to the main record, is maintained regardless of any writing on the cards, this being accomplished by the patentee's method of positioning the cards bearing distinguishing marks. By the method adopted for positioning a large number of cards provided with projections or tabs on their peripheries, the user of the card record at a glance down the row of classified cards, is enabled to find a tabulated subject without examination of the face of the card. And this is accomplished even though the tabs or projections are located in different positions on the cards; the entire arrangement being such as to permit the cards with projections of like position to come in position behind each other in parallel alignment. To facilitate and enlarge the usefulness of the general plan, movable guide or index cards, differently shaped and easily distinguished from tab cards, though also provided with projections, are used as an index to alphabetical or numerical recording. Their function is quite different from that of the tab cards. They serve merely as a medium for separating or subdividing portions of the record cards, while the tab cards indicate the tabulated subject of the individual or record cards. The essence of the invention rests in the contour or profile of the cards containing the distinguishing feature to which attention has been directed and the manner of positioning them. The prior art is differentiated from the arrangement of the card record in suit in that formerly the record was made by simply writing on cards without any special features thereon; that is, without contours enabling serial classification.

Counsel for defendant contends that, as the grouping of cards together with tab cards was known to the art at the date of the invention in suit, the manner of positioning the tab cards in series, being simply a new use of a well-known feature, clearly lacks patentability. I am unable to subscribe to the correctness of this contention. Complainant's manner of positioning the cards and arranging the tab cards was a meritorious improvement, as an examination of the exhibits

found in the record will disclose. That any information written or printed on complainant's cards may be found with much greater facility than in former devices cannot safely be controverted. The user of the card record has quick access to a variety of subjects; a mere visual inspection of the top of the cards giving him the key to the subject tabulated. The advantages and results obtained by the Gunn system of card files, as is evidenced by the proofs, are valuable and important. Many prior patents for cards, indexes, and files for keeping records have been introduced in evidence by the defendant as anticipatory of the patent in suit or indicating that to one skilled in the art the exercise of inventive qualities was not necessary to attain the same result. The evidence satisfies me, however, that Gunn's manner of assembling and positioning the tab cards was conceived and made practicable after experimental effort and the exercise to a slight degree at least of the inventive faculty. There are several prior patents which perhaps could have been modified and easily changed to attain the result achieved by the Gunn system; but, it not appearing from the exhibit patents in evidence that the patentees had in mind the adoption or use of their inventions to the accomplishment of a similar function as that of complainants' patent, I think the claims 1, 2, and 3 of the latter should be sustained. Brill v. Third Ave. R. Co. (C. C.) 103 Fed. 289; Cawood Patent, 94 U. S. 695, 24 L. Ed. 238; Ryan v. Newark Spring Mattress Co. (C. C.) 96 Fed. 100. The patents to Thomas, Northrup, and Stamford are a close approach to the Gunn invention, but they are of later date, and therefore require no attention.

The involved claims being held valid, and infringement not being denied, a decree may be entered for complainants, with costs.

DWINELL-WRIGHT CO. v. CO-OPERATIVE SUPPLY CO. et al.

(Circuit Court, E. D. Pennsylvania. October 27, 1906.)

No. 17.

1. TRADE-MARKS AND TRADE-NAMES.

The name "White House" and the picture of the White House at Washington constitute a valid trade-mark and trade-name for coffees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 1, 12.]

2. SAME—PRELIMINARY INJUNCTION.

Where plaintiff claims that defendant has violated its trade-mark and trade-name, a preliminary injunction will issue, though defendant before suit brought has partly modified its carton so as to remove the more objectionable features.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Names and Trade-Names, § 108.]

In Equity.

The plaintiff's bill claims the exclusive right, by continuous usage from 1890 until the present time, to the use of the trade-name "White House Coffee" and the trade-mark of a picture of the White House at Washington upon the carton of the package in which its coffee is sold. Affidavits were filed with the bill in support of a motion for a preliminary injunction. A counter

affidavit was filed by the defendants, in which the defendants admitted having used a carton for the sale of this coffee on which a picture of the White House and the words "White House Coffee" were found. The counter affidavit further averred that, upon receipt of notice from the plaintiff of its claims, and prior to the commencement of suit, it had abandoned the picture of the White House and the use of the words "White House Coffee," and had thereafter sold its coffee in packages inclosed in carton in which neither the name nor the picture of the White House appeared. It was argued by defendants' counsel that their original carton, owing to sundry differences, would not mislead a person who wanted to buy the plaintiff's coffee; and further that, at any rate, the defendants' carton as now used did not interfere with the plaintiff's property rights.

Reynolds D. Brown and George L. Huntress, for plaintiff.
I. H. Mirkil, for defendants.

PER CURIAM. A preliminary injunction should issue in the language of the bill to preserve the status quo until final hearing; the court, however, reserving the question of the propriety of the changed form of carton and the words and pictures thereon, alleged by the defendants to be now used by them.

CLARK et al. v. CLYDE S. S. CO.

(District Court, S. D. New York. September 22, 1906.)

SHIPPING—LIABILITY ON BILLS OF LADING—GOODS NOT ACTUALLY RECEIVED.

A steamship carrier cannot be held liable for nondelivery of goods not actually received for shipment, although it issued bills of lading therefor upon receipts purporting to have been signed by its shipping clerks at the wharf, but which were in fact forged.

In Admiralty.

Benedict & Benedict, for libellants.
Robinson, Biddle & Ward, for respondent.

ADAMS, District Judge. This action was brought by the firm of Downing, Clark & Company to recover from the Clyde Steamship Company the value of 2 cases of dry goods. One was alleged to have been delivered to the respondent at New York on the 26th day of July, 1905, for transportation and delivery to John Winkler at Meridan, Mississippi. The other was said to have been delivered to the respondent at New York, on the 2nd day of August, 1905, for transportation and delivery to J. L. Moses, Jacksonville, Florida. The answer admits the issuance of bills of lading and that the goods were not delivered by the respondent, but claims that they were never received. It is averred that the bills of lading were issued upon receipts purporting to have been signed by the respondent's receiving clerks at its shipping wharf, when in fact the shipping receipts which were presented with the bills of lading by the libellants and upon which the bills of lading were procured, were forged.

The evidence makes it clear that the receipts were forged and not in any sense the receipts of the respondent, but the libellants urge that the evidence warrants the inference that the goods were actually de-

livered to the respondent, who in the absence of proper delivery on its part must remain responsible.

The basis of the action is the bills of lading and when it was shown that they were issued upon forged receipts, it was an end of the case unless the court should be satisfied that the goods were actually received by the respondent, which then failed to deliver them.

The libellants urge that the forgery might have been done by the truckmen who carried the goods before they went to the wharf or might have been done by some receiving clerk after the goods were received on the wharf. It does not in any way appear that the goods were ever delivered on the wharf, excepting from an inference to be derived from the testimony of the libellants' truckmen, who testified in a general way that they delivered everything there which they received for that purpose. Any weight which might be given to such testimony is overcome by the fact of no results having been obtained from a thorough investigation made by the steamship company in an attempt to trace the goods. Such fact is more persuasive of the nonreceipt of the goods than any inference from the testimony of the truckmen, which was very vague and unsatisfactory.

It is not necessary to determine what became of the goods. It is sufficient to conclude that the respondent company did not receive them. The fact of forged receipts having been presented for the purpose of obtaining the bills of lading, though no doubt innocently by the libellants, is more suggestive of the trouble having been with those employed by them, than with the employees of the respondent at its wharf, which the libellants contend for.

It is well settled that a carrier cannot be bound for goods not actually received for shipment even though the master of a vessel issues a bill of lading for them—Pollard v. Vinton, 105 U. S. 7, 26 L. Ed. 998.

The libel is dismissed.

In re BUILDERS' LUMBER CO.

(District Court, E. D. North Carolina. October 10, 1906.)

1. BANKRUPTCY—LIENS—CONTRACT OF CONDITIONAL SALE.

Claimant sold certain saw mill machinery to a receiver by a contract of conditional sale, in which it reserved title until full payment. The receiver had no authority as such to make the purchase, and turned the machinery over to the bankrupt corporation, which installed it in its mill and thereafter made payments thereon, to the amount of two-thirds of the price, to the receiver, who transmitted the same to claimant. Under the law of the state the contract was valid only from the time of its record as against creditors or subsequent purchasers even with actual notice, and the contract in question was not acknowledged nor recorded until nearly two years after its date and shortly before the bankruptcy, when claimant recorded it and instituted an action in claim and delivery in a state court and obtained an order of seizure, under which the officer purported to seize the property, but did not remove the same nor detach it from the bankrupt's mill to which it was attached, and it was sold by the trustee in bankruptcy as a part of the bankrupt's plant. The bankrupt never became a party to the contract with claimant, although the latter

had knowledge that it was in possession of the property. *Held*, that claimant had no lien on the property or its proceeds either by virtue of the contract which was void as against the bankrupt, nor by virtue of its attempted seizure which was void under Bankr. Act July 1, 1898. c. 541, § 67f, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3450].

2. SAME—PROVABLE DEBTS.
One who sold property on credit to a third person, who turned it over to a corporation which did not become a party to the contract of sale, did not thereby become a creditor of the corporation for the price and entitled to prove a claim against its estate in bankruptcy.

3. SAME—LIENS—ULTRA VIRES MORTGAGE BY CORPORATION.
A mortgage executed by a corporation when insolvent and within four months prior to its bankruptcy to secure notes which were delivered to an officer of the corporation without consideration and pledged by him as collateral security for his personal indebtedness, and which were issued for such purpose and not for any corporate purpose as was known to the pledgees, does not constitute a valid lien in their favor against the bankrupt's property.

4. SAME—ESTOPPEL OF CREDITOR TO CONTEST LIEN.
A creditor of an insolvent corporation *held* not estopped by an agreement entered into with the holders of a mortgage on the debtors' property, looking to a sale of such property, to contest the validity of the mortgage in subsequent bankruptcy proceedings against the debtor.

In Bankruptcy. On review of decision of referee.

Jno. D. Bellamy and McLean, McLean & McCormick, for claimants. Iredell Meares, for petitioning creditors.

PURNELL, District Judge. The Builders' Lumber Company was adjudged bankrupt on a petition filed on April 19, 1905, by the S. M. Price Machinery Company and Omohundro Bros. The officers of the Builders' Lumber Company were P. W. Johnson, president, W. J. Edwards, vice president and manager, H. P. Edwards, treasurer, and T. C. McNeely, secretary. It was organized under a charter granted by the state of North Carolina. The adjudication was made May 1, 1905. On petition of the duly appointed trustee, the American Wood Working Machinery Company, W. H. Saunders, and R. H. Lynn, alleging they claimed preferred liens and were necessary parties to the proceeding, were made parties and filed answer. The American Wood Working Machinery Company claimed to be the owner of certain machinery in the possession of the bankrupt corporation by virtue of a conditional sale, title reserved, signed by W. J. Edwards as receiver of the Southern Sawmills & Lumber Company, and by him transferred to the bankrupt, and by virtue of certain claim and delivery proceedings instituted about the time or shortly before, within a few days, of the filing of the petition in bankruptcy and within four months of the adjudication. The parties thus brought in answered and the proceeding was referred to a master pro hac vice, to take testimony, find the facts, and report his conclusions of law thereon.

As to this claim the master finds the following facts: W. J. Edwards, as receiver of the Carolina Northern Railroad, on June 23, 1903, ordered from the American Wood Working Machinery Company certain machinery. The agreed price was $6,000, payable, one-half in 30 days, balance in 60 days. The terms of the order were as follows:

"It is agreed that title to the property mentioned above shall remain in the consignor until fully paid for in cash, and that this contract is not modified or added to by any agreement not expressly stated herein, and that a retention of the property forwarded, after thirty days from date of shipment, shall constitute a trial and acceptance, be conclusive admission of the truth of all representations made by or for the consignor and void all its contracts or warranty express or implied. It is further agreed that the purchaser shall keep the property fully insured for the benefit of the American Wood Working Machinery Company."

On July 21, 1903, the said company notified said Edwards, as receiver of the Carolina Northern Railroad Company, that goods were ready for shipment, and inclosed contracts to be signed. This contract was signed by Edwards as receiver of the Carolina Northern Railroad Company, and returned to said company August 11, 1903. On August 15, 1903, said Edwards wrote said company, asking it to erase the name of the Carolina Northern Railroad, as the material was ordered for the Southern Sawmills & Lumber Company, and thereupon, August 18, 1903, said company sent Edwards a new contract to be executed by him as receiver of the Southern Sawmills & Lumber Company. On September 1, 1903, said Edwards returned the new contract, signed by him as receiver of the Southern Sawmills & Lumber Company, saying, "This company is strong and good, and doing a profitable business." The said company on receipt of this contract, signed by Edwards as receiver of the Southern Sawmills & Lumber Company, returned the former contract.

The new contract, which is in the form of an order and acceptance, was dated as of June 23, 1903, and contains the same terms as hereinbefore set out. The execution of the said order by W. J. Edwards, as receiver, was proven by the witness H. P. Edwards. The execution of the paper by said company was acknowledged before a notary public on February 17, 1905. It was admitted to probate by the clerk of the superior court of Robeson county, February 21, 1905, and recorded in the register of deeds office of said county on February 22, 1905. The machinery was shipped on August 9 and 10, 1903, to Kemper, S. C., to the Builders' Lumber Company. It was received at Marietta in due course of transportation, was delivered to the Builders' Lumber Company, and is now and has been a part of the said Builders' Lumber Company. Said machinery was a part of said plant at the time this court sold the plant to Sanders, Lynn, and Harper. W. J. Edwards had no authority from the court to purchase said machinery and to make said agreement as receiver of the Southern Sawmills & Lumber Company. Edwards represented to said company that he bought said machinery for the Southern Sawmills & Lumber Company. From the inception of the agreement the said company dealt with the transaction as a debt due to said company by the receiver of the Southern Sawmills & Lumber Company. Said company did not contract with the Builders' Lumber Company and did not extend it credit on this machinery. It refused on November 9, 1904, to accept a new agreement and security to be executed by the Builders' Lumber Company in lieu of the agreement above set out. Said company acknowledged on October 9, 1903, the payment of $1,000. It then called to the

attention of W. J. Edwards that $2,000 more was due, and the balance of the $6,000 more would be due in three weeks. It acknowledged the receipt of $1,000 on account of said machinery on October 28, 1903, urging at the same time that the remainder of the money was overdue. From November, 1903, the said company by various and sundry letters, in some of which further payments are acknowledged, frequently called attention to the nonpayment of the amount due it on this contract. This correspondence extends from the date of said contract to November 1, 1904. The said company knew by the terms of the order or agreement accepted by it that the machinery was to be delivered to the Builders' Lumber Company, at Kemper, S. C. After September, 1903, the said company had knowledge that the said machinery was located at Marietta, in the possession of the Builders' Lumber Company. By reasonable inquiry they could have known that the Builders' Lumber Company was a separate and distinct corporation, not connected with the receivership of W. J. Edwards. The said agreement was in the possession of the said company from its delivery to the date of its record on February 22, 1905. At the time of the recording of said agreement the unpaid balance due by W. J. Edwards, as receiver of the Southern Sawmills & Lumber Company, upon said agreement, was overdue for a year or more. Petitioning creditors and other creditors of the Builders' Lumber Company had no legal notice of the said agreement, or that the purchase price of the said machines had not been paid. The reason assigned by said company for not recording said mortgage is because it was not its custom to record mortgages the law did not require to be recorded within a stated time, except where it deems it necessary for its interest, and it had no reason to believe at the start, or for a good while thereafter, that its interests in this agreement would not be protected by Edwards without the necessity of recording the instrument. It relied previous to the record of the said agreement on the confidence it had in W. J. Edwards as receiver that its debt would be paid, and it had a contract which could be recorded at any time in addition. All the orders taken by said company for machinery are on the form used in this agreement, and it is the custom of the company not to record these papers until it deems it necessary for its protection, unless the law of the state in which the machinery is sold requires the papers to be recorded within a certain time. "The company takes the stand that it is unnecessary to worry customers by recording such instruments when they don't like such things, as customers often do not like documents of the kind on record, even when they may be perfectly good to take care of them."

The American Wood Working Machinery Company instituted an action in the superior court of Robeson county, N. C., against the Builders' Lumber Company, W. J. Edwards, receiver of the Southern Sawmills & Lumber Company, W. J. Edwards, individually, Marietta Lumber Company, S. A. Edmund, and T. C. McNeely. The summons was issued on the 1st day of April, 1905, and was returnable at term on the 22d day of May, 1905. On the same date it filed an affidavit for claim and delivery, alleging that it was the owner and entitled to the

immediate possession of certain enumerated machinery. The affidavit stated that it was wrongfully detained by the defendants; that the cause of its detention was not known. The actual value of the property was about $3,000 and the plaintiff was about to commence his action for the recovery of the said property. It gave bond and obtained an order of seizure. The sheriff made on the said papers the following return:

"Rec'd Apr. 1st, 1905, executed 3rd Apr. 1905, by reading and delivering copies of summons, affidavits, undertaking and order of seizure to W. J. Edwards, Vice Pres. Builders' Lumber Company, W. J. Edwards, Rec. Southern Saw Mills & Lumber Co., T. C. McNeely, Sec. of Marietta Lumber Co., T. C. McNeely, S. A. Edmund and W. J. Edwards, and by seizing and taking into my possession the property, within described and after holding three days delivered it to the plaintiff."

The complaint in the action was filed at the May term of court. There is nothing in the affidavit, complaint, or order of seizure, other than a similar description of the machinery, that connects the said proceeding with the agreement or contract of the said Edwards, receiver, and said company. The claim and delivery proceeding was instituted 19 days before the bringing of this proceeding in bankruptcy, and 30 days before the Builders' Lumber Company was adjudged bankrupt. The deputy sheriff visited the plant of the Builders' Lumber Company to seize the property described in the affidavit. He did not take actual, physical possession of it. He found the machines attached to the floor with screws or bolts, and adjusted with the necessary belting and other machinery for the operation of the plant. He notified the superintendent of the Builders' Lumber Company that he had seized the property and would leave him in possession of it as his agent. The sheriff did not return to the plant thereafter to make any further delivery to the plaintiff, nor did he in any manner detach the property from the plant. The property has remained as situated at the institution of the said claim and delivery proceeding and prior to the bankruptcy proceeding, and passed with the plant when sold by order of this court. The Builders' Lumber Company paid for the purchase of the machinery covered by the contract between the Southern Sawmills & Lumber Company and the American Wood Working Machinery Company the sum of $4,000 to W. J. Edwards, as receiver of the Southern Sawmills & Lumber Company. The said W. J. Edwards, as receiver of said Southern Sawmills & Lumber Company, is due an unpaid balance upon the said agreement to the American Wood Working Company, the sum of $2,575.63, with interest.

"The Constitution and laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Const. Art. 6, § 2. The Constitution of North Carolina of 1868, art. 1, § 29, provides "a frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty," to which constitutional provisions it seems necessary to call attention to some of the parties and attorneys in this proceeding, particularly those who have in the course of the proceeding attempted to interfere with the property

of the bankrupt by a proceeding in claim and delivery in the state court. The act of Congress of July 1, 1898 (30 Stat. 544, c. 541 [U. S. Comp. St. 1901, p. 3418]), the bankrupt act, passed under article 1, § 8, c. 4, of the Constitution of the United States, makes all such proceedings, which are in the nature of attachment proceedings, void. Hence the conclusion of the referee that the proceedings instituted in the superior court of Robeson county by the American Wood Working Machinery Company are void and the property or the fund arising from the sale thereof must be surrendered at once to the trustee in bankruptcy is affirmed. Taking all said in the answer of this company to be true, it was dealing with a receiver of the Southern Sawmills & Lumber Company, who showed and had no authority to so deal as such receiver, and, if he had had such authority, it would have been illegal; for even the court could not grant to its receiver authority to construct a plant such as is claimed was to be constructed in said answer. The contract with Edwards, receiver, being without authority and void, the American Wood Working Machinery Company dealt only with Edwards.

The parties claim to have contracted with the receiver, who had no authority to contract, to establish a new or branch business. Receivers are appointed for the benefit of all parties who may establish rights in the cause. The money and property in his hands is in custodia legis for whoever can make out a title to it. It is the court itself which has the care of the property in dispute. The receiver is but a creature of the court. He has no powers except such as are conferred upon him by the express orders of the court. Bates, § 580; Booth v. Clark, 17 How. 330, 15 L. Ed. 164; Baltimore Building Loan Association v. Alderson, 99 Fed. 494, 39 C. C. A. 609. Being without authority to enter into such contract, it was void. But the Builders' Lumber Company had the machinery, and through its general manager, Edwards, paid $4,000 thereon through Edwards as receiver. This is true according to Edwards' testimony, but claimant disclaims any contract with the Builders' Lumber Company, and never set up any claim against such company, now bankrupt, until the institution of the claim and delivery proceedings, which, as we have seen, were void under the bankrupt act, and insists on its contract with Edwards, receiver, which was void. It takes two persons capable of making a contract to contract, and Edwards was without authority to enter into this contract. Hence there was in contemplation of law no such contract.

Claimants disregarded the law of North Carolina regarding the registration of its supposed contract of sale. Section 1275, Code 1883, section 983 of Revisal of 1905, provides all conditional sales of personal property in which the title is retained by the bargainor shall be reduced to writing and registered in the same manner, for the same fees, and with the same legal effect as is provided for chattel mortgages. Section 1254, Code of North Carolina, provides no deed of trust, chattel mortgage, etc., shall be valid at law to pass any property as against creditors, etc., but from the registration of such deed of trust or mortgage. In discussing this section in Barrington v. Skinner, 117 N. C. 52, 23 S. E. 90, the Supreme Court holds that no notice, however clear, of an unregistered mortgage, can effect the rights of creditors or subse-

quent purchasers. The act, now section 1275 of the Code, was passed for a purpose, and it is not unreasonable to say such purpose was to prevent exactly what the parties have attempted to do in this transaction—give credit on a false basis to corporations. At all events, the law of the state has been ignored, and the conditional sale, not being registered, even if valid, could not effect the rights of creditors or subsequent purchasers; i. e., the Builders' Lumber Company as purchaser of the machinery from Edwards or any one else, or subsequent creditors, who gave credit on the faith of the possession of such machinery in its plant, upon which no lien could be found on the records. The explanation or reasons for not recording the paper may be satisfactory to the American Wood Working Machinery Company and its attorneys, but is not satisfactory under the law.

The special master, in his conclusions of law as follows, is affirmed:

"That the American Wood Working Machinery Company is not entitled to a lien upon the specific property mentioned in the conditional contract of sale executed between the said company and W. J. Edwards, receiver of the Southern Sawmills & Lumber Company, because the said machinery had become a fixture of the plant of the Builders' Lumber Company; that it had paid therefor $4,000 to the Southern Sawmills & Lumber Company; that the contract of sale between said claimant and the Southern Sawmills was not a contract with the Builders' Lumber Company, and said contract, although dated June 23, 1903, was not acknowledged until February 17, 1905, and not recorded until February 22, 1905; that said American Wood Working Machinery Company is not a creditor of the Builders' Lumber Company and not entitled to share either by priority or common creditor in the assets of the defendant bankrupt; that the claim and delivery proceedings brought by the American Wood Working Machinery Company and the levy of the sheriff in pursuance thereof upon the articles mentioned in the affidavit and complaint in said action, having been instituted and the levy executed within four months from the institution of this proceeding, is void under section 67, subsec. 'f,' of the bankrupt law (30 Stat. 564, c. 541 [U. S. Comp. St. 1901, p. 3450])."

Claim of Saunders & Lynn, $20,000.

The special master, after hearing testimony and considering other proofs, finds the following facts, eliminating references to evidence and unnecessary verbiage, tautology, etc., to wit:

W. J. Edwards was receiver of the Carolina Northern Railroad; also receiver of the Southern Sawmills & Lumber Company. He was also vice president and general manager of the Builders' Lumber Company. As receiver of the Carolina Northern Railroad Company, he issued three receiver's certificates, each bearing date of 23d day of November, 1903, pursuant to an order of the United States Circuit Court for the Eastern District of North Carolina. One of said certificates, being No. 3, certified that there was "due R. H. Lynn, R. N. Harper, and W. H. Saunders six thousand ($6,000) dollars, with interest at the rate of six per cent. (6%) per annum, from date until paid, on account of purchase of box cars for said road." Another of the said certificates, being No. 6, certified that there was "due W. H. Saunders, R. H. Lynn, and Robert N. Harper two thousand ($2,000) dollars, with interest at the rate of six per cent. (6%) per annum, from date until paid, on account of purchase of rails for terminals." Another of the said certificates, being No. 4, certified that there was

"due Robert N. Harper, R, H. Lynn, and W. H. Saunders seven thousand five hundred ($7,500) dollars, with interest on account of purchase of flat cars for said road." Robert N. Harper is the president of the American National Bank of Washington, D. C., W. H. Saunders is its vice president, and R. H. Lynn is its cashier. W. H. Saunders is a real estate broker. The Carolina Northern Railroad Company or its receiver did not at the time of the issuance of the said certificates owe any sum to the said Saunders, Lynn, and Harper on account of the purchase of box cars for said road, or on account of purchase of rails for terminals or on account of purchase of flat cars for said road. The said R. H. Lynn, W. H. Saunders, and R. N. Harper agreed with W. J. Edwards to raise for him the face of the said certificates, to wit, $15,500, for a commission of $750. They did raise the money on said certificates by placing certificate No. 3 with H. Clay Harding, Asheboro, Va., certificate No. 4 with the Loudon National Bank, Leesburg, Va., and certificate No. 6 with the National Bank of Manassas, Manassas, Va. Each of the said certificates was indorsed by the said Robert N. Harper, W. H. Saunders, and R. H. Lynn, for the purpose of passing title to the holders, and on certifiate No. 3 the prior indorsements are guarantied by the American National Bank, Washington, D. C., R. H. Lynn, cashier. The Builders' Lumber Company had no interest in the transaction relative to said certificates.

Some time after the transaction between the said W. J. Edwards and Saunders, Lynn, and Harper, and some time before the execution by the Builders' Lumber Company of the mortgage to said Saunders and Lynn, alleged by petitioning creditors to be fraudulent, the said W. J. Edwards went to W. H. Saunders, at Washington, D. C., and represented to him that these certificates had been improperly issued by him, that he had used the money raised thereon for other purposes, and that he had been ordered by the court to return the certificates to the court. R. H. Lynn and R. N. Harper, also, had notice that said certificates had been informally issued, and had to be redeemed. Edwards had sold these certificates outright. The parties said they were going to be contested, and Edwards agreed to take them back from Saunders, Lynn, and Harper. Edwards offered to borrow from Saunders, Lynn, and Harper the sum necessary to take up the certificates, and execute to them mortgages on the properties of the Philadelphia Construction Company, a corporation which he controlled, but which did not owe Saunders and Lynn any sum, and upon the Builders' Lumber Company, and before taking said mortgages the said W. H. Saunders came to North Carolina, examined the property, and consulted his attorneys, and for himself, R. H. Lynn and Robert N. Harper agreed to make the loan. Pursuant to said agreement the said W. J. Edwards caused a special meeting of the stockholders of the Builders' Lumber Company to be held at Sanford on the 19th day of December, 1904, at which meeting the following resolutions were passed:

"Whereas, it is necessary to negotiate a loan of at least $20,000 to provide for the payment of the debts of this corporation, and, whereas, arrangements have been perfected for the negotiation of said loan from I. H. Saunders

and W. H. Saunders of the city of Washington, District of Columbia, therefore be it resolved that the president or vice president and secretary of this company be authorized and directed to negotiate a loan of not less than $20,000, said loan bearing interest from date at 6% per annum, payable semiannually, and to execute the note or notes of this company therefor, and as security for the payment thereof the said officers of this corporation are authorized and instructed to execute a mortgage upon the property of this corporation.

"Be it further resolved that the said mortgage, a copy whereof is now presented to the meeting and read, be executed by the president or vice president and attested by the secretary and the common seal of the corporation affixed thereto."

On the same date a meeting of the directors was held at the same place and the action of the stockholders approved. The said form of mortgage was submitted to W. H. Saunders with the minute book, showing the resolutions passed, and exhibited to him, also, were proxies by certain stockholders to W. J. Edwards that authorized the issue of said mortgage for the purpose of raising money to pay the corporation debts. W. H. Saunders declined to loan the money upon this mortgage, because he desired that the mortgage be made to W. H. Saunders and R. H. Lynn as mortgagees and trustees, instead of to W. H. Saunders and I. H. Saunders, and because the proxies used in voting in this meeting and the resolutions passed by the stockholders and directors were qualified by the provision that the money so to be borrowed was to be applied to the payment of the debts of the corporation. He stated as his reason therefor that neither he nor his associates desired to be responsible for the application of the fund. Thereafter the stockholders of the Builders' Lumber Company held a meeting on January 5, 1905, at Sanford, at which meeting the following resolutions were passed:

"Resolved that the proper officers of the Builders' Lumber Company are hereby authorized and instructed to execute a mortgage or deed of trust in the name of the company upon all property of the company, except its lumber and logs, upon a form to be approved by the directors and counsel selected by them, for the purpose of securing a sum not exceeding $20,000, to bear interest at the rate of six per cent. per annum.

"Resolved (2) that the board of directors are authorized to empower the vice president to sign the name of the company by W. J. Edwards, vice president, to be attested by the secretary and to attach the common seal of this company to said mortgage and to notes or bonds secured thereby."

On the same date the directors held a meeting and passed the following resolutions, after reciting the foregoing as a preamble:

"Resolved that the vice president and secretary be, and they are hereby, authorized and directed in the name of the company, in its behalf, and under its corporate seal, in the form this day approved by the board of directors and counsel, and which is hereby directed to be spread upon the minutes, to execute and deliver a mortgage to W. H. Saunders and R. H. Lynn, of the city of Washington, District of Columbia, conveying to W. H. Saunders and R. H. Lynn all of its rights, title, and interest, under a certain lease and option executed to the Builders' Lumber Company on or about September 1st, 1902, in and to a tract of land containing about ten acres near the town of Marietta, in Robeson county, North Carolina, adjoining the land of Mrs. Williamson, O. Page, and others, together with the buildings, engines, boilers, machinery, fixtures, and appliances of every character located upon the above-described lot, to secure the payment of twenty promissory notes of even date herewith, each for the sum of one thousand dollars ($1,000), all due and payable on the

5th day of July, 1905, and bearing interest from date at the rate of six per cent. per annum. Which said notes shall be, executed by the vice president in the name of the Builders' Lumber Company, by W. J. Edwards, vice president, under the seal of the company, and attested by its secretary."

Pursuant to this resolution, the Builders' Lumber Company executed the mortgage, bearing date the 5th day of January, 1905, to W. H. Saunders and R. H. Lynn, mortgagees and trustees, to secure the payment of the sum of $20,000, represented by 20 promissory notes of even date, each in the sum of $1,000 and payable on the 5th day of July, 1905, with interest. This mortgage was filed for registration after being admitted to probate and was registered in the county of Robeson, wherein the property was located on the 6th day of January, 1905, at 10 o'clock p. m., within four months of the date when this proceeding was instituted. Thereafter, pursuant to the agreement between the parties, W. J. Edwards executed six personal notes, each dated January 7, 1905, payable 90 days after date, to W. H. Saunders and R. H. Lynn, or order, for value received, being borrowed money loaned him, negotiable and payable at the American National Bank, Washington, D. C. One of said notes is for $2,500, another for $6,000, another for $2,000, and another for $5,000, aggregating $15,500, and two others, each for $375, aggregating $750, which said two notes were executed to cover commission to the said parties. As collateral security to secure the payment of the said personal notes, the said Edwards delivered to the said Saunders and Lynn 635 shares of the capital stock of the Builders' Lumber Company, 17 notes, each in the sum of $1,000, of the Builders' Lumber Company, secured by mortgage of the Builders' Lumber Company hereinbefore set out, 10 notes of the Philadelphia Construction Company, each in the sum of $1,000, secured by a mortgage executed by said corporation to Saunders and Lynn upon all of its property, and, in addition thereto, the said Saunders and Lynn hold three notes of the said Builders' Lumber Company executed to them and secured by said mortgage, each in the sum of $1,000. Such notes are not referred to in the notes of W. J. Edwards to said Saunders and Lynn, but are of the series of 20 notes issued and secured by said mortgage.

The Philadelphia Construction Company is a South Carolina corporation, controlled by W. J. Edwards, and the mortgage securing its notes is upon a tramway and timber holdings, located in Robeson county, N. C., and said mortgage was recorded on January 6, 1905, in the county of Robeson, but the Builders' Lumber Company has no connection and is not interested in said Philadelphia Construction Company or in the transaction by it with the said Saunders, Lynn, and Harper. The said six notes were executed on a printed form, which measures up as a written obligation to the definition of a lawful fence given by a North Carolina judge—"horse high, bull strong, and pig tight." There was no possibility for Edwards to jump over, knock down, or get through the guards around him. After the execution and delivery of the papers the said W. H. Saunders, R. H. Lynn, and R. N. Harper took up the certificates of the Carolina Northern Railroad, which they had negotiated and indorsed, and delivered the same to W. J.

Edwards, who returned them to the United States Circuit Court as ordered. The object of the Builders' Lumber Company, in the execution of said notes and mortgage, was not for a corporate purpose, but for the purpose primarily to redeem the said certificates of the Carolina Northern Railroad, issued by the said Edwards, indorsed and negotiated by said Saunders, Lynn, and Harper, and to pay the said Saunders, Lynn and Harper the sum of $750 commission. No money was paid by Saunders, Lynn, and Harper to the Builders' Lumber Company upon the said notes and mortgage, and there was no corporate consideration for the execution of the said notes and mortgage. The said notes and mortgage are now held by the said Saunders, Lynn, and Harper, and the only sum advanced thereon was the sum of $15,500, which said Saunders, Lynn, and Harper paid to redeem said certificates. The said Lynn and Harper in the transaction aforesaid had knowledge that the said notes and mortgage were not executed for a corporate purpose, but for the purpose aforesaid. They knew that W. J. Edwards was vice president of the Builders' Lumber Company and did not personally own the notes and mortgage of the Builders' Lumber Company put up by him as collateral.

The Claim of The United Lumber Company.

The United Lumber Company on September 9, 1903, loaned the Builders' Lumber Company and W. J. Edwards, receiver of the Southern Sawmills & Lumber Company, on their joint notes, indorsed by W. J. Edwards personally, the sum of $5,000 in cash. The said notes were signed by W. J. Edwards, receiver of the Southern Sawmills & Lumber Company, and the Builders' Lumber Company by W. J. Edwards, vice president. There were four notes, each dated September 9, 1903, three $1,000 each, payable September 1 and November 1, 1904, respectively, and one for $2,000, payable December 1, 1904, with interest. As collateral to the said notes, the said W. J. Edwards delivered to the said United Lumber Company a receiver's certificate, payable to bearer, and issued by him as the receiver of the Southern Sawmills & Lumber Company, pursuant to an order of court. The said W. J. Edwards represented to the said company at the time of making said loan that the Builders' Lumber Company had been incorporated, but the stock was not all subscribed for, and he had personally subscribed for enough stock to control the company, and that it was connected with the Southern Sawmills & Lumber Company; the latter being practically the parent company. At the time of the loan the memorandum of agreement, dated the 9th day of September, 1903, between the Builders' Lumber Company and the United Lumber Company, being an agreement for the shipment by the Builders' Lumber Company of its output and the handling of the same by the United Lumber Company, was entered into between the parties as a further condition of the loan. On October 24, 1904, the memorandum of agreement between W. J. Edwards, receiver of the Southern Sawmills & Lumber Company, and the United Lumber Company, was executed between the parties, being an agreement in regard to the shipment of lumber and the terms upon which the same was to be handled. Under date of October 28,

1904, the said United Lumber Company surrendered the said notes above described, and, in lieu thereof, accepted similarly executed notes, and, again, on October 31, 1904, the second set of notes were surrendered, and the United Lumber Company, in lieu of the same, accepted the notes upon which it now claims against the bankrupt. The said notes are executed by the Builders' Lumber Company, by W. J. Edwards, vice president, and by W. J. Edwards. They consist of five notes, each dated September 28, 1904, payable to the United Lumber Company, one for $2,000, due December 1, 1905, and three each for $1,000, due September 1, October 1, and November 1, 1905, with interest at the rate of 6 per cent. The money advanced upon the said notes was paid and used by the Builders' Lumber Company. At the time of taking the said notes the said W. J. Edwards and the United Lumber Company entered into a memorandum agreement, dated at Norfolk on the 31st day of October, 1904. The said memorandum agreement acknowledges the receipt by Edwards of $5,000 collateral security, surrendered by the said United Lumber Company, in exchange for which said Edwards delivered to Alexander, its representative, 160 shares of the capital stock of the Builders' Lumber Company, and the said Builders' Lumber Company assigned and delivered to said United Lumber Company certain insurance policies, covering the property of the plant of the said company, aggregating $8,000. Edwards further agreed to deliver 80 shares of the capital stock of the Bank of Sanford and $5,000 of the mortgage bonds of the Carolina Northern Railroad; the above three lots of security being pledged as collateral for the notes dated September 28th, amounting to $5,000, being the same notes referred to in the contract of October 24th, referred to above. The notes now sued on are owned and claimed by the United Lumber Company as against the bankrupt. The $5,000 collateral surrendered was the receiver's certificate of the Southern Sawmills & Lumber Company, which had been previously given the United Lumber Company as collateral security. The said W. J. Edwards at the time of this transaction represented to the United Lumber Company that he was obliged to recover the said receiver's certificate for return to the court; that he wanted to have the Southern Sawmills & Lumber Company released from any responsibility on the notes, as he had had no authority to sign the notes as receiver of the Southern Sawmills & Lumber Company, and no authority to have put up the receiver's certificate as collateral. He further represented at the time that the bonds of the Carolina Northern Railroad were duly issued and were negotiable. The bonds were delivered afterwards to the United Lumber Company. The 160 shares of the capital stock was also delivered at the time of the transaction. The stock of the Bank of Sanford was not delivered. The agreement further stipulated that the United Lumber Company would advance to the Builders' Lumber Company $2,500 on the Builders' Lumber Company's note, indorsed by W. J. Edwards and said company as security for the loan, or to deliver 200 shares of the capital stock of the Builders' Lumber Company, the said 200 shares of stock to be surrendered upon payment of said note on or before the date of maturity. The United Lumber Company

by check on the Third National Bank of Springfield, Mass., advanced to the Builders' Lumber Company the sum of $2,500, the Builders' Lumber Company executed its note for the said $2,500, and the said W. J. Edwards put up as security thereto stock certificate No. 10, being 200 shares. The said note for $2,500 was paid on January 30, 1905, and was surrendered. The 200 shares of stock represented by certificate No. 10 is still in the possession of the United Lumber Company, having been filled out in their name. The stock represented by certificate No. 5, for 160 shares of the capital stock of the Builders' Lumber Company, is held by the United Lumber Company as collateral. The certificate of the capital stock of the Builders' Lumber Company was held as collateral to the payment of the said note of $2,500, which has been paid. On December 27, 1904, at Norfolk, Va., at the request of W. J. Edwards, the United Lumber Company signed a proxy, appointing W. J. Edwards to vote the said shares of stock at a meeting to be held on December 27th. On January 2d, in a letter to W. J. Edwards, the said George F. Alexander, treasurer of the said United Lumber Company, inclosed the proxy which appears in the minute book, at page 25, which is in words:

"We, the United Lumber Company of Springfield, Mass., hereby constitute and appoint W. J. Edwards our true and lawful attorney in fact to vote the three hundred and sixty shares of stock in the Builders' Lumber Company, a corporation chartered under the laws of North Carolina, at a meeting of the stockholders of said Company called to be held at Sanford, North Carolina, on Thursday, January 5th, 1905, or at any time or place to which said meeting may be adjourned with purpose or substitution and revocation. Hereby ratifying and approving of all acts done by my said attorney in fact in the premises, as if we were in person doing and performing the same.

"Given under our hand and seal this second day of January, 1905.

"The United Lumber Company [Seal.]

"By George F. Alexander, Treasurer & Mgr."

The bonds of the Carolina Northern Railroad, which were delivered to the United Lumber Company as further collateral, were surrendered by them to W. J. Edwards for return to the court on January 30, 1905, as he had been required by the court to surrender the same, as they did not belong to him, and was in distress because the United Lumber Company would not surrender them without consideration. They were regarded as the best security they held as collateral. The United Lumber Company were advised by their counsel, Mears, to surrender the bonds, even without consideration, because they could be traced as the property of others, and would have to be surrendered if identified, and thereupon Edwards, representing to George F. Alexander, the treasurer of the United Lumber Comany, that he must have the bonds registered at Lumberton, or he would be involved in great trouble, as the bonds were not his property, the said company surrendered them without consideration.

George F. Alexander, as treasurer of the United Lumber Company, being thereto duly authorized, and William H. Saunders and R. H. Lynn, as mortgagees and trustees, acting for themselves and Robert N. Harper, the only parties in interest, entered into the contract dated the 30th day of January, 1905. On January 31, 1905, a contract was

entered into by and between W. J. Edwards, as vice president of the Builders' Lumber Company, and the Louis Stave Company of West Virginia, for the purchase and sale of the plant of the Builders' Lumber Company at the sum of $22,500, which contract is the contract referred to in the agreement between the United Lumber Company and Saunders and Lynn. On the 1st day of February, 1905, the said George F. Alexander, as treasurer of the United Lumber Company, being thereto authorized, and W. H. Saunders and R. H. Lynn, mortgagees of the Builders' Lumber Company, for themselves and Robert N. Harper, being the parties alone interested, entered into a contract supplemental to their contract of the 30th of January, and supplemental to the contract between the Builders' Lumber Company and the Louis Stave Company. On the 2d day of February the Builders' Lumber Company by writing duly executed assented to the said agreement between said parties of February 1, 1905. At the time the said contracts were entered into by said parties, they were led to believe by W. J. Edwards, vice president of the Builders' Lumber Company, that the said Builders' Lumber Company did not owe more than a few hundred dollars, other than its debt to Saunders and Lynn and to the United Lumber Company. The said United Lumber Company had been assured by the said Saunders and Lynn that they could effect a sale of the Builders' Lumber Company plant, and at the time the Louis Stave Company was investigating it with a view of purchase. The parties believed, if the sale could be effected, that the debts of the Builders' Lumber Company could be paid in full, and the contract was made by the United Lumber Company with the view of not embarrassing the probabilities of sale by the institution of bankruptcy proceedings. Later the sale was not effected because of the complication in which the said Builders' Lumber Company was involved. The United Lumber Company became one of the petitioners in this proceeding.

To the findings of fact exceptions are filed, but after a careful examination of a voluminous record this court is of the opinion such exceptions are without actual merit. Hence said exceptions are overruled, and the special master's findings of fact affirmed.

The referee finds as a conclusion of law, first, that the notes executed by the Builders' Lumber Company to W. H. Saunders and R. H. Lynn, mortgagees and trustees, and the mortgage executed by the Builders' Lumber Company to the said parties to secure said notes, not being for a corporate purpose, and the moneys loaned thereon not having been applied to a corporate purpose, to the knowledge of the trustees and mortgagees, and no consideration therefor having passed to said mortgagor, the same are ultra vires and void against the creditors in this proceeding of the Builders' Lumber Company; second, that the contracts of the United Lumber Company and William H. Saunders and R. H. Lynn, trustees and mortgagees, dated January 30, and February 1, 1905, are not an estoppel against the United Lumber Company in setting up the invalidity of the said mortgage; third, that the Builders' Lumber Company is indebted to the United Lumber Company in the sum of $5,000 upon the said notes, with interest

from the maturity thereof, and that it is also indebted to the said company in the sum of $486.64 on open account, with interest from the 12th day of May, 1904, and that the said United Lumber Company is entitled to share pro rata with the creditors whose claims have been proven and admitted in the assets of the defendant corporation; fourth, that the funds in court should be distributed, first, to the payment of the expenses of the trust, and, second, to the payment of the common creditors pro rata, including the petitioning creditors. On all of which conclusions of law the referee is affirmed. The claim of Saunders, Harper, and Lynn is further objectionable as an attempt to give a preference within four months of the adjudication, even if it were otherwise valid.

It is further ordered that the trustee proceed at once to reduce the estate to cash, as provided by law, to collect the bond given for $11,500 for the deferred payment, and the referee proceed as soon as may be to close up the estate.

AMERICAN CHINA DEVELOPMENT CO. v. BOYD.

(Circuit Court, N. D. California. August 11, 1906.)

No. 13,682.

1. PRINCIPAL AND AGENT—CONTRACT OF EMPLOYMENT—RATIFICATION.

The Chinese imperial government contracted with defendant for the construction and equipment of a railroad in China, and for the purpose of effecting the scheme a commission was organized, consisting of two Chinese and three Americans, to supervise the construction and operation of the line. The commission employed plaintiff, one of its number, for a period of five years, to act as secretary to the commission and to the general manager and engineer in chief, at a yearly salary. Plaintiff's employment was recognized by defendant's president in a letter, in which, however, he repudiated the commission's authority to make a five-year contract, but stated that his position would hold as long as that of his chief. Defendant also accepted plaintiff's services for a year and 10 months, paid his salary, and later directed his discharge before the expiration of the contract period, for the purpose of reducing expenses. *Held*, that defendant ratified plaintiff's contract, and was bound by its terms.

2. JUDGMENT—ESTOPPEL.

Where a contract of employment was broken by plaintiff's discharge during the month of June, 1904, a judgment recovered by plaintiff for his salary for that month did not estop him from thereafter suing defendant for damages for breach of contract.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1092–1095, 1100.]

3. MASTER AND SERVANT—CONTRACT OF EMPLOYMENT — BREACH — PROSPECTIVE DAMAGES.

In an action by a servant for breach of a contract of employment caused by his discharge before the expiration of the term for which he was employed, he was entitled to recover prospective damages, consisting of the contract price unpaid, in the absence of proof by defendant that plaintiff might have obtained other employment.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 47, 54–56.]

John Garber, for appellant.

Bert Schlesinger and Marshall B. Woodruff (F. M. Brooks, of counsel), for appellee.

MORROW, Circuit Judge. This was an action brought by the plaintiff in the consular court of Shanghai, China, to recover from the defendant the sum of $21,000 for breach of contract. The cause of action stated in the petition is as follows:

"W. Porter Boyd, Plaintiff, vs. American China Development Co., Defendant. Petition.

"Canton-Hankow Railway.

"To Honorable John Goodnow, Consul General, Acting Judicially: The petition of the above-named plaintiff shows:

"(1) That he is a citizen of the United States of America now residing at Shanghai, China, and within the jurisdiction of this honorable court.

"(2) That the defendant is a corporation organized and existing under and by virtue of the laws of the state of New Jersey, a sovereign state of the United States of America, doing business at said Shanghai, and within the jurisdiction of this honorable court.

"(3) That on the 21st day of August, 1902, at Shanghai, aforesaid, plaintiff and defendant mutually agreed by contract in writing, a copy of which contract is on file in the office of the U. S. consulate, to which reference is hereby made, that the plaintiff should serve the defendant, as set forth in said contract, and that the defendant should employ the plaintiff, for the term of five years, and pay him for his services $500 U. S. gold monthly, on the 5th of each month, during the term of said agreement.

"(4) That thereupon the plaintiff entered upon the service of the defendant under said agreement, and has ever since been, and still is, ready and willing to continue in such service.

"(5) That on the 11th day of July, 1904, the defendant wrongfully discharged the plaintiff, and refused to permit him to serve, as aforesaid, though the plaintiff then and there offered to continue in said service, and perform said agreement on his part, to the damage of the plaintiff in the sum of twenty-one thousand dollars.

"Wherefore the plaintiff demands judgment against defendant in the sum of $21,000 U. S. gold, and for costs of suit."

To this petition the defendant answered as follows:

"Between W. Porter Boyd, Plaintiff, and The American China Development Company, Defendant.

"Canton-Hankow Railway.

"The answer to the amended petition, filed on the thirty-first day of August, one thousand nine hundred and four, herein, sheweth as follows:

"(1) Paragraphs 1 and 2 of the petition herein are admitted, but the defendant company is not the Canton-Hankow Railway.

"(2) The defendant company denies that it entered into an agreement with the plaintiff, as alleged in the petition, or into any agreement with the plaintiff. The agreement referred to in paragraph 3 of the petition is made between the board of commission of the Canton-Hankow Railway. It is denied that the defendant company agreed to employ the plaintiff for the term of five years, or for any term, or to pay him for his services, or otherwise.

"(3) It is denied that the plaintiff entered into the service of the defendant company, or that the plaintiff has ever been in such service.

"(4) It is denied that the defendant company wrongfully discharged the plaintiff, as alleged in paragraph 5 of the petition. The plaintiff was discharged by the said board of commissioners on the thirtieth day of June, one thousand nine hundred and four, and has suffered no damage thereby.

"(5) In the alternative, if there was any agreement between the plaintiff and the defendant company or otherwise, which is denied, such agreement and employment were created by or subject to the terms of a letter dated the seventeenth day of March, one thousand nine hundred and three, written by the president of the defendant company, and the contents of which letters were communicated to the plaintiff, and understood and agreed to by him. The following is a copy of such letter:

"'New York, March 17th, 1903.

"'Mr. Willis E. Gray, Eng'r in Chief and General Manager, the American China Development Company, Shanghai, China— My Dear Sir: By a recent mail I wrote you in regard to Mr. Boyd, and the resolution of the board of commissioners giving him a five-year contract. Now the board of commissioners have no authority to do any such thing, and it is only fair to Mr. Boyd to state, in a manner not to be misunderstood, that the American China Development Company accepts no such terms by the board of commissioners. Mr. Boyd, who is secretary to the general manager, holds what is a confidential position, and his tenure of office can only be as long as that of his chief. Except for some extraordinary reason, you will not be interfered with in the selection of your private secretary, but you must give your successor the same privilege. I hope that Mr. Boyd will continue with the company five years, or as long as he may desire to stay, but such stay will be entirely independent of the recent resolution of the Board of Commissioners. Very truly yours,

"'[Signed] Wm. Barclay Parsons.'

"(6) Mr. Willis E. Gray was the engineer-in-chief and general manager of the defendant company at the date of such letter.

"(7) Mr. Gray was Mr. Boyd's 'chief,' within the meaning of the said letter.

"(8) Mr. Gray has since left China, and is not at present the engineer-in-chief and general manager of the defendant company, nor in that company's employment.

"(9) In the alternative, the plaintiff has sustained no damage, or the damages claimed by him are excessive.

"Wherefore, the defendant company prays: (1) For an order that the petition herein be dismissed. (2) For an order that the plaintiff do pay to the defendant company its costs of suit."

The agreement referred to in the third paragraph of plaintiff's petition, is as follows:

"Imperial Chinese Railway Administration, Canton-Hankow (Yueh Han) Line.

"Office of the Board of Commissioners.

"AGREEMENT.

"This agreement, made at Shanghai, China, on the 21st day of August, A. D. 1902 (one thousand nine hundred and two), between the board of commissioners of the Canton-Hankow (Yueh Han) Railway through its chairman, Willis E. Gray, hereinafter designated as the 'Commissioners,' and Mr. W. Porter Boyd, a citizen of the United States of America, residing at Honolulu, Hawaiian Islands, and to the date of the execution of this agreement holding a responsible position with the United States government, and hereinafter designated as the 'Secretary,' witnesseth:

"Article First. That the commissioners on behalf of the Canton-Hankow Railway employ the secretary for the period of five years, dated from the first day of August, 1902 (one thousand nine hundred and two), as secretary to the commissioners and secretary to the engineer in chief.

"Article Second. That the salary to be paid by the Canton-Hankow Railway to the secretary during the period of this agreement shall be annually six thousand gold dollars of the United States coinage of the present standard weight and fineness, the same to be paid in equal monthly installments on the fifth day of each month for the month last preceding.

"Article Third. That the commissioners pay the traveling expenses of the secretary and wife from Honolulu to Shanghai.

"Article Fourth. That the commissioners are to pay all proper and actual expenses incurred by the secretary for himself while the latter is absent from Shanghai on railway business, and the secretary shall pay his own personal expenses while on duty in Shanghai.

"Article Fifth. That the secretary shall faithfully and honestly to the best of his ability serve the commissioners and engineer in chief, and that his habits shall at all times be free from criticism, and shall not engage in any business without first obtaining the consent of the commissioners, nor divulge information concerning the affairs of the commissioners or the engineer in chief.

"Article Sixth. That should the secretary, at any time after the expiration of one year from date of this agreement, be unable to attend to his duties by reason of illness, continuing for three consecutive months, his salary shall be paid as usual, but if such illness continue beyond three months he shall receive no further salary until able to resume his duties, when his salary shall again be paid, beginning at the date of such resumption. If, however, the secretary does not enter upon his duties at the end of six months from the beginning of such sickness, then the commissioners may, if they so desire, declare this agreement terminated, and the secretary shall receive no further compensation.

"Article Seventh. That four copies of this agreement shall be made. A copy shall be filed with the director general and one in the consulate general of the United States at Shanghai. The commissioners and the secretary shall each retain a copy.

"In testimony whereof the commissioners have with the full approval of the director general of the Imperial Chinese Railway Administration, by and under the authority given them by article six (6) of the contract between the Imperial Chinese Government and the American China Development Company, dated April 14, 1898 (one thousand eight hundred and ninety eight), and July 13th, 1900 (one thousand nine hundred), and the secretary have upon the day and year first herein written signed their names and affixed their seals to the foregoing agreement.

"For the Canton-Hankow Railway, by order of the commissioners,

"[Signed] Willis E. Gray, Chairman. [Seal.]

"[Signed] W. Porter Boyd. [Seal.]

"Witness: [Signed] Geo. A. Derby."

The evidence shows that on the 21st day of August, 1902, the plaintiff entered into the service described in the agreement as secretary of the board of commissioners of the Canton-Hankow Railway and secretary to the engineer in chief; that he performed the services to which he was assigned, and was paid his salary, as provided in the agreement, by the American China Development Company from August 1, 1902, up to June 1, 1904, having served for a period of one year and 10 months; that he continued in the employment until July 11, 1904, when he was notified by the acting engineer in chief that, "having ceased to be secretary to the board of commissioners or to the engineer in chief," he was not to enter the office of the company in future. On July 11, 1904, the plaintiff brought suit in the consular court at Shanghai, China, for his services for the month of June, and recovered a judgment.

Upon the trial of the present case in the consular court a judgment was entered in favor of the plaintiff for $13,519. The case has been brought here both by appeal and by writ of error, under sections 4093 and 4096, Rev. St. U. S. [U. S. Comp. St. 1901, pp. 2771, 2772].

The appellant and plaintiff in error (the defendant in the consular

court) contends that the judgment in the consular court is erroneous in the following assigned particulars: (1) In adjudging that the defendant company was bound by the contract, or that it employed plaintiff in any capacity. (2) In adjudging that the plaintiff was not estopped from maintaining this action by his former suit for his salary for the month of June, 1904. (3) In adjudging that the plaintiff was entitled to prospective damages. (4) In considering the injury to plaintiff's character and the fees of his attorneys as elements of his damages. (5) The plaintiff testified on his own behalf. On cross-examination he was asked as to his duties as secretary of the board of commissioners, the apparent object of the question being to ascertain what proportion of plaintiff's work was done as secretary of the engineer in chief and what proportion as secretary to the board of commissioners. The consul overruled the question, and the action in not allowing the plaintiff to answer this question is assigned as error.

1. It appears from the record that on April 14, 1898, the Chinese minister at Washington, having been designated and deputed by the director general of Imperial Chinese Railways for the purpose, entered into a written contract with the American Chinese Development Company of New Jersey, wherein the latter agreed to provide a loan, amounting to £4,000,000 sterling, or its equivalent in American dollars gold, or more, if necessary, for the construction of a railway line in China from the city of Hankow to the city of Canton upon the security of Imperial Chinese gold bonds, carrying interest at the rate of 5 per cent. per annum, such bonds to be a first mortgage upon the railway and its appurtenances. The bonds were to be delivered to and taken by the American China Development Company at 90 per cent. of their face value, the company to have the liberty of selling any or all of the bonds to the public, the company bearing whatever loss and receiving whatever profit there might be in the sale. The company was also required by the contract to build and equip in accordance with the best modern system and operate a line of railway with all necessary appurtenances from Hankow to Canton and from Canton to the sea, if such latter extension should be deemed advisable, and as a remuneration for superintendence and services the company was to receive as compensation 5 per cent. on the entire cost of construction, excepting land and earthworks. After completion of the line, or so much of the line as might be in working order, it was to be operated under officials appointed by the company, who were to be approved by the director general. It was further agreed that, after paying salaries and wages and other expenses for operating and maintaining the line and the interest on the loan, the company should receive 20 per cent. on the net profits, to be represented by and in the form of debentures, to an amount equal to one-fifth of the cost of the line, which debentures should be issued in form agreed to by the director general and the company at the same time as the first mortgage bonds provided for in the agreement. By a supplemental agreement between the Imperial Chinese Railway Administration, under imperial sanction, and the American China Development Company, dated July 13, 1900, it was

recited that a preliminary survey, as provided in the main agreement, had been made, which had disclosed the fact that the work of construction would cost more than was contemplated, and that it was liberally estimated that a sum of $40,000,000 American gold would be required for building and equipping the railway. The American company was accordingly authorized to sell or hypothecate the bonds of such lines from time to time as money should be needed for the work, or as the money market would allow, and the provisions of the supplemental agreement were to be construed and treated as of the same purport and effect as a mortgage customarily executed and delivered in the United States to a trustee for the purpose of securing loans to and bond issues upon railway properties. In article 6 of this supplemental agreement, it was provided as follows:

"The director general shall * * * appoint a board for supervising the construction and operation of the railway, to be called the 'Board of Commissioners.' * * * The members thereof shall be five, of whom two are to be Chinese selected and appointed by the director general, and, besides the engineer in chief, there shall be two foreign members selected and appointed by the American company. The salaries of these five members are to be fixed by the director general and the American company, and to be paid from the general accounts of the railway."

In accordance with the foregoing paragraph of the supplemental agreement, a board of commissioners of the Canton-Hankow Railway was organized at Shanghai, China, on August 21, 1902. The members of the board present were W. E. Gray, Chun Oiting, J. S. Fearon, and W. P. Boyd, plaintiff in this case. The object of the meeting, as stated by the chairman, was the organization of the board of commissioners of the Canton-Hankow Railway under the contract. In the minutes of the proceedings of the board on this occasion it is recited:

"Notice was given by his excellency Sheng Tajen that Mr. Chun Oiting and Taotai Wong Kai Kah were appointed as members of the board of commissioners for the Chinese. The American China Development Company advised that Mr. J. S. Fearon and Mr. W. P. Boyd, with Mr. W. E. Gray, engineer in chief, were the commissioners to represent its interests on the board of commissioners. * * * It was moved by Mr. Chun Oiting and seconded by Mr. Fearon that the chairman be authorized to employ Mr. W. P. Boyd as secretary to the board of commissioners and also to the engineer in chief at a salary of six thousand dollars ($6,000) U. S. gold per annum, and to execute a contract with him, which contract was submitted, covering a period of five years from August 1, 1902. Resolution and contract were approved, and contract duly executed."

The contract has already been set out on 148 Fed. 260. On January 10, 1903, William Barclay Parsons, president of the American China Development Company, gave to Kenneth J. Kingsford in New York City a letter of introduction to W. E. Gray, general manager and engineer in chief at Shanghai, China, informing the latter that Kingsford had been appointed controller of the American China Development Company. The letter contained the following paragraph:

"As Mr. Kingsford is the head of a department, and ranking next to you in China, it will be well to have him replace Mr. Boyd on the board of commissioners, so that any financial matters that may arise at the meetings of the

board may be promptly and properly answered by the comptroller. It is not necessary to displace Mr. Boyd as secretary of the board of commissioners, as that is a position which I think he should continue to fill, and there is no reason why a member of the board should be secretary of it."

On March 17, 1903, Mr. Parsons, as president of the company, wrote to W. E. Gray, as general manager and engineer in chief, concerning the contract entered into between the board of commissioners and W. P. Boyd August 21, 1902, employing the latter for a term of five years. This letter is as follows:

"By a recent mail I wrote you in regard to Mr. Boyd, and the resolution of the board of commissioners giving him a five-year contract. Now the board of commissioners have no authority to do any such thing, and it is only fair to Mr. Boyd to state, in a manner not to be misunderstood, that the American China Development Company accepts no such terms by the board of commissioners. Mr. Boyd, who is secretary to the general manager, holds what is a confidential position, and his tenure of office can only be as long as that of his chief. Except for some extraordinary reason, you will not be interfered with in the selection of your private secretary, but you must give your successor the same privileges. I hope that Mr. Boyd will continue with the company five years, or as long as he may desire to stay, but such stay will be entirely independent of the recent resolution of the board of commissioners."

Mr. Gray showed this letter to Mr. Boyd, who testified that he told Mr. Gray that the American China Development Company was rather late in the day; that he had already resigned a government position and signed the contract with the company. Mr. Gray said that it wouldn't make any difference, that the board had a perfect right to make the contract, and that he would write a letter to that effect. Mr. Gray accordingly wrote to the New York office under date of May 9, 1903, as follows:

"I have shown your letter in relation to Mr. Boyd to him. I am quite sure the board of commissioners felt they were acting fully within their authority when they made a contract with him."

Mr. Boyd continued to perform the duties mentioned in the contract, and was paid his regular monthly salary until May 2, 1904, when the board of commissioners received a telegram from the New York office, dated May 1, 1904, as follows:

"Immediately on receipt of this limit expenditure to $45,000 monthly including everything. Construction-lan-police-general expenses, discharge Boyd, buy wood ties Yuehhan."

In presenting this telegram to the board of commissioners Mr. Kingsford said:

"Owing, I believe, to some reason or other, the expenses here are to be curtailed, and Mr. Boyd discharged, I presume, in consequence. I have instructed Mr. Boyd that his services as an officer of the American China Development Company have ceased, and he will therefore cease to represent the American China Development Company as an acting commissioner on this board."

On the 6th of June, 1904, Mr. Kingsford, acting agent and comptroller of the defendant, wrote to the plaintiff, referring to the notice which he gave the plaintiff on the 1st of May, stating that he had received telegraphic instructions from New York to discharge the

plaintiff, and that he wrote the letter to inform him that he now had another cable from the New York office stating that they considered the plaintiff discharged since April 30th. Mr. Kingsford further says in this letter:

"As we have paid you your salary up to the first of June, this company cannot give you any further remuneration. We are, however, prepared to pay your passage back to Honolulu, as is customary, should you wish it. Kindly give the writer all the keys belonging to the company, and correspondence and documents which you have in your office."

To this letter the plaintiff replied on June 7th as follows:

"The instructions received by you from the New York office prompting the announcement conveyed in your letter of the 6th inst., whereby a solemn contract between the American China Development Company and myself is declared abrogated, is clearly in violation of the rights and privileges guaranteed and secured to me by the terms of said contract, made in strict compliance and conformity with the clear and well-defined powers with which the board of commissioners is endowed, which is clearly stated in article No. 6 of the rules defining the power of the board of commissioners. I will therefore refuse to consider myself discharged or deprived of any of my legal rights under the terms of said contract, and I will not deliver up the keys, correspondence, and documents in my custody belonging to the company, in compliance with the demand in your letter of the 6th inst., and will continue to perform my functional duties as though no such order of discharge had been made."

On June 30, 1904, the board of commissioners adopted the following resolution:

"Resolved that Mr. W. P. Boyd is hereby discharged from his position as secretary to this board and to the engineer in chief, and is hereby notified to turn over all records of said offices to the board of commissioners and the acting engineer in chief, respectively."

It appears from this evidence that the Imperial Chinese government entered into an agreement with the American China Development Company for the construction and equipment of a line of railway from Hankow to Canton. The Chinese government was to issue bonds to the amount of $40,000,000, which were to be taken and sold by the American China Development Company, and with the proceeds the company was to build, equip, and operate the road in accordance with the terms of the agreement. For the purpose of carrying this scheme into operation, a board for supervising the construction and operation of the railway was provided. This board was to be called the "Board of Commissioners." It was to consist of five members. Two of the members were to be Chinese, who were to be selected and appointed by the director general of the Imperial Chinese Railway Administration. There were to be two foreign members besides the engineer in chief, who were to be selected and appointed by the American China Development Company. The salaries of these five members were to be fixed by the director general and the American China Development Company, and were to be paid from the general accounts of the railway. The board of commissioners, as a body, was, in effect, the agent of both the Chinese government and the American China Development Company in the construction and equipment of a line of railway from Hankow to Canton, and the members of the

board individually were appointed by, and represented the interests of, their respective principals. The plaintiff became a member of the board at the time of its organization, representing the interests of the American China Development Company. This is set forth in the proceedings of August 21, 1902, connected with the organization of the board, under paragraph 6 of the supplemental agreement. It is stated in the minutes of the proceedings that the American China Development Company advised that Fearon, Boyd, and Gray were the commissioners to represent its interests on the board. In addition to being a member of the board of commissioners, the plaintiff was employed by the commissioners on behalf of the Canton-Hankow Railway for the period of five years, dating from the 1st day of August, 1902, as secretary to the commissioners and secretary to the engineer in chief. This employment was manifestly in the interest of the American China Development Company, and was made by the commissioners as the agent of that company. It is true the name of the company was not mentioned as the contracting party in the agreement of August 21, 1902. The parties to that agreement were the "Board of Commissioners of the Canton-Hankow (Yueh Han) Railway, through its Chairman, Willis E. Gray, * * * and Mr. W. Porter Boyd." The agreement, however, recites that it is "with the full approval of the director general of the Imperial Chinese Railway Administration, by and with the authority given them article six (6) of the contract between the Imperial Chinese government and the American China Development Company, dated April 14, 1898, and July 13, 1900."

The employment of the plaintiff was recognized and ratified by the president of the American China Development Company in his letter of January 10, 1903, to Willis E. Gray, general manager and engineer in chief, in which he says that it would be well for Mr. Kingsford to replace Mr. Boyd on the board of commissioners, but he also says that it will not be necessary for him to replace Mr. Boyd as secretary of the board of commissioners. The employment was also recognized by the president of the company in his letter of March 17, 1903, when he undertook to repudiate the contract providing for the employment of the plaintiff for a period of five years, and said that the board of commissioners had no authority to do any such thing. The objection to the contract was, however, stated to be that the secretary to the general manager holds what is a confidential position, and his tenure can only be as long as his chief. The president hoped that Mr. Boyd would continue with the company five years, or as long as he might desire to stay. The employment was also recognized and ratified by the company in accepting his services for a period of one year and 10 months, and paying his salary during that time, upon printed vouchers made out in form against the company. The company also recognized his employment in directing his discharge from the employment of the company on May 1, 1904, June 6, 1904, and June 30, 1904.

There can be no question, therefore, but that the plaintiff was employed by the defendant during the time plaintiff continued in such

employment. He certainly was not employed by the Chinese government nor by the board of commissioners except as the agent of the American China Development Company. But, was the defendant bound by the agreement of August 21, 1902, to the employment of the plaintiff for the period of five years? That is the question.

The plaintiff was in the service of the United States government as shipping commissioner at Honolulu when he went to Shanghai and signed the agreement of August 21, 1902. After that contract was signed, and not before, he resigned his position as shipping commissioner. It will not be presumed that the plaintiff would be employed in such important positions, as that mentioned in the contract, or trusted with such confidential relations to defendant's business and operations, without some one responsible for his engagement having knowledge of his ability, experience, and previous occupations. The agreement provided that he should be employed as secretary to the commissioners and secretary to the engineer in chief. He at once entered upon and performed the duties of these two positions. The agreement provided that he should be paid an annual salary of $6,000 in gold, to be paid in monthly installments. This salary was paid to him by the defendant for the period of one year and 10 months. The services performed and salary paid were certainly under the written contract, as there was no other, and if the contract was not originally authorized by the defendant, these acts certainly constituted ratification. But the defendant claims to have repudiated the contract in March, 1903, more than six months after its execution, on the ground that one of the positions held by the plaintiff under the contract was a confidential one to another officer, and that his employment could only continue as long as it was agreeable to that officer. The plaintiff protested against this interpretation of the contract, and refused to accept it. Nevertheless, he was continued in the employment without further controversy for more than a year longer, performing the duties prescribed in the contract. He was then ordered discharged, not because the plaintiff had failed to perform his duties, or in any respect lacked qualifications for them, and not because his employment in a confidential position to another officer was not agreeable to that officer or to the commissioners, but the discharge was ordered because the company desired to reduce expenses. Manifestly, this was not a denial of the obligations of the contract. Moreover, there is not a particle of evidence in the record tending to show that the plaintiff either entered into the employment of the defendant, or continued in such employment with any agreement or understanding that the tenure of his employment was dependent upon the expenses attending defendant's operation. My conclusion is, therefore, that the defendant is bound by the contract as a principal, the contract having been executed by the board of commissioners as the agent of the defendant; but, if there is any question as to the authority of the board of commissioners to make this contract, it was afterward ratified by the acts of the defendant.

2. There is nothing in the record to sustain the claim of the defendant that the plaintiff is estopped from maintaining this action by

his former suit for his salary for the month of June, 1904. The suit is not pleaded, and there is no judgment in the record, but in the defendant's answer it is alleged that the plaintiff was discharged by said board of commissioners on the 30th day of June, 1904, and had suffered no damage thereby. In the report of the testimony taken upon the trial in this case on September 8, 1904, there is the following statement, referred to in the bill of exceptions:

"By agreement between the two counsel, the evidence of Messrs. Boyd and K. J. Kingsford, as given in this court on the 22d of July, was admitted as testimony in this case, and the exhibits of the suit heard on the 22d of July were agreed upon as exhibits in this case."

In the testimony of the plaintiff, Boyd, given in the prior case, and by the agreement made evidence in this case, is the following:

"Q. Did you make a demand for the payment of your salary for the month of June, and it was refused? A. I did, on the 5th June, and it was refused. Q. How much was due you? A. $500 gold."

In the opinion of the consular court there is this reference to this prior case:

"On July 11th Mr. Boyd brought suit for services rendered in June, 1904, under the before mentioned contract, and obtained judgment therefor in this court. In the present suit Boyd sued on August 10th for U. S. gold $500 for July salary. Defendant denied any agreement, and maintained that plaintiff's proper remedy, if any, was to sue for damages for breach of contract. Plaintiff on September 1st filed a new petition, alleging breach of contract, and asking U. S. gold $21,000 damages. To this procedure defendant offered no objection."

If this reference to the prior suit in the opinion of the court and in the bill of exceptions be deemed sufficient to require this court to consider this specification in the appeal, it is sufficient to say that the former suit appears to have been for the salary of the plaintiff for services rendered during the month of June, 1904, under the contract of August 21, 1902. The present suit is for breach of that contract in July, 1904. There is no estoppel in the prior suit prosecuted by the plaintiff for his salary for services rendered under a contract as against the present suit brought for a subsequent breach of that contract.

3. The present suit appears to have been originally brought by the plaintiff to recover from the defendant the salary due plaintiff for his services during the month of July, 1904. The defendant denied liability upon such a cause of action, and maintained that plaintiff's remedy, if any, was for damages for breach of contract. The plaintiff accordingly amended his petition, claiming damages for a breach of contract. To this amended petition no objection was made, and no objection was offered to the testimony introduced in support of the amended petition. Plaintiff testified in his own behalf upon the hearing as follows:

"Mr. Brooks. How many months remain unexpired of the term of your contract? Witness. Three years and one month. Mr. Brooks. That is including July and August? Witness. Yes. Mr. Brooks. You say that is three years? Witness. Thirty-seven months. Mr. Brooks. At $500 gold a month, if you were permitted to carry out the contract? Witness. That is $18,500 gold.

* * * Mr. Brooks. Have you endeavored to find any employment during the last month or two? Witness. I made inquiries among my friends during the last month or two, and I have been unable to find any employment so far. There is no good outlook for me for a position."

Without objection or exception to this testimony, no question would be presented to this court for review upon writ of error, and, while the case comes here on appeal, the statute makes the appeal subject to the rules, regulations, and restrictions prescribed in law for writs of error from district courts to circuit courts. Rev. St. § 4093 [U. S. Comp. St. 1901, p. 2771].

But the appellant seeks to avoid the absence of objections and exceptions to the testimony by urging the objection that the judgment was excessive, and made excessive by the consular court, taking into consideration the prospective damages which the plaintiff would suffer between the date of trial and the expiration of the contract. The amount sued for was $21,500. The plaintiff had recovered a judgment for his salary for the month of June, 1904. The trial was had on September 10, 1904. There was then due the plaintiff under the contract his salary for two months and 10 days, or $1,166. If the plaintiff had been permitted to continue to discharge his duties under the contract until the expiration of the term, his salary for the unexpired term would have amounted to $18,500. The judgment was for $13,519. It is evident that the court, in entering its judgment for the plaintiff, did take into consideration prospective damages. Was the judgment excessive by reason of that fact? Assuming, without admitting, that this question is open for consideration on this appeal, I think the law as now established by the authorities, upholds the judgment.

In Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, the action was for breach of four certain contracts for the delivery of certain bales of hops. As to the first contract, the term to commence performance had arrived, and a shipment had been tendered and refused. The breach as to the other three contracts was the refusal to perform before the time for performance had arrived. The court, in deciding the case, reviewed the American and English cases relating to the right of the injured party to recover prospective damages for the breach of an executory contract. The court held that the doctrine that there might be an anticipatory breach of an executory contract by an absolute refusal to perform it had become the settled law of England as applied to contracts for services, for marriage, and for the manufacture and sale of goods, and that the rule laid down in Hochster v. De la Tour, 2 El. & Bl. 678, was a reasonable and proper rule to be applied to the case before the court. That case was an action to recover prospective damages for the breach of a contract for employment, and its approval by the Supreme Court of the United States makes it applicable to the present case. The case is stated by the Supreme Court as follows:

"Plaintiff, in April, 1852, had agreed to serve defendant, and defendant had undertaken to employ plaintiff, as courier, for three months from June first, on certain terms. On the eleventh of May defendant wrote plaintiff that he had changed his mind, and declined to avail himself of plain-

tiff's services. Thereupon, and on May twenty-second, plaintiff brought an action at law for breach of contract, in that defendant, before the said first of June, though plaintiff was always ready and willing to perform, refused to engage plaintiff or perform his promise, and then wrongfully exonerated plaintiff from the performance of the agreement, to his damage; and it was ruled that, as there could be a breach of contract before the time fixed for performance, a positive and absolute refusal to carry out the contract prior to the date of actual default amounted to such a breach. In the course of the argument, Mr. Justice Crompton observed: 'When a party announces his intention not to fulfill the contract, the other side may take him at his word, and rescind the contract. The word "rescind" implies that both parties have agreed that the contract shall be at an end as if it had never been. But I am inclined to think that the party may also say: "Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time; but I will hold you liable for the damage I have sustained, and I will proceed to make that damage as little as possible by making the best use I can of my liberty."' "

In delivering the opinion of the court (Campbell, C. J., Coleridge, Erle, and Crompton, JJ.), Lord Campbell, after pointing out that at common law there were numerous cases in which an anticipatory act, such as an act rendering the contract impossible of performance, or disabling the party from performing it, would constitute a breach giving an immediate right of action, laid it down that a positive and unqualified refusal by one party to carry out the contract should be treated as belonging to the same category as such anticipatory acts, and said (page 690):

"But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the 1st of June, he is prejudiced by putting faith in the defendant's assertion; and it would be more consonant with principle if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it. Suppose that the defendant, at the time of his renunciation, had embarked on a voyage for Australia, so as to render it physically impossible for him to employ the plaintiff as a courier on the continent of Europe in the months of June, July, and August, 1852. According to decided cases, the action might have been brought before the 1st of June; but the renunciation may have been founded on other facts, to be given in evidence, which would equally have rendered the defendant's performance of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer. An argument against the action before the 1st of June is urged

from the difficulty of calculating the damages, but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case, the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial. We do not find any decision contrary to the view we are taking of this case."

In a previous case (Pierce v. Tennessee Coal, etc., R. R. Co., 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591) the Supreme Court of the United States had held that on discharge from a contract of employment the party discharged might elect to treat the contract as absolutely and finally broken, and in an action to recover the full value of the contract to him at the time of the breach include all that he would receive in the future as well as in the past, deducting any sum that he might have earned or that he might thereafter earn. Mr. Justice Gray, speaking for the court, said:

"It appears to us to be equally clear that the Circuit Court of the United States erred in excluding the evidence offered by the plaintiff, in restricting his damages to the wages due and unpaid at the time of the trial, and in declining to instruct the jury as he requested. Upon this point the authorities are somewhat conflicting, and there is little to be found in the decisions of this court, having any bearing upon it, beyond the affirmance of the general propositions that 'in an action for a personal injury the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligence, including not only expenses incurred for medical attendance and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning by the wrongful act of the defendant'; and, 'in order to assist the jury in making such an estimate, standard life and annuity tables, showing at any age the probable duration of life, and the present value of a life annuity are competent evidence' (Vicksburg, etc., Railroad v. Putnam, 118 U. S. 545, 554, 7 Sup. Ct. 1, 30 L. Ed. 257); and that in an action for breach of contract 'the amount which would have been received if the contract had been kept is the measure of damages if the contract is broken' (Benjamin v. Hillard, 23 How. [U. S.] 149, 167, 16 L. Ed. 518). But the recent tendency of judicial decisions in this country, in actions of contract, as well as in actions of tort, has been towards allowing entire damages to be recovered, once for all, in a single action, and thus avoiding the embarrassment and annoyance of repeated litigation. This especially appears by well-considered opinions in cases of agreements to furnish support or to pay wages, a few only of which need be referred to."

In the case of Rhoades v. Chesapeake & O. Ry. Co., 49 W. Va. 500, 39 S. E. 209, 55 L. R. A. 170, 87 Am. St. Rep. 826, the same doctrine was declared by the Supreme Court of West Virginia with respect to a similar state of facts.

The appellant contends that the law of the last two cases is not applicable to the present case, for the reason that in both cases the employés had received permanent injuries in the service of the employers, and as compensation for such injuries the employers had entered into agreements with the employés to pay them wages and provide them with support. In such cases it is contended that the damages can be determined with some degree of certainty, presumably for the reason that it was not probable that they could obtain employment elsewhere, and the cost of support could be ascertained, while in the present case it is said the plaintiff's damages will be un-

certain, since he might obtain employment elsewhere, and even more remunerative than that from which he was discharged, and his support is not involved. But this is a question of evidence relating to the mitigation of damages, and—

"The burden of proof is on the defendant to show that the plaintiff might have obtained other employment; for the failure of the plaintiff to obtain other employment does not affect the right of action, but only goes in reduction of damages, and, if nothing else is shown, the plaintiff is entitled to recover the contract price upon proving the defendant's violation of the contract and his own willingness to perform." Sedgwick on Damages, par. 667, and cases there cited.

4. It was not alleged in the petition that plaintiff had incurred any expense in employing an attorney to prosecute the action, nor was it alleged that he had suffered any damage to his character by reason of the discharge. The testimony relating to these matters was introduced without objection or exception, and, as there is no evidence that the court considered either as elements of damages, they will not be deemed to have entered into the judgment.

5. The question asked the plaintiff on cross-examination as to his duties as secretary to the board of commissioners was so manifestly intended to call for irrelevant and immaterial testimony that the discussion of this specification appears to be unnecessary.

It follows from what has been said with respect to the several specifications set forth in the appeal that no error appears on the record, and the judgment of the lower court is therefore affirmed, with costs and interest.

EDDY v. CITY AND COUNTY OF SAN FRANCISCO.

(Circuit Court, D. California. August 24, 1906.)

No. 13,697.

MUNICIPAL CORPORATIONS—SUIT TO ENFORCE BONDS PAYABLE FROM SPECIAL FUND—LACHES.

An act of the Legislature of California (St. 1875–76, p. 433, c. 326), authorized the board of supervisors of the city and county of San Francisco in its discretion to pass an order for the widening of Dupont street, which order might be rendered nugatory, however, by the action of a majority of the abutting property owners. In case it remained effective, the act created a commission to have charge of the improvement and prescribed the procedure. It provided that all damages, costs, and expenses of the improvement should be paid by bonds of "the city and county of San Francisco," due and payable in 20 years, which should be paid, principal and interest, from taxes to be levied upon the lands found to be benefited, and for which the municipality should not be liable. It further provided that a tax sufficient to pay the interest and one-twentieth of the principal of such bonds should be annually assessed, levied, and collected "in the same manner as other taxes." *Held*, that the municipality was not a voluntary or contractual trustee with respect to the levy and collection of such taxes, but that the duty was one imposed by the statute upon certain of its officers, for a breach of which it could not be charged with liability as a trustee, and that where such duty was not performed except for five years after the issuance of the bonds, a bondholder who waited until more than 20 years there-

after, and 8 years after the maturity of the bonds, was barred by laches from maintaining a suit for equitable relief against the municipality.

In Equity. On demurrer to bill.

W. T. Hume and John H. Dickinson, for complainant.
Napthaly, Friedenrich & Ackerman, for defendant.

MORROW, Circuit Judge. This is a bill in equity filed in this court on January 4, 1905, by the complainant, a citizen of the state of Rhode Island against the defendant, the city and county of San Francisco, to enforce an alleged trust arising out of the proceedings connected with the widening of Dupont street between Bush street and Market street in the city of San Francisco, in the year 1877. The act of the Legislature of the state, approved March 23, 1876 (St. Cal. 1875–76, p. 433, c. 326), entitled "An act to authorize the widening of Dupont street in the city of San Francisco," provided for proceedings that would extend Dupont street to a uniform width of 74 feet, from the northerly line of Market street to Bush street, and from Bush street to the southerly line of Filbert street.

Section 21 (page 442) of the act authorized the board of supervisors of the city and county of San Francisco, if in the judgment of the board it should be expedient that Dupont street be widened in accordance with the mode prescribed by the act, to express such judgment by resolution or order, within 60 days after the passage of the act, and in the event the board should fail to pass or adopt such order or resolution, then no further proceedings should be had or taken under the act for any purpose whatever; but if the board should pass such resolution, then all proceedings thereafter should be taken under the provisions of the act. The board passed such resolution within the time prescribed, and further proceedings were taken in accordance with the act.

The fourth section (page 434) of the act constituted the mayor, the auditor and the surveyor of the city and county of San Francisco, and their successors in office, a board of Dupont street commissioners to perform the duties prescribed in the act. They were each to receive a compensation of $2,000 for their services. In the event the board of supervisors, under section 21, passed the resolution expressing their judgment in favor of the improvement, then, under section 6, the board of Dupont street commissioners were to publish notice in two of the daily papers printed in San Francisco, informing property owners along the line of the street of the organization of the board, "and inviting all persons interested in property sought to be taken, or which would be injured by said widening, to present to the board maps and plans of their respective lots, and a written statement of the nature of their claim or interest in such lots."

The second section provided that the value of the land taken for the widening of the street and the damages to improvements thereon or adjacent thereto, which might be injured thereby, and all expenses whatsoever incident to such widening, should be held to be the cost of widening said street, and should be assessed upon the district there-

in described as benefited by said widening, in the manner therein provided. The district declared to be benefited by the proposed improvement, and upon which the cost of making the assessment was to be assessed, was described and designated in section 3 of the act, and included two strips between Filbert and Market streets; one on the east side of Dupont street, extending in width half way to Kearny street, and the other on the west side of Dupont street, extending in width half way to Stockton street. Kearny and Stockton streets are adjoining streets, on the east and west side, respectively, of Dupont street, and running parallel to that street. It was further provided in section 3, that in case Dupont street were not widened further north than Bush street, then the district to be benefited should be bounded on the north by the southerly line of Bush street, and on the south by the northerly line of Market street.

In section 12 (page 438) it was provided that the majority of the property owners on Dupont street between Market street and Bush street might defeat the improvement and relieve themselves from any burden on account of it by filing a written protest at any time within 30 days after the notice in section 6 of the act had been given. No such protest was filed. Section 12 also provided that unless within that time the majority of the property owners fronting on Dupont street between Bush and Filbert streets should petition for it, there should be no widening north of Bush street, but that portion of the assessment district should be exempt and excluded from the operation of the act. No such petition was filed and the widening of Dupont street was accordingly limited by the property owners in the district to the four blocks between Market and Bush streets. In the event the improvement should be authorized, first, by the resolution of the board of supervisors, as provided in section 21, and, second, by the action of the property owners under section 12, the board was then required by section 7 (page 435) to proceed to ascertain and determine and separately state and set down in a written report, the description and actual cash value of the several lots and subdivisions of lands and buildings included in the land taken for the widening of Dupont street, and the damages done to the property along the line of said street, and the board was also required to proceed and ascertain and set down, in a written report, a description of the several lots of land included in the district to be benefited by the widening of said street, and the sum or amount in which, according to the judgment of the board, the said lot would be benefited by the improvement. It was further provided that when such report was completed, it was to be left at the office of the board daily, during the ordinary business hours, for 30 days, for the free inspection of all parties interested, and notice that the same was open for such time at such place was to be published by the board daily for 20 days in two daily papers printed and published in the city. At any time within this 30 days, any person interested, who felt aggrieved by the action of the board, could file in the county court his petition setting forth his grievance, and the court was empowered to cause the same to be altered or modified, and finally approved as modified.

It was provided in section 9 (page 436) that all damages, costs, and expenses arising from or incidental to the widening of the street being fixed by the confirmation of the report, as in the act provided, the board was to issue bonds of the city and county of San Francisco in such forms as they might prescribe, in sums of not less than $1,000 each, for such an amount as would be necessary to pay and discharge all such damages, costs, and expenses. The bonds were to be known and designated as the "Dupont Street Bonds," and were to be payable within 20 years from their date, unless sooner redeemed as in the act provided. They were to bear interest at 7 per cent. per annum, payable semiannually; such interest being evidenced by coupons attached to each bond, and signed by the president of the board.

In section 10 (page 437) it was provided that any person or persons to whom damages were awarded, according to the provisions of the act, upon tendering to the board a satisfactory deed of conveyance to the city and county for the land for which damages were so awarded, was entitled to have bonds in an amount equal to the damages awarded for the lands conveyed, together with damages for the improvements thereon or affected thereby, and the bonds so issued and delivered were to be in full compensation for all damages for lands and improvements taken and improvements injured, as contemplated in the act.

By section 11 the board was authorized to sell bonds sufficient to realize money enough to meet and discharge all expenses and damages arising from the widening of the street as established by the report as finally confirmed. The money arising from the sale was to be known and designated as the "Dupont Street Fund." As soon as the bonds were converted into money, as in the act provided, the board of commissioners was required to give public notice in the daily newspapers published in the city and county, for at least 10 days, that they were prepared to pay all damages and liabilities fixed by the final report of the board (not then already discharged) and upon receiving from the parties entitled thereto the proper deeds or proper acquittances from those entitled to compensation, the board was to give to each party an order upon the treasurer for the amount shown to be due, according to the report, payable out of the Dupont street fund.

Provision was made, in section 13 (page 439) of the act, for the levy, assessment, and collection, annually, at the same time and in the same manner as other taxes are levied in the city and county, of taxes upon the lands affected, sufficient to pay the interest on the bonds as they matured, and also sufficient to pay one-twentieth of the principal, and to constitute a sinking fund for the redemption of the bonds; such taxes to be collected out of such lands only, and to be adjusted and distributed according to the values as fixed in the final report of the board, and to go into the hands of the treasurer of the city and county as part of the Dupont street fund.

Section 22 (page 443) of the act provided that the completion of the work should be deemed an absolute acceptance by the owners of all lands affected by the act, and by their successors in interest, of the lien created by it upon the several lots so affected, and operated as an

absolute waiver of all claims in the future upon the city and county of San Francisco and their successors in interest, for any part of the debt created by the bonds authorized to be issued. It was further provided that this provision of the statute should be regarded as a contract between the owners and holders of the bonds and said city and county, and that this provision should be stated on the face of the bonds.

It appears that pursuant to section 9 of the act the board of commissioners reported to the county court the amount of damages allowed, and the value of the real estate taken, and the damages imposed thereon, and the actual contingent expenses incurred or that might be incurred, and reported that the total amount of such damages and costs would be $898,105; that the county court modified said report as to the value of the real estate taken, and decreased the same $84,422, reducing the total cost of damages to the sum of $813,683. The board of commissioners thereupon issued bonds to the extent of $1,000,000. The bonds contained the agreement on the part of the bond holder waiving all claim against the city and county of San Francisco, provided in section 22 of the act. The complainant claims to be the owner of 10 of these bonds of $1,000 each, dated January 1, 1877, payable 20 years from date, with interest at 7 per cent. per annum.

The complaint alleges:

"That the defendant and its officers, failed and neglected to levy and collect taxes, or in any manner provide sufficient money, or create a trust fund, as provided in said act, sufficient in amount to pay the interest on the full amount of said bonds, as the same accrued, or to redeem the bonds so issued and disposed of by defendant, and that the amount collected for the payment thereof, as required by the provisions of said act, was sufficient to pay only a part thereof, and that by reason thereof no funds have come into the hands of said defendant, or the treasurer thereof, or are now in their possession, or under their control, under the provisions of said act or otherwise, sufficient to meet the said interest or the said bonds, or to meet any part of the sum due thereon to this plaintiff. * * * That plaintiff has demanded payment of said bond and the interest coupons attached thereto, from the city and county of San Francisco, and from the treasurer thereof; but, notwithstanding the said demand of the plaintiff, and notwithstanding that the said bond and the interest coupons, are long past due and payable, the same has not been paid or redeemed as by said act provided, or any part thereof, or in any manner, except the coupons thereon from No. 1 to No. 4, inclusive, and the said bond and the said coupons from No. 5 to No. 40, both inclusive, still remain, and are wholly unpaid and unredeemed, and due and owing to this plaintiff. * * * That the said defendant accepted said trust and entered upon the performance of its duties thereunder, but did not keep and perform the conditions and obligations of said trust, and has abandoned the same without notice of any kind to the plaintiff, nor did it perform the duties and obligations imposed upon it as trustee as defined in said act. On the contrary defendant, the said city and county of San Francisco, failed and neglected, during the time specified in said act, or at any time, to assess, levy, and collect, or cause to be assessed, levied and collected from the property specified in said act, or otherwise, taxes sufficient to pay the interest coupons and to redeem the said bonds, as provided therein, and failed in any manner to create the trust fund provided for therein in such sum as to pay the said bonds and coupons, or to provide in any manner for their payment."

The relief prayed for is for an accounting by the defendant for the various sums of money collected by it as taxes and otherwise under the provisions of the act of the Legislature, and for a judgment in favor of the complainant for the principal and interest on complainant's bonds, and for an order and decree requiring and directing defendant to immediately proceed to carry out the alleged trust by proceeding to levy and collect in the proper manner, and as provided by the act of the Legislature, a sum of money sufficient to pay the said complainant the amount found to be due her, together with her costs. To this complaint the defendant has demurred on the ground that the complainant is not entitled to the relief prayed for, and for want of equity in the bill; that complainant's remedy is barred by lapse of time and by the laches of complainant; that there is a want of proper parties defendant, and that the bill is uncertain.

The case of Mather v. City and County of San Francisco, 115 Fed. 37, 52 C. C. A. 631, was an action at law in this court on a number of these bonds, to establish by judgment the amount due the plaintiff for the purpose of securing by way of execution a writ of mandamus to compel the collection of the tax necessary to pay the amount of the bonds and interest. The complaint was demurred to on a number of grounds, which were sustained and the complaint dismissed; judgment being entered for the defendant for costs. The case was taken to the Circuit Court of Appeals upon a writ of error. With respect to the liability of the city and county of San Francisco on these bonds, the court said:

"The provision in the act of the Legislature that the city and county of San Francisco shall not be liable for the debt created by the bonds does not absolve it from responsibility to provide the means for the payment of the bonds in the manner prescribed by the act. * * * The provision in the act exempting the city and county of San Francisco from liability for the debt means only that the debt is not the debt of the city and county, and is not enforceable against it as such. It does not mean that the city and county has received legislative authority to refrain from doing the very things which the act of the Legislature commanded it to do. The Legislature certainly did not intend that the bondholders should have no remedy on their bonds. * * * The means provided by the Legislature for the payment of these bonds is plainly pointed out in the statute. Assuming, as we must, upon the demurrer, that the averments of the bill are true, it is clear that the defendant in error has been remiss in the performance of its duty. The bonds have not been paid for the reason that the fund for the payment thereof has not been created as the law required that it should be created. The present suit has no other aim than to compel the defendant in error to do what it ought to do, and what the act required it to do."

But the court also held that the statute of limitations of California (Code Civ. Proc. § 337), requiring that an action upon a contract or liability founded upon an instrument in writing executed in this state should be brought within four years was applicable to an action on interest coupons attached to municipal bonds and barred the action in four years from the time the coupons matured. The action was commenced June 22, 1900, and the court held that the statute operated to bar the action on all the coupons save the last two, namely,

those due on July 1, 1896, and January 1, 1897. The present action was not commenced until January 4, 1905. To avoid the statute of limitations or the corresponding defense in equity that complainant's remedy is barred by lapse of time and by the laches of the complainant, the bill charges the defendant as a voluntary trustee in whose favor the right to interpose such defense does not begin to run until there is a distinct repudiation of the trust. The complainant cites Warner v. New Orleans, 167 U. S. 467, 17 Sup. Ct. 892, 42 L. Ed. 239, and New Orleans v. Warner, 175 U. S. 120, 20 Sup. Ct. 44, 44 L. Ed. 96, as supporting the cause of action alleged in the bill. The two cases relate to the same transaction. In 1858 the state of Louisiana undertook the work of draining and reclaiming portions of the parishes of Orleans and Jefferson. This work was to be done under the direction and control of the board of drainage commissioners appointed for the several districts into which the territory was divided. Provision was made for assessing the cost and expenses of the work upon the property benefited. The work continued under these auspices until 1871, when, by an act of the Legislature, the board of drainage commissioners was abolished and the work of drainage transferred to a canal company, but the duty of collecting the assessments was imposed upon the board of administrators of the city of New Orleans, and the administrator of accounts was directed to draw warrants on the administrator of finance against the drainage fund for the payment of amounts due for the work. The canal company, becoming embarrassed, assigned all its rights to an individual, who completed about two-thirds of the work prior to February 24, 1876, when an act was passed authorizing the city of New Orleans to assume exclusive control of the drainage work, and, if it desired, to purchase from the canal company and its transferee all the boats, tools, and apparatus pertaining to the work, and also the franchise of the company. This act further provided that the price should be paid by the city with drainage warrants in the same form and manner as those theretofore issued. The city elected to make the purchase of the property of the canal company and its transferee. It was appraised at $300,000, and a formal sale and transfer was executed by the company and its transferee to the city at the amount named, payable in drainage warrants, and the city covenanted "not to obstruct or impede, but, on the contrary, to facilitate, by all lawful means, the collection of drainage assessments, as provided by law, until said warrants have been fully paid; it being well understood and agreed by and between said parties thereto that collection of drainage tax assessments should not be diverted from the liquidation of said warrants and expenses under any pretext whatsoever until the full and final payment of the same."

It appears that prior to the purchase of the property from the canal company and its transferee, the city had issued its bonds in excess of the whole amount assessed against individuals and against the city on the areas of its streets and squares. After the city had assumed exclusive control of the work, after it had voluntarily purchased from the canal company and its transferee their property,

and had given its warrants payable out of the drainage fund, it sold some of the drainage machinery, suffered the rest to become rotten and valueless, and abandoned the work of drainage, so that by reason of the noncompletion of the drainage system drainage taxes could not be collected, inasmuch as no benefit had been conferred upon the property. Further than this, the city, by various means, impeded the collection of the taxes, and by conduct, ordinance, and proclamations encouraged and induced the people to refuse to pay the assessments, whereby those due by private persons became valueless. The Supreme Court of the United States, in Warner v. New Orleans, 167 U. S. 467, 477, 17 Sup. Ct. 892, 42 L. Ed. 239, answering questions certified by the Circuit Court of Appeals, stated that the question was whether the city was not estopped to plead in defense of liability on these drainage warrants the fact of a prior issue of bonds to a greater amount than that assessed by areas against the streets and squares and collected from private property. The court thought the question must be answered in the affirmative, on the ground that the city, in respect to the purchase of the property from the canal company and its transferee, and in the obligations assumed by the warrants issued, had acted voluntarily. It was, in this transaction, a voluntary contractor and the proposition which the court affirmed was:

"That one who purchases property, contracting to pay for it out of a particular fund, and issues warrants therefor payable out of that fund—a fund yet partially to be created and created by the performance by him of a statutory duty—cannot deliberately abandon that duty, take active steps to prevent the further creation of the fund, and then, there being nothing in the fund, plead in defense to a liability on the warrants drawn on that fund that it had prior to the purchase paid off obligations theretofore created against the fund. Whatever equity may do in setting off against all warrants drawn before this purchase from the canal company and its transferee the bonds issued by the city, * * * it by no means follows that the city can draw new warrants on the fund in payment for property which it voluntarily purchases, and then abandon the work by which alone the fund could be made good, resort to means within its power to prevent any payments of assessments into that fund, and thus, after violating its contract promise not to obstruct or impede, but on the contrary to facilitate by all lawful means, the collection of the assessments, plead its prior issue of bonds as a reason for evading any liability upon the warrants. One who purchases property and pays for it in warrants drawn upon a particular fund, the creation of which depends largely on his own action, is under an implied obligation to do whatever is reasonable and fair to make that fund good. He cannot certainly so act as to prevent the fund being made good, and then say to his vendor, you must look to the fund and not to me."

In New Orleans v. Warner, 175 U. S. 120, 20 Sup. Ct. 44, 44 L. Ed. 96, the same case had reached the Supreme Court on appeal, and in deciding the case the court again referred to the facts, reaffirmed what it had said in the previous case in answer to the questions propounded by the Circuit Court of Appeals, and added:

"Having thus voluntarily assumed the obligations of a trustee with respect to this fund, it cannot now set up the statute of limitations against an obligation, which, as such trustee, it had undertaken and failed to perform. The rule is well settled that in actions by cestuis que trust against an express trustee the statute of limitations has no application, and no length of time is a bar. While that relation continues, and until a distinct re-

pudiation of the trust by the trustee, the possession of one is the possession of the other, and there is no adverse relation between them. Perry on Trusts, § 863. In Oliver v. Piatt, 3 How. 333, 411, 11 L. Ed. 622, it is said that 'the mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust; and time begins to run against a trust only from the time when it is openly disavowed by the trustee who insists upon an adverse right and interest, which is fully and unequivocally made known to the cestui que trust.' To set the statute in motion the relation of the parties must be hostile, and so long as their interests are common, or their relations fiduciary, as in the case of landlord and tenant, guardian and ward, vendor and vendee, tenants in common, or trustee and cestuis que trust, the statute does not begin to run. Zeller's Lessee v. Eckert, 4 How. 289, 11 L. Ed. 979; Seymour v. Freer, 8 Wall. 202, 19 L. Ed. 306; Lewis v. Hawkins, 23 Wall. 119, 23 L. Ed. 113."

Is the doctrine of this case applicable to the case now before the court? The city and county of San Francisco was not a volunteer contractor nor a volunteer trustee. What it did it did pursuant to the statute and under its express direction. The only discretion it exercised was to give its consent through the board of supervisors to the widening of Dupont street, but it was still left to the majority of the owners of property affected by the proposed improvement to protest against it and the project would be defeated. Nothing that the city was required to do could prevent such action if the property owners deemed the improvement adverse to their interests. The only contract the city entered into was with the bondholders, and even this contract was expressly directed by section 22 of the act. That section is as follows:

"The completion of the work described in this act shall be deemed an absolute acceptance by the owners of all lands affected by this act, and by their successors in interest, of the lien created by this act, upon the several lots so affected, and it shall operate as an absolute waiver of all claim in the future upon the city and county of San Francisco for any part of the debt created by the bonds authorized to be issued by this act, and their successors in interest. This shall be regarded as a contract between said owners and the holders of said bonds and said city and county, and this provision shall be stated on the face of the bonds."

What the defendant failed and neglected to do, as charged in the bill of complaint, was to fail and neglect to assess, levy, and collect sufficient taxes upon the property described in the act for the purpose of creating a fund to be held in trust for the payment of the interest and the full amount of the bonds issued and disposed of by the defendant, and it is alleged that by reason thereof no funds had come into the hands of the defendant or the treasurer thereof, sufficient to meet the interest or principal of said bonds, or any part thereof due to the plaintiff.

The direction of the statute is:

"There shall be levied, assessed, and collected annually at the time and in the same manner as other taxes are levied, assessed, and collected in said city and county, a tax upon the lands described in section three of this act, sufficient to pay the interest on said bonds as the same matures; said tax to be collected out of the said land only. The assessment therefor, however shall be adjusted and distributed according to the enhanced values of the respective parcels of land, as fixed in the said final report by the said board. * * * There shall be levied, assessed, and collected annual-

ly, at the time, and in the manner, and upon the same lands, and in accordance with the same rule of assessment upon enhanced values as provided in this section, a tax upon each $100 valuation, sufficient to raise one-twentieth of the principal of said bonds."

The duties of making these assessments and levying and collecting these taxes were purely statutory duties, created, not by municipal obligation but primarily by a board of commissioners proceeding under a state statute. It is true the statute directed that the mayor and auditor and the city and county surveyor should constitute the board of Dupont street commissioners; but it also provided that they should each receive a compensation of $2,000 for their services. The services of these officers as a board of commissioners, were, therefore, not municipal services for which they were otherwise compensated, but were special services under the act of the Legislature. It seems to me that the facts of this case bring it within the doctrine declared by the Supreme Court in the case of Peake v. New Orleans, 139 U. S. 342, 11 Sup. Ct. 541, 35 L. Ed. 131, where the city of New Orleans was held to be a compulsory trustee, as distinguished from a voluntary and contractual trustee, as afterward found in Warner v. New Orleans, and New Orleans v. Warner, supra. In the Peake Case, as in the present case, the complainant charged, among other things, that the defendant did not collect certain assessments when it ought to and could have done so. The assessments were to be levied and collected under a statute providing for drainage work. The court said, with respect to this distinction:

"The scheme was one of special assessments, as distinguished from municipal tax for general benefits. The distinction between the two is obvious and well recognized. It is stated by Cooley in his work on Taxation, page 416: 'The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed, beyond what may be anticipated from an adminstration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be especially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and in addition to the general levy, they demand that special contributions, in consideration of special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of public work, are at the same time to suffer no pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies."

Then, after referring to the legislation which brought the city of New Orleans into relation with the drainage work and the assessments to carry it on, the court said:

"The obligations cast upon the city were purely statutory, and while they were, in respect to the party doing the work, and the collection of assessments, somewhat in the nature of a trust, they are more to be regarded as statutory obligations, a failure to discharge which puts less strain on the moral sense. * * * If ever there was a case in which the responsibility of a city should be narrowed, this is one. By the legislation of the state, it was denuded of all freedom of action. It had no choice of

contractor or price. Neither the property to be taxed, nor the means or method of collecting the assessments, was intrusted to its discretion. This is not a case in which there was a failure on the part of the legislative body, the city council, to prescribe and provide sufficient machinery for the collection of assessments. No superintendence of the financial department, whether as to the property to be assessed, the amount of the assessment or the collection thereof, was intrusted to the municipality. All this financial power was placed directly, by state action, without its consent, in one of its official boards. Thus denuded of freedom of action it may properly insist upon the narrowest limits of responsibility. If the financial duty was devolved, without its consent, upon one of its administrative boards, and such board was derelict of duty, it may properly say to a complaining party, your remedy was mandamus, to compel prompt and efficient action by that board."

If I am correct in my opinion that the law of the Peake Case is applicable to the present case, it follows that the duty of assessing, levying, and collecting the Dupont street taxes was a statutory duty imposed upon certain officers of the city and county of San Francisco, and was not a voluntary municipal or contractual obligation, and that the defendant was not a voluntary or contractual trustee, and is not liable as such, upon the facts stated in the bill of complaint. It is alleged in the bill of complaint that the defendant alleges and pretends contrary to the truth; that in each fiscal year from 1877–1878, to and including 1896–1897, taxes were levied and assessed on the property described in section 3 of the act of the Legislature, and that the defendant has exhausted its power to make further liens and assessments with respect to such taxes; that the defendant also pretends that it has omitted to collect the taxes so levied and assessed, for the reason that certain actions were commenced in the Superior Court of the city and county of San Francisco in 1879–1880, to enjoin the tax collector from selling the property described in the act; and that in 1881 judgments were entered in all of said actions restraining the tax collector and his successor in office, from advertising and offering for sale any of said lands described in said actions, or any past or future levy or attempted levy on account of the provisions of said act; and that said judgments have not been reversed, vacated or modified, and the said injunctions still remain of record as the final judgments in said actions and bind and are conclusive upon the successors in office of the said tax collector, and all of the property described in said actions is protected by said judgments and injunctions, and none of the same can be sold, and the defendant pretends, and alleges that by reason thereof it is prevented from performing the duties and obligations of such trust, and has performed the obligations of such trust to the extent of its ability, and is therefore not negligent in its duty to the complainant. The complainant alleges that in any actions commenced against the tax collector, neither the complainant nor the defendant was a party thereto, and that it was the duty of the defendant, as trustee of the plaintiff, to become a party to said actions and to notify the plaintiff of the pendency of said actions, and to use all reasonable means and diligence to defend said actions so far as the same affected or attempted to affect the validity of the bonds, and to take all reasonable

steps and proceedings necessary and proper to defend the plaintiff and her interest in said bonds and the interest accruing thereon, and that the defendant failed and neglected to notify plaintiff of the pendency thereof; that defendant omitted and neglected its duties and obligations to complainant in carrying out said trust, to exercise and use such means, process, and steps as were necessary, proper, and convenient to appear in said action to defend the same, and to use all ready and reasonable means within its control to prosecute said action, by appeal or otherwise, to its final termination, and neglected to use such reasonable means as were in its power and control to protect the interests of plaintiff, and to carry out the obligations and duties imposed upon it under the conditions of the trust.

I am of the opinion that even assuming that the city and county of San Francisco was charged by law with a trust in the duty imposed to assess and collect the taxes to pay the interest and principal of the bonds described in the bill of complaint, nevertheless it appears from the bill of complaint that that trust was repudiated and denied when it defaulted in the payment of the interest on the bonds due and payable on and after July 1, 1881; that it repudiated and denied the trust when it defaulted in the payment of the several coupons from January 1, 1882, to January 1, 1897; that the trust was also repudiated and denied when it defaulted in the payment of the bonds when they came due on the 1st day of January, 1897; that the trust was also repudiated and denied when the city and county of San Francisco failed to become a party to the suits against the tax collector in 1879 and 1880, and failed to intervene prior to the judgments entered in such suits in 1881. The first default occurred more than 20 years, and the last default on the payment of the interest and the principal of the bonds, more than five years, before the commencement of the present suit; and the failure to defend against the suits brought to restrain the collection of the taxes occurred more than 20 years before the commencement of this suit. The failure of complainant to bring suit within a reasonable time after these numerous defaults was, in my judgment, gross laches on the part of complainant, and deprives her of the equitable jurisdiction of this court. The complainant should have proceeded at law within the period prescribed by the statute of limitations to enforce the statutory obligation by judgment and the execution of the judgment by mandamus.

The demurrer is therefore sustained, and the bill dismissed.

THE UMBRIA.

THE CHARLES E. MATTHEWS.

(District Court, S. D. New York. June 26, 1906.)

COLLISION—DAMAGES—COST OF REPAIR.

Where the testimony produced by the owner fairly establishes the amount actually expended in repair of a vessel injured in collision, but it is not satisfactorily shown that such amount was the fair and reasonable cost of the repairs called for by the survey, resort may be had to the

estimates of competent experts called by claimants to determine the amount properly allowable as damages for the collision.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 265.]

In Admiralty. On report of commissioner awarding damages for collision.

Benedict & Benedict, for libellant.
Lord, Day & Lord, and Goldthwaite H. Dorr, for the Umbria.
Wing, Putnam & Burlingham, for the Matthews.

ADAMS, District Judge. On the trial of this action it was determined that both the Umbria and the Matthews were in fault for the collision, and it was referred to a commissioner to ascertain the damages. Proof having been given, it was reported by him that damages were sustained by the libellant amounting to $15,739.71. Of this amount $10,142.59 were reported as the amount required to make the necessary collision repairs.

In this report the commissioner, after analyzing the testimony with respect to repairs and concluding the libellant's proof was deficient, said:

"The bill not having been proved, it cannot be allowed as presented. It is clear, however, that extensive repairs were made, and the position of counsel for both claimants is that the bill should be allowed less a deduction of 25%. The testimony of the witnesses called by claimants justifies such deduction, as far as their estimates go, even if allowance be made for a tendency on the part of expert witnesses to lean towards the party who calls them. But the cost of rebuilding the scow in 1901 should furnish a useful standard of comparison, although reasonably precise evidence of such cost has not been presented. Mr. Packard, Jr., said that at that time they 'rebuilt her from keelson up, leaving nothing there but the bottom, including the keelson.' He also said that his company kept no books, but he thought their records would enable him to get the cost of that work approximately. He did not furnish it, however. Mr. Packard, Sr., said that it cost 'somewhere about ten to eighteen thousand dollars,' according to his best recollection. Even if we accept the highest amount given by Mr. Packard, Sr., the bill under consideration would appear to be excessive by comparison; inordinately so, if we divide the difference between his maximum and minimum and assume the cost to have been $14,000; and libellant cannot justly complain if such amount be adopted, since it could have furnished the correct amount had it seen fit to do so.

"I therefore allow $10,142.59 for repairs, that being the amount of the bill less a deduction of 25%."

Upon the report being presented for confirmation the libellant applied for leave to have the reference opened for the purpose of taking further testimony. This motion was granted and another report has been made on the question of recovery for repairs, in which the commissioner says:

"This cause was originally referred to me, to ascertain the amount of libellant's damages, by the interlocutory decree entered May 11th, 1905, and I filed my report January 31, 1906, by which I found, among other things, that a bill for repairs to libellant's scow, amounting to $13,523.45, had not been proved, and that on the testimony then before me the amount appeared to be excessive for repairing the damage suffered in the collision. I allowed $10,142.59 for repairs, which was the amount of the bill less a deduction of 25%. This sum was conceded by counsel for both the libelled vessels. Subsequently, on libellant's motion, the reference was re-opened by the court to permit fur-

ther testimony by an order made February 28, 1906, and both sides have presented additional proofs under that order.

To prove the bill, libellant has adopted a method referred to by the Circuit Court of Appeals in The Norma, 68 Fed. 509, 15 C. C. A. 553, following the rule laid down in Mayor v. 2nd Ave. R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839. In the former case the court said that 'it was competent to prove the charges by the testimony of the bookkeeper who transcribed them from the temporary memoranda (which were substantially slate entries) supplemented by testimony of the persons who made the memoranda that such memoranda, to their own knowledge, were correct.' It was held that the proof was insufficient where the bookkeeper, who had but little personal knowledge of the items, and only general knowledge as to the fact that the men were working on the job, made up his account from memoranda furnished him by the workmen, the memoranda being assumed by him to be correct and destroyed by him as soon as entered in the books; the court stating that the difficulty was that no one testified of his own knowledge, and that although it would probably be impossible to produce specific evidence of the accuracy of each memorandum, because of its destruction, libellant should at least have called the workmen who made the memoranda to testify that all memoranda made by them, and turned in to the bookkeeper during the period, correctly set forth the hours they worked and the materials they used; adding, 'Without such proof the charges are supported only by hearsay evidence.' In the present case, also, the memoranda of the workmen and heads of departments at the shipyard have been destroyed. It is apparent that strict compliance with this stringent rule is most difficult, and at times might be impossible, where the job is a large one on which many workmen from a shifting force are engaged.

Libellant called the foreman on the job, the heads of various departments at the shipyard, the store-keepers there, and the time-keeper and book-keeper. The testimony of these witnesses, or at least some of them, was to the effect that Lynch, who was employed by and represented libellant, and testified on the first reference, kept track of the work, and compared his record of labor and materials with theirs.

Cross, the foreman on the job, who had charge of the dry dock where the scow was repaired, testified he was there at all times while the work was in progress, with the exception of a couple of days at the end, that he laid out the work for the men, measured the lumber used, and made memoranda of it, and handed in his memoranda to Olson, the book-keeper and time-keeper, from day to day, and that his memoranda correctly reported the lumber that actually went into the repairs. Olson testified to receiving these daily reports, but said that sometimes there were memoranda, and sometimes the reports of Cross were oral, depending upon whether there were few or many items. This variance between them, on which counsel for the Umbria dwells, seems to me to be of slight importance.

Schenck, the foreman of the caulkers, testified that he decided what materials were necessary in his line, that these consisted of oakum, pitch, paint, pitch mops, brushes, etc., kept in a storehouse of which one Larkin had charge, that he himself procured such supplies from the storehouse, weighed them himself, gave the weights to Larkin, and carried the materials to the scow, and that they actually went into the job. Larkin testified that he did the weighing as stated by Schenck, reported the quantities accurately, and handed in a daily memorandum to Olson; and this was confirmed by Olson.

Monroe, the head fastener, whose department included 'all iron to be driven and all holes to be bored,' testified that when he wanted iron he ordered the men to go to the blacksmith's, about 100 yards away, and had it cut, weighed and charged, the men weighed it themselves, the quantity was marked down by them on a blackboard, the weights were put down accurately in every instance, sometimes he would go with the men, sometimes he would go afterwards, most of the time, he thought, he saw them do the cutting. The largest part of the iron used he saw weighed. Larkin, from whose storehouse these materials were taken, testified that the men weighed accurately, he always looked at the scales, he took the weight down in every case, turned the memo-

randa in to Olson daily, and the memoranda were correct. Horner, another storekeeper, who had charge of the pipe and pipe fittings, packing, machinery steel, nipples, drills, steam gauges, boiler fittings, boiler tubes, castings, grate bars, galvanized iron pipes, testified that he knew such articles were used on the scow, that he weighed most of the things himself, and in some instances the men themselves did the weighing, but he immediately made a memorandum of the correct weight after being told by them. His knowledge that the articles he referred to were used in the scow was derived from the men, as he did not go aboard to see. He turned in his memoranda to Olson daily. Olson testified that he received the memoranda of Larkin and Horner for each day's materials.

Anderson, head blacksmith, testified that he made correct memoranda of the time of the men and the material in his department, and Olson took these up daily. He said, however, that his work was confined to the shops, and he knew when anything was for the scow because the men told him; and he added that he could not be misled, because his experience enabled him to know whether the work was for a vessel or for a scow. Olson confirmed Anderson's testimony as to receiving the memoranda from him.

Preacher, the master machinist, testified that the pump, injectors and piping were overhauled by his department, new piping put in, the boiler re-tubed, and other work done, that the record of the material in his department was kept by Horner, the men made out their time on printed forms used for that purpose, these were taken up by Olson daily and examined by himself, he went over them and the records of material with Olson, followed the work up, knew what each man was doing, and that the slips were made out correctly. Olson testified to receiving these slips.

Besides testifying that he received daily the memoranda and slips hereinbefore referred to, Olson said that each morning he went over the place to ascertain what men were at work and what they were engaged on, and repeated this trip several times a day, he himself noted the time of the carpenters and laborers, obtained information as to caulkers from the head caulker, which he confirmed by his own observation, and of the blacksmith's helpers from the head blacksmith, observed what machinists were at work as well as receiving the slips, obtained from the head boiler-maker the time of his men, entered everything in a memorandum book from which the entries were carried to the blotter day by day, and in this blotter also entered the contents of the memoranda and slips already referred to as received by him from heads of departments and workmen. All these entries were correctly made, he said, and he compared his record of time with Lynch each day, and adjusted with him any variance between them. He also testified that each day's blotter entries were copied on a billhead as the work went on, so that as soon as the job was finished the entire bill was ready, and that this was in accordance with their custom. He stated that the items on the bill are correct copies from the blotter. On cross-examination, he said that men were shifted from one job to another as convenience required, and his testimony indicated that to some extent he inquired of the men themselves as to who worked on the job and the time each man was employed on it. He said that his work was really clerical, to keep the books straight and put down what was told him.

The testimony of these witnesses is criticised by counsel for the Umbria as largely hearsay, and he contends that the bill has not been proved by competent testimony. I think there is sufficient competent testimony to make out a prima facie case that the labor and materials itemized in the bill were bestowed upon the scow; and if there were satisfactory proof that the account represented the fair cost of making the repairs called for by the survey, I should consider that the bill ought to be allowed in full. The proof most open to criticism is that relating to carpenters and laborers; but I do not consider that Olson's testimony as to their time is hearsay because the men were not under his eyes all the time. His frequent trips about the yard, and his own observation, although assisted by inquiries of the men, enabled him to keep a reasonably correct record of their time. But this, as well as other items in the bill, are supported to some extent by the testimony of Lynch on the first

reference, which I held in the original report was not sufficient in itself to prove the bill. The circumstance there alluded to that the entries in Lynch's books accorded so closely with the items in the bill as to suggest copying from the same source might be regarded as explained by the testimony on the re-hearing that it was Lynch's practice to compare his record with that of the others, and adjust any discrepancies there may have been; although it should be added that Lynch was absent part of the time. Labor and material which appeared to have been recorded by him on the faith of statements made by others, has now been proved by competent testimony. He also testified that he personally made a record of the carpenter work from his own observation, and this testimony, although its value was impaired on cross-examination, is to be considered in connection with Olson's testimony on that subject. I do not think that I should aggravate the difficulties of proving the bill under the rules laid down in The Norma by a captious criticism of the testimony.

It is insisted by counsel for claimants that, assuming the bill in fact represents what was done upon the scow, either the work was done extravagantly, or the bill includes repair work outside the survey, not necessitated by the collision. In my original report I stated that Mr. Packard, Jr., vice-president and treasurer of libellant, testified that in making the repairs the survey was followed with some slight changes. Rankin, superintendent of the Perth Amboy Company, testified on the first reference that there were a few important departures from the survey, which he described and which are set forth in the original report (pages 16–17). He also testified that the lumber saved by changes was about equal to the lumber used for the additions, and the change in the keelson work was a saving on both labor and material. Morrison, the foreman on the job, testified on the re-hearing that no work was done outside the survey, and that there was no work except what was necessary to repair the damage. Mr. Packard, Sr., also testified to the latter fact on the first reference, but Mr. Packard, Jr., said that there was some additional work for which a separate bill was rendered. This bill has not been produced.

Lang and Hoyt, called by claimants on the first reference, gave estimates of the amount of labor and material which would have been required to carry out the survey, and their testimony is discussed on pages 17–20 of the original report. They did not make estimates of the fair cost of the repairs, but Lang was again produced as a witness for claimants on the re-hearing, and testified that in the winter and spring of 1905, $10,534 was the fair and reasonable cost of doing the work called for by the survey, with the changes indicated by Rankin, and including a renewal of certain planks which the survey did not clearly indicate were to be renewed. This amount, he said, would allow a profit of about 13% at his place at Hoboken, but in view of the lower cost of labor at Perth Amboy, and the resulting advantage to the shipwright, there might be a profit of 18% on work there without its being unreasonable. Mr. Packard, Sr., has himself said that he gave the work to the Perth Amboy Company because labor was cheaper there; and that this company had that advantage is the testimony of all the witnesses. Lang's testimony shows that he made a careful and intelligent investigation of the subject, and there was nothing in his cross-examination to impair its substantial accuracy. There were a few items of small importance that he did not consider, some of which he said were not called for by the survey, but there were allowances in his estimate which appear to have been sufficient to cover all proper items.

On the first reference, libellant's principal witness, Rankin, did not dispute the substantial accuracy of the estimates of Lang and Hoyt as based on the survey, and no other shipwright was called to overcome them. Rankin made the general statement that the bill (referring to the first portion, for $13,-253.69) was fair and reasonable, but he testified as follows on cross-examination:

'Q. You have no personal knowledge then as to whether these items are correct in these bills? A. No personal knowledge; I believe those to be correct, for the simple reason that they were checked off every morning with Mr. Packard's man. Mr. Packard had a man on the job all the time and him and our bookkeeper checked the bills up every morning together. Q. You have

no personal knowledge of the matter, just simply your confidence in Mr. Packard's man and—A. And our own man.'

On the re-hearing, although fully advised that claimants intended to continue their vigorous attack on the bill, libellant has called no person in authority at the shipyard, and no shipwright or other experienced and competent person, to sustain the bill or point out errors or fallacies in the figures given by claimants' witnesses, or explain the considerable difference between the bill and what was apparently the fair cost of carrying out the survey. Mr. Runyon, the president of the Perth Amboy Company, with whom the arrangements were made for the repairs, and who, according to Rankin, had knowledge of the work, did not testify on either reference. Certain bids which Mr. Packard, Sr., said on the first reference were received from other builders and exceeded those of the Perth Amboy Company, have not been produced, although their absence was referred to in the original report. Nor has Mr. Packard made a satisfactory explanation of the disproportionate cost of making these repairs as compared with the cost of rebuilding the scow a few years previously.

Libellant's counsel argues that estimates should not be received against a bill for work actually done, and refers to The Catharine, 17 How. 170, 15 L. Ed. 233, and The City of Chester (D. C.) 34 Fed. 429. The former case held that where a vessel damaged in collision had actually been raised and repaired, the district court erred in adopting as the measure of damage the difference between her value immediately before the collision and her value in a sunken and disabled condition as estimated by experts, and that inquiry should have been made as to the actual cost of raising and repairing. The case is not an authority for holding that no inquiry can be made as to the reasonableness of that cost. In The City of Chester, Judge Brown merely held that where an estimate of the cost of repairs was made at the time of the survey at New York, the libellant could not recover the amount of the estimate when he had the repairs made at another place for a less amount, as the rule of damages was complete restitution and the libellant should not be allowed to make a profit out of the transaction. It is difficult to see how a repair bill could be impeached except by resorting to estimates. And in The Robert Hadden (D. C.) 68 Fed. 1017, where a bill of $2,864 for repairs had been actually paid by the libellant, Judge Brown sustained a report allowing only $1,785 because on the evidence the latter sum was the reasonable cost of making repairs.

It is also contended by libellant that the survey should not be regarded as determining the repairs to be made, but the cost of repairing the scow independently of the survey should be considered, and that as a matter of fact, the survey was not followed. But with the exception of Lynch, the testimony of libellant's own witnesses is to the effect that the survey was substantially followed, although on the first reference, after Lang & Hoyt had testified, Rankin, who was the surveyor for libellant and signed the report, was recalled and gave a technical, and not very enlightening, explanation which was intended to show that there were various changes which he had not previously mentioned, and which would account for the excess of labor and material.

Lynch testified:

'Any one looking at the job knew we could shorten the job by doing it in the way we done. Make it less expensive by leaving the survey and doing it in another way.

'Q. Then the changes you made were in the interest of economy on the job? A. Yes.

'Q. It cost less to do it the way you did than the way the survey called for? A. Decidedly.

'Q. Was there any old iron put back? A. Yes.

'Q. Can you tell me about how many tons? A. I can't tell you.

'Q. In a general way? A. We used every particle of old iron that was straight enough to measure figures 18 inches, if we could get a bolt 18 inches out of it, we saved it and used it back.'

And Rankin testified as follows on cross-examination, after he had described the additional changes referred to:

'Q. Would you agree with these gentlemen who testify for us, that taking that survey as it is, it calls for about forty to forty-four thousand feet of lumber? A. I think those gentlemen, taking the survey as they saw it, might fairly estimate on that lumber.

'Q. Now, you have come here to-day to tell us there was a lot of work done outside of the survey, have you? A. There is not so very much outside the survey.

'Q. Are we to understand your testimony to-day varies your previous testimony as to that at all? A. Not to any great extent, I don't think.

'Q. Do you remember the last time you were here I asked you with the greatest particularity whether you did anything outside of the survey, do you remember that? A. Yes sir.

'Q. Do you remember you told me in three respects you departed from the survey and in three only? A. Did I say three only?

'Q. Yes; did you mean anything else? A. I don't remember.

'Q. Do you want to change your testimony from that day? A. If I said in three only.

'Q. Three important particulars only; is that right? A. That is right, yes.

'Q. You tried to make a good, honest, fair survey, did you? A. We did to the best of our ability.

'Q. You have often made surveys before? A. A great many.

'Q. You testified, Mr. Rankin, as to these various pieces of work that did not show in the survey. Have you made any estimate—detailed estimate—of the additional lumber that it would require to carry out these various things which you say had to be done and were done and which it was not possible to see in the survey? A. No, I have not.

'Q. So when you say that would account for that 17,000 increase in lumber, it is just pure guess work, you have not reckoned it up. That cost is not based on any detailed working out on how much lumber would be taken out by this work that the survey did not show and how much would be needed for that piece of work? A. I haven't had time to go into these details.

'Q. You have not gone into any detail? A. No.

'Q. Have you described this work in such detail this afternoon that it would be possible to make such estimate? A. I don't think it would, because I told you those are only drawn from memory. They are not from actual measurements.'

My conclusion is that libellant has failed to prove that the amount of the bills is the fair and reasonable cost of repairing the damage caused by the collision, and I find that $10,534, the estimate of Lang, does represent such cost."

The libellant has taken several exceptions to the report as follows:

"The above named libellant hereby excepts to the report of the Commissioner herein filed June 14, 1906, on the following grounds:

First. On the ground that the Commissioner has given preference to an estimate of cost of repairs made by Lang, a witness who never saw the scow, over evidence of the cost of actual repairs. Such estimate is found on page 90 of the testimony on the second reference.

Second. On the ground that the Commissioner admitted, over objection, an improper hypothetical question, and decided the case on the answer thereto. The question was as follows, (p. 89 of Testimony on Second Reference):

'Q. From your examination of this survey, and from your experience as a shipwright, what do you say would have been the reasonable cost of repairing a mud scow such as this 022 in the winter of 1905, or in the spring of the year, in this port, doing all the work called for by this survey, Exhibit 11, and in addition, whatever is called for by those modifications which I have stated to you?' and the objection thereto being that it does not include all of the work which was actually done on the scow.

Third. On the ground that the Commissioner found that the libellant has failed to prove that the amount of the bills is the fair and reasonable cost of repairing the damage caused by the collision.

Fourth. On the ground that the Commissioner found that the estimate of Lang does represent such cost.

Fifth. On the ground that the Commissioner has assessed the amount due libellant for repairs at the sum of ten thousand five hundred and thirty-four dollars, instead of at thirteen thousand five hundred and twenty-two 76/100 dollars."

The difference between the first and second report seems to be that the commissioner instead of deducting 25% from the libellant's bill, has adopted the estimate of Mr. Lang, and this is objected to by the libellant.

In view of the strenuous criticism of the libellant, which contends that it is not allowed the actual cost of collision repairs to its vessel, I have examined the matter carefully and concluded that the commissioner has reached a just conclusion. It does not seem necessary to add anything to what he has said.

The exceptions are overruled.

BOWERS HYDRAULIC DREDGING CO. v. FEDERAL CONTRACTING CO.

(District Court, S. D. New York. June 27, 1906.)

ADMIRALTY—JURISDICTION—SUIT FOR HIRE OF DREDGE.

A court of admiralty has jurisdiction of a suit to recover the hire of a Bowers hydraulic dredge, intended to operate afloat, and generally used for maritime purposes, and should not decline such jurisdiction because the dredge was temporarily used for a partly land transaction in dredging material from a stream for the purpose of depositing the same by means of its pipes on land of the charterer.

In Admiralty. Action to recover hire of dredge.

Horace L. Cheyney, for libellant.

Edward W. Norris, for respondent.

ADAMS, District Judge. This action was brought by the Bowers Hydraulic Dredging Company against the Federal Contracting Company to recover the hire of Dredge No. 2, under a written contract to pay $3,000 per month, from July 1st to July 24th, 1905, amounting to $2,322.48. The respondent defends, (1) on the ground that the dredge was not able to do the work which it was represented she could do, and (2) because the court has no jurisdiction of the cause of action.

1. It appears that the respondent paid the hire of the dredge for the months of April, May and June, 1905, and the testimony did not show any condition which differed materially in July. The dredge did all the work that the libellant undertook that she should do, or which could reasonably have been expected of her. The contract did not provide that she should be adapted to the pumping of the bricks and stones which were met with and had the effect of retarding her work in July, so that then she did not always work up to the guaranteed

capacity. I found nothing in the testimony on the trial to warrant any deduction from the claim of the hire sued for.

2. The parties have entered into the following stipulation, which determines the facts necessary to be considered on the question of jurisdiction, viz.:

"The parties to this action, in order to avoid the transcribing of the minutes of trial, hereby stipulate and agree, as follows:

On May 20th, 1905, the libellant and respondent entered into a contract (a true copy of which is attached to the libel) whereby the libellant let unto the respondent, its hydraulic dredge and appurtenances, including necessary pontoons, discharge pipe including 2000 feet of shore pipe, derrick scow and two coal scows, for and during the working season of 1905. The respondent agreed to pay for the use of the dredge and its appurtenances the sum of Three thousand dollars per month.

The agreement above referred to contained, inter alia, the following provisions:

'Said dredge and appurtenances to be used as the charterer or its agents may direct in dredging material and putting same ashore on the property of the Hackensack Meadows Company, located on the Passaic and Hackensack Rivers, N. J., or at such other localities as said charterer may direct.'

'Notwithstanding anything hereinbefore contained the charterer shall have the option and privilege of cancelling this charter after said dredge has been in its service for three months if at the expiration of that period it is found unsuitable for its business, it being understood and agreed that said dredge shall be able to deposit on shore an average of 300 cubic yards of material, scow measurement, through 2000 feet of land pipe per hour.'

'The charterer during the term of this charter party shall have the sole and absolute possession, control and management of said dredge and its officers and crew and all the legal rights and privileges of owners.'

At the time the contract was entered into, the dredge and its appurtenances were lying in the Delaware River, at Camden, N. J. The dredge was towed from that place to the Passaic River by way of the Delaware Bay and the Atlantic Ocean.

The dredge was thoroughly equipped for ocean voyages and theretofore had made several voyages to different ports on the Atlantic coast. The dredge however had no motive power of her own and was towed upon these various voyages by tug boats.

The scows and pontoons were towed from Camden by way of the Delaware River, Delaware and Raritan Canal, etc. to the Passaic River.

The libellant's dredge was intended to operate afloat and contained machinery, consisting of rotary cutters for digging the mud beneath the water and centrifugal pumps by which the sand, mud and material loosened by the rotary cutters and drawn up in a state of solution were forced through lines of pipe to place of deposit, and certain engines for the operation of the machinery on the dredge.

While the libellant's dredge was employed under this contract her discharge pipe extended continuously from the dredge to a point, about 1,200 feet on shore, and the dredge material was deposited at about that distance from the bank of the river. The pipe was carried from the dredge on pontoons to the shore and thence on the land to the place where the dredged material was discharged from the pipe and deposited.

Mr. Somers, the President of the Libellant Company, testified that at the time the contract was entered into, it was understood that the material to be dredged should be brought by scows from the vicinity of New York harbor. This was objected to by respondent's counsel and an exception taken.

Upon the arrival of the dredge in the Passaic River, the respondent commenced to use her in digging two or three basins for the reception of dredged material to be brought by scows from other points. The material dug or dredged out of these two or three basins was pumped ashore.

The dredge was occupied in digging these two or three basins until the

latter part of June or the early part of July, 1905, when the respondent obtained permission to dump dredged material in the basins which had been dug out, and thereafter about 18 scows of dredged material were brought from the Bay Ridge District and certain other dredged material was brought by scows from other portions of the Passaic River, all of which was dumped into the basins above referred to. The material so dumped into these basins was then dredged by the libellant's dredge and pumped ashore.

All of the material which was dredged by the libellant's dredge out of these basins was pumped ashore on lands of the Hackensack Meadow Company, and the dredge was not employed in deepening the channel."

The libellant contends it is settled law that a court of admiralty has jurisdiction over dredges, citing The Alabama (C. C.) 22 Fed. 449; The Pioneer (C. C.) 30 Fed. 206; Aitcheson v. Endless Chain Dredge (C. C.) 40 Fed. 253; The Atlantic (D. C.) 53 Fed. 607; The Starbuck (D. C.) 61 Fed. 502; Saylor v. Taylor, 77 Fed. 476, 23 C. C. A. 343; The International (D. C.) 83 Fed. 841; McMaster v. One Dredge (D. C.) 95 Fed. 832. The distinction, however, between those cases and the one under consideration is in the method of disposing of the dredged material. In addition to the above authorities, there is cited McRae v. Bowers Dredging Company (C. C.) 86 Fed. 344. The latter was a case where it was sought to subject a dredge, in insolvency proceedings, to liens for wages. It was there determined that a dredge was subject to admiralty process, where she was used for cutting water ways and filling tide flats. Judge Hanford there said (page 346):

"The main question in the case is whether the dredgers are vessels subject to admiralty process, whether the work which they were doing was a maritime service, whether the contracts under which they were supplied and kept in repair are maritime and whether their crews have maritime liens for their wages. The writers and judges who have expounded maritime laws and the rules by which the jurisdiction of admiralty courts must be measured, have not succeeded in making known any satisfactory test by which floating structures which are subjects of admiralty jurisdiction, and to which maritime liens may attach, may be distinguished from those which have no place in the realm of maritime jurisprudence. There are numerous decisions which tell that adaptibility to float on the water, masts, sails, propelling machinery, steering apparatus, capacity for carrying merchandise or passengers, and mobility, are features by which a subject of admiralty jurisdiction may be recognized; but the decisions are not at all consistent with any guiding principle which makes admiralty jurisdiction depend upon the size or shape of a vessel, her means of propulsion or her adaptability for use. According to the decisions a ship although afloat is not a ship if her original construction, rigging and furnishing remain incompleted. Men employed on board a vessel for her preservation do not acquire maritime liens for their wages if she is out of commission; that is, if she has no voyage in contemplation. A ship is not employed in a maritime service when used merely as a warehouse to hold her cargo after the completion of a voyage, and while navigation is suspended. The actual employment of a structure designed for use in the transportation of merchandise or passengers by sea is not under all circumstances conclusive. Wharves and warehouses are necessary for the transportation and preservation of merchandise to be carried in ships to a distance, and yet such structures, although in fact instruments of commerce and aids to navigation, are not maritime vessels. Floating dry docks, used in the repair of vessels, are not maritime things. On the other hand, a private yacht or pleasure boat, not designed for nor employed in trade or commerce is a vessel which may be a subject of admiralty jurisdiction."

The contention of the respondent is that as the vessel was solely employed in dredging material and putting the same ashore, the contract was not in any sense for a maritime service and therefore was not within the authoritites which sustain liens upon dredges. The respondent cites and relies upon In re Hydraulic Steam Dredge No. 1, 80 Fed. 545, 25 C. C. A. 628, which was a libel in rem filed to recover for a supply of coal furnished to a dredge similar in character to the one involved here. Jenkins, J., in denying the lien said, for the Circuit Court of Appeals, Seventh Circuit (pages 556, 557, of 80 Fed., page 639, of 25 C. C. A.):

"Upon the assumption that the structure in question is a ship or vessel, and within the admiralty jurisdiction, that jurisdiction will not be asserted to enforce a contract touching the ship, unless such contract is maritime in its nature. Insurance Co. v. Dunham, 11 Wall. 1, 20 L. Ed. 90. The admiralty deals alone with things pertaining to the sea. We declared in The Richard Winslow, 34 U. S. App. 542, 18 C. C. A. 344, and 71 Fed. 426, that 'a maritime contract must therefore concern transportation by sea. It must relate to navigation and to maritime employment. It must be one of navigation and commerce on navigable waters.' It was there pointed out that not every contract having reference to a ship is within the admiralty jurisdiction, but only such as relate to maritime employment, such as pertain to the navigation of a ship or assist the vessel in the discharge of a maritime obligation. It is not enough that the service is to be done upon the sea or with respect to the ship. It must relate to trade and commerce upon navigable waters. The coals furnished by libelant were supplied to the dredge while it was engaged in its work for the Illinois Central Railroad Company, and to enable it to perform that work, which was 'to fill in earth for its railroad purposes behind a line of piling on its grounds on the lake front in Chicago.' By means of its cutting apparatus, the earth on the bed of the lake was dug up, loosened and disintegrated, and, with the adjacent water, sucked up into and through a centrifugal pump, and thence discharged through a continuous line of adjustible pipes to the place of deposit upon the adjacent shore. This is not a maritime employment. The fact that the dredge floated upon navigable waters is not controlling. The dredge in the performance of that contract was not engaged in navigation, nor even in the marine transportation of the earth dug from the bed of the lake. To the contrary, a peculiar mechanism dispensed with the necessity of marine transportation. The employment related solely to the land, to the creation of an embankment upon the land for the use of a railway upon the land. The only possible relation to the sea in this employment was in this: that for the purpose of obtaining the earth, and as a necessary incident thereto, the bed of the lake was dug out, and thereby the channel was deepened. That was not, however, for the purposes of navigation. It is not suggested that vessels engaged in navigation frequented the place; that wharves were constructed or designed; or that the excavation was for the purpose of or in aid of navigation. The work was done in and for the construction of an embankment upon the land, and for railroad purposes. The earth was taken from the bed of the lake because more convenient to the place of deposit, and less expensive than when brought from a distant point of land. The effect upon the channel was incidental and subordinate. The work had no possible relation to marine transportation. It is of no moment that the structure floated upon the water, and dug out the bed of the lake. That does not give marine character to this employment. The admiralty deals with vessels which 'plow the sea,' and with contracts touching navigation. In The Richard Winslow, supra, we held that a contract for storage of grain during the closed season of navigation was not maritime. The present case falls within the principle of that decision. It may be that this structure could engage in a maritime service, and its maritime engagements brought within the jurisdiction of the admiralty. It is enough to say that in the performance of

its contract to plow the prairies of the state of Illinois, or in the construction of a railway embankment upon land, to dig up the bed of the lake, and shoot the earth through tubes for deposit on the land adjacent, it was not so employed. The supplies furnished to enable the dredge to perform a contract not maritime cannot attain to the dignity of a maritime lien."

Upon the above authorities, it would seem that the question of jurisdiction here should be decided in favor of the respondent, but the admiralty jurisdiction has been broadened very considerably by the recent decision of the Supreme Court in The Blackheath, 195 U. S. 361, 25 Sup. Ct. 46, 49 L. Ed. 236. That was a question of the jurisdiction of the District Court for the Southern District of Alabama, arising out of the destruction of a beacon fastened to piles driven into the bottom of the Mobile river or bay by a navigating vessel. The court below, Toulmin, J. (D. C.) 122 Fed. 112, declined jurisdiction under the authorities, but the case was certified to the Supreme Court and it was there held that the action was maintainable, the court, Mr. Justice Holmes, saying (page 365, of 195 U. S., page 47, of 25 Sup. Ct. [49 L. Ed. 236]):

"The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history. As to principle, it is clear that if the beacon had been in fault and had hurt the ship a libel could have been maintained against a private owner, although not in rem. Philadelphia, Wilmington & Baltimore R. R. v. Philadelphia & Havre de Grace Steam Towboat Co., 23 How. 209, 16 L. Ed. 433; Atlee v. Packet Co., 21 Wall. 389, 22 L. Ed. 619; Panama Railroad v. Napier Shipping Co., 166 U. S. 280, 17 Sup. Ct. 572, 41 L. Ed. 1004. Compare The Rock Island Bridge, 6 Wall. 213, 18 L. Ed. 753. But, as has been suggested, there seems to be no reason why the fact that the injured property was afloat should have more weight in determining the jurisdiction than the fact that the cause of the injury was. The Arkansas (D. C.) 17 Fed. 383, 387; The F. & P. M. No. 2 (D. C.) 33 Fed. 511, 515; Hughes, Adm. 183. And again it seems more arbitrary than rational to treat attachment to the soil as a peremptory bar outweighing the considerations that the injured thing was an instrument of navigation and no part of the shore, but surrounded on every side by water, a mere point projecting from the sea."

Mr. Justice Brown, in a concurring opinion, said (pages 368, 369, of 195 U. S., page 48, of 25 Sup. Ct. [49 L. Ed. 236]):

"I accept this case as practically overruling the former ones, and as recognizing the principle adopted by the English Admiralty Court Jurisdiction Act of 1861 (section 7), extending the jurisdiction of the admiralty court to 'any claim for damages by any ship.' This has been held in many cases to include damage done to a structure affixed to the land. The distinction between damage done to fixed and to floating structures is a somewhat artificial one, and, in my view, founded upon no sound principle; and the fact that Congress, under the Constitution, cannot extend our admiralty jurisdiction, affords an argument for a broad interpretation commensurate with the needs of modern commerce. To attempt to draw the line of jurisdiction between different kinds of fixed structures, as, for instance, between beacons and wharves, would lead to great confusion and much further litigation."

It seems in view of what has been said in this authority that such artificial distinctions as arise out of the work of a dredge being performed partly on land and for the purpose of a land transaction, should not oust the court of jurisdiction of a floating structure which in its ordinary purpose is distinctly maritime. Boni judicis est ampliare jur-

isdictionem, which properly interpreted means, that it is the duty of courts to amplify their remedies, and without usurping jurisdiction, to apply their rules, to the advancement of substantial justice. Broom's Legal Maxims, pp. 79, 80.

Decree for the libellant for $2322.48, with interest.

MOODY v. COLE.

(District Court, D. Maine. November 6, 1906.)

No. 74.

1. BANKRUPTCY—PROCEEDINGS FOR CONTEMPT—MEASURE OF PROOF REQUIRED.
A proceeding in bankruptcy to enforce obedience to an order requiring a bankrupt to surrender property or money to his trustee is criminal in character, and a finding that the bankrupt is in contempt should be reached only on evidence which induces belief beyond a reasonable doubt; but where it meets such requirement, the court should exercise the power of commitment expressly given by the statute, and not compel the trustee to resort to a plenary suit.

2. SAME.
In a contempt proceeding to enforce obedience to an order requiring a bankrupt to pay over money to his trustee, the denial of the bankrupt that he has the money in his possession or under his control is not conclusive, but is entitled to its due weight in connection with the other evidence and circumstances shown.

In Bankruptcy. Proceeding for contempt.

Haley & Haley and Bartlett & Anderson, for the bankrupt.

Albert S. Woodman and Cleaves, Waterhouse & Emery, for the trustee.

HALE, District Judge. This case now comes before the court upon the petition of Charles A. Moody, trustee in bankruptcy of the estate of Annie M. Cole, praying that the bankrupt may be ordered to show cause why she should not be adjudged in contempt for failure to comply with an order of the court, and that, if adjudged in contempt, she shall be dealt with in accordance with the law. The matter from which this proceeding arises was brought into the District Court of the District of Maine by the certificate of one of its referees, by which it appeared that the referee ordered the bankrupt, Annie M. Cole, to pay over the trustee the sum of $2,425 on or before the 16th day of January, 1905. It will be found by the opinion of the District Court in 135 Fed. 439, that the District Court sustained the findings of the referee. Thereupon, on March 4, 1905, the District Court entered an order:

"That the bankrupt turn over and deliver to the trustee, within fifteen days, the said sum of twenty-four hundred and twenty-five dollars, in default of which she stand committed to the marshal of this district, to be incarcerated until she obeys the order of this court, or is otherwise discharged by due process of law, or until the further order of this court."

The decree of the District Court was then taken to the Circuit Court of Appeals to revise matters of law. In the opinion of the Circuit

Court of Appeals, Judge Putnam makes a statement of the case. I quote enough of the opinion to show the attitude of the case as it now comes before this court:

"This is a revisory petition under the statutes in bankruptcy. The petitioner, Annie M. Cole, was duly adjudged bankrupt on a petition filed in November, 1903. It is claimed that she received in September, 1903, $3,800, as the proceeds of the sale of her homestead in Saco. This was paid in bills, and it is maintained by her that it was paid into the hands of her husband, and that no part thereof ever came into her hands. The trustee in bankruptcy admits that a portion of it has been accounted for, leaving $2,425, which, on his application, the referee directed should be paid over by Mrs. Cole to him. * * * Therefore, the fact remains that on this record the District Court might find, as a matter of fact, that, as to the possession of the proceeds of the sale, Mrs. Cole's husband was simply her representative or agent. Such being the case, it needs no citation of authorities to establish the further proposition that in the eyes of the law the possession of a mere agent is the possession of the principal. This proposition was enforced and applied with reference to funds to be transferred to the trustee, under the bankruptcy statutes in Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, and in Mueller v. Nugent, 184 U. S. 1, 17, 18, 22 Sup. Ct. 269, 46 L. Ed. 405. It also cannot be denied that a bankrupt, whose funds are deposited with an agent, cannot excuse himself from not delivering over the same to the trustee because so deposited, unless he shows, as a matter of fact, an inability to obtain the actual possession of what he ought to surrender. The record fails of any proof meeting this requisite condition. Therefore it does not in this regard present a question of the class of which we can take jurisdiction on a proceeding of this character, and consequently, so far as this portion of the case is concerned, the decision of the District Court must stand. We think, however, that there was error in that the District Court entered, in substance, a judgment for contempt, accompanying an alternative order for committal. It is plain that a proceeding for contempt is of a different character from one resulting in a mere order for the payment of money to a trustee in bankruptcy. It is claimed that it is criminal in its nature, while an order for the mere payment of money is civil; that it would be justified only by the proofs, and the amount of proofs requisite on ordinary criminal issues; and that it is, in effect, an independent proceeding, which can be initiated only after an order for payment of money has been disobeyed, and on an order to show cause, or some other new notice, given to the person alleged to be in default. It is sufficient now to say that the record does not show that Mrs. Cole had any day in court on the issue involved in that part of the order in question. Without undertaking to say in what manner an issue may be so presented as to justify a proceeding for an alleged contempt, and entering a penal judgment on account thereof, we are of the opinion that the record, would show that the issue had been made in some way, and that the person adjudged guilty of contempt had had an opportunity to be heard in reference thereto. Rapalje on Contempts (1887) 126, 127, 128. For this reason, the order to which the petition relates must be annulled, except only so far as it affirms the decision of the referee, which directed that the money in question should be paid to the trustee."

The mandate, made in pursuance of the above opinion, contains the following order and decree:

"It is ordered, adjudged, and decreed, that the aforesaid decree of the District Court for the District of Maine be, and the same hereby is, annulled, except only so far as it directed that the money in question should be paid to the trustee; and as to so much of said decree as directed the payment to the trustee of twenty-four hundred and twenty-five dollars, the same is hereby affirmed, with interest thereon from the date of the entry of said decree in the District Court."

This petition for an order to show cause is directed to the above decree of the Circuit Court of Appeals. It is claimed by the petitioner that the bankrupt is now in contempt for failure to comply with that decree. In pursuance of the opinion and mandate of the Circuit Court of Appeals, the bankrupt was given her day in court, and on August 6, 1906, she appeared before this court, and testified as follows:

"Q. In your statement, I have understood you to say that you gave the money to your husband? A. I never gave the money to my husband; I never had the money to give him. Q. But the statement was made that you gave the money to your husband? A. It might be; not knowing how to express it. Q. Now, will you tell the court just exactly what you meant when you said that you gave him the money? A. I meant that I gave my permission for my husband to sell the house, and take the money and pay his debts. Q. Pay his debts; is that what you say? A. Yes. Q. To pay his debts. And as a matter of fact have you ever had from the time that house was sold the physical possession of that money in any way? A. Never, in any way. Q. Now, I want to ask you how old you are? A. I was born in 1843. Q. And how old is your husband? A. Mr. Cole is seventy-five in July. Q. Did you ever pay my brother (Mr. Haley) any attorney fees at all here in this matter? A. I never have. Q. And since the time of the passage of the order he has done work for you, has he not? A. Certainly. Q. Now, aside from the explanation that you desired to make to the court, in regard to the word 'give,' as used in your testimony, did you make a truthful statement in regard to your not having the money, and the testimony you gave before Mr. Donovan? A. Certainly."

The remainder of her examination and the testimony of her nephew, Winfield C. Jordan, added nothing which aids the court in coming to a conclusion. She has, then, testified that she is unable to comply with the order of the court, and it is claimed by her counsel, in his very able presentation of the cause to this court, that this denial of the bankrupt should be practically conclusive in the matter, and that in the face of such denial the court should not adjudge her to be in contempt. Clause 13 of section 2 of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421]) authorizes a court of bankruptcy to "enforce obedience by bankrupts, officers and other persons of all lawful orders, by fine or imprisonment, or fine and imprisonment." In courts of chancery an attachment to enforce obedience of an order to pay money or to surrender property has been regarded as a civil execution for the benefit of the equitable owners of the fund, and not as a criminal process; but in bankruptcy a proceeding of this nature is criminal in its character, and the conclusion that a party is in contempt should be reached only upon evidence which induces belief beyond a reasonable doubt. In re Salkey, Fed. Cas. No. 12,253; In re Schlesinger (D. C.) 97 Fed. 930; In re Goldfarb Bros. (D. C.) 131 Fed. 643; In re De Gottardi (D. C.) 114 Fed. 328.

In dealing with this question, the courts of bankruptcy of the country have held with great clearness that the power of commitment should be cautiously exercised, and only when its propriety is beyond reasonable doubt. Judges have used very strong, emphatic language in enforcing this doctrine, going so far as to say that the fact of the control of the bankrupt over the funds should be established by indisputable testimony before this great power of the court should be exercised. The courts of bankruptcy have also held that the answer of the respondent to the rule to show cause is not conclusive, but traversable;

that weight should be given to the denial of the bankrupt, but that it is the duty of the court to examine all the evidence, both circumstantial and direct, relating to the matter, and to see whether there are any inconsistencies in the bankrupt's testimony or conduct which affect his testimony.

In the Goodridge Case, Fed. Cas. No. 5,547, where a bankrupt was alleged to have concealed property in the hands of his brother, Judge Blatchford says:

"A fraud of the kind here alleged is one that can seldom be proved by other than circumstantial evidence. The parties to the transaction are generally, as in this case, the only witnesses, and if their stories are to be believed as told, no fraud can be established. External evidence is not to be had, and the truth must be reached by examining the evidence of the alleged parties to the fraud, and weighing its probabilities, and scrutinizing its general tenor and manner. * * * The determination of the question of fraud or no fraud must, under such circumstances, depend upon the impression made by the evidence of the parties concerned. Of course, those who would commit such a fraud, would swear falsely to carry it through. If their positive testimony to the honesty of the transaction is overborne by badges and indicia of fraud, deduced from their own testimony, the conclusion must be that there was fraud."

In the Schlesinger Case (D. C.) 97 Fed. 930, Judge Addison Brown comments upon the appearance of the bankrupt, his inconsistencies of conduct and of statement, and says:

"The referee considered it incredible that the bankrupt was as ignorant of his business and his payments as he professed to be, and he did not consider him worthy of belief."

In the Deuell Case (D. C.) 100 Fed. 634, the court comments upon the inconsistencies of the bankrupt's testimony. It says:

"When asked if she did not talk this matter over with her husband and son, who were assisting her in running the store, and ascertain what explanation they gave, or as to what theory they had to account therefor, her answer was equally uncertain and indefinite. As the goods were not on hand when she was declared a bankrupt, and as she claims the goods had not been spirited away, and testifies that they had been received and sold, the conclusion is irresistible that she must have the money in her possession, or that she knows who did receive it and who has it. * * * Shall she be permitted thus to obtain property of other people, secrete and appropriate it, without even so much as rendering any intelligible account thereof, and escape the pains and penalties imposed by the bankrupt law, simply because she is a woman, and under the naked assumption or bare possibility that her husband and son embezzled the proceeds of these goods?"

In Boyd v. Glucklich, 116 Fed. 140, 53 C. C. A. 456, the court says:

"A bankrupt cannot be imprisoned for the purpose of exploitation. Torture as a means of extracting evidence or forcing a confession is no longer allowable either in civil or criminal proceedings."

In the Goldfarb Bros. Case (D. C.) 131 Fed. 643, the District Court of Georgia says:

"A bankrupt cannot be required, under a proceeding for contempt, to do that which it is out of his power to do. The evidence in such a proceeding should satisfy the court beyond a reasonable doubt that the bankrupt has the money or goods in his possession and control, and is able to turn them over when so ordered."

In the Anderson Case (D. C.) 103 Fed. 854, the District Court of South Carolina says:

"I have not, then, the slightest doubt of the power of the court to commit for contempt in any proper case, but this power should be most cautiously exercised. Where the bankrupt denies possession or control, the fact of such possession should be established by indisputable testimony; for it is only in cases where it is proved beyond a reasonable doubt that the bankrupt is willfully disobedient in refusing to obey its orders that the court should feel itself compelled to punish such disobedience."

In the Adler Case (D. C.) 129 Fed. 502, the District Court of the Western District of Tennessee, in speaking of the power to commit for contempt to enforce the order of the court, says:

"To invoke that power requires something like incontestible proof as against the bankrupt's denial that he has the money. * * * That remedy applies only to a fund which can be designated and traced into his possession, so that it is, in a legal sense, a tangible fund, on which the court can lay its hands, and it cannot be made to apply to some intangible money supposed to be kept in his possession, which he can be forced to pay by raising or procuring the money to meet the orders of the court."

See In re De Gottardi (D. C.) 114 Fed. 328; In re Purvine, 96 Fed. 192, 37 C. C. A. 446, and cases cited; In re D. Levy & Co. (C. C. A.) 142 Fed. 442.

In the case before me I have treated the order to show cause as an independent proceeding, and have applied the rules of evidence pertinent to a criminal case. I find upon the threshold of the proceeding the decree of the Circuit Court of Appeals that the bankrupt pay over certain money to the trustee, and that she have her day in court upon the question whether she shall be held to be in contempt. In pursuance of the request of the respondent, I have considered only the testimony of the bankrupt herself, the greater part of which I have given in full, and of Mr. Jordan, her nephew, together with her examination before the referee, which she has verified and made part of her testimony. With reference to the other rulings, requests for which have been preferred by the learned counsel for the respondent, I do not find it necessary to pass upon them affirmatively and in detail; but it will be seen that I have adopted substantially the rules of law which he has invoked in the proceeding.

I have also examined the records of the District Court, so far as they are material, relevant, and admissible. In her schedule she states that the money forming the subject-matter of this proceeding was lent to her husband, William H. Cole. On her examination before the referee she says, "I gave him the money," and further, "I gave him the money to pay his debts; that is all I know about it." In her examination before me she says, "I never gave the money to my husband; I never had the money to give him." Her counsel then says, "The statement was made that you gave the money to your husband." She answers, "It might be; not knowing how to express it." She then testifies that she gave permission for her husband to sell the house, take the money, and pay his debts, and that she has never had, since that time, the physical possession of that money in any way. She thus makes three several statements and accounts of the money receiv-

ed from the sale of her house; first, accounting for it as a loan to her husband, and on the last two occasions giving slightly varying statements as to the money going into her husband's hands. She confines her testimony as to her inability to comply with the order of the court to the statement that she has no physical possession of the fund; she does not affirmatively say that she has no control of it. I do not place any great weight upon this technical failure to expressly negative her control of the money, but in the attitude the case has assumed it is proper to comment on the peculiar language used in her expression of inability to comply with the order of the court. Throughout the case, her whole testimony touching the disposal of the fund is indefinite, unsatisfactory, and inconsistent. Her husband is not produced to testify, although the Circuit Court of Appeals has held that he was her representative or agent. She does not say that she has ever tried to obtain the physical possession of the fund, and she assumes to be stolidly ignorant of all vital matters. Her alleged ignorance upon the business concerns with which she was brought in contact, and which form the subject-matter of the inquiry, is as noteworthy as was the ignorance of the respondent in the Schlesinger Case. In that case the court held it incredible that the bankrupt could be as ignorant of his business and payments as he professed to be, and that he could not be thought worthy of belief. I have endeavored to give full weight to the denial of the respondent, but if the denial of a bankrupt were taken as conclusive, he could always escape an order for the surrender of property by making a false statement, and adding perjury to his failure to comply with the decree of the court.

In the opinion of the Circuit Court of Appeals, Judge Putnam has said that the referee might have come to his conclusion upon a preponderance of the evidence in a matter relating to directing a payment; but the records of the District Court show that the referee did actually come to his conclusion upon testimony which induced belief beyond a reasonable doubt, and his order directing the payment of the money to the trustee has been affirmed by the District Court and the Circuit Court of Appeals.

In my view of the testimony in the case in its present attitude, it is the duty of the court to deal directly and summarily with the matter, and not to leave the trustee to further proceedings in chancery to obtain the fund in question.

In Mueller v. Nugent, 184 U. S. 14, 22 Sup. Ct. 269, 46 L. Ed. 405, to which the Circuit Court of Appeals has referred, Mr. Chief Justice Fuller has said:

> "The bankruptcy court would be helpless, indeed, if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law."

The whole testimony, taken together, induces the belief in my mind, beyond a reasonable doubt, that the bankrupt has control of the $2,425, constituting the fund in question, and that she stands in contempt of the decree of the court. I therefore order that she stand committed

to the marshal of this district, to be incarcerated in the Portland jail within this district until she turn over and deliver to the trustee the sum of $2,425, in obedience to the order of the court, or is otherwise discharged by due process of law, or until the further order of this court.

In re NORTON.

(District Court, N. D. New York. October 29, 1906.)

BANKRUPTCY—INVOLUNTARY PROCEEDINGS—SERVICE ON DEFENDANT.

Under Bankr. Act July 1, 1898, c. 541, § 18, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429], which provides that on the filing of a petition for involuntary bankruptcy "service thereof with a writ of subpœna shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, * * * but in case personal service cannot be made then notice shall be given by publication, * * *" where the defendant is temporarily absent from the district, but has his dwelling house or usual place of abode therein, valid service may be made by leaving a copy of the petition and subpœna at such dwelling, "with some adult person who is a member or resident in the family," as authorized in equity suits by equity rule 13; that being a personal service within the meaning of the statute.

In Bankruptcy. Motion to quash the writ of subpœna issued herein and to dismiss the proceeding, upon the ground that no proper service of the subpœna herein has been made.

Brown, Carlisle & McCartin (William H. Sullivan, of counsel), for the motion.

P. C. J. De Angelis, opposed.

RAY, District Judge. The return of service states as follows:

"I hereby certify and return that I have served the annexed subpœna and petition on the therein named Fred H. Norton, by handing a duplicate petition to and leaving a true and correct copy of said subpœna with the wife of Fred H. Norton, a person of adult age, at his dwelling house and usual place of abode, personally at Gouverneur in said district, on the 12th day of October, A. D. 1906. C. D. MacDougall, U. S. Marshal, by E. C. J. Smith, Deputy."

The affidavits used on this motion show, and the facts are not disputed, that Matilda G. Norton is and then was the wife of the above-named Fred H. Norton, a person 21 years of age, and that the service of the subpœna and petition was made upon her at the residence of Fred H. Norton in Gouverneur, N. Y., in the Northern district of New York, on the 12th day of October, 1906, by giving to and leaving with her a duplicate of the petition and a correct copy of the subpœna, and that at the time of such service her husband, Fred H. Norton, the alleged bankrupt, was in Sumerville, N. J., for his health, and had been there from about November 1, 1905, for that purpose. There is no pretense or claim that he was not a bona fide resident of the state of New York, or that service was not made in the manner aforesaid at his actual place of residence in the Northern district of New York; his presence in New Jersey at the time being merely temporary and for his health.

Up to the present time no notice has been given by publication in the manner and for the time as provided by law for notice by publication in suits in equity in courts of the United States. The contention is that, as there has been no personal service of the petition and subpœna upon the bankrupt within the Northern district of New York, and no such personal service can be made by reason of his absence from the district, there has been no service as required by section 18 of the act to establish a uniform system of bankruptcy throughout the United States (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]), and that therefore the subpœna should be quashed and the proceeding dismissed. Section 18 of the bankruptcy law referred to, and providing for the service of the process and pleadings in bankruptcy proceedings, reads as follows:

"Sec. 18. Process, Pleadings, and Adjudications.—a. Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits in equity in courts of the United States."

Rule 13 of rules of practice for the courts of equity of the United States reads as follows:

"The service of all subpœnas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some adult person who is a member or resident in the family."

By the act referred to the Supreme Court of the United States was authorized to make general rules and orders in bankruptcy and to prescribe forms, and by general order 3 it is provided that "all process, summons and subpœnas shall issue out of the court under the seal thereof and be tested by the clerk."

Form 4, adopted by the Supreme Court for "order to show cause upon creditors' petition," provides as follows:

"Upon consideration of the petition of ——— that ——— be declared a bankrupt, it is ordered that the said ——— do appear at this court, as a court of bankruptcy, to be holden at ———, in the district aforesaid, on the ——— day of ———, at ——— o'clock in the ———noon, and show cause, if any there be, why the prayer of said petition should not be granted; and

"It is further ordered that a copy of said petition, together with a writ of subpœna, be served on said ———, by delivering the same to him personally, or by leaving the same at his last usual place of abode in said district, at least five days before the day aforesaid."

It is contended that, while under the provisions of the rule quoted the service made would be good, still section 18 of the act also quoted above modifies the rule so that, in case personal service of the subpœna and petition cannot be made upon the bankrupt himself, then there must be notice by publication in the same manner and for the same time as provided by law for notice by publication in suits in equity in the courts of the United States. If this be so, section 18 is unnecessarily prolix and confusing.

If it had been intended that there should be notice by publication in all cases where personal service upon the alleged bankrupt could not be obtained, the act would have so stated in direct and explicit terms. It would have provided that service of such process and petition should be made personally upon the bankrupt, or, in case personal service could not be made, then by publication in the same manner notice is given by publication in suits in equity in the courts of the United States. This was not done by the act, but it was provided that service shall be made upon the person named in the process in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, and that mode of service as prescribed by the rule is that the subpœna is to be served by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode of the defendant with some adult person who is a member of or resident in the family. In short, if the defendant is not at his dwelling place or usual place of abode, service upon him is made when a copy is left there with some adult person who is either a member of or a resident in the family. Either mode of service is service upon the defendant, and the service is complete when that act is done. Section 18 is satisfied when, under the circumstances stated, that is, the defendant is absent, a copy is delivered to and left with some adult person who is a member of or resident in the family. The process to be served has then been personally delivered to and left with a designated person. However, section 18 further provides as follows: "But in case personal service cannot be made then notice shall be given by publication," etc. It will be noticed that section 18 does not say, "But in case personal service cannot be made upon the defendant," as would have been done had Congress intended that service should be made by publication in all cases where personal service cannot be obtained upon the defendant himself. The personal service here referred to is personal service either upon the defendant himself or a personal delivery of the process and pleading to "some adult person who is a member or resident in the family." Of course the service and delivery must be at the dwelling house or usual place of abode of the defendant.

It is said that service by delivering to some adult person who is a member of or resident in the family is not a personal service upon the defendant. This is quite true. But it is a personal service upon the person designated as the one to whom the subpœna and petition may be delivered, and which service is a good service on the defendant and equivalent to a delivery to the defendant himself. Strictly speaking, this is a service by substitution upon the defendant, but it is a good service. Section 18 intended that, in case the defendant or alleged bankrupt cannot be found, or is not found within the district, and no adult person who is a member or resident in the family of the defendant can be found at the defendant's dwelling house or usual place of abode, then notice is to be given by publication, not otherwise. It would have been better to have said in section 18 that, in case personal service cannot be made on either the defendant or some adult person who is a member or resident of his family at his residence

or usual place of abode, then notice shall be given by publication, etc. But this was not done, and section 18 is to be construed in the light of the rule and of the reading of the entire section, and also in the light of the construction placed upon this section by the Supreme Court of the United States when it formulated and prescribed form 4, which prescribes an order as to the mode and manner of the service of the petition and writ of subpœna upon the alleged bankrupt. Either mode of service is good—personal service in the district, or service by leaving the same at his dwelling house or usual place of abode in the district with some adult person who is a member of or resident in the family, if at the time of service he has such place of abode or dwelling house, and such adult person is there found.

This question under this statute has been passed upon in accordance with the views above expressed in the district of Massachusetts by Lowell, District Judge, in Re Risteen (D. C.) 122 Fed. 732. In that case service was made by leaving a duplicate of the petition with a copy of the subpœna with the clerk of the hotel of which the bankrupt was proprietor and where he usually resided. The bankrupt was absent in another town sick and unconscious, and he died two days later without regaining consciousness. The service was held good.

The same views are held in Loveland on Bankruptcy (2d Ed.) § 73, p. 205; also in Brandenburg on Bankruptcy (3d Ed.) §§ 452, 453, pp. 293, 294. Brandenburg states, in substance, that the service must be, where the alleged bankrupt is absent, at the existing present dwelling house or the existing present usual customary place of abode of the alleged bankrupt, and he says:

"However, if inquiry at the last and usual abode of an alleged bankrupt elicits no information as to his present whereabouts, beyond the fact that he is not in, service is sufficiently made by leaving the papers with some adult person who is a member of or resident in the family, stating that they are for the bankrupt."

He cites, as sustaining these views, In re Derby, 8 N. B. R. 106, Fed. Cas. No. 3,815; Ala. & Chatt. R. R. Co. v. Jones, 5 N. B. R. 97, Fed. Cas. No. 126. Brandenburg, in section 453, says:

"Service by publication is only authorized where the party to be served cannot be found, or his place of residence ascertained."

He cites Stuart v. Hines, 33 Iowa, 60. It would seem that there should be added to this the further statement that service by publication is authorized where no adult person who is a member or resident of his family can be found at his last place of residence when that is ascertained.

I do not think it was intended to provide that service by publication must be made where the bankrupt has a place of residence within the district where the proceeding in bankruptcy is instituted, and an adult person who is a resident or member of his family can be and is found there, and service is there made on such person, if the alleged bankrupt himself is temporarily absent from the district so that personal service cannot be made upon him within the territorial jurisdiction of the court. To repeat, the personal service referred to in section 18 is not personal service upon the alleged bankrupt himself, but personal

service upon any of the persons mentioned in the rule upon whom service is permitted as the equivalent of service upon the alleged bankrupt himself. To hold otherwise would prevent valid service on a foreign corporation, otherwise than by publication, when it has within the district where the proceeding is instituted a designated attorney or person upon whom service of process may be made. In a bankruptcy proceeding it has been held that service on such a corporation is good if made on its duly-appointed attorney to receive such service. In re Magid-Hope Silk Mfg. Co., 6 Am. Bankr. R. 610, 110 Fed. 352.

The motion to quash and dismiss is therefore denied.

In re HUDSON CLOTHING CO.

(District Court, D. Maine. November 1, 1906.)

No. 106.

BANKRUPTCY—PARTNERSHIP—EVIDENCE TO ESTABLISH RELATION.

Where two persons each contributed to the capital employed in a mercantile business, which they conducted together under a company name, intending to incorporate, but never carrying out such intention, there was a partnership in fact between them in the business, which may be adjudicated a bankrupt, and which is the owner of the property and assets of the common concern.

In Bankruptcy. On review of decision of referee.

See 140 Fed. 49.

John W. Manson, for trustees of estate of Henry Hudson.

John S. Williams and Albert S. Woodman, for trustee of estate of Hudson Clothing Company.

HALE, District Judge. John F. Sprague, Esq., referee in bankruptcy, certifies that in the course of the proceedings in this case he made the following order:

"That the said John W. Manson, Albert W. Chapin, and Freeman D. Dearth, as trustees of the estate of Henry Hudson, a bankrupt in bankruptcy, pay over to John S. Williams, as trustee of the estate of Henry Hudson and James Hudson, copartners under the firm name and style of Hudson Clothing Company, the sum of thirty-five hundred dollars, it being the amount for which said stock of goods was sold and lawful interest on the same from August 15, 1905, to July 6, 1906.

"And it is further ordered that the respondents herein, being the said John W. Manson, Albert W. Chapin, and Freeman D. Dearth, pay to the said John S. Williams, trustee as aforesaid, the costs of these proceedings, to be taxed by the clerk of this court."

The referee further reports that the trustees of the estate of Henry Hudson, in bankruptcy, have filed a petition for review of this action of the referee. All the evidence and all the papers pertinent to the review are before me, and the case has been fully argued by counsel. The trustees in bankruptcy of Henry Hudson take the ground that no such partnership ever existed as is found by the referee under the name of Hudson Clothing Company, and that, if any such partnership

did exist, it had no title to any of the goods in question, but that said goods were the property of Henry Hudson, now in bankruptcy.

The original petition in involuntary bankruptcy in this case alleges that Henry Hudson and James Hudson constituted the partnership of the Hudson Clothing Company, that the partnership owned the stock of goods, and that an act of bankruptcy had been committed in connection with that stock of goods. In the matter of adjudication, this court had a full hearing in June, 1905. Much testimony was before the court on the question of the existence of a partnership and as to the ownership of the goods by the alleged partnership. Petitioners claimed that Henry and James Hudson were partners in fact, and that they owned the stock of goods in question. The matter was fully argued by counsel. The court ordered the partnership adjudicated bankrupts. Afterwards, upon the question of a rehearing, I gave an opinion, which is found in 140 Fed. 49.

In the matter now before me the referee says:

"Hence it appears to me that, when the court adjudicated Henry Hudson and James Hudson bankrupts, and when the same subject-matter was again brought before the same court by petition for rehearing, and the petition denied, and no appeal taken, the whole question of the ownership of the stock of goods now in controversy had been finally settled between these same litigants by decrees of a court of competent jurisdiction, and that these decrees are now the law governing this case.

"It appears to me from the evidence in the case, and I so find, that when the court adjudged Henry Hudson and James Hudson bankrupts, under the firm name and style of Hudson Clothing Company, it settled the question of the ownership of these goods. The contention was really whether or not they were copartners. If they were, then they were bankrupts, and necessarily the owners of the goods, as there were no other assets belonging to them. The two questions of whether they were copartners, and hence owners of the goods, and whether they were bankrupts, were inseparable. When they were adjudged bankrupts, they were also found by the court to be owners of the goods."

The referee further found that the question presented is now res judicata. All the counsel in the case have asked me, however, to examine the evidence and to come to a conclusion on the testimony itself as to whether the referee should be sustained in making the order which he has made. I have accordingly examined with care the testimony and the mixed questions of law and fact, which have been fully argued.

Counsel for the bankrupt estate of Henry Hudson have urged with great earnestness that, upon all the evidence, there has been no partnership proven in the case; that, on the most favorable view which may be taken for the petitioners, the evidence shows only certain acts of the alleged bankrupts in holding themselves out as copartners; that those acts have a tendency to prove merely an estoppel to deny partnership; that proving such estoppel is a different thing from proving a partnership in fact; and that such estoppel, if proven, would not warrant an adjudication in bankruptcy. I shall not undertake to burden the record by reciting in detail the testimony upon this point. There is evidence tending to show that Henry Hudson contributed the stock of goods in the first instance; that James Hudson contributed $1,000 of his own money; that a bank account was opened; that James

Hudson deposited his $1,000; that checks were drawn upon the account for the partnership business; that, out of the $1,000 brought in by James Hudson, bills were paid for goods which were put into the store by Henry Hudson; that Henry and James Hudson intended to form a corporation; that they took steps to form a corporation; that they assumed a corporate name; but that they never completed the organization. Upon a careful review of the record, I do not find evidence tending to show that Henry and James Hudson held themselves out to the public as a partnership, but rather that the contrary is true. They did, however, intend to form a corporation, and they took the initial steps for organization, but never organized it. The whole testimony induces the belief that they were partners in fact.

In Frost v. Walker, 60 Me. 470, in speaking for the Supreme Court of the state, Judge Walton said:

"An unincorporated joint-stock company is a mere partnership, and each member is personally liable for all its debts. * * * The New England Express Company was never incorporated. It was, therefore, a mere partnership, and each member was personally liable for all its debts."

The court further held that, by contributing to the actual working capital of the company, the members became entitled to share in the profits of the business and became copartners. This is the leading case in Maine touching this question. The court goes far beyond holding a mere partnership by estoppel. It holds that there was a partnership in fact.

When federal courts have construed the law of partnership as it pertains to bankruptcy matters, they have held that a mere holding out of partnership is not sufficient to warrant an adjudication; otherwise, a bankrupt might become liable to some creditors and not liable to others, and the proceedings in bankruptcy might be good as to some and void as to others. Partnership in fact must be actually proven in order to sustain an adjudication. In the Beckwith Case, 130 Fed. 475, which has been brought to my attention, the District Court for Pennsylvania reviewed the law quite fully upon this point. The statement of the law is valuable, although the decision was overruled on the ground that the testimony was not sufficient to establish the existence of a partnership in that particular case. Jones v. Burnham, etc., 138 Fed. 986, 71 C. C. A. 240.

While it is clear that, in order to proceed to adjudication, a partnership in fact must be proved, of course, this may be proved by circumstantial, as well as by direct, testimony. The subject-matter of the different kinds of evidence that are admitted by the courts to prove partnership is discussed in Wigmore on Evidence, § 1249, and cases cited; Greenleaf on Evidence, §§ 477–481.

Upon a careful analysis of the evidence, I come to the conclusion that the testimony is not of a character to show a mere partnership by estoppel, but that it does show a partnership in fact, and that the goods in question belonged to that partnership; and I so find.

There is no question but that the stock of goods was sold by the trustees of the bankrupt estate of Henry Hudson for the sum of $3,500; that this sum was in their possession at the time of the filing of the

petiton to pay over the funds, upon which this proceeding is founded; and that it is still in their possession.

Under the law and the rules in bankruptcy, however, they did not receive interest upon it, nor derive any benefit from it. In an action of trover against them, they might be chargeable with interest. But this is a proceeding in bankruptcy, in which the court is passing upon the disposal of a certain fund in its custody. In such proceeding, and upon the testimony before me, the trustees of the estate of Henry Hudson in bankruptcy should not be charged with interest.

In the view that I have taken of the case, it is not necessary for me to decide the question of res judicata, upon which the referee based his decision.

The order of the referee is sustained, except as to the matter of interest.

And it is ordered that John W. Manson, Albert W. Chapin, and Freeman D. Dearth, trustees of the estate of Henry Hudson in bankruptcy, pay over the sum of $3,500 to John S. Williams, trustee in bankruptcy of the Hudson Clothing Company, a copartnership consisting of Henry Hudson and James Hudson.

The further order of the referee as to costs is sustained; and it is ordered that the respondents pay to the said John S. Williams, trustee as aforesaid, the costs of the proceedings before the referee and of the further proceedings in this court.

MANUFACTURERS' COMMERCIAL CO. v. BROWN ALASKA CO. et al.

(Circuit Court, S. D. New York. August 8, 1906.)

1. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—ACTION AGAINST MAKER AND INDORSERS OF NOTE.

The contracts and liability of the maker of a promissory note and of the several indorsers thereon are each separate and distinct from the others, and their joinder as defendants in the same action, as permitted by a state statute, does not render the cause of action joint, or joint and several; but such an action is severable, and may be removed by any defendant who would have the right if sued alone, without regard to the citizenship of his codefendants. But such removal carries only the controversy between such defendant and the plaintiff, and does not give the federal court jurisdiction over the other defendants or of the causes of action against them.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, §§ 94–96.

Separable controversy, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86, and Mecke v. Valleytown Mineral Co., 35 C. C. A. 155.]

2. SAME—JURISDICTION OF FEDERAL COURT—NONRESIDENCE OF PARTIES.

Although a plaintiff cannot invoke the exercise of the jurisdiction of a federal court in a district of which neither he nor defendant is an inhabitant, where he sues in such district in a state court, the defendant may invoke the exercise of such jurisdiction by removal, if the requisite grounds of removal exist.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, §§ 32, 33.]

On Motion to Remand to State Court and Motions by Certain Defendants to Vacate an Attachment and to Dismiss.

Elbridge L. Adams, for plaintiff.
Justus P. Sheffield, for defendants.

THOMAS, District Judge. On June 4, 1906, a warrant of attachment issued out of the Supreme Court, state of New York, which was on the same day levied upon the bank account of defendant Brown Alaska Company, amounting to $6,454.88, and the bank account of defendant John A. Mead Manufacturing Company, amounting to $1,353.18, both with the People's Trust Company of Brooklyn. June 16, 1906, the Brown Alaska Company appeared generally by attorney, and thereupon removed in its own behalf the action to this court. Neither of the other defendants have been served with the summons, or appeared in such manner as to confer jurisdiction on this court or the Supreme Court. But the Mead Company now moves in this court to vacate the attachment and dismiss the action as to it, and the Alaska Smelting & Refining Company moves to dismiss the action as to it. At the same time the plaintiff moves to remand the action, upon the ground that it is not removable to this court.

The plaintiff and defendant Mead Manufacturing Company are citizens and residents of the state of New Jersey. The Brown Alaska Company and the Alaska Smelting & Refining Company are citizens and residents of the state of Washington. The complaint states causes of action on several promissory notes made by the defendant Alaska Smelting & Refining Company, to the order of the Brown Alaska Company, and indorsed by it and the Mead Manufacturing Company. Section 454 (amended 1877) of the Code of Civil Procedure of New York provides:

"Two or more persons, severally liable upon the same written instrument, including the parties to a bill of exchange or a promissory note, whether the action is brought upon the instrument, or by a party thereto to recover against other parties liable over to him, may, all or any of them, be included, as defendants in the same action, at the option of the plaintiff."

Section 455 provides:

"The joinder of a person, as defendant in an action, with another person, as prescribed in the last section, does not affect his right to any order or other relief, to which he would have been entitled, if he had been separately sued in the action."

Daniel on Negotiable Instruments (5th Ed.) § 669, states:

"Nature of the contract of indorsement—It is a separate and independent contract.—The indorsement of a bill or note is not merely a transfer thereof, but it is a fresh and substantive contract, embodying all the terms of the instrument indorsed, in itself. The indorsement of a bill is equivalent to the drawing of a new bill by the drawer upon the drawee (or acceptor, if it be accepted) in favor of the indorsee; and the indorsement of a note is equivalent to the drawing of a bill upon the maker, who stands in the relation of acceptor, as it were, in favor of the indorsee. So entirely distinct and independent is the contract of the indorser of a note from that of the maker that at common law a separate action against each was indispensable."

The contract of the maker of the notes involved herein, and his liability thereon, is quite independent of the several contracts of the indorsers, and the contracts and liability of the indorsers are alike distinct one from the other; but it is the policy of the state of New York to permit the holder to avoid a multiplicity of actions by joining causes of action of such a nature in a single action. There is no joint cause of action against two or more of the parties as regards any contract existing by reason of the note or the endorsements thereon. Causes of action and parties severally liable thereon are joined, but the liability is, as regards the basis thereof, separate. The holder does not charge joint, or joint and several, liability, but distinct liability on entirely separate contracts. The cause of action does not become joint, or joint and several, from the mere fact that the plaintiff elects to avail itself of the statutory permission and unite parties in the same action. The plaintiff cannot by such procedure make joint, or joint and several, what is necessarily several in its essential nature; nor can the plaintiff, by availing itself of the statutory provision, estop any defendant, liable solely upon its independent contract, from removing the action as regards such defendant to the federal court, if the other conditions precedent to such removal be present. The rule is stated in Hyde v. Ruble, 104 U. S. 407, 26 L. Ed. 823, Ayres v. Wiswall, 112 U. S. 187, 5 Sup. Ct. 90, 28 L. Ed. 693, and Louisville & Nashville R. Co. v. Ide, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63. It appears from these cases, as well as from Starin v. New York, 115 U. S. 248, 6 Sup. Ct. 28, 29 L. Ed. 388, and Little v. Giles, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. Ed. 269, that the question whether there is joint liability is not determined by the separate defense of a defendant denying joint liability. The fact that the Mead Company is a citizen and resident of New Jersey, of which state the plaintiff is also a citizen and resident, does not preclude the Brown Alaska Company from removing the action for the ascertainment of its liability, separate and distinct. The action is severable. Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. Ed. 1122; Connel v. Smiley, 156 U. S. 335, 15 Sup. Ct. 353, 39 L. Ed. 443; Barney v. Latham, 103 U. S. 205, 26 L. Ed. 514; Fergason v. Chicago, M. & St. Paul Ry. Co. (C. C.) 63 Fed. 177; Warax v. Cincinnati, N. O. & T. P. Ry. Co. (C. C.) 72 Fed. 637; Sugar Creek, etc., Co. v. McKell (C. C.) 75 Fed. 34; Hartshorn v. Atchison Ry. Co. (C. C.) 77 Fed. 9; Carothers v. McKinley Mining & Smelting Co. (C. C.) 116 Fed. 947; Helms v. Northern P. Ry. Co. (C. C.) 120 Fed. 389; Harley v. Home Insurance Co. (C. C.) 125 Fed. 792; Henry v. Illinois Central Ry. Co. (C. C.) 132 Fed. 715; Cella et al. v. Brown et al. (C. C.) 136 Fed. 439; New England Waterworks Co. v. Farmer's Loan & Trust Co., 136 Fed. 521, 69 C. C. A. 297.

Some of the above cases involve the removal of the whole controversy to the federal court, while others relate to actions that are severable and removable as regards the liability of the removing defendant. This phase of the subject will be noticed later in reference to the motions of the defendants, not joining in the removal, to dismiss the action as to them and to vacate the attachment against the property of the Mead Company. Before considering that question the motion to remand up-

on the ground that neither the plaintiff nor the Brown Company is a resident of the Southern District of New York demands attention. The joinder of the other defendants does not affect this inquiry. The present question relates solely to the Brown Company. In Iowa Lillooet Gold Mining Company v. Bliss et al. (C. C.) 144 Fed. 446, the rule and grounds therefor adopted in many cases are well expressed by Judge Reed (144 Fed. 448) as follows:

"The motion to remand challenges the jurisdiction of this court, and in support thereof it is urged that, plaintiff being a corporation of Canada and defendant a corporation of Maryland, neither being a citizen or resident of Iowa, the action could not have been brought by original process in this court, and is not, therefore, one that is removable from the state court. This contention fails to distinguish between the jurisdiction or right of a court to determine a controversy and the venue or place where that jurisdiction may be exercised. The first part of section 1 of the judiciary act of 1887–88 (Act March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 508]) confers jurisdiction upon the Circuit Courts of the United States, concurrent with the courts of the several states, of all suits of a civil nature at law or in equity, wherein the requisite amount is involved, and in which there shall be a controversy between (3) citizens of different states, and (5) citizens of a state and foreign states, citizens, or subjects. The second part of that section provides that no civil suit shall be brought against any person in a Circuit Court of the United States by original process in any other district than that whereof he is an inhabitant; but, 'when the jurisdiction is founded only upon 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.' This suit is not of the class there described, for plaintiff is a corporation of Canada, defendant Bliss a citizen and resident of the Northern District of Iowa, and the Guaranty Company a corporation of Maryland. If it is one of which this court has jurisdiction, it might therefore have been brought in this court by original process against defendant Bliss, and if the Guaranty Company is jointly liable with him on its bond, against that company also, especially if it did not object to being sued there, and is removable to this court, if it is within the terms of the removal section. The second clause of section 2 provides that: 'Any other suit of a civil nature at law or in equity of which the Circuit Courts of the United States are given jurisdiction by the preceding section, which may now be pending or which may hereafter be brought in any state court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein being nonresidents of that state.' 24 Stat. 552 [U. S. Comp. St. 1901, p. 509]. It is the first part of section 1 that confers jurisdiction upon the Circuit Courts of the United States, and this cannot be conferred by consent of the parties to a suit. The second part of that section, which restricts the place where the jurisdiction conferred by the first shall be exercised, is not jurisdiction, but is a personal exemption granted to the defendant from being sued, in the class of cases there described, elsewhere than in the district of his residence or that of the plaintiff. This exemption the defendant may waive, and if he is sued in a district other than that of his residence, or that of the plaintiff, he does waive it by appearing generally to the suit and not claiming the benefit of such privilege or exemption."

Certain authorities upon which the learned judge relies are stated in his opinion, and further support for the holding may be found in Vinal v. Continental Company (C. C.) 34 Fed. 228 (Southern District of New York); Burck v. Taylor (C. C.) 39 Fed. 581; Amsinck v. Balderston (C. C.) 41 Fed. 645; Uhle v. Burnham (C. C.) 42 Fed. 1 (Southern District of New York); Alley v. Edward Hines Lumber Company (C. C.) 64 Fed. 903; Long v. Long (C. C.) 73 Fed. 369; Stalker v. Pullman's Palace Car Co. (C. C.) 81 Fed. 989; Duncan v.

Associated Press (C. C.) 81 Fed. 417; Creagh v. Equitable Life Assurance Society (C. C.) 83 Fed. 849; Cowell v. City Water Supply Co. (C. C.) 96 Fed. 769; Kirby v. Chicago & N. W. Ry. Co. (C. C.) 106 Fed. 551; Memphis Savings Bank v. Houchens, 115 Fed. 96, 52 C. C. A. 176; Pepper v. Rogers (C. C.) 128 Fed. 987. The result of this interpretation of the statute is that a plaintiff is forbidden to bring the action in the federal court, save "in the district of the residence of either the plaintiff or defendant," yet, if in obedience to such prohibition he bring the action in a state court within a prohibited district, the defendant may by removal do what the plantiff could not, viz., confer exercise of jurisdiction upon the federal court in such district. The theory is that the federal court has a jurisdiction which it cannot exercise at the instance of the plaintiff, but may exercise at the option of the defendant sued in a state court within the district.

If the plaintiff sue the defendant in the federal court of a forbidden district, it is quite understandable that the defendant might appear and waive objection to the district selected; but it is less easily appreciated that a plaintiff, incapable of selecting a certain district, and therefore forced to seek relief in the state court, may thereafter, at the will of the defendant, be carried to that very district. But this is explained upon the ground that the prohibition operates only against the plaintiff, as an original suitor, and in addition that it does not relate to the removal of cases. Hence it follows that the "proper district" for purposes of removal is that within which the defendant is sued in the court of a state, and that the "proper district" for original actions is the "district of the residence of either the plaintiff or defendant." In J. S. Appel Co. v. Baggott (D. C.) 132 Fed. 1005, decided in this court for the Eastern District of New York, a different conclusion was reached, and there are similar holdings by Judge Keller in the Circuit Court for the Southern District of West Virginia (120 Fed. 156), and Judge Holland in the Circuit Court for the Eastern District of Pennsylvania (134 Fed. 150). The Appel Case was decided upon what appeared to be the plain words of the statute. But the current of decision does not sustain the conclusion reached in the Appel Case. Hence the motion to remand must be denied.

But what controversy has the Brown Alaska Company removed to this court? It has removed the jurisdiction of the action so far as it relates to a distinct and separable alleged cause of action against it. But as to that single cause of action neither of the other parties is even a proper party, nor are they joined in the action with reference to it. They are not brought into this court. The court has no jurisdiction of them, either as to the cause of action stated against either of them or that stated against the Brown Alaska Company. The action was severable. The Brown Company severed it as regards itself and brought the severed part to this court. It brought the whole controversy to this court in which it was interested. There is a controversy as to two contracts of indorsement, from which it has removed itself. Can the Brown Company defeat the action as to them by voluntarily abandoning the tribunals of the state? This would enable one defendant, perhaps unable to respond for damages, to defeat recovery against

codefendants, by causing a dismissal of the action attempted to be begun against them. Meantime the statute of limitations might run, the benefit of attachments might be lost, or other injurious results follow. If service of the summons had been had, that benefit would be lost. But it seems that the other defendants are not in this court. The action as regards them is not here. They cannot be dismissed from such severed part, because they are not brought with it to this court. It is not for this court to decide whether the attempt to give the state court jurisdiction over these defendants can be perfected. That is a matter for the state court to decide. If the Mead Company's moneys are tied up by the attachment, they are not detained by any action of this court. If the levy of the attachment upon the Mead Company's property should be vacated according to the laws of New York, application therefor should be had to the court that has jurisdiction of the Mead Company and the attachment proceeding.

The motion to dismiss as to the other two non-removing defendants is denied, and the motion to vacate the attachment is also denied. The attachment of the property of the Brown Alaska Company, the removing defendant, will be vacated upon filing the bond that has been proffered and approved.

ENTERPRISE MFG. CO. OF PENNSYLVANIA v. BENDER et al.

(Circuit Court, N. D. Ohio, E. D. October 12, 1906.)

No. 6,853.

TRADE-MARKS AND TRADE-NAMES—UNFAIR TRADE—REPAIRS FOR UNPATENTED MACHINE.

Complainant manufactured and sold an unpatented meat chopper called the "Enterprise," which name was registered as a trade-mark, and also parts for replacing those that became worn which were marked with complainant's name. Defendants also made such replacing parts, selling them in packages marked to show for what machine they were made and by whom, but the parts themselves were not identified by any mark. *Held*, that defendants, while having the right to make and sell the parts, were not entitled to do so without clearly marking the same to prevent their being mistaken by retail purchasers for those made by complainant for its own machines.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, § 86.

Unfair competition, see note to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

In Equity.

Howson & Howson, for complainant.
Thurston & Woodward, for defendants.

TAYLER, District Judge. The bill of complaint in this case charges the defendants with unfair competition in trade, arising out of the sale of meat chopper parts, and asks for an injunction and an accounting. A stipulation has been entered into, setting out the facts in the case, and the question becomes purely one of law. It appears that

the complainant has been, for a great many years, manufacturing what is known as the "Enterprise Meat Chopper." The name "Enterprise" is registered as a trade-mark, but there is no patent on the machine. No one else is engaged in the manufacture of a machine designated "Enterprise" meat chopper. The principal wearing parts of the machine are the knife and the plate against which it revolves. These parts, as manufactured by the complainant, for the "Enterprise" meat chopper, are marked—the plate with the words "Enterprise Mfg. Co. Warranted Steel," and the knife with similar identifying language. The defendants manufacture a knife and plate for "Enterprise" meat choppers; that is to say, for the meat choppers made by the complainant. The plate and knife are of the same general shape and appearance as the complainant's, but the plate is marked "Warranted Steel" at the place where the complainant has the inscription "Enterprise Mfg. Co.," and also a duplication of the inscription "Warranted Steel" at the place where the complainant marks its plate "Warranted Steel." There is no mark at all on the knife made by the defendants. The defendants' knives and plates are put up in packages, each of which is labeled "Repair Parts for Enterprise Meat Choppers Manufactured by The Giant Lock Co., Cleveland, Ohio."

It appears in the agreed statement of facts that complaint has been made by users of Enterprise meat choppers that the knives and plates made by other persons than the complainant are unsatisfactory, and not of the quality of those which the complainant makes; and that such unsatisfactory knives and plates were supposed by the users to be of the manufacture of the complainant. In this state of facts, the court is asked to enjoin the defendants from furnishing knives and plates to be used in Enterprise meat choppers, unless they clearly designate on the knives and choppers the fact that they are made by the defendants. It seems to me that the prayer to this effect ought to be granted. Undoubtedly the user of Enterprise meat choppers will usually, if not always, presume, in the absence of knowledge to the contrary, that knives and plates for Enterprise meat choppers are manufactured by the manufacturer of Enterprise meat choppers. Undoubtedly the defendants have a right to make these parts, but they ought not to be permitted to so make them as to induce users of them to believe that they are made by the complainant. The ease with which these parts might be stamped by the defendants, and the inexpensiveness of such work, naturally raise the question why the defendants do not so mark them as the complainant marks its similar parts. The answer to that, in argument, is that dealers purchasing repair parts for Enterprise meat choppers do not desire the name of the manufacturer to appear on the parts, as they do not desire the name of the manufacturer to appear on many other things which dealers sell; that the retail purchaser, having used a certain article identifiable by the name of its manufacturer marked on it will, when he has occasion to buy another of the same kind, insist upon having the same thing. That almost concedes away the whole case. So much being admitted, it would seem to be but a step further, and somewhat more reasonable, to assume that the dealer did not want the name "Enterprise Mfg. Co." inscribed on those parts,

or the name of any other manufacturer inscribed on them, so that the purchaser, who was the owner of an "Enterprise" meat chopper, when he bought the knife and plate, would not know that the knife and plate were not of the manufacture of the Enterprise Manufacturing Company. Cases of this peculiar character are rare. Nothing exactly like it has been cited by counsel. An examination of two or three will serve to disclose the principle that ought to control in such a case.

In Flagg Mfg. Co. v. Holway, 178 Mass. 83, 59 N. E. 667, complainants were the first to market a zither of particular shape and arrangement of keys. Defendant subsequently came upon the market with a zither identical with plaintiff's in shape and construction. No infringement of any patent, trade-mark or name was claimed, nor was there present any simulation of package or wrapper. The confusion arose merely because plaintiff's zither was well known by reason of its distinctive shape and construction, that fact being sufficient to cause defendant's zithers to be bought as and for the plaintiff's. The court held that, by reason of the absence of a patent, plaintiff could claim no monopoly upon the zithers, and defendant had a perfect right to make and sell them; but it was further held (Holmes, C. J.) that "the only thing he [the defendant] has not the right to steal is the good will attaching to the plaintiff's personality," and that this should be guarded by requiring the defendant's zithers to be clearly marked, so that they would indicate unmistakably that they were the defendant's and not the plaintiff's goods. The decree enjoined the defendant from selling or offering for sale zithers like that made by the plaintiff, unless clearly marked to show that they were the product of the defendant and not that of the plaintiff.

In the case of Deering Harvester Co. v. Whitman & Barnes, 91 Fed. 376, 33 C. C. A. 558, an attempt was made to enjoin the defendants from making parts for use in complainant's harvester, giving those parts numbers and letters similar to those used by the complainant for its parts. The court below refused the injunction; but it appeared that the parts in that case were plainly labeled, showing them to be not those of the complainant's manufacture, and hence no one was misled. The chief contention in that case was that the defendants used certain symbols to designate the several parts and the place where they were to go, being the same symbols as those used by the complainant. The court disposed of that adversely to the complainant, and also made the following observation:

"Neither does the evidence justify any relief upon the ground of unfair trade. The appellees have affixed to the parts made by them for use in Deering machines the same letters and numerals as those affixed upon the same parts by the Deering Company. This they have a right to do. These parts are open to the manufacture of all. The letters and numerals affixed, being only for the purpose of defining kind, shape, size, and place, may be rightly used by any one for the same purpose. These parts made by appellees have been plainly advertised by catalogue and label as of their own manufacture, and their whole course of dealing, as shown by this evidence, has been such as to mislead no one into buying their product as that of the appellants."

If the knives and plates in the present case were plainly advertised by label as of the manufacture of the defendants, a different case would appear from that which is now presented. If it were impracticable to stamp these parts, then it would be sufficient to label them by some attached tag. Surely the defendants would be put to no more expense or trouble than that to which the complainant is now subjected, if they suitably inscribed their parts for the Enterprise meat chopper. The case cited by counsel for the complainant in their brief, the original report of which is not available, is Neostyle Mfg. Co. v. Elliam's Duplicating Co., 21 R. P. C. 185. In that case, the plaintiff sold a duplicating machine under the name of "Neostyle," and defendants sold an ink, adapted and intended for use in plaintiff's machine, calling it "Ink for the Neostyle." Plaintiff sought to restrain the sale, but it was held that the defendants had a perfect right to sell ink for the Neostyle, and to call it so, so long as they did so under their own reputation; but held further, however, that it was the defendants' duty to clearly mark their product with their own name. It appearing, therefore, that users of Enterprise meat choppers who are required to buy knives and plates to replace those originally furnished with the device are not only likely to be, but frequently are, as shown by the proof, led to believe that the replacing parts are manufactured by the complainant when they are not, it is a violation of the manifest duty of the manufacturers of such parts designed and sold for use in complainant's machine to fail to so stamp or mark them as to preclude the danger of such mistake being made.

Decree for an injunction may therefore be entered in accordance with the prayer of the bill. I see no reason why an accounting should be had.

CHAMBERLAYNE v. AMERICAN LAW BOOK CO.

(Circuit Court, E. D. New York. November 19, 1906.)

No. 1.

1. FRAUD—FALSE REPRESENTATIONS—ACTIONABLE STATEMENTS.

A person contracting to write a law treatise on a given subject in legal contemplation holds himself out as conversant with the subject and as a competent law writer able to perform the contract, and a representation made to him by the other party that he can complete the work within the time limited by the contract is not a representation of fact, but merely the expression of an opinion upon a matter of which he should have the greater knowledge, and cannot be made the basis of an action for deceit or false representations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 9–13.]

2. SAME—ACTIONS—ALLEGATION OF DAMAGES.

An allegation in the complaint, in an action for false representations inducing plaintiff to enter into a contract to write a law treatise, that by reason of such false representations the compensation agreed upon was "at least five thousand dollars less than it would have been had such representations been true," affords no basis for the recovery of damages, since those alleged are wholly speculative and incapable of proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 24, 42.]

At Law. On demurrer to complaint.

The plaintiff alleged in his complaint that on October 1, 1902, he entered into a contract with defendant by which he agreed and undertook to write for the defendant a legal article of not more than 1,000 printed pages, on the subject "Evidence," for publication in the Cyclopedia of Law and Procedure, to be completed by January 1, 1904, and for which plaintiff was to receive the sum of $5,000; that plaintiff was at the time a practicing lawyer and had for many years prior thereto enjoyed a favorable reputation as an authority and writer on the law relating to the subject of evidence; that, to induce him to enter into said contract, defendant's officers, acting in its behalf, falsely and fraudulently represented to him that an article such as was required by the contract "could be written by a competent writer between said 15th day of September, 1902, and the 1st day of January, 1904"; and also made other false and fraudulent representations in reliance on which plaintiff entered into the contract.

The complaint further alleged:

"(14) That the compensation agreed upon for the preparation and writing of said article or treatise on the subject 'Evidence' was at least five thousand (5,000) dollars less than it would have been had defendant's representations been true; that with the exception of two short summer vacations and other temporary absences the plaintiff was constantly employed therein for a period of twenty-eight (28) months, instead of fourteen (14) months, as he would have been had defendant's representations been true; and that by reason of plaintiff's continued absence from his business he has completely lost his clientage and practice which he would not have done had defendant's representations been true.

"(15) That by reason of the premises plaintiff has been damaged fifteen thousand (15,000) dollars."

To the complaint defendant filed a general demurrer.

Field & Chittenden, for plaintiff.
Judson & Hale, for defendant.

THOMAS, District Judge. The allegations in the complaint must, in view of the demurrer, be accepted as true statements of fact. The plaintiff devotes his brief to showing that such allegations are made in due form, but he does not illustrate that such false representations are actionable, or that any legal damage resulted therefrom. The plaintiff, in legal contemplation, held himself out as a person conversant with the subject upon which he contracted to write, and as a law writer able to perform the contract into which he entered. The alleged representation that he could perform the work within the time limited by the contract seems to be an expression of opinion as to the working capacity of a competent writer, in view of the work to be done under the contract, and not a statement of a past and existing fact. The facts alleged pertain to the ability of the plaintiff to perform the contract, of which the plaintiff had knowledge necessarily beyond any information that the defendant could possess. The plaintiff's mental equipment, his faculties for writing the article, his readiness, dispatch, and physical endurance in disposing of his duty, were matters largely subjective, and cannot be made the basis of an action for deceit or false representations. Slaughter's Administrator v. Gerson, 80 U. S. 379, 20 L. Ed. 627.

The eighth subdivision of the complaint alleges that the defendant "falsely and fraudulently stated and represented that a payment of five (5) dollars per printed page for such article or treatise was at the rate of compensation paid to defendant's most favored author, and

falsely and fraudulently stated and represented to plaintiff that Hon. John F. Dillon, a former circuit judge of the United States and a very eminent and highly remunerated writer on legal topics, was an author of articles in said 'Cyc.'"; and in subdivision 10 it is stated that the defendant, through its president, "falsely and fraudulently stated and represented that a payment of five thousand (5,000) dollars for an article or treatise on said subject, to consist, as nearly as practicable, of not more than one thousand (1,000) pages, the author paying for his own clerical assistance, was at the rate of compensation paid to defendant's most favored author, and was a just and reasonable compensation for such services on the part of the plaintiff as were contemplated by the defendant, and were the same or 'as good as' the compensation paid the Honorable John F. Dillon for similar services."

It is further alleged that said Dillon "had never written an article or treatise for defendant"; and that "in truth the defendant was paying its staff writers, who enjoyed no reputation as specialists upon any topics of the law, five and 60/100 dollars per printed page and in addition furnished them free of charge with all necessary clerical assistance, and that the defendant had a subsisting contract with Judge Seymour D. Thompson whereby the said Seymour D. Thompson was to furnish his own clerical assistance and was to receive for an article or treatise, to consist, when printed, as nearly as practicable of nine hundred (900) pages all told, including the analyses, the sum of nine thousand ($9,000) dollars, besides other concessions of substantial value."

There is grave doubt whether the action may be predicated upon false and fraudulent representations of this kind. However that may be, it is considered that the complaint does not state any legal damage arising therefrom. Certainly such allegations as to false statements regarding "the compensation paid to defendant's most favored author" does not entitle the plaintiff to recover damages under the statement that:

> "The compensation agreed upon for the preparation and writing of said article or treatise on the subject of 'Evidence' was at least five thousand (5,000) dollars less than it would have been had defendant's representations been true."

This is purely speculative. How can any court or jury ascertain that the defendant would, had it not made such false allegations, have made the contract price $10,000 instead of $5,000? The plaintiff's proposition is equivalent to this: If the defendant had not represented to the plaintiff that it was undertaking to compensate him at a rate equal to the best rate paid to any other of its authors or writers, it would have contracted to pay him for the proposed service twice the sum that it did agree to pay him, and twice the rate it represented itself as paying its most favored authors. This is not an allegation of any fact, but a statement of the condition of mind of the defendant's agent, and of a contract that such mental state would have prompted such agent to make. No evidence could be given of what the defendant would

have done in this regard. How, then, is an allegation to that effect sufficient?

The demurrer is sustained, with leave to the plaintiff to plead over within 30 days, upon payment of costs.

LUDVIGH v. UMSTADTER et al.

(District Court, S. D. New York. November 9, 1906.)

BANKRUPTCY—SUIT BY TRUSTEE TO RECOVER PROPERTY—EQUITIES.

A bankrupt and another, some time prior to the bankruptcy, bought two lots in common and also entered into a verbal partnership to conduct a business as building contractors. The business was continued for a short time only, and was unsuccessful, resulting in debts to an unknown amount, which were not paid. During and after the partnership the parties built two houses of equal value on the common lots, one of which with half the ground was subsequently deeded to the wife of the bankrupt and the other to defendant, who was the wife of the other partner. The houses were not built in partnership, but an unknown portion of the money used therein belonged to the partnership and an unknown portion was furnished by each partner. No settlement of the partnership business was ever had, and there were no books or records from which such settlement could be made. *Held*, that the cross-deeds, whether valid as conveyances or not, operated as a fair partition of the property, and that the bankrupt's trustee had no equitable claim against the portion conveyed to defendant which entitled him to have the conveyance to her set aside, whatever might be the rights of partnership creditors.

In Equity. Suit by a trustee in bankruptcy.

Morris J. Hirsch and Mr. Grossman, for complainant.

Thomas A. McKennell and Mr. Zimmerman, for defendants Baumann.

HOUGH, District Judge. Before the month of April, 1904, the defendant Abraham Baumann and the bankrupt, Umstadter, purchased three lots of land in Yonkers. They contributed equally toward the purchase and took title as tenants in common. Some time in the spring of 1904 the same two men entered into a partnership for the purpose of erecting, on contract, houses in the neighborhood of the land they had bought. They had no partnership articles, and the testimony regarding their arrangements leaves nothing clear except that they were each to draw from the firm a weekly stipend, which they called "wages," and were to share equally the profits and losses of the enterprise. They had no capital, and practically the only moneys handled by the firm during its brief existence were borrowed from friends or relations, or derived from payments on account of the few contracts obtained. While the firm was in existence, the partners began the erection of two houses upon the land held in common. This building operation was not a partnership enterprise. The houses, when completed, were intended, respectively, as the houses of Baumann, who was already married, and of Umstadter, who was intending marriage. The money wherewith to build the family houses was in part derived from mortgage covering the land held in common, and

in part from the personal contributions of Baumann and Umstadter, while the origin of the balance of the moneys necessary for the erection of these houses has given rise to the present litigation. On July 30, 1904, the firm of Baumann & Umstadter was dissolved.

I find, on very conflicting testimony, that there was not then or at any other time a settlement of the firm affairs, and that on dissolution it was impossible, owing to absence of proper books and records, to know where the firm stood. By the dissolution agreement Umstadter was to finish the outstanding firm contracts. This he proceeded to do, and with such unsuccess that I must find that there were no firm profits; that the amount of loss cannot be ascertained; that for those losses Baumann and Umstadter are equally liable; and that, if an accounting were had between them (which has never taken place), there is no evidence here produced showing which one would be indebted to the other. The family houses were finished in August, 1904; but the materials entering into their construction were not then all paid for, and, indeed, some of the bills have never been paid. From the evidence of Umstadter and Mrs. Baumann and the bills for materials produced at the trial, I find that all moneys actually expended upon these family houses (over and above the proceeds of mortgages on the land, and the small, and approximately equal, private contributions of Baumann and wife on the one hand, and Umstadter, by borrowing from his father,—on the other) were the moneys of the firm of Baumann & Umstadter. Such moneys were the proceeds of loans made to the firm (e. g., by Umstadter's mother), or were appropriations to the use of the family houses of partial payments on firm contracts. Thus, in effect, inasmuch as the affairs of Baumann & Umstadter terminated in loss to an unascertainable extent, some or all of the moneys put into the family houses should have been used in paying firm debts; while for all the unpaid bills on those houses Baumann and Umstadter were at the time of their completion jointly liable, because such bills had been incurred in the firm name. The evidence is so vague and unreliable that I cannot find accurately the amount of firm money put into these houses, nor do I think it material to make the attempt. Each partner in the firm profitted equally by the operation; each remained equally liable for the consequences of their acts.

After the firm's dissolution Umstadter not only unsuccessfully completed the firm contracts, but embarked upon other enterprises in his own name which resulted in loss. On October 13, 1904, he was hopelessly insolvent, and on that day he and Baumann carried out their original intent in purchasing the joint land and building the family houses, but with one modification. By an arrangement of deeds made and delivered on that day they conveyed (or attempted to convey) half the land and one house to the defendant Dina E. Baumann, the wife of Abraham Baumann, and the other half of the land and the other house to Frances J. Umstadter, the wife of the bankrupt Umstadter. The conveyances to the respective wives were evidently afterthoughts, as is shown by erasures in the deeds, and the deeds themselves are not appropriate as transfers to the wives, and are appropriate to the partition between the partners originally intended. In

result Mrs. Baumann got some interest in a lot of land from an insolvent grantor, who a few days later became a bankrupt, and that bankrupt's trustee brings this suit to set aside the conveyance to Mrs. Baumann, which for the purposes of this litigation may be regarded as vesting in her a fee to a parcel of land of the same value as that which was retained by the Umstadters. Umstadter was proceeded against in bankruptcy by individual petition; and neither Baumann nor the firm of Baumann & Umstadter have been adjudicated or attacked in bankruptcy.

It seems to me that the true legal view to take of these tangled proceedings by ignorant persons is to regard the transaction of October 13th as a partition between the partners, with a cotemporaneous transfer of each partner's interest to his wife. Umstadter's individual creditors (through their trustee) have successfully attacked the conveyance to Mrs. Umstadter. The creditors of Baumann & Umstadter might perhaps successfully attack either or both conveyances, but this case rests upon the asserted right of a trustee, who represents only the individual creditors of Umstadter, to attack the conveyance to Mrs. Baumann. To the extent that both partners put their individual money into the land and houses, or jointly borrowed on the security of the jointly owned land, the transaction is unassailable. It amounts to no more than a partition, and, there being no difference in value between the Umstadter ownership of an undivided half of a tract of land and two houses and a separate ownership of half the land and one house, the transaction is lawful and Umstadter's creditors unharmed. There was in reality an exchange of equal interests, or a change in form, but not of substance. Sawyer v. Turpin, 91 U. S. 114, 23 L. Ed. 235. I think it is true that the firm of Baumann & Umstadter had some equitable interest in the family houses on October 13, 1904. The firm's money had to a certain extent gone into them, though no more had gone into the house destined for Baumann than into the other intended for Umstadter. But such interest is an asset not primarily for the creditors of Umstadter individually, but for the creditors of the firm, and I fail to see upon what principle Umstadter's trustee can follow it. Neither Baumann nor his wife was on October 13, 1904, a creditor of Umstadter, and therefore there could be no preference under section 60 of the bankruptcy act of July 1, 1898 (30 Stat. 562, c. 571 [U. S. Comp. St. 1901, p. 3446]). The creditors of Umstadter were not hindered, delayed, or defrauded by the transfer, because they could have no right to attack the only assailable portion of the transaction, viz., a possible equitable interest of the creditors of Baumann and Umstadter in the Baumann half of the tract, until such partnership creditors were satisfied (which has not been done), and therefore neither section 67 nor section 70 of the act applies.

Further, whatever of the property conveyed to Mrs. Baumann on October 13, 1904, may be regarded in equity as an asset for the payment of debts is an asset for the payment of partnership debts, and is in equity partnership property, and under the circumstances of this case and the express terms of section 5h of the act shall "not be administered in bankruptcy" by the trustee of a single partner.

It follows from these considerations that Mrs. Baumann should have judgment dismissing the complaint as to her. She is awarded against the trustee in bankruptcy costs of one docket fee and the disbursements of this trial to be taxed by the clerk. It follows, also, that the proceedings against Mrs. Baumann to recover for the use and occupation of the house which is the subject of this litigation should be vacated. Let the order or decree be settled on four days' notice.

DOYLE v. CINCINNATI, N. O. & T. P. RY. CO.

(Circuit Court, S. D. New York. July 11, 1906.)

No. 35.

JUDGMENTS—RES JUDICATA—MATTERS CONCLUDED.

Plaintiff's testator filed a claim with defendant for overcharges on shipments of stone made by defendant's connecting carrier, and on notice of the claim defendant intervened in a cause in which receivers were appointed for such connecting carrier, claiming against the receivers the amount of overcharges which plaintiff's testator claimed of defendant, which amount defendant admitted had been overcharged, and prayed that the purchaser of the connecting carrier's line from the receivers be ordered to pay plaintiff the amount claimed. The master's report directing such payment was confirmed, and the amount paid. *Held*, that the only issue adjudicated in such proceeding was the amount of overcharges which the purchaser of the connecting carrier's line must pay as purchaser from the receivers which could only include the overcharges which came into the receiver's hands before sale; and hence the judgment in such proceeding was not res judicata of plaintiff's claim against defendant.

Robert L. Stanton (James P. McGovern, of counsel), for plaintiff.

Stetson, Jennings & Russell (Vivian Spencer, of counsel), for defendant.

PLATT, District Judge. This is an action at law to recover on behalf of Doyle, deceased, overcharges on stone shipped in the years 1891–1895 from Bedford, Ind., to Biltmore, N. C., over the railways of the defendant company and of its connecting carriers. The defendant avers that if liable at all, it is only for overcharges made during a two years' guaranty of a certain freight rate, from October 3, 1891, to October 3, 1893. The cause was removed from the state court in February, 1895. In July, 1895, an amended answer was filed which contains the foregoing averment, and also a second defense, which latter is demurred to.

The second defense is elaborate, but the essential parts seem to be as follows: The Richmond & Danville Railroad, the connecting carrier by whom the overcharges were made, went into the hands of a receiver in June, 1892. Upon notice of Doyle's claim the defendant intervened in the cause in which the receivers had been appointed in the United States Circuit Court for the Eastern district of Virginia, claiming against the receivers the amount of overcharges which Doyle claimed from defendant, to wit, $4,851.86, which amount defendant admitted had been overcharged, and praying that the purchaser from

said receivers, to wit, the Southern Railway Company, be ordered to pay the plaintiff executor the amount of said overcharges.

The matter was referred to a master, who took testimony, and then made a preliminary report requiring said executor (the present plaintiff) to be made a party thereto; said executor filed his appearance, whereupon the master filed a final report, finding that the overcharges were in fact $4,829.20 (the exact amount claimed herein), which was classified as follows:

From date of first shipment to October 3, 1891, the date of alleged guaranty	922 33
From October 31, 1891, to June 16, 1892, date of appointment of receivers	626 32
From date of appointment of receivers to date of expiration of alleged guaranty	2,111 72
From expiration of guaranty to end of shipments	1,168 53
	4,829 20

and that $1,976.68 thereof had been received by said receivers during the time of the alleged guaranty, which is here set up in the first defense, and should be paid to said executor. Said report was confirmed by said court and a decree made December 10, 1904, which adjudicated that said sum, without interest, be paid by said Southern Railway Company to said executor, which was done.

Thus all matters in controversy have been adjudicated by said Circuit Court, and plaintiff is estopped from recovering more than $626,-32, which were the overcharges found by the court to have been made after the alleged guaranty began and before the receivers were appointed, and $33.54, which was the amount overcharged by another connecting carrier during the alleged guaranty, and these amounts, with interest, defendant offers judgment for. This second defense seems to be that the guaranty alleged in the first defense has become by the decree of the Circuit Court res adjudicata, and with what is now offered in judgment settles everything. The only issue, however, which seems to have been directly adjudicated in the Virginia court is as to the amount of the overcharges which the Southern Railway Company must pay, as the purchaser under foreclosure proceedings, from the receivers. That would, of course, only be the amount of overcharges which came into the receivers' hands before sale under the foreclosure, and as neither the date of such sale nor the date of the termination of the receivership appear, we are in the dark as to whether the decree covers the entire controversy. The question of whether there was such a guaranty was not necessarily adjudicated in the Virginia court, and it will be noted that the master's report upon which the decree is based calls it an alleged guaranty.

Counsel for defendant in support of the second defense says that plaintiff intervened in said suit, had counsel, took an active part in the proceeding, did endeavor to sustain his claim by evidence, and took no appeal, but unfortunately for him, the record does not sustain the vital portions of his contention. I cannot find that the plaintiff herein has ever had his "day in court" on the issues now to be litigated.

Fayerweather v. Ritch, 195 U. S. 276–299, 25 Sup. Ct. 58, 49 L. Ed. 193, is authority for sustaining the demurrer, with costs.

Let that portion of the answer entitled "For a Second Separate and Distinct Defense" be stricken out.

NEW ENGLAND PHONOGRAPH CO. v. NATIONAL PHONOGRAPH CO. et al.

(Circuit Court, D. New Jersey. September 26, 1906.)

EQUITY—TAKING PROOFS—RIGHT OF WITNESS TO REFUSE TO ANSWER.

In general, a witness whose testimony is being taken orally before an examiner, under equity rule 67, cannot refuse to answer a question on the ground that the evidence called for is immaterial or irrelevant, although there may be cases where the evidence is so clearly outside the issues that he will be entitled to the protection of the court.

In Equity. On motion to compel witness to answer questions before examiner.

Ferguson & Ferguson (Robert D. Murray and J. Aspinwall Hodge, of counsel), for complainant.

Frank L. Dyer, for defendants.

LANNING, District Judge. The defendants called a witness before the examiner, and examined him for the purpose of supporting the plea which has been filed by one of the defendants. On cross-examination by the complainant the witness refused, under advice of counsel, to answer certain questions on the ground that the questions were immaterial and irrelevant. Application is now made by the complainant for an order requiring the witness to answer. The evidence is being taken under the provisions of equity rule No. 67.

In Blease v. Garlington, 92 U. S. 1, 23 L. Ed. 521, Mr. Chief Justice Waite said:

"Since the amendment of rule 67, in 1861, there could never have been any difficulty in bringing a case here upon appeal, so as to save all exceptions as to the form or substance of the testimony, and still leave us in a condition to proceed to a final determination of the cause, whatever might be our rulings upon the exceptions. The examiner before whom the witnesses are orally examined is required to note exceptions; but he cannot decide upon their validity. He must take down all the examination in writing, and send it to the court with the objections noted. So, too, when depositions are taken according to the acts of Congress, or otherwise, under the rules, exceptions to the testimony may be noted by the officer taking the deposition, but he is not permitted to decide upon them; and, when the testimony as reduced to writing by the examiner, or the deposition, is filed in court, further exceptions may be there taken. Thus, both the exceptions and the testimony objected to are all before the court below, and come here upon the appeal as part of the record and proceedings there. If we reverse the ruling of that court upon the exceptions, we may still proceed to the hearing, because we have in our possession, and can consider, the rejected testimony. But, under the practice adopted in this case, if the exceptions sustained below are overruled here, we must remand the cause in order that the proof may be taken. That was done in Conn. et al. v Penn., supra [5 Wheat. 424, 5 L. Ed. 125]; which was decided before the promulgation of the rules. One of the objects of the rule, in its present form, was to prevent the necessity for any such practice."

This language was approved in Nelson v. United States, 201 U. S., at page 114, 26 Sup. Ct., at page 365, 50 L. Ed. 673.

In Parisian Comb Co. v. Eschwege (C. C.) 92 Fed. 721, Judge Lacombe, after referring to Blease v. Garlington, said:

"It seems as if the information sought to be elicited were not essential to complainant's case, nor, indeed, relevant or material to the issues which, according to practice, will be first argued, viz., validity of patent, construction of claim, and infringement. Nevertheless this court is not the final arbiter as to whether the testimony is or is not immaterial, and, in view of the object intended by the amendment of the sixty-seventh rule, it should obtain and preserve the answers for the benefit of the appellate tribunal."

To the same effect see Maxim-Nordenfeldt Guns & Ammunition Co. v. Colt's Patent Firearms Mfg. Co. (C. C.) 103 Fed. 39; Appleton v. Ecaubert (C. C.) 45 Fed. 281; Fayerweather v. Ritch (C. C.) 89 Fed. 529. Cases may arise where it would be the duty of the court to protect a witness against an effort to secure information in violation of the witness's constitutional rights, or upon a point clearly outside of the issues raised by the pleadings. See Perry v. Rubber Tire Wheel Co. (C. C.) 138 Fed. 836; Dowagiac Mfg. Co. v. Lochren (C. C. A.) 143 Fed. 214.

In the present case, however, it does not clearly appear that the evidence sought to be elicited from the witness is immaterial, and, if there be any question of doubt whatever on the point, it should be taken so that, if there be an appeal, the court of appeals may have the evidence before it. It is clear that, under the authorities, the questions must be answered, and the objections thereto noted by the examiner. Such was the ruling in a somewhat similar case in this court by my associate in a memorandum in the case of Encyclopædia Britannica Company v. Werner Company et al. (filed January 2, 1906).

There will be an order requiring the witness to answer the questions.

In re EISENBERG.

(District Court, S. D. New York. November 2, 1906.)

1. BANKRUPTCY—COMPOSITION—POWER TO SET ASIDE.
   Under Bankr. Act July 1, 1898, c. 541, § 13, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], a court has no power to set aside a composition after the lapse of six months from the date of its confirmation.

2. SAME—FAILURE TO FULFILL AGREEMENT.
   The fact that a bankrupt has failed to fulfill a composition agreement affords no ground for setting aside the composition, whatever its effect may be on the operation of the composition as a discharge.

In Bankruptcy. On motion to set aside order confirming a composition.

Whitridge, Butler & Rice and Mr. French, for the motion.
Severance & Stein, opposed.

HOUGH, District Judge. In January, 1904, the bankrupt offered to the creditors a composition "at 20 per cent. * * * to be paid

as follows: 10 per cent. thereof in cash, and the balance (to wit 10 per cent.) in promissory notes payable in six months and properly endorsed by Sajun & Tahelran." This composition was agreed to by the requisite number of creditors, some of whom, however, prefixed to their written consent the condition "that indorser is satisfactory." On March 27, 1905, after due proceedings, an order was entered declaring "that the said composition offered by the bankrupt herein be, and the same hereby is, in all things confirmed." Before, however, any distribution was made, either of the cash or of the notes provided for by the composition agreement, the proposed indorsers became financially embarrassed, and the attorneys for certain creditors (i. e., some of those who had made their consent to the composition conditional) served notice upon the depository having charge of the funds and the notes to make no distribution "pending investigation into facts and circumstances." It does not appear by any record herein what investigation, if any, was made; but another creditor shortly thereafter procured (after notice to all creditors) an order directing the referee, trustee, and depository "to pay out the fund consisting of cash and notes * * * under and by virtue of, and pursuant to the order" confirming the composition. The creditor, now moving to set aside the composition, took his cash payments as well as the notes. The indorsers became insolvent and absconded, and the bankrupt has not paid (at all events) the notes of the creditor now moving to set aside.

He now alleges as the substantial ground of his motion that the bankrupt falsely represented the proposed indorsers as "both solvent and responsible," although they were at the time known to him to be insolvent. It is too late for an application of this kind. Section 13 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]) distinctly confines the power to set aside compositions to a period of six months. A composition in bankruptcy duly perfected undoubtedly has the effect of a discharge (In re Merriam, Fed. Cas. No. 9,479, 18 N. B. R. 411); but just as a right to a discharge is distinct from the effect thereof (In re Dresser & Co., 13 Am. Bankr. Rep. at page 637, and cases cited), so the right to a composition must be distinct from the effect of a composition. The lapse of time is a sufficient reason for sustaining the bankrupt's right to his composition; but the effect of an unfulfilled composition agreement is an entirely different matter. One may have a right to a discharge in bankruptcy, yet the discharge will not be a bar against many debts. This bankrupt has a right to maintain the existence of his composition, but the effect thereof may well depend upon proof of its fulfillment. The mere fact that in some other forum, or in a future proceeding, the failure of the bankrupt to pay the notes given in composition may be held to have revived the original debt (In re Hurst, Fed. Cas. No. 6,925, 13 N. B. R. 455), or the fact that if such holding were made this court would refuse to interfere by injunction (In re Negley [D. C.] 20 Fed. 499), affords no ground for setting aside the composition, and would have furnished no ground for so doing had the application been made within six months. A bankrupt may by his acts de-

prive himself of the benefit of a composition. He may so behave that the composition order ceases to be a shield, but that furnishes no reason why the order should be vacated in any other manner, or for any other reasons than are specified in the act.

The motion is denied

In re DORAN.

(District Court, W. D. Kentucky. November 10, 1906.)

1. BANKRUPTCY—LIENS—UNRECORDED MORTGAGE.

Under Ky. St. 1903, § 496, which provides that no mortgage shall be valid against creditors until it shall be acknowledged or proven according to law and lodged for record, as construed by the courts of the state, a mortgage which was withheld from record for several months, and until shortly before the bankruptcy of the mortgagor, is not a lien as against his creditors in bankruptcy whose claims originated while it was so withheld.

2. SAME—TRUSTEE—REPRESENTATIVE CAPACITY.

While in respect to an adverse claimant of property a trustee in bankruptcy stands in the place of the bankrupt and with the same rights and no more, in a contest with a creditor who claims a lien or a right of priority the trustee represents the body of unsecured creditors, and not the bankrupt, and may assert their rights which are not necessarily limited to those of the bankrupt.

In Bankruptcy. On review of decision of referee.

L. A. Faurest, for petitioner.

Claude Mercer, for trustee.

EVANS, District Judge. The adjudication in this proceeding was made May 18, 1906. C. H. Moorman had held sundry unrecorded mortgages on portions of the bankrupt's property since January, 1902. The one now in question was dated January 9, 1905, and had been acknowledged January 20, 1905, but fortunately or unfortunately was not put to record until March 13, 1906. It was made to secure a note for $714.61, which seems to have been a renewal of previous notes for the same debt, also secured by previous unrecorded mortgages. Moorman made proof of his claim as a secured debt, but the referee only allowed it as an unsecured demand, and it is this ruling which is sought to be reviewed. Technically this might possibly have been erroneous to some extent, because, if any of the bankrupt's debts had been created after the mortgage was recorded, it would have been good as to such subsequent creditors; but as the referee found the fact to be, and pointed it out in his opinion, there were no such debts created. The mortgage was not, as we shall see, any security entitling Moorman to priority as against debts created while he voluntarily kept that instrument secret, viz., from January 9, 1905, to March 13, 1906, and the debts thus created would more than exhaust the assets. Hence the error of the referee, if any, was abstract, and in no way prejudicial to the mortgagee, if otherwise the referee's ruling was substantially correct.

Under the provisions of section 64 of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], among the "debts which have priority" are (clause b [5]) those "owing to any person who by the laws of the states or of the United States is entitled to priority." It is therefore essential to ascertain whether Moorman, holding an unrecorded mortgage, is, as against creditors whose debts were created in the meantime, entitled to priority of payment out of the property embraced in the mortgage or its proceeds. The Kentucky statute must furnish the test. This is expressly demanded by the clause in the bankruptcy act just quoted, so that upon that statute alone, and its proper construction, the decision of the pending question must turn. The applicable Kentucky statute (1903) is in this language:

"Sec. 496. No deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deeds shall be acknowledged or proved according to law, and lodged for record."

In the case of In re Ducker (D. C.) 133 Fed. 771, precisely the same issues were involved, and in that case we very carefully considered the question of the proper construction of the section of the Kentucky Statutes just copied, and reached a conclusion which justified the referee in holding that Moorman's mortgage did not entitle him to any priority of payment over any of the bankrupt's creditors whose claims were created after the mortgage was made but before it was placed on record. As an interpretation of the law of Kentucky, we do not doubt the accuracy of the views expressed in the opinion referred to, nor need we repeat what was there said. Especially is this so now, because the conclusion we then reached, when reviewed by the Circuit Court of Appeals, was fully approved; its elaborate opinion thereon being reported in 134 Fed. 43, 67 C. C. A. 117. We are not at all at liberty, therefore, even if so disposed (which we are not) to change the ruling as to the proper construction of the statute of Kentucky, since that construction is now that of the higher court.

It is vigorously insisted, however, that, while the ruling on the Shuster claim in the Ducker Case was proper upon the facts there presented, as the mortgage there was never recorded at all, yet that the case now before us must be ruled by that of York Mfg. Co. v. Cassell, 201 U. S. 450, 26 Sup. Ct. 481, 50 L. Ed. 782. In that case there was a contest between a seller of property upon condition and the trustee of the bankrupt as to whether the former could remove the property. The condition had been that the title was not to pass until the price was paid. The price had not been paid, and there was an Ohio statute applicable to such cases which had been given a construction by the courts of that state. Accepting, as it must, the construction thus put upon the Ohio statute, the Supreme Court held that as the trustee in the state of case then presented stood in the plight and condition of the bankrupt, and as the contract as between the latter and the conditional seller was good, whether recorded or not, it was also good as between the seller and the trustee, who pro hac vice stood in the shoes

of the bankrupt, who alone was claiming, and that under the construction given the Ohio statute the seller, as between him and the trustee, was entitled to take the property which had not been paid for; that is to say, as the bankrupt himself could not dispute the contract, neither could the trustee, who stood in his place. But here the rights of the parties to this contest are the rights of innocent creditors which depend upon Kentucky law, and we must distribute the estate, in great measure, as required by the law of that state. This, as we have seen, is demanded by the express provision of the bankruptcy act, and we think the Kentucky law, properly construed, substantially supports the ruling of the referee; there being no dispute that the net assets of the bankrupt will not exceed $1,000, while the debts proved amount to about $2,550, of which $1,745.66 were created between the date of Moorman's last mortgage, viz., January 9, 1905, and the time when it was put to record, viz., March 13, 1906, and $800 of which was created previous to January 9, 1905. Certainly much the larger part of the indebtedness was created while the bankrupt apparently had the unincumbered ownership of all the property covered by a mortgage which the mortgagee kept carefully concealed, thus giving the bankrupt a credit which would be fictitious if the priority of that mortgage is upheld.

Under these circumstances, we are of opinion that a proper construction of the Kentucky law defeats his right to any preference or priority in payment out of the $1,000 which constitute the assets of the bankrupt, even though, as appears to be the case, a large portion thereof came from a sale of the mortgaged property. We think the proper construction of the law of Kentucky demands that, as he deliberately withheld his mortgage from the record, he thereby forfeited, in favor, at least, of the creditors whose claims were created while he did so, all right to priority over them; they having extended credit presumably upon the bankrupt's apparent ownership of the property. Certainly under these circumstances it is equitable for him to suffer the loss, rather than those who were without fault.

Nor do we think there is anything in York Mfg. Co. v. Cassell to require a different ruling. As already pointed out, the rights of the parties in that case depended upon a statute of Ohio which the courts of that state had construed, and it is easily and fairly distinguishable from the one before us. Moreover, the question there involved was between two claimants to certain specific property; one the seller upon condition unfulfilled, and the other the trustee, who, as to the ownership thereof, stood in the shoes of the bankrupt. The Supreme Court, following the established construction in Ohio of a statute of that state, upheld the title of the seller. In Kentucky, however, the rule of construction, in respect to such conditional sales as that in the case then before the Supreme Court, is exactly the reverse of the rule in Ohio. In the opinion in the Ducker Case (D. C.) 133 Fed. at page 771, it was said:

"The T. B. Shuster Company, of New Haven, Conn., having made a conditional sale (as it supposed) to the bankrupt of certain merchandise which it delivered to him in Louisville, Ky., the parties entered into a written agree-

ment by which it was stipulated between them that the title to the merchandise should remain in the seller until the purchase price was paid, and power was given to it to retake possession of the property and remove it if it was not paid. This being precisely such an agreement as the settled law of Kentucky makes an absolute sale, with a mortgage back to secure the purchase money (Baldwin v. Crow, 86 Ky. 679, 7 S. W. 146; Welch v. Cash Register, 103 Ky. 30, 44 S. W. 124, and cases cited), the Shuster Company has proved its claim as a secured debt."

The Circuit Court of Appeals approved this view (134 Fed. 46, 67 C. C. A. 117) in that case, which depended upon the laws of Kentucky, because it was conformable to the settled law of that state, while for a similar reason the Supreme Court followed the opposite rule in a case which depended upon the settled law of Ohio.

In the case before us there is a contest among creditors, who do not stand in the plight of the bankrupt at all, as to their respective rights in the distribution of the bankrupt's assets, and it is the right and the duty of the trustee, who here represents all the creditors, to see that the law is enforced. He is not now the substitute of the bankrupt, and standing as he alone would stand, as in the York Mfg. Co. Case, but it is his duty to stand for the unsecured creditors so that there may be a lawful distribution of the assets in his hands.

In its opinion in Atkins v. Wilcox, 105 Fed. 597, 44 C. C. A. 626, 53 L. R. A. 118, the Circuit Court of Appeals for the Fifth Circuit said:

"By the clearest implication he represents all the creditors, and as such representative has an interest in the just administration of the estate which belongs to the creditors. Moreover, this right is expressly recognized in the sixth paragraph of general order in bankruptcy 21 (32 C. C. A. xxii., 89 Fed. ix.), which has itself the force of a statute, even if not clearly founded on the text of the statute, which we think it is. It appears to give the trustee precedence even of the creditors, for the language is that: 'When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may,' etc."

See, also, Loveland on Bankruptcy, § 139, and Brandenburg on Bankruptcy, § 869.

So we conclude that the objections of the trustee here, to the allowance of Moorman's claim as a secured debt as against the creditors whose demands had been created while the mortgage was kept secret, properly raised a controversy among the creditors as to the manner of distributing the bankrupt's assets, and that on the merits the objections to the proof of the debt as a secured claim against the general creditors should be sustained. As against those creditors Moorman's mortgage gives no right of priority in payment, because it was not recorded until after they were created, and, as those claims would, as against his mortgage, exhaust the assets, he was not prejudiced by the ruling complained of. Of course, the referee's order does not give any preference in the distribution to any of the debts, and Moorman will get his distributive share along with all the others. He is excluded from priority, but not from participation.

These conclusions seem also to be supported by the provisions of section 64a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), which is in this language:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

Clause "d" of the same section also shows the stress laid upon the duty of recording a mortgage if such recording was necessary "in order to impart notice."

Of course, if the proceeds of the mortgaged property had been more than sufficient to pay the debts created while the mortgage was in hiding, viz., those created between the execution and when it was recorded on March 13, 1906, then it might be important to inquire whether Moorman would not be entitled to the surplus as against creditors whose claims arose before January 9, 1905. We think Moorman, in that contingency, would be so entitled, and, if upon the return of the case such a surplus should by any possibility develop, the referee should readjust his rulings to that state of case; but, as the papers sent up appear to show that such a surplus is impossible, the question would now be altogether speculative, and the equity of the case as now presented evidently demands that all the general creditors, including Moorman, should share pro rata. To attempt any other course would be to attempt the impracticable.

The ruling sought to be reviewed is affirmed, and the petition for a review is dismissed. In further proceedings in the case the referee will follow the equitable principles established in the Ducker Case, referred to, as well as what is expressed in this opinion.

THE BUFFALO.

(District Court, W. D. New York. September 19, 1906.)

SHIPPING—PROCEEDINGS FOR LIMITATION OF LIABILITY—PARTS OF VESSEL.

A traveling derrick upon a scow belonging to her owner, and the use of which was indispensable to enable her to perform the duties in which she was engaged at the time of the commission of a negligent act, is a part of her apparel, tackle, and furniture to be appraised as a part of her in proceedings for limitation of liability on account of such act.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 639, 656.

Limitation of owner's liability, see note to The Longfellow, 45 C. C. A. 387.]

In Admiralty. In the matter of limitation of liability. On application of respondent to exempt certain property from lien and attachment. See 147 Fed. 304.

Lawrence J. Collins, John Cunneen, and Thomas C. Burke, for libelants.

Hoyt, Dustin & Kelley and Brown, Ely & Richards, for respondent.

HAZEL, District Judge. The question here is whether a traveling derrick is a part of the apparel, tackle, and furniture of the scow Buffalo. The derrick in question which concededly belonged to the owners of the scow, was a part of her apparel, tackle, and furniture, and

is therefore liable to the extent of its appraised value for the negligent act complained of. Its use was essential to the practicability of the scow for the purpose and object for which she was being used at the time of the accident. There is no doubt but that she would not have been engaged to unload or reload the stranded vessel except for her hoisting rigging and machinery. Situate as she was, the remarks of Lord Stowell, in The Dundee, 1 Hag. Ad. 120, are thought to be appropriate. In speaking generally of accompaniments that are essential to a ship as distinguished from her cargo, he says:

"If they are indispensable instruments, without which the ship cannot execute its mission and perform its functions, it may, in ordinary loose application, be included under the term "ship," being that which may be essential to it—as essential to it as any part of its own immediate machinery."

The case of Swift v. Brownell, Fed. Cas. No. 13,695, cited by proctors for respondent, is not controlling here. There it was simply held that provisions and supplies of a whaling ship were not within the meaning of the word "ship" or "vessel" as those terms are used in our statute. Under the English law they were appurtenances, but, as the term "appurtenances" was omitted from our statute, it was thought that they did not come under its provisions. It will readily be observed that the facts of that case are distinguishable. The derrick cannot be classed strictly within the meaning of an appurtenance of a ship, even though it could be, and frequently was, moved to and from the ship. In its operation it was conjointly used with the ship, and became an indispensable and necessary part thereof—as necessary as the mast of a sailing vessel, or the engine of a steamer. See the Edwin Post (D. C.) 11 Fed. 602.

The coal buckets were not aboard the vessel when the accident happened, and therefore the proctors for libelant consent that they should not be included in the report of the appraisers.

The application to exempt the derrick is denied. A decree limiting the liability of the vessel in question in accordance with the foregoing views may be entered.

GUTHMAN, SOLOMONS & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. July 11, 1906.)

No. 4,157.

CUSTOMS DUTIES—NEEDLECASES—COVERINGS.

So-called furnished needlecases, consisting of books or cases for holding needles during transportation and while the needles in them are being used, are not usual coverings, being used otherwise than in bona fide transportation of the needles, within the meaning of Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924], relating to coverings consisting of "any unusual article or form designed for use otherwise than in the bona fide transportation" of merchandise to the United States.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision below related to so-called furnished needlecases containing needles, the cases being composed of paper. In some instances paper was the component material of chief value in the entire article, in others the value of the needles exceeded that of the paper. The point in issue is whether the cases should be treated as coverings, under Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924], and, if so, whether as usual or as unusual, coverings, or whether the goods should be considered as entireties. The importers contended that the needles should be classified free of duty under the provision for needles in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 620, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685], and that the cases, as usual coverings, would accordingly also be free; also, in the alternative, that the cases should be classified as manufactures of paper, under section 1, Schedule M, par. 407, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673]. The collector treated the goods as entireties composed of paper and metal, and where the metal (needles) was the more valuable element, classified them as manufactures of metal, under Schedule C, par. 193, § 1, c. 11, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645], and where the cases exceeded the needles in value, classified them as manufactures in chief value of paper, under said paragraph 407. This classification was affirmed by the Board of General Appraisers, on the authority of a former decision, G. A. 6,220, T. D. 26,887.

The pertinent portion of said section 19 reads as follows:

"Sec. 19. That whenever imported merchandise is subject to an ad valorem rate of duty, * * * the duty shall be assessed upon the actual value, * * * including the value of all cartons, cases * * * and coverings of any kind, * * * and if there be used for covering or holding imported merchandise * * * any unusual article or form designed for use otherwise than in the bona fide transportation of such merchandise to the United States, additional duty shall be levied and collected upon such material or article at the rate to which the same would be subject if separately imported."

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

Charles Duane Baker, Asst. U. S. Atty.

WHEELER, District Judge. These are needlebooks, or cases for holding needles during transportation to this country and afterwards till the needles in them should be used up. This appears both from the testimony before the Board and that in this court. This is a use "otherwise than in bona fide transportation" of the articles to this country, and therefore they seem to be dutiable as they were assessed.

Decision affirmed.

U. H. DUDLEY & CO. v. UNITED STATES.

PAUL TAYLOR BROWN CO. v. SAME.

(Circuit Court, S. D. New York. July 18, 1906.)

Nos. 3,705, 3,706.

CUSTOMS DUTIES—CLASSIFICATION—PINEAPPLES IN SUGAR.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], for "pineapples preserved in their own juice," *held* not to include pineapples in which sugar has been used as a preservative. They are dutiable under the provision in the same paragraph for fruit preserved in sugar.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below see G. A. 5,787 (T. D. 25,577), affirming the assessment of duty by the collector of customs at the port of New York.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

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

WHEELER, District Judge. The question here is whether these pineapples are "preserved in their own juice," as protested, or in sugar as classified under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651]. The opinion of the board shows clearly that sugar was used as a preservative in putting up these goods, and the evidence taken in this court does not make it appear otherwise. The decision of Judge Platt [Johnson v. U. S. (C. C.) 143 Fed. 839], as to preserved pineapples, would be controlling if the findings or results of the evidence were the same, but they do not appear to be. It is said that pineapples cannot be preserved in their own juices, and that therefore there is strictly no such thing as pineapples preserved in their own juices to which this provision of the act can apply. But, if that is so, the articles must fall elsewhere, and these protests cannot be sustained.

Decisions affirmed.

WING ON WO v. UNITED STATES.

(Circuit Court, S. D. New York. July 11, 1906.)

No. 4,154.

CUSTOMS DUTIES—CLASSIFICATION—DRIED LIZARDS—DRUG.

Dried lizards, used by the Chinese in compounding a medicine, are drugs within the meaning of Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 548, 30 Stat. 197 [U. S. Comp. St. 1901, p. 1683].

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision below affirmed the assessment of duty by the collector of customs at the port of New York on the authority of a previous decision. G. A. 5,977 (T. D. 26,186).

Everit Brown, for importer.

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

WHEELER, District Judge. These are lizards dried in pairs on bamboo and used in compounding sirup for Chinese medicine, and appear to be essentially a drug, such as the dried insects, etc., of Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 548, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1683]. Therefore they do not go under section

6, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], as nonenumerated unmanufactured articles where classified.

Decision reversed.

FLEET v. UNITED STATES.

(Circuit Court, S. D. New York. January 12, 1892.)

No. 109.

CUSTOMS DUTIES—CLASSIFICATION—DRESSED FUR—PIECES TEMPORARILY SEWN TOGETHER—"ARTICLES."

Pieces of fur sewn together continuously for convenience or safety, but not intended to be used as articles in that shape, are not "articles made of" fur under Tariff Act March 3, 1883, c. 121, § 6, Schedule N, 22 Stat. 512, but are dutiable as "dressed furs on the skin," under the same schedule, 22 Stat. 513.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision below related to merchandise imported at the port of New York by William H. Fleet. It was classified under Tariff Act March 3, 1883, c. 121, § 6, Schedule N, 22 Stat. 512, relating to "furs, articles made of," and was claimed by the importer to be dutiable under the provision in the same schedule, 22 Stat. 513, for "dressed furs on the skin."

William B. Coughtry, for importer.

James T. Van Rensselaer, Asst. U. S. Atty.

WHEELER, District Judge. The appraiser originally seems to have put down these things as lambskins to be used for fur linings, and the General Appraisers say that that was not controverted before them. But now it is controverted on the evidence. The pieces of lambskin seem to be sewed together continuously, not only for safety in transportation, but also for the purpose of presenting a more inviting appearance to purchasers; but they do not seem to be made into any articles for use. They seem to be simply an area of lambskins with the wool on, as in a bundle or some kind of a package, so arranged for convenience in transportation, and not an article made into anything from fur. The section of the statute reads: "Furs, articles made from, * * * or articles made of." I do not think this is an article made of fur; but it is a mode of packing or arranging fur, by sewing it together for safety or for convenience. I do not think it was properly assessed as an article of fur. If it was the lining of a coat, made for that purpose, and used for that, of course, it would then be an article of fur. That seems to have been the way it stood before the appraisers, according to their statement; but this evidence taken since shows it not to be so.

The decision will be reversed.

ALEXANDER MURPHY & CO v. UNITED STATES.

(Circuit Court, S. D. New York. January 22, 1895.)

No. 1,280.

CUSTOMS DUTIES—CLASSIFICATION—FILTERING PAPER.

Filtering paper that has been cut into disks and made ready for use in filtering, is not by this treatment removed from the provision in paragraph 419, Tariff Act October 1, 1890, c. 1244, § 1, Schedule M, 26 Stat. 599, for "papers commercially known as * * * 'filtering paper,' * * * made up in copying books, reams, or in any other form."

On Application for Review of a Decision of the Board of United States General Appraisers.

On the authority of a former decision, G. A. 1,557 (T. D. 13,052), the board overruled the protests of the importers against the assessment of duty by the collector of customs at the port of New York. The merchandise was described by the board as consisting of circular sheets of filtering paper about 12 inches in diameter, and as being bought, sold, and commercially known as "filtering paper." The provisions quoted in the opinion of the court (infra) are found in paragraphs 419 and 425, Tariff Act October 1, 1890, c. 1244, § 1, Schedule M, 26 Stat. 599.

Comstock & Brown, for importers.
Jason Hinman, Asst. U. S. Atty.

WHEELER, District Judge. This importation is of filtering paper, cut into disks ready for use in filtering, and are sometimes called "filters." The tariff act of 1890 provides for duties on "papers known commercially as 'copying paper,' 'filtering paper,' 'silver paper,' and all tissue paper, white or colored, made up in copying books, reams, or in any other form," and for a lesser duty on "manufactures of paper * * * not specially provided for." They have been assessed as filtering paper. The importers appeal, claiming them to be completed filters, and therefore manufactures of paper. The paper was not at all changed, except in form, by this cutting into shape. The words "made up in copying books, reams, or in any other form," are applicable distributively, and seem intended to be so applied to all of the papers mentioned. The words "or in any other form," would be applicable to filtering papers; and as this cutting into disks is merely a change of form, these disks of filtering paper, even if they are called "filters," are filtering paper in that form specially provided for.

Judgment affirmed.

JENNINGS v. JOHNSON et al.

(Circuit Court of Appeals. Fifth Circuit. October 16, 1906.)

No. 1,507.

1. PROCESS—VALIDITY OF SERVICE—TERRITORIAL JURISDICTION OF COURT.
In the absence of express statutory authority, there is no power in a court to order personal service of process upon a defendant beyond its territorial jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 70.]

2. COURTS—JURISDICTION OF FEDERAL COURTS—LOCAL SUITS.
Section 8 of the federal judiciary act of 1875 (Act March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513]), prescribing the practice for bringing in nonresident defendants in local suits for the enforcement of liens, etc., must be strictly followed, and the provisions that the court may make an order "directing such absent defendant or defendants to appear, plead, answer or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable wherever found," and that on proof of such service "it shall be lawful for the court to entertain jurisdiction," are not met by an order merely directing the service of process on a defendant by the marshal of another district, and such service of a subpœna in the usual form does not confer jurisdiction.

3. APPEAL—RIGHT OF APPEAL—PREPAYMENT OF COSTS.
The clerk of a circuit court is not authorized by law to require an appellant to pay the costs which accrued to him and the marshal prior to the appeal as a condition to his transmission of the record to the appellate court, where the appellant has given a supersedeas bond in conformity to rule 13 of the Circuit Court of Appeals.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1998.]

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

Isaac Hardeman and Geo. S. Jones, for appellant.

Ellis, Wimbish & Ellis (W. D. Ellis and W. A. Wimbish, on the brief), for appellees.

Before SHELBY, Circuit Judge, and MEEK, District Judge.

SHELBY, Circuit Judge. 1. This was a foreclosure suit brought by Ligon Johnson and George A. Speer, as receivers of the Atlanta National Building & Loan Association, against O. L. Thompson and Charles W. Jennings. The real estate sought to be condemned was situated in the district where the suit was brought. In the progress of the case it was made to appear that the defendant, Charles W. Jennings, resided without the territorial jurisdiction of the court. Thereupon the following order was made by the court:

"It being made to appear to the court from the affidavit of Charles W. Jennings, one of the defendants to the ancillary petition above stated, that he resides without the territorial jurisdiction of this court, to wit, in the city of San Francisco, California, it is thereupon ordered that service of process upon said Charles W. Jennings be made by the marshal for the Northern district of the state of California, and in default thereof, that service be had by publication, as prescribed by the statute in such cases. This 2nd day of June, 1902."

A subpœna in equity was issued, presumably pursuant to this order, directed to the defendant, Charles W. Jennings, commanding that:

"You personally be and appear at the clerk's office of the said court in the city of Macon, at rules to be had on the first Monday in April next to answer to those things which shall then and there be objected to you in an ancillary petition filed by the receivers of the Atlanta National Building & Loan Association, and to do further and receive what the said court shall have considered in that behalf. * * *"

This subpœna and an uncertified copy of the foregoing order was served on Charles W. Jennings in the Northern district of California by the United States marshal of that district, acting by his deputy. Charles W. Jennings, limiting his appearance for that purpose, moved to set aside the service, because no order was made directing that he appear, plead, answer, or demur by a day certain, and because such service was not effective to require him to appear, plead, answer, or demur to the bill. This motion was overruled, and afterward the court rendered a final decree granting the relief prayed for and directing the sale of the property described in the bill. Charles W. Jennings thereupon appealed to this court, and assigns that the court erred in rendering the final decree, for the reason that the court was without jurisdiction because no warning order was made, as required by law, and that the defendant, being a nonresident of the district, could not be served while out of the district with a subpœna issuing out of said court, and that the alleged service upon the defendant, being made without the territorial jurisdiction of the court, was wholly ineffective. The only authority for the Circuit Court to proceed in a case like this is found in section 8 of the act of March 3, 1875 (18 Stat. 472, c. 137 [U. S. Comp. St. 1901, p. 513]). We quote the entire section, but we place in italics the part of it that is especially applicable to this case:

"Sec. 8. That when in any suit, commenced in any Circuit Court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order *directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants*, if practicable, wherever found, *and also upon the person or persons in possession or charge of said property*, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, *and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district*: but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district, and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same state, said

suit may be brought in either district in said state; provided, however, that any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law." 18 Stat. 472 [U. S. Comp. St. 1901, § 8, p. 513].

No principle is more vital to the administration of justice than that no man should be deprived of his property without notice and an opportunity to make his defense. When he is within the territorial jurisdiction of the court, notice is uniformly given by the issuance and service of process calling on him to defend. In the absence of express statutory authority, there is no power in a court to order actual personal service of process upon a defendant beyond its territorial jurisdiction. We know of no federal statute which authorizes the Circuit Court to direct the issuance and service of process on a defendant who is not within the territorial jurisdiction of the court. The statute which we have quoted—and it is that alone which confers jurisdiction on the Circuit Court in a case like this—directs that an order be made requiring the absent defendant to appear, plead, answer, or demur to the plaintiff's declaration, petition, or bill by a day certain, to be designated in the order, and it is this order which is to be served on the absent defendant. If the order cannot be served, the statute provides for notice by publication. It is only after complying with these requirements of the statute that it is made "lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process in the district." The order that is relied on to confer jurisdiction in this case does not require the defendant to appear, plead, answer, or demur to the plaintiff's bill within a designated time. It contains only the direction "that service of process be made on the defendant by the marshal for the Northern district of the state of California, and in default thereof that service be had by publication." It has been suggested by the learned counsel for the appellees that the subpœna should be looked to to supply the deficiencies in the order, and that the subpœna required the defendant to appear on the first Monday in April following its issuance. The statute clearly intends that the court should set the time within which the defendant should plead, answer, or demur. In many cases it would be proper to give a much longer time than would be allowed by the terms of a subpœna in equity issued in the usual form. Besides, there is nothing in the statute to indicate that Congress intended to confer the authority to issue process to and serve it on defendants without the territorial jurisdiction of the court. Statutes conferring jurisdiction to proceed against absent parties are strictly construed. In such cases, to permit the court to assume jurisdiction without conforming to the statute, would be to dispense with the forms of law prescribed by Congress for the security of absent parties. In the practice in this circuit, orders made in the progress of a suit in equity are usually prepared by the solicitors and presented to the court. The solicitors

should aid the court by having the orders so written as to conform to the statutes. Mr. Bates, in his work on Federal Equity Procedure, gives a clear statement of the practice in cases like this, but he is inclined to follow those cases which require the most rigid adherence to the terms of the statute. 1 Bates on Federal Equity Procedure, § 158. The order in question in this case does not even substantially conform to the statute, and it follows that no such service was had on Jennings as to confer jurisdiction to render the final decree condemning his property.

2. There is a question in this case relating to costs, on which it seems proper that we should express an opinion. It is contended by the learned solicitors for the appellees that "the appellant should be required to pay the costs in the Circuit Court before this appeal is entertained by this court." To make the exact question apparent, a further statement is required. The final decree from which this appeal is taken is one foreclosing a mortgage on land, and directing that the funds which arise from the sale shall be applied, first, "to the payment of the costs of this cause, together with the costs and expenses of executing this decree," and then to the amount found due on the mortgage. The appellant took his appeal from this decree, and the judge granted the appeal "upon the filing of a bond in the sum of $600, with good and sufficient security to be approved by the court." The bond having been presented to the court, it was further ordered:

"Said bond, having been presented, is hereby approved, and it is hereby ordered that said appeal shall operate as a supersedeas of said decree of July 14, 1905."

This order allowing the appeal, together with the bond and other papers relating to the appeal, were filed in the clerk's office, and the appellant's solicitors requested the clerk to transmit the record to this court in accordance with the citation. The clerk presented to the appellant's solicitors the bill of costs, embracing the entire costs in the court below, together with the estimate of the costs of the transcript on appeal, and requested that the entire bill be paid, and, in fact, refused to forward the record to this court until the entire costs were paid. The solicitors for the appellant thereupon paid the clerk's costs for entering and filing the papers on appeal, and the estimated costs of the transcript on appeal, the fee for certificate and seal to be attached to the transcript, and the expressage charges, all amounting to $29.45. The solicitors, however, refused to pay the general bill of costs taxed by the clerk as due to him as fees in the court below and the marshal's costs as by bill rendered by him. Application was made to one of the judges of this court to require the clerk to forward the transcript to the court without the payment of the general bill of costs so presented. Pending this application, the question which it involved was, by agreement between the clerk and the solicitors, submitted to this court by petition; the clerk agreeing to forward the record to this court, not waiving his right to be paid in advance for all the costs incurred in the court below, but submitting his contention to be decided by this court.

The question raised by this branch of the case is whether or not the clerk is authorized by law to require an appellant to pay the costs

which accrued to him and the marshal prior to the appeal, before it becomes his duty to transmit the record to the appellate court. It is contended on behalf of the clerk, in the brief filed here for him, that it has long been the established practice in the court below in all cases "to require appellants to pay all costs of suit, including the cost of transcript, before the record is transmitted to the appellate court." It is provided by statute that:

"Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid." Act Sept. 24, 1789, 1 Stat. 84 [U. S. Comp. St. 1901, § 1000, p. 712].

Rule 13 of this court is founded on this statute, and, we think, answers the question involved here. It is as follows:

"(1) Supersedeas bonds in the Circuit and District Courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fails to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and cost and interest on the appeal; but in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

"(2) On all appeals from any interlocutory order or decree granting or continuing an injunction in a Circuit or District Court, the appellant shall, at the time of the allowance of said appeal, file with the Clerk of such Circuit or District Court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain the appeal."

From an examination of the record it appears that the only decree for the payment of costs is the final decree, dated July 14, 1905, which is the decree appealed from, and that decree is superseded by the express terms of the order allowing the appeal:

"Said bond having been presented, is hereby approved, and it is hereby ordered that said bond shall operate as a supersedeas of said decree of July 14, 1905."

The entire decree is superseded. It could not be enforced either as to principal, interest, or costs so long as the supersedeas was in force. To require an appellant to pay the entire costs in the court below before he could obtain the transcript for the appellate court would, in many cases, be to deny him the right of appeal. He might be amply able to conform to the rules of this court and with the order of the judge as to giving bond, and yet be unable to pay the entire costs of the court below. Where the opposing party was insolvent and had given no bond, the appellant would be unable to recover the costs, although he was successful in the appellate court.

Responding only to the question raised by this record, which involves only the costs which accrued before the appeal, the appellant having voluntarily paid that part of the costs which relates to the appeal, we are of opinion that the clerk had no right to require the appellant to pay the costs taxed in the court below before the appeal as a condition upon which the transcript would be sent to this court.

For the want of proper legal service upon the defendant, the decree of the Circuit Court is reversed, and the cause is remanded for further proceedings in accordance with equity and the opinion of this court.

SEABOARD AIR LINE RY. v. SHANKLIN.

(Circuit Court of Appeals, Fifth Circuit. October 16, 1906.)

No. 1,478.

1. MASTER AND SERVANT—ACTION FOR DEATH OF EMPLOYÉ—PROOF OF RULES OF EMPLOYER.

It is the duty of a railroad company to establish and enforce definite rules and regulations for the protection of its employés, and of employés to obey such rules, which, when known to them, are as law in the regulation of their conduct; but where oral instructions given as a rule of conduct are relied on in an action for the injury or death of an employé, and have a vital bearing on the rights of the litigants, their existence, meaning and import are matters for proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 283.]

2. SAME—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

In an action to recover for the death of a section foreman on defendant's railroad, who was killed by a collision between hand cars, on one of which he was riding, seated on a box on the forward end, it was shown that a rule of the company required section foremen to receive instructions from the roadmaster and the latter testified that he instructed all foremen, including the deceased, not to ride in such position. There was testimony tending to show that other foremen had not been so instructed, that it was customary for them to so ride with the roadmaster's knowledge, and that he had himself so ridden. There was also a conflict of testimony as to the comparative safety of such position and others in case of such a collision. *Held*, that the court correctly refused to direct a verdict for defendant on such evidence, and properly submitted the question of contributory negligence to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089–1132.]

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

E. T. Brown and H. N. Randolph, for plaintiff in error.

C. T. Ladson, for defendant in error.

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

MEEK, District Judge. This action was originally brought in the city court of Atlanta, Fulton county, Ga., by Mrs. Ursula E. Shanklin against the Seaboard Air Line Railway to recover damages for the alleged negligent killing of her husband, Calvin A. Shanklin. Upon

the petition of defendant the case was duly removed to the United States Circuit Court for the Northern District of Georgia, where it was brought to trial and resulted in a verdict and judgment in favor of plaintiff for $5,000. The accident resulting in the death of plaintiff's husband occurred in the state of Florida, and the suit is under the provisions of section 3, c. 4071, of the laws of that state (Rev. St. 1892), which is as follows:

"If any person is injured by a railroad company by the running of locomotives or cars or other machinery of the company, and the damage was caused by the negligence of another employé and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to a recovery. No contract which restricts such liability shall be legal or binding."

Chapter 3439, Laws Fla. 1883, p. 59 (Sections 2342, 2343, Rev. St. 1892), provides for the survival of actions in event injuries result in death, and establishes the right to sue, first, in the surviving widow.

The petition charges that plaintiff's husband, while in the employ of the defendant as section foreman, received injuries resulting in his death because of the careless and negligent operation of two lever or hand cars by the crews thereof, who were also in the employ of the defendant; that the crew of one of these cars carelessly and negligently propelled it so that it ran into and collided with the hand car on which her husband was riding; that because thereof he was thrown therefrom and run over, both by his own and by the colliding car; that the crew of the third of these cars carelessly and negligently propelled it so that it ran into the car, colliding with that on which plaintiff's husband was riding, and that it also ran on and over him; that these things happened without any fault or want of care on his part. The defendant answered, admitting its incorporation and the operation by it of a system of interstate railways, and denying all other allegations material to plaintiff's cause of action.

Calvin A. Shanklin was a section foreman in the employ of the Seaboard Air Line Railway at Hampton, Fla. Between sundown and dark on the 12th day of October, 1903, he was returning northward to Hampton from work on his section. He and his crew were occupying and propelling a lever or hand car. Three other crews, one of these being an extra crew, and the other two bridge gang crews, were in close proximity and also propelling lever or hand cars in the same direction, toward Hampton. Shanklin was on the second car. He sat on a box on the right of the front end of the car. While the four cars were in motion, at speeds estimated variously by different witnesses from 8 to 15 miles an hour, something became wrong with the brake on the front car and its speed was checked. Thereupon its foreman signaled Shanklin to check the speed of his car. Shanklin threw up his hand, and one of his men stepped on the brake and checked its speed. In a few seconds thereafter the third car collided with and jammed into Shanklin's car. There were either two or three distinct impacts between Shanklin's and the third car. One witness testified, in substance, that Shanklin was toppled from his seat and thrown to the ground in front of his car by the first of these; that he lit on his feet between the rails and started forward and to the side to get out of

the way when the second impact occurred; that this gave his car additional momentum, so that it overtook and ran over him. Another witness testified that Shanklin retained his seat through the first impact, that he was thrown from his car by the second, and that he was run over because of the third. There was evidence tending to prove that, upon receiving the signal to slacken the speed of his car, Shanklin by throwing up his hand signaled the third car to check up; that one of the men under him secured a green flag that was on the car and waved the crew of the third and fourth cars to slow up; that, when the collision was imminent, the men on Shanklin's car "whooped and halloed" warnings to the men on the third car; and that, notwithstanding these signals and warnings, they continued to work the levers and propel their car continuously until it collided with and jammed into the car on which Shanklin was riding, and even after the first impact with his car, until there was a second and third impact. Shanklin was run over by his own and by the third and fourth cars, thus receiving the injuries from which he died shortly thereafter. The evidence also tended to prove that at the time of the accident there was sufficient daylight for the crews of the different cars to have easily seen the signals given; that, when Shanklin signaled the crew of the third car to check its speed, there was sufficient distance between the cars for it to have avoided the collision, had the signal been obeyed; that there was a sufficient distance between the third and fourth cars at the time of the collision between the second and third for the fourth car to have been stopped. The defendant introduced in evidence rule No. 64 of its book of rules, as follows: "Section foremen report to and receive instructions from the roadmaster." W. H. Thomas testified that he became roadmaster for the defendant railway south of Jacksonville, in Florida, on the 1st day of August, 1903; that on the 4th day of August he gave Shanklin instructions as to his duties concerning hand cars. On this subject he testified, in part, as follows:

"I can't say whether any of the hands were present or not. They might have been, or might not have been [meaning when he gave instructions to Shanklin]. Well, sir, at that time [August 4, 1903] I made a trip over the road. On the division I noticed a number of section foremen riding on the front of the hand cars on water kegs and boxes, and I instructed all foremen, together with Shanklin, and told every section foreman I came to, that the practice of riding on boxes and water kegs on the front of hand cars must be stopped, as all the injuries that had occurred to them had been caused by that practice."

Much evidence was introduced by both plaintiff and defendant pertaining to the relative safety of different positions on hand cars as places to ride. It was the opinion of some of the witnesses that it was dangerous to ride seated on a box in front, and of others that such position was safest in event of a collision from the rear, as a person would naturally be thrown backward against the levers, and not forward off the car. Alex Colley, a witness called by the defendant, and who was foreman of the extra gang at the time of the accident and still in the employ of the defendant at the time of the trial, testified that he did not remember to have received any instructions from the roadmaster, Thomas, not to ride on the front of his hand car. He also testified that Thomas had ridden on his (Colley's) car in front

and had seen him (Colley) riding in front before Shanklin's death. Upon the close of the testimony in the trial of the case the defendant moved the court for a directed verdict, on the ground that the uncontroverted evidence showed the death of Shanklin was caused by reason of his disobedience of the positive instructions given him by his superior in authority, the roadmaster. The court refused the motion, and submitted the question as to whether or not Shanklin had received such instructions for the determination of the jury. This action of the court is assigned as error, and is relied upon in oral and printed argument as the main ground for asking a reversal.

It was clearly the duty of the court to submit the issues of negligence and contributory negligence arising on the proof for the determination of the jury, unless it became its duty to withdraw the case and charge peremptorily because of the evidence relating to the instructions given Shanklin and his violation of them. It is the duty of a company engaged in a complex business to establish and enforce definite rules and regulations for the protection of its employés. It is the duty of employés to obey such rules. McGhee v. Campbell, 101 Fed. 936, 42 C. C. A. 94. Where such rules are established and promulgated in some reasonable and practical way, and employés have knowledge of them, they are as law in the regulation of their conduct. Carroll v. E. T., V. & G. Ry. Co., 82 Ga. 452, 10 S. E. 163, 6 L. R. A. 214; Ga. Pac. Railway Co. v. Dooley, 86 Ga. 294, 12 S. E. 923, 12 L. R. A. 342. The instructions to section foremen not to ride on kegs or boxes on the front end of hand cars testified to by the roadmaster were not printed or in writing, but oral. It is true verbal or oral instructions given emloyés have been held to have the same binding effect as written rules. The A. & S. R. Co. v. Dorsey, 68 Ga. 228; Prather v. R. & D. R. Co., 80 Ga. 427, 9 S. E. 530, 12 Am. St. Rep. 263; Ga. Pac. R. R. Co. v. Mapp, 80 Ga. 631, 6 S. E. 24; McMillan v. Grand Trunk Ry. Co., 130 Fed. 827, 65 C. C. A. 165. But there are certain infirmities which inhere in oral instructions given as a rule of conduct. The language in which they are framed is passing, and not fixed. They are uncertain, and therefore open to constructions partaking of the bias and disposition of the employés. If carrying with them a disagreeable restriction, they are likely to be ignored and soon forgotten. At last, as here, when their existence, meaning, and import are called in question, when these have a vital bearing on the rights of litigants, it is left to the fallible and imperfect memory of witnesses to say that they existed, what they were and what they meant. The proof concerning the instructions given Shanklin was not of the conclusive nature that would justify the court in withdrawing the issue of contributory negligence from the jury.

In the court's general charge the jury was told that if Shanklin was riding on the front of his car sitting on a box in violation of instructions given him by the roadmaster, and if sitting in that position on the front of the car contributed to the accident resulting in his death, the plaintiff would not be entitled to recover, even though the other employés on the car behind Shanklin's were guilty of negligence in running into his car and causing him to be thrown from it. In view

of this instruction, it was not error for the court to decline to give two requested charges bearing on the same subject and giving expression to substantially the same rule. We find no error in the record.

The judgment of the Circuit Court is affirmed.

BARRY v. HARNESBERGER et al. In re McGUIRE et al. McGUIRE & SCHWARTZ v. BARRY.

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

No. 1,236.

1. MORTGAGES—EFFECT OF FORECLOSURE SALE ON LIEN—ILLINOIS STATUTES.
Under the statutes of Illinois relating to foreclosure sales and redemption therefrom, as construed by the state Supreme Court, which establish a rule of property in the state binding on the federal courts, a sale under a decree foreclosing a mortgage exhausts and extinguishes the lien of the mortgage, and the same is not revived by a redemption from the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1682.]

2. SAME—REDEMPTION FROM SALE—LIEN OF DEFICIENCY JUDGMENT.
Real estate in Illinois was sold under foreclosure decree in a federal court, and was purchased by the mortgagee for less than the mortgage debt, and a deficiency judgment entered by the court against the mortgagors, as provided by the state statute. Hurd's Rev. St. Ill. 1905, c. 77, § 1, provides that, unless execution is issued on a judgment within one year from its rendition, it shall cease to be a lien on real estate. Within the year allowed for redemption from the foreclosure sale the mortgagors sold and conveyed the property by warranty deed to a third party, who took possession, recorded the deed, and made the statutory redemption from the foreclosure sale by paying into court the amount of the bid, with interest. Subsequently, and more than a year after the entry of the deficiency judgment, an execution was issued thereon and levied on the property. *Held*, that the same in the hands of the grantee was not subject to such execution, having been freed from the lien of the mortgage by the foreclosure sale, under the law of the state, and from the lien of the judgment, if any ever existed, by the failure to issue execution thereon within a year.

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

In foreclosure proceedings had in the original suit herein, the complainant in that suit and appellee herein bought the premises in the original bill and this petition described for the sum of $800, and afterwards, on April 7, 1900, in the same proceeding, obtained a deficiency judgment against the defendants, the Harnesbergers, for the sum of $510.58, under the provisions of section 16, of chapter 95 of the statutes of Illinois (Hurd's Rev. St. 1905), which reads as follows, viz.: "16. Decrees for Balance—Execution. Sec. 16. In all decrees hereafter to be made in suits in equity directing foreclosure of mortgages, a decree may be rendered for any balance of money that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of such balance, the same as when the decree is solely for the payment of money. And such decree may be rendered conditionally, at the time of decreeing the foreclosure, or it may be rendered after the sale and the ascertainment of the balance due: Provided, that such execution shall issue only in cases where personal service shall have been had upon the defendant or defendants personally liable for the mortgage debt, unless their appearance shall be entered in such suits."

The language of the decree is: "It is further ordered by the court that the complainant have a personal judgment against Alice M. Harnesberger and William H. Harnesberger for the sum of five hundred and ten dollars and fifty-eight cents ($510.58), being the amount of said deficiency as shown by said master's report of sale."

No execution was issued upon this decree or judgment until April 8, 1903, a period of three years and one day. By section 1 of chapter 77 of the Illinois statutes (Hurd's Rev. St. 1905), entitled "Judgments, Decrees and Executions," it is provided that "when execution is not issued on a judgment within one year from the time the same becomes a lien it shall thereafter cease to be a lien, but execution may issue upon such judgment at any time within said seven years, and shall become a lien on such real estate from the time it shall be delivered to the sheriff or other proper officer, to be executed."

On February 25, 1901, the Harnesbergers, being still in possession of said premises, executed and delivered to petitioners (appellants herein) a warranty deed of said premises, together with a power of attorney, authorizing them, "for us and in our name, place, and stead, to redeem" said lot from said sale, and also thereupon delivered possession of said premises to appellants, who thereupon entered upon said premises and proceeded to make valuable improvements thereon and sold a part thereof to one Schwartz. On the same day appellants paid to the master the sum of $844.00, being the full amount required for redemption of said land, and also presented to him the power of attorney, and notified him that they had received and caused to be recorded a deed from the Harnesbergers thereof. Whereupon the master took the money and reported such redemption to the court as made under said power of attorney, making no mention of the deed, which report was approved. Later the master filed a corrected report in this behalf. On August 14, 1900, appellee Barry, receiver, assigned and transferred to one Prickett said deficiency judgment. On April 18, 1903, more than two years after said redemption, said Prickett took out execution on this said deficiency judgment, and the marshal proceeded to levy upon said premises to satisfy the same, claiming that appellants stood in the shoes of the Harnesbergers, and, in order to redeem, must pay the full amount of the original mortgage debt, and the redemption "left the title in the property in them [the Harnesbergers] and it would still be subject to the payment of the deficiency judgment, for that judgment was a lien against all of the property of the Harnesbergers within the Southern district of Illinois. * * * Therefore my contention is that no odds whether we view it from the standpoint that they could not redeem from the mortgage, or whether we view it from the standpoint that this is an execution against the Harnesbergers, it is levied upon their property and there is no reason why the court should have quashed the levy."

On May 23, 1903, appellants filed their petition to quash said levy, for which a stipulation of facts was substituted on November 11, 1905. Afterwards such proceedings were had that the court refused the prayer of said petition, from which ruling this appeal was taken. The assignment of errors is limited to this one question.

Hosea V. Ferrell, for appellant.

F. M. Youngblood, for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge, having stated the case, delivered the opinion of the court.

Appellants made redemption of the lands in question as assignees of the defendants,' Harnesbergers,' equity of redemption in pursuance of the terms of the Illinois statute. This statute lays down a rule of property, and has received interpretation at the hands of the Supreme Court of Illinois in the cases of Seligman v. Laubheimer, 58 Ill. 124; Ogle v. Koerner, 140 Ill. 170–181, 29 N. E. 563; Lightcap v. Bradley, 186 Ill. 510–526, 58 N. E. 221. That in such a case this court will

follow the state court decisions is too well settled to require citation of authorities. In Seligman v. Laubheimer, supra, the court says:

"The second mortgagee, who redeemed from the sale, was the grantee of the mortgagors. By express provision of the statute, he had the right to redeem the lands, by the payment of the amount bid by plaintiff in error [who was the first mortgagee and who purchased the property at the sale for less than the decree]. If he had filed a bill in chancery to redeem, he could then be compelled to do equity, by the payment of the prior mortgage debt, before he could obtain any relief. But this redemption was a statutory right. Upon the payment of the amount bid, with interest, the original certificate of purchase was null and void. The equity of redemption established by the courts is entirely different from the statutory right. The one is governed by principles of equity jurisprudence; the other is controlled, in its operation and effect entirely by the statute. In the enforcement of the one right, the party must pay all that is equitably due; in the other he need only comply with the statute."

In the case of Ogle v. Koerner, supra, it is said:

"But where the redemption is made by a party not liable upon the mortgage debt, the mortgage lien having been exhausted, the property cannot be subjected a second time to the satisfaction of the same lien. The party redeeming does so for his own benefit, and the holders of the senior mortgage, having, by the sale, become entire strangers to the property, are in no position to derive any advantage from the redemption. The sale having been made at public auction, and in the manner prescribed by statute, the presumption, as between the senior and junior incumbrances, is a conclusive one that the property has produced its entire value, and, the value having been once applied to the senior mortgage, the lien has accomplished its full purpose and is thereafter functus officio."

In Lightcap v. Bradley, supra, this language is used:

"It is true that, if the premises are redeemed by the mortgagor, they become like any other property owned by him and may be subject to execution and sale for a deficiency; but that is because they belong to the debtor, and not on account of any lien by virtue of the mortgage. A redemption by any person not liable for the debt would free them absolutely, so that they could not even be levied upon by execution for a deficiency."

And again, in the same case (Bradley v. Lightcap, 201 Ill. 511, 66 N. E. 548), it is said:

"The sale discharged the land from the trust deed and transferred the lien created by contract into a statutory lien by the certificate of purchase, and the land was released as security for the balance of the debt."

From these authorities it is evident that the original mortgage lien was fully discharged by the master's sale. This was a proceeding under the statute, and appellants, as grantees of the mortgagee, were not required to pay the full amount of the mortgage indebtedness before they could redeem. They paid all that the receiver seems to have deemed the land to be worth, and all that the statute required. While there was an irregularity in the steps taken by appellants in making the redemption, it is clear from the whole record that these were mistakes merely. There is absolutely nothing in the record to show that the Harnesbergers had, or ever have claimed to have, any interest in the premises subsequent to the sale of the equity of redemption to appellants. The fact that appellants received and recorded the deed overcomes the error, if it was such. It seems clear, and we hold, that title

passed to appellants through the warranty deed and the redemption proceedings. The deficiency judgment was not a lien upon any of the Harnesbergers' property between the dates of April 7, 1901, and April 18, 1903, a period of 2 years and 11 days. The language of the court in the foreclosure decree awarding an execution for any deficiency that might arise after sale is of no force, since the statute authorizes only a judgment or decree for the deficiency. This judgment or decree then became like any other judgment or decree, and subject to the same conditions as to its lien. Therefore it cannot be claimed that it was a lien at the date of the levy upon any interest the Harnesbergers may have had in the premises prior to the conveyance to appellants. We do not mean to intimate that any such lien could attach. It appearing then, first, that the lien of the mortgage was extinguished by the foreclosure proceedings; second, that by conveyance and redemption under the statute title passed to appellants; third, that appellants have been ever since the redemption in open and adverse possession of the premises in question; fourth, that no lien can be claimed as against their interest therein—it follows that the levy was without warrant of law, and should have been quashed by the Circuit Court.

The ruling appealed from is reversed, with directions to the Circuit Court to quash the levy.

STEWART et al. v. WESTLAKE et al.*

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

No. 2,326.

1. MINES AND MINERALS—FRAUDULENT RELOCATION OF CLAIM BY LESSEE—SUIT TO ESTABLISH TRUST.

A lessee of a mining claim, who has contracted to do an amount of work thereon which would be a sufficient compliance with the legal requirements in respect of development, and also to notify the lessor of any intention to surrender or abandon the lease, cannot, upon failing to perform his obligations, secretly relocate the claim and so secure and hold for himself the title, and a patent obtained under such circumstances will be decreed to be held in trust for the lessor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 62.]

2. SAME.

Lessees of a mining claim, under a lease from an individual which bound them to do the work thereon required by law and to notify the lessor of any intention to abandon the tenancy, who, in violation of their contract, without notice to him allowed the work for a certain year to go undone, and on its expiration secretly relocated the claim for their own benefit in the name of a third person to whom a patent was subsequently issued, but who had in fact no interest in the claim, cannot avoid the consequences of their fraud, in a suit in equity by the heirs of the lessor to recover the claim, on the ground of the invalidity of the lease because the lessor had previously conveyed the title to the claim to a corporation, of which he was president and manager, with authority to make contracts in its name and of which he also owned all the stock when the lease was made.

*Rehearing denied February 18, 1907.

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

Clinton Reed (John A. Ewing, on the brief), for appellants.
M. B. Carpenter, for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. This was a suit by the Stewarts to secure a decree that defendants, Westlake, Cable, and Hendee, hold the patent to a mine as trustees for them upon the ground that their ancestor, John T. Stewart, whose heirs and devisees they are, was the owner and was deprived of his rights by fraud of defendants and a violation of the fiduciary relations existing between him and his agent and lessees. The trial court dismissed complainants' bill upon final hearing, and they have appealed.

It is undisputed that at one time John T. Stewart owned the mining claim, and that he conveyed it to an Iowa corporation, of which he was the president and general manager, with authority to make and sign all contracts for and in the name of the company. In his individual name, and whilst the title stood in the company, he executed a lease of the mine for a term of three years. This was in 1899. About a year later, with the consent of Stewart, the lease was assigned to and accepted by Westlake, Hendee, and one Campbell. Campbell afterwards dropped out, and he need not be further mentioned. Westlake and Hendee will henceforth be referred to as the lessees. When the lease was made, Stewart was the owner of all of the stock of his company, and continued so to be until his death, in 1901, when it passed to the complainants. The evidence shows that in the early morning of January 1, 1902, the lessees, Westlake and Hendee, relocated the claim in the name of defendant Cable. To use the local vernacular, they "jumped it." The excuse for this proceeding was that the requisite assessment work for the preceding year had not been done. One McGarry, a trusted agent of Stewart, was at the shafthouse on the claim during the night and knew what was about to transpire. Stewart lived in Iowa. The proof is convincing that McGarry connived with the lessees, and that it was understood between them that the relocation could not be made in their names because of their relations to Stewart. The lease required the lessees to do an amount of work in the development of the mine that would have fulfilled all legal requirements for the protection of Stewart's interests, and it also required them to notify him in writing of any purpose on their part to abandon the tenancy.

The defendants say that after his conveyance to the corporation Stewart had no title to the claim, the lease was void, there was no landlord, and therefore no responsibilities or duties were imposed upon them. In effect the contention is that, though the lease was still subsisting according to its terms, the fact that Stewart signed the lease, instead of the company in which the title stood, permitted them to ignore it, to violate the obligations they assumed, and to make such violation supply the opportunity for securing to themselves the title to the leased property. The contention is not tenable. While the lease was

executed by Stewart, the president, general manager, and sole stockholder of the company, in his own name, the circumstances were such that the company was in no position to repudiate it. It would have been estopped from doing so. It knew that its president and managing officer, having power to execute leases, had made one that contemplated the continued development of the mine and the expenditure of substantial sums of money by the lessees, and that these things, the work and the expenditure of money, were going on. Moreover, the company never questioned or assailed the act of Stewart. The lessees entered into possession by the authority of Stewart, and peacefully, without interference or objection from any one, operated the mine for a part of the term, when they conceived and put into execution the scheme complained of. Under such conditions a tenant will not be permitted to strike at his landlord with one hand, while he holds to his lease with the other.

The proof is also convincing that neither of the lessees ever notified Stewart, as the lease required, of an intention to surrender or abandon the tenancy. It is true that Westlake swore that the notice was given and produced a mutilated letter press book containing a copy of a letter to that effect. Charles T. Stewart, one of the complainants and a son of the lessor, testified that no such letter was ever received. He was then attending to all of the business of his father, who was in ill health. Hendee, the associate of Westlake, said no such notice was given, and his testimony is in harmony with the whole atmosphere of the case, for the proof is overwhelming that in the autumn of 1900 Westlake and Hendee conceived the scheme to relocate the mine for themselves, if the necessary work for 1901 was not done by Stewart or by some one else for his benefit. A notice to Stewart that they intended to abandon the lease and to repudiate their agreement to do the work for him would have put him on his guard and probably frustrated their plans. The secrecy with which it was thought necessary to move is disclosed by a letter from Westlake to one Borman, who had been let into the venture after the relocation in the name of Cable. Westlake wrote:

"I hope you will be home by time this reaches you as I wish to rush this through to patent while nothing interferes. * * * This is a matter which does not want to be spoken of outside of ourselves. * * * This is best time of the year as Rock Hill (on which the claim was) is covered with snow, and no one is liable to go up there and see what we are doing. After we get it through to patent that settles it for all time."

Honest men engaged in a transaction which they have a right to undertake have no need to move with so much stealth, or to shroud their actions with such secrecy.

In our opinion the evidence also clearly shows that, when the relocation was made in Cable's name, he was ignorant of it, and that after being informed he consented to its use as a cloak for the operations of the lessees. He was an acquaintance of Westlake and lived in Denver. The mining claim was at Leadville. His testimony was noticeably brief and unsatisfactory considering that he was the patentee of the property in controversy. Hendee disclosed the scheme in all its details and testified to matters of grave importance that called for

explicit denial from Cable if his position was a true one, but Cable made no denial. The letters written by Westlake to Hendee and to Borman while the claim was in progress towards the patent contain complete refutation of his contention that the relocation was with Cable's knowledge and consent, and that it and the patent afterwards issued were for Cable's benefit.

Our conclusions may be briefly summarized: When the lessees learned that the title to the claim was in the Iowa corporation, and not in their lessor, and that there had previously been neglect in the filing of the affidavits of work done to keep the claim alive, they concluded to abandon further development of the mine during the year 1901 as required by their lease and to secure the property for themselves if Stewart and his company did not have the necessary assessment work done by some one else. Doubtless this was thought to be a much cheaper way of acquiring the property than by paying $35,000 for it according to the terms of the contract between them. Fearing the watchfulness of McGarry, the agent of Stewart, they took him in and promised him a tenth interest. They afterwards repudiated the promise because he refused to make an affidavit which they desired in connection with the relocation. The lessees were advised that they could not relocate the claim in their own names because of their relation to Stewart, and that McGarry could not do so for a similar reason. So Westlake furnished the name of Cable, who, after learning of it, complaisantly allowed them to continue. To secure funds for the work, and proceedings preliminary to a patent, Westlake and Hendee sold Borman a fourth interest for $1,000. Borman paid half of the amount, but was unable to pay the remainder. Hendee also was unable to keep up his contributions, and Westlake himself was greatly in need of money. In all of the correspondence between these parties there is not a word indicating that Cable had any interest in the property, or that he ever contributed anything towards the cost of the necessary work or the expenses of the proceedings. Nor does Cable testify that he paid anything. Though the patent ran in the name of Cable, it was obtained and held, not for him, but for those who so violated their duty and obligation that a court of equity will not allow them to profit by their conduct.

The law of the case is well settled. A lessee of a mining claim who has contracted to do an amount of work thereon which would be a sufficient compliance with the legal requirements in respect of development, and also to notify the lessor of any intention to surrender or abandon the lease, cannot upon failing to perform his obligations secretly relocate the claim and so secure and hold for himself the title. A patent obtained under such circumstances will be decreed to be held in trust for the lessor. Turner v. Sawyer, 150 U. S. 578, 14 Sup. Ct. 192, 37 L. Ed. 1189; Lowry v. Mining Company, 179 U. S. 196, 21 Sup. Ct. 104, 45 L. Ed. 151.

The other contentions of the defendants do not require special mention. They are not tenable.

The decree of the Circuit Court is reversed, and the cause is remanded, with direction to enter a decree for the complainants.

UNITED STATES FIDELITY & GUARANTY CO. v. EGG SHIPPERS' STRAWBOARD & FILLER CO.

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

No. 2,318.

1. INSURANCE—ACTION ON FIDELITY BOND—EVIDENCE.
In an action on a fidelity bond insuring a corporation against loss through the fraud or dishonesty of an officer to recover a loss resulting from his acts, the testimony characterizing such acts necessarily takes a wide range, and evidence of his general course of conduct in plaintiff's affairs, though not directly relating to the transactions in issue, is properly admissible to show the spirit and intent which moved him.

2. SAME—FIDELITY BONDS—CONSTRUCTION.
Liability on a fidelity bond insuring an employer against loss through the "fraud or dishonesty" of an employé is not limited to such losses as result from his criminal acts, such as embezzlement or larceny, but such words have a broader meaning, and include any acts which show a want of integrity or a breach of trust.

3. SAME—ACTION ON BOND—PLEADING.
The petition in an action on a fidelity bond insuring a corporation against loss through the fraud or dishonesty of its treasurer states a cause of action where it alleges that such treasurer falsely credited himself on the company's books with a disbursement which he did not make, making him short in his accounts, and that, having authority to execute notes and accept drafts for the company representing its valid indebtedness and not otherwise, he accepted drafts for large amounts which it did not owe, and used its funds in paying the same, resulting in loss to it through the insolvency of the drawer, all of which acts he concealed from its directors.

4. SAME—APPLICATION AS EVIDENCE—IOWA STATUTE.
A writing executed by a corporation for the purpose of procuring a fidelity bond insuring it against loss through the fraud or dishonesty of an officer, which contains questions and answers and representations which are made warranties, and a breach of which by the terms of the bond thereafter issued will render the same void, is an application for insurance within the meaning of Iowa Code 1897, § 1741, which requires insurance companies to attach a copy of the application to each policy of insurance, and provides that the omission to do so shall preclude the company from pleading or proving any part of such application or the falsity of any representations made therein in an action on the policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 216.]

5. SAME—SCOPE OF STATUTE.
Iowa Code 1897, § 1741, requiring insurance companies to attach a copy of the application to each policy of insurance issued by them, applies to all forms of insurance, including fidelity bonds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 216.]

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

J. O. P. Wheelwright (Albert C. Cobb and J. L. Stevens, on the brief), for plaintiff in error.

William C. Howell (Walter H. McElroy and H. Scott Howell, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. This was an action by the Egg Shippers' Company upon a bond of the Guaranty Company insuring the former against loss through the fraud or dishonesty of one Boardman, its treasurer. The plaintiff was an Iowa corporation organized by dealers in poultry and eggs, and its business was the purchase and sale of fillers for egg cases used in transportation. Though of small capital, it was thriving and prosperous from its organization down to the time of the conduct of its treasurer, which furnished the cause of this litigation. The fillers it dealt in were purchased from the manufacturer, the Tama Paper Mills & Filler Company, under a contract providing that the plaintiff should accept and honor the drafts of the Tama Company, due in 15 days, for all manufactured fillers which it ordered shipped, and drafts payable in 30 days for the remainder of the contract quantity that was manufactured, but not desired for immediate delivery. The contract specified that bills of lading should be attached to the first class of drafts, showing the fillers had been shipped, and warehouse receipts to the other class of drafts, showing that the fillers covered by them had been manufactured and were actually in the warehouse subject to the plaintiff's order. Boardman was the treasurer of the plaintiff, with authority to execute notes and accept drafts representing its bona fide indebtedness. He was a salaried officer, and the financial management of the plaintiff's affairs was largely in his charge between directors' meetings, which were held semiannually. At one meeting his official report showed that he had allowed the Tama Company to overdraw its account about $2,600. He was at once instructed by the directors that he must not continue such course; that they were not satisfied of the integrity of the manager of the Tama Company; that he must secure fillers balancing the overdraft; and that in the future nothing should be paid and no drafts should be accepted unless the goods already manufactured had either been shipped or were held in the warehouse subject to plaintiff's order, and unless those conditions were shown by bills of lading or warehouse receipts.

There was substantial evidence tending to show the following facts, and on appeal we must assume them to be true. Boardman violated his official duty, ignored his instructions, concealed his conduct, and falsified his reports. When the crash came, there was outstanding about $70,000 of negotiable paper of the Tama Company upon which Boardman had obligated the plaintiff by way of accommodation, and in addition to this he had advanced to the Tama Company about $10,000 for which he had no bills of lading or warehouse receipts. These sums amounted to more than seven times the plaintiff's capital, and the Tama Company soon failed for a large sum. The plaintiff was made bankrupt. Boardman was found to have been using plaintiff's money in his own affairs. He left the state soon afterwards, taking with him the check stubs, canceled checks, drafts, and vouchers pertaining to plaintiff's business, having previously refused to allow his successor in office to examine them, for the reason, as he alleged, that they also concerned his personal business. The items which entered into plaintiff's verdict for $8,700 were $3,000 of a credit which Boardman took in his accounts as having paid an obligation of the plaintiff, when, in fact, he had

not paid it, $590.24 which the plaintiff paid upon one of the accommodation acceptances that was held by an innocent purchaser and was therefore an obligation which plaintiff could not escape, and $5,130 which Boardman paid to the Tama Company without bills of lading or warehouse receipts. These items amount to a little more than the recovery, but it is probable that the jury omitted the odd dollars and cents to make a round sum. Each of them represented an actual loss to the plaintiff. It is true that all that Boardman did of a fraudulent and dishonest character was not directly connected with these items, but it is also true that all of the loss included in the recovery resulted from a willful and inexcusable betrayal of his trust, and the evidence of his general course of conduct in the plaintiff's affairs was properly admitted to show the spirit and intent that moved him. In such cases the scope of inquiry necessarily takes a wide range, and we are of the opinion that the latitude allowed by the trial court did not go beyond the legal limits. The defendant claims that there was no showing of a breach of the fidelity bond which was conditioned to "make good and reimburse to the employer [the plaintiff] all and any pecuniary loss sustained by the employer, of money, securities or other personal property in the possession of the employé [Boardman], or for the possession of which he is responsible, by any act of fraud or dishonesty on the part of said employé, in the discharge of the duties of his office or position." Another clause of the bond provided that its true intent and meaning was that the defendant should be responsible only "for moneys, securities, or property diverted from the employer through fraud or dishonesty on the part of the employé." In other words, defendant contends that no fraud or dishonesty of Boardman was shown. We are at a loss how to characterize his conduct if it was not both fraudulent and dishonest. The test is not whether he intended to personally profit by his course, though that he did is perhaps a permissible inference from the facts shown. He occupied a position of trust and confidence which he secretly betrayed. He received compensation for guarding the interests of his employer and he was willfully, intentionally, and grossly faithless. This is not a case of mere indiscretion or error of judgment. There was a breach of trust, a want of financial integrity, coupled with deceit and concealment, and resulting in financial loss to the employer. This was both fraud and dishonesty within the meaning of the bond. Cases involving fidelity bonds insuring against "embezzlement and larceny" or "fraud and dishonesty amounting to embezzlement or larceny" are obviously not in point. Guarantee Co. v. Trust Co., 40 C. C. A. 552, 100 Fed. 559; Monongahela Coal Co. v. Fidelity & Deposit Co., 94 Fed. 732, 36 C. C. A. 444; Reed v. Fidelity & Casualty Co., 189 Pa. 596, 42 Atl. 294; Milwaukee Theater Co. v. Fidelity & Casualty Co. (Wis.) 66 N. W. 360. In the bond before us the terms "fraud" and "dishonesty," while relating to pecuniary matters, are employed in a broader and more comprehensive sense. They are not restricted to such conduct as imports a criminal offense. An act entailing a financial loss to another may be both fraudulent and dishonest, and yet not fall within the definitions of embezzlement and larceny.

The defendant objected to the introduction of evidence, and also moved for a directed verdict upon the ground that the petition did not state facts sufficient to constitute a cause of action. No motion to make the petition more definite and certain was interposed. In addition to full descriptive averments of the terms of the bond and a compliance therewith, a copy of the bond being also attached as an exhibit, the petition discloses that Boardman was plaintiff's treasurer, with authority to execute notes and accept drafts representing its valid and bona fide indebtedness and no other; that between January 1 and November 18, 1902, he fraudulently and dishonestly and without plaintiff's knowledge accepted drafts drawn on him by the Tama Company which he knew represented no valid indebtedness of his company; that he did so to enable the drawer to dispose of them to innocent purchasers, and they were so disposed of; that, without authority, he fraudulently and dishonestly and without plaintiff's knowledge paid $22,000 of such drafts from plaintiff's funds in his hands; that the Tama Company was insolvent, and that Boardman charged it upon his books with the amount so paid out, leaving it finally indebted to his company in the sum of $12,000; that it was Boardman's duty to receive and disburse plaintiff's funds and keep true books of account and he had no right to credit himself with the payments made on the fraudulent drafts; that he also entered a credit of $3,000 to himself as having paid a note of that amount, but the entry was falsely, fraudulently, and dishonestly made, because he had not paid the note, and as a result Boardman was short in his accounts. There was a further averment of a partial payment by plaintiff upon one of the fraudulent drafts that had passed into the hands of an innocent purchaser. We are of opinion that a cause of action was stated in the petition and that the trial court was right in overruling the general objection made to it. The mere charge that Boardman falsely, fraudulently, and dishonestly took credit upon his books for a disbursement he never made, resulting in a shortage in his accounts as treasurer which he failed and refused to pay, is in itself sufficient to sustain the petition against the attack made upon it. The charge is in substance one of pecuniary loss caused by the dishonesty of Boardman.

Complaint is also made that the trial court excluded the written statement made by the plaintiff to secure the bond sued on. It was offered in evidence by defendant to show certain warranties and representations, the breach and falsity of which were relied on to defeat recovery. The evidence was not admitted because the defendant had failed to comply with an Iowa statute (section 1741, Code of 1897) which provides that all insurance companies or associations shall attach to or indorse upon every policy "a true copy of any application or representation of the assured which, by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of said policy," and that the omission to do so shall preclude the company issuing a policy from pleading or proving any such application or representations or the falsity of any part thereof in an action upon the policy. It is conceded by defendant that the bond in suit is an insurance contract,

but it is contended (1) that the instrument offered is not an application, and (2) that the Iowa statute was not intended to apply to fidelity bonds.

Although differing slightly from the usual form of application for insurance, in that it recites than an application for the bond had already been made, nevertheless the writing is to all substantial intents and purposes a part of that preliminary step on the part of the applicant that is usually designated by that term. It contains various questions concerning the risk propounded by the defendant, the plaintiff's answers, and a recital that it shall be the basis of the bond if issued. The bond contains a reference to it as part thereof, a warranty by plaintiff of the truth of its statements, and a provision that untruth in any respect shall make the bond void. It is altogether clear that the written statement which the defendant failed to attach to or indorse on the bond is an application or representation within the meaning of the Iowa statute.

The statute was originally enacted in 1880, and it is contended that at that time the business of insuring the fidelity of employés was unknown in Iowa, and that therefore it cannot be said to have been within the intent of the Legislature in the passage of the law. Assuming the premise to be true, there is nothing in the statute indicating a purpose to confine its operation to those subjects of insurance that were then known. On the contrary, it was framed in general and comprehensive terms that cover insurance of every kind and character. The virtue and the vitality of laws so framed are such that they extend to and embrace the new growth and development of the subjects to which they relate. With reason equal to that of the contention now made, it could be said that the commerce clause of the Constitution did not apply to our railroad systems of to-day because they were unknown at the time of its adoption. The unvarying construction of the statute by repeated decisions of the Supreme Court of Iowa is that it includes every insurance company, association, and individual doing an insurance business of any kind, and that its purpose is to require the insurer to attach to, or indorse upon, the policy a copy of every instrument that may affect its validity. Moreover, in 1897 a new Code for Iowa was adopted as the existing law, the provisions of the statute in question were incorporated in it, and all prior laws were repealed. In this Code there is explicit recognition of the business of insuring the fidelity of persons holding places of private or public trust, and that such business was then quite generally engaged in throughout the United States is a matter of common knowledge.

There is nothing in the assignments of error upon the refusal to give instructions requested by the defendant that requires mention further than to say that such as should have been given were fairly embodied in the charge of the court.

The judgment is affirmed.

UNION CENT. LIFE INS. CO. v. ROBINSON.*

(Circuit Court of Appeals, Fifth Circuit. November 3, 1906.)

No. 1,602.

1. PRINCIPAL AND AGENT—NOTICE TO AGENT—IMPUTATION TO PRINCIPAL.
While it is the general rule that notice to an agent of any matter connected with the agency is notice to the principal, such rule has no application to a case where the agent at the time he receives such notice is acting for himself, in his own interest, adversely to the interest of his principal, and the communication of the notice to the principal would be contrary to his interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 689.

Ed. Note.—Knowledge of agent as notice to principal. Effect of adverse interest, fraud, or collusion of agent, see note to Chandler v. Rutherford, 43 C. C. A. 222.]

2. INSURANCE—BINDING RECEIPT ISSUED BY AGENT OF LIFE COMPANY.
A general agent of defendant life insurance company was entitled by his contract of agency to a commission of 50 per cent. of the first premium on policies secured by him, but such commission was to accrue only when the premium was paid in cash to the company, and he was required to hold all sums collected by him in trust. He took an application for a policy, which was forwarded to the company, and pending its acceptance he issued to the applicant what was called a "binding receipt" for the amount of the first premium, which provided that the insurance should be in force from its date provided the application was accepted; otherwise the amount should be returned. He was authorized to issue such receipt where the premium was in fact paid, but in this case he received a note for one-half the premium, which he discounted, and agreed for purposes of his own to give the applicant credit for one-half on account of his commission. The applicant died, no policy having been delivered, and the beneficiary brought action on the receipt, alleging that the application had been accepted prior to the death. *Held* that, since the premium was not in fact received by the agent and held in trust, as required by his contract, the transaction by which the receipt was issued was not binding upon the company unless it had knowledge or notice of the facts, and that such notice could not be imputed to it because of the knowledge of the agent.

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

See 144 Fed. 1005.

Henry C. Peeples and Robert Ramsey (Maxwell & Ramsey and Peeples & Jordan, on the brief), for plaintiff in error.

Alex C. King and Samuel N. Evins (King, Spalding & Little and Evins & Spence, on the brief), for defendant in error.

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

SHELBY, Circuit Judge. This is an action at law brought by Roby Robinson, a citizen of Georgia, against the Union Central Life Insurance Company, an Ohio corporation, upon an alleged contract insuring the life of William F. Robinson. On January 1, 1898, an application was made by William F. Robinson to the insurance company for insurance upon his life for $5,000 in favor of his son, Roby Robinson.

*Rehearing denied January 15, 1907.

No part of the premium was paid at the time the application was made. The application was sent to the insurance company at Cincinnati, Ohio, at the instance of its general agent, W. M. Leary. On January 5, 1898, Roby Robinson received at Atlanta, Ga., from Leary what is called a "binding receipt." This acknowledged the receipt from Roby Robinson of $247.85, the amount of the first annual premium, and contained the agreement that:

"Wm. F. Robinson is to be insured from date of this receipt, in accordance with all the provisions, conditions, and stipulations of the policies of the said company, provided said application shall be approved and accepted by said company. If, however, the application shall be declined by the company, this agreement is to be null and void, and the amount, receipt whereof is herein acknowledged, is to be returned to said Roby Robinson by me on surrender of this receipt."

No money was in fact paid by Roby Robinson when this receipt was given. He gave Leary a note, payable to him individually, for half the premium, due at 90 days, and he accepted from Leary a gift of the other half of the premium, which Leary claimed was due to him by the company as a commission for procuring the insurance. The note was discounted at a bank, where Roby Robinson paid it before its maturity, and on the day his father died, January 22, 1898.

It was alleged in his petition and contended by the plaintiff that the contract shown by the binding receipt was approved and accepted by the company before the death of William F. Robinson, and was in force when he died. The company contended that the application for insurance was never approved and accepted; that, on the contrary, it was held under consideration at the time of the death of William F. Robinson; and that, after the death of William F. Robinson, it tendered to Roby Robinson the amount of the premium named in the receipt. As another defense, the company contended that the powers of Leary as agent did not authorize him to bind the company by taking a note for half the premium, and giving Roby Robinson his (Leary's) commission for the other half, and that the company did not consent to or ratify such transaction. A more detailed statement of the facts that relate to these several contentions will be given as they are considered. There was a verdict in favor of the plaintiff below for $5,000, and the comapny sued out this writ, and has made many assignments of error, only one of which it will be necessary to consider.

In the course of his charge to the jury, the learned trial judge said: "I state to you, gentlemen, that notice to an agent of any matter connected with the agency is notice to the principal." There is no doubt but that this is a correct statement of the general rule. It is sometimes more elaborately stated that when, in the course of his employment, the agent acquires knowledge or receives notice of any fact material to the business in which he is employed, the principal is deemed to have notice of such fact. Tiffany on Agency, § 59, p. 257. The insurance company reserved an exception to this charge. The charge was only pertinent as applying to the transactions between Roby Robinson and Leary, as the agent of the insurance company. It was equivalent to instructing the jury that any knowledge that Leary obtained or had in reference to his transactions with Roby Robinson

was to be imputed to the insurance company. The reason usually given for the rule announced by the trial judge is that, if the notice is received in the line of the agent's authority, it is his duty to inform his principal, and the law presumes that he performs this duty; and that, ordinarily, on principles of public policy, the knowledge of the agent is imputed to the principal. Story on Agency, § 140. There is, however, an exception to the general rule which is as well established as the rule itself. The rule has no application to a case where the agent is acting for himself, in his own interest, adversely to the interest of his principal. In such case the adverse character of his interest takes the case out of the operation of the general rule, because, first, he will be likely, in such case, to act for himself, rather than for his principal; and, secondly, he will not be likely to communicate to the principal a fact which he is interested in concealing. It would be, therefore, both unjust and unreasonable to impute notice by mere construction under such circumstances. Thomson-Houston Electric Co. v. Capitol Electric Co. (C. C.) 56 Fed. 849; Frenkel v. Hudson, 82 Ala. 158, 2 South. 758, 60 Am. Rep. 736. In Allen v. South Boston Railroad Co., 150 Mass. 200, 206, 22 N. E. 917, 919, 5 L. R. A. 716, 15 Am. St. Rep. 185, the court said:

"There is an exception to this rule [referring to the general rule above quoted] when the agent is engaged in committing an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act. It is sometimes said that it cannot be presumed that an agent will communicate to his principal acts of fraud which he has committed on his own account in transacting the business of his principal, and that the doctrine of imputed knowledge rests upon a presumption that an agent will communicate to his principal whatever he knows concerning the business he is engaged in transacting as agent."

There have been conflicting suggestions as to the true reason for the rule in question and the exception to it (Irvine v. Grady, 85 Tex. 120, 125, 19 S. W. 1028; Allen v. South Boston R. R. Co., supra); but it would not be useful to enter on that inquiry, for, whatever may be the true reason for the rule and the exception to it, both are unquestionably too well established now to be controverted. Both have been uniformly held applicable to officers and other agents of corporations. Tiffany on Agency, § 61, p. 266; Barnes v. Trenton Gaslight Co., 27 N. J. Eq. 33–37; Whelan v. McCreary, 64 Ala. 319, 329.

The record shows that Leary was a general agent of the insurance company. Under the contract of agency, all moneys and securities received by him for the company were to be held by him as a fiduciary trust, and not to be used by him for any purpose whatever. If money and securities when collected were not immediately sent to the insurance company, they were to be at once deposited by him in such bank or banks as the company might approve, to the credit of the company. In reference to Leary's compensation, it was agreed that he was to receive a commission upon premiums which were paid in cash to, and received by, the company on all policies of insurance effected through his procurement at the rate of 50 per cent. on the first premiums paid on such policies as the one in question. Such commissions were to accrue only as the premiums were paid in cash to the company. Through

Leary's agency, W. F. Robinson made an application for $5,000 of insurance in favor of his son, Roby Robinson. The application represented that the premium had been paid in advance. It contained this provision:

"I agree that any policy which may be issued under this application shall not be valid until the first premium is paid to the company, or its authorized agent, and the receipt therefor countersigned by the agent, and delivered during my lifetime."

It seems to have been understood between Roby Robinson and Leary that the former was to pay the premiums upon the policy applied for by W. F. Robinson. The following is the account given by Roby Robinson himself as to what occurred between him and Leary at the time of the issuance of the binding receipt:

"On January 5th Leary came into my office in the Equitable Building, and wanted to know if I was going to pay for the insurance, or who was going to pay for it. I told him I was going to pay for it, as previously told him, and he wanted to know when. I told him I was ready to pay for it whenever he delivered the policy. He said he wanted to close the matter up that day, as he wanted to get it in some report for the previous year, which was close about that time, or a little later on. I told him I did not want to pay for the policy until I got it. He says, 'If you will pay for it now I will give you a binding receipt.' * * * With regard to the payment receipted for in this binding receipt, I gave him my note at the same time he gave me that receipt. The note was written out then and there, and delivered to him when he delivered me the receipt. The paper, dated Atlanta, Ga., January 5th, 1898, signed 'Roby Robinson,' being a note due in ninety days, payable to W. M. Leary, or order, for $123.93, is the note. I explained to Mr. Leary that I could not pay for the binding receipt at that time, but if he wanted to close it up I would give him my note, and he could get the note discounted at the Atlanta National Bank. I suppose it was discounted that day, because I never heard anything from it, and subsequently he told me it was all right. The writing in the body of the note is in Leary's handwriting. With reference to the face of the note being $123.93, while the binding receipt calls for $247.85, I will say Mr. Leary told me he had a commission due him in writing insurance. That, of course, I knew, and he stated furthermore that if he could write a certain amount of insurance he would get a bonus on his business, and that he would give me a discount on the premium. I therefore only gave him my note for half the amount; the other part was Mr. Leary's commission that he gave to me, and this is all I gave him. I don't remember that he told me what his commission was in the matter, but he told me he would give me a discount of fifty per cent. He led me to believe that was his commission on the transaction. * * * Will Leary said he had commissions coming to him out of his business, and that he would give me his commission off, whatever you may call it, of 50 per cent., and that's the reason * * * why the note was made for half the amount."

Roby Robinson thereupon gave his note to Leary for $123.93, and received from him the binding receipt, which recites that $247.85 had been paid to him, being the first annual premium on an application for a policy on the life of W. F. Robinson. No money was in fact paid. It appears, however, from the record that Roby Robinson's note for $123.93 was discounted in bank by Leary. The other half of the premium was considered as between the two paid by Leary's giving Robinson the benefit of the commission upon the premium to which he claimed to be entitled. Leary had told Robinson that he wanted to close the matter up that day, as he wanted to get it in a report of his work for the previous year. He told him, also, that if he could write

a certain amount of insurance he would get a bonus on his business. It appears that it was this bonus that encouraged him to give a discount to the amount of one-half of the premium. The amount of the bonus which he was to receive from the company is not shown by the record. Judging by the ordinary rules that influence men, the bonus that he was to receive was probably greater than the sum he was releasing to Robinson, and it is probable that it required the addition of the Robinson policy to his other earnings to entitle him to the bonus. This agreement between Roby Robinson and the insurance company's agent, it seems to us, under the circumstances that surrounded it, made pending the application of W. F. Robinson, was intrinsically of such a character that it is not reasonable to presume that the agent would have informed the principal of its nature and purpose. It may be said that Leary had a right to release the commission, because, if Robinson had paid the premium to him in cash, he would have been at liberty to return one-half of it to him. This, however, does not conform to Leary's contract of agency. His commission of 50 per cent., according to the agreement, was to accrue "only as the premiums are paid in cash," and the receipt which he gave Robinson provided that, if the application for insurance should be declined by the company, "the amount, receipt whereof is herein acknowledged, is to be returned to said Roby Robinson." If Leary had received the cash from Robinson, it was clearly his duty to hold it as a trust fund for the insurance company, to be used in discharging the obligation of the receipt in the event the application for insurance was declined. Both he and Roby Robinson must have known this, for they both were informed of the words of the receipt, the one signing it and the other receiving it. The receipt was at least prima facie evidence that the entire premium had been paid, which was untrue, and, although it was subject to explanation by other evidence, it cast the burden of making such proof on the insurance company. With the application only submitted to the company, to effect insurance it required its acceptance and the issuance and delivery of a policy. The binding receipt changed this. If it is controlling, it required by its terms only its approval and acceptance by the company to effect insurance. While the company was considering, or, at least, had before it, the application, Leary, its agent, issued the receipt. It is true that he was a general agent, and had authority to issue it; but he had authority to do so only upon the payment of the required premium. Conceding that the note given by Roby Robinson effected the payment of one-half of the premium, we are constrained to hold that the other half was not paid by the mere words of Leary giving Roby Robinson his agreed commission, which he had not in hand, and which was not due to him and had not accrued to him by the terms of the contract of agency. His title and right to the commission was dependent upon the approval and acceptance of the application by the company. The company's right to the premium did not accrue till it accepted the application. Leary was giving what he did not have or own; Robinson received nothing. But if it be conceded that the transaction was as if the money passed from Robinson to Leary, and was by the latter returned to the former,

the result is not altered, for the controlling fact is that at the time of this transaction, whatever may have occurred later, the application had not been accepted, and the money, if it had been paid by Roby Robinson, would have been held by Leary in trust for the company, to be returned to Robinson in the event of the rejection of the application. There is no view of the case that makes the anticipated commission the property of the agent at the time of his attempted gift of it. A transaction like this, in justice and right, should not bind the company, unless it is shown that, with full knowledge, it ratified it. We reach this conclusion without imputing any wrongful intention to Roby Robinson; nor do we impute intentional fraud to the company's agent.

Conceding, but not deciding, that the facts would sustain the jury's finding, shown by the general verdict for the plaintiff, that the contract embraced in the receipt was "approved and accepted" by the insurance company, we are of opinion that the transaction between Roby Robinson and Leary was such that the approval and acceptance, if made without knowledge of what occurred between them, would not be binding on the company. We find in the record no evidence of direct notice to the company. We are of opinion that the circumstances proved are such that Leary's (the agent's) knowledge of the facts was not constructive notice to the company (the principal), and that the charge of the court, in effect, that it was notice, was erroneous.

There are other questions in the case, but, as the evidence on the next trial may not be the same, we think it unnecessary, and, perhaps, not advisable, to decide them or comment on them.

The judgment of the Circuit Court is reversed, with instructions to grant a new trial.

THE INCA.

SOUTH ATLANTIC TOWING CO. v. SWAN et al.

(Circuit Court of Appeals, Fifth Circuit. November 3, 1906.)

No. 1,596.

TOWAGE—LOSS OF TOW—LIABILITY OF TUG FOR GROUNDING OF TOW.

Conflicting evidence, taken chiefly in the presence of the trial judge, *held* to support his findings that the sinking of a bark in tow in the Satilla river, Ga., while being towed down to sea laden with lumber, was due solely to the fault of the tug in allowing the bark to ground upon a mound of stones to one side of the channel, which had been there for many years, and was generally known to navigators of the river, but was unknown to the master of the tug, and afterward in pulling her off, instead of waiting for her to be floated by the rising tide; the result being such injury to her bottom that she sank at once.

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

For opinion below, see 130 Fed. 36.

William Garrard and P. W. Meldrim, for appellants.

Walter G. Charlton, for appellees.

Argued before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

MEEK, District Judge. This cause comes up on appeal from the decree of the District Court of the United States for the Southern District of Georgia, sitting in admiralty. The libel in rem was filed by John Swan and others, owners of the bark Justine H. Ingersoll, against the steam tug Inca, then lying in the port of Brunswick, Ga. The South Atlantic Towing Company, owner of the tug, intervened as claimant. The trial below resulted in a decree in favor of the libelant against the defendant, the claimant, and a surety company (the tug having been released to claimant on bond), for the sum of $6,700.89. From this decree claimant appeals.

The Justine H. Ingersoll took on a cargo of 373,000 feet of lumber at the Hilton & Dodge Mills, a point up the Satilla river, in the state of Georgia, about 18 miles from Saint Andrew's Sound. Her destination was New York, via the river and the sound, and she was ready to begin her voyage on February 8, 1903. The steam tug Inca was engaged to carry her to sea, and for this purpose took her in tow at the mills about 1 o'clock p. m. of that day. The bark was 142 feet long, and, loaded, drew 17 feet 3 inches aft, and 16 feet 6 inches forward. The Satilla river is a navigable river at the point where the bark was lying, having an ebb and flow tide, with a rise of about 6 feet, and with sufficient draft to float the bark in safety. The tide began to flow in about noon, and the voyage was commenced on a young flood. The hawser, with 350 feet of length, was made fast on the bark to her port bow and at the stern of the tug to her starboard bitts. While going around a curve or bend in the river, about a half mile from the place of starting, the bark, while being drawn by the tug, was run upon a mound of rock or ballast that had been sunk in the river years before. The river at this point was from 375 to 390 feet wide. The channel was 200 feet wide, with a depth of water of from 28 to 30 feet, and, going down, was to the right or starboard of the stream. The mound of rock was on the port side of the channel, and in the curve or bight of the river. The bark struck and stuck between the foot of her mizzenmast and stern. The tug made three efforts to pull her off the obstruction, and finally succeeded on the third. While pulling at her for this purpose, her rudder came up, and in coming off the obstruction she lost her shoe, and was so injured otherwise that she filled, and sunk in 5 or 10 minutes. A survey was held upon the bark after sinking, and, as repairs would have cost $10,000, it was recommended by the board of surveyors that she be sold as she lay, which was done. She was almost a total loss, bringing but $725 at the sale. This amount was bid largely for her apparel and furniture.

The faults charged against the master of the Inca were, substantially, that he failed to exercise ordinary and reasonable care and caution and maritime skill—first, in towing the bark on the stage of tide then existing; second, in handling the bark immediately before and at the time and place of grounding; and, third, in his efforts to get the bark off the obstruction. The contentions of the claimant

were that the bark was unseaworthy, and that she was not steered in the wake of the tug, but permitted to sheer off to port, thus bringing herself upon the mound of rock.

When the master of the bark engaged the services of the steam tug to carry her to sea, and the tug assumed the task, the latter was in control, and became the dominating mind in the undertaking. White v. Steam Tug Lavergne (D. C.) 2 Fed. 788; The Annie Williams (D. C.) 20 Fed. 866; The Express, 3 Clif. 462, Fed. Cas. No. 4209. In the relations existing between the steam tug and the tow, duties were imposed upon each. The conditions under which the venture was to be undertaken were confided to the tug. Her holding out for this service implied a knowledge of the conditions of the stream, channel, and tide that were to be met, so far as reasonable maritime experience and efficiency as pilot in this river could inform her. It was for her to determine the hour of starting; to fix the relative positions of the tug and tow; to control the length of hawser; to regulate the speed of the vessels according to the exigencies of the voyage; to give necessary instruction to the tow for its movements and safety. The correlative duties of following the guidance of the tug, to keep as near as possible in her wake, and to conform to her directions, were imposed upon the tow. The exercise of reasonable care and skill within this sphere were incumbent upon her. The Margaret, 94 U. S. 497, 24 L. Ed. 146; The Fannie Tuthill (D. C.) 12 Fed. 446.

Entering upon a consideration of the faults charged against the tug, it appears that the warning testified to have been given the master of the tug as to the dangerous stage of the tide upon which he was undertaking the tow had peculiar reference to shoals in the river that had to be passed several miles below the point of grounding. Probably, had the tide been at full flood at the time of starting, the stone mound would not have been an obstruction, and the bark could have passed over it in safety. But the channel of the river 200 feet in width was navigable, irrespective of the stage of the tide.

As to the manner of handling the bark immediately before and at the time and place of grounding, it is shown that the Satilla is a muddy, fresh-water stream; that the master of the tugboat had an experience of 15 years as a pilot, and was accustomed to ply his vocation on this river; that he did not know of the stone mound sunk in the river at this point, although it had been made many years before by vessels dumping their ballasts of stone, and was known by other pilots on the river. In one instance the knowledge of its presence had been handed down from father to son. These circumstances, taken in connection with the ebb and flow of the tide and the consequent changing of depths and currents, with the draft of vessels plying there, and with the configuration of the banks of the river, made it incumbent upon him to be advised of its presence. If the accident resulted through his ignorance of this known obstruction to navigation, the owners of the tug would be liable. The Margaret, supra; The Florence (D. C.) 88 Fed. 302; The Robert H. Burnett (D. C.) 30 Fed. 214.

As to what transpired immediately before and at the time of the grounding, we quote from the opinion of the learned trial judge, who manifestly gave attentive consideration to the case:

"It appeared from the evidence at the time of the misadventure, she [the tug] was going ahead with all her power. Taking the diagram as true, in connection with the testimony of Floyd, the master of the tug, we discover these facts: The river is 375 or 390 feet wide at the point where the Ingersoll grounded. This was on the port side of the vessel, and on the left-hand side of the river. The channel was 200 feet wide. According to the testimony of Floyd, the obstruction which caused the loss of the vessel was 60 feet to the left-hand edge of the channel. The bark was 142 feet long and 40 feet wide, and it is safe to conclude that if all Floyd said was true, around the natural sweep of the tow at the end of a hawser 300 feet long would have carried the tow to the point where she struck. There were peculiar reasons, therefore, why the tow should have received the most careful instructions to avoid this danger. There was at least 24 feet of water everywhere in that neighborhood, except on these ballast mounds. Besides, the master of the tug must have known that while she was going around the bend, the strong flood tide striking the tow on the starboard bow would have a tendency to bear her off to port and on these obstructions. That she was wobbling, and that she was following her own course, Floyd testifies. It does not appear, nor is it pretended, that any caution was given by any one aboad the tug. It appears, moreover, that she did not strike the obstruction with her stem, and as she went out of the way only 60 feet from the edge of the channel and came upon the rocks under her mizzenmast, the probabilities are very strong that if Floyd's testimony is true, that her sagging or divergence from the channel was due to the curve of the river and the force of the tide, and not to any fault or misconduct on the part of the tow. But if the testimony of the officers and the available members of the crew of the Ingersoll can be accepted, the facts illustrate conduct on her [the tug's] part far more inculpatory. Not only does it appear from this evidence that after having been warned, the master of the tug started the voyage at a dangerous stage of the tide, but that he kept down the left side of the river, and dragged the bark directly on the ballast mounds. When notified by the cries from the tow that the bark was aground, he slacked the hawser, and she floated. He then started ahead again, and dragged her further up on the mound, where she stuck. It is then contended by libelants that, instead of waiting for the rise of the tide, which in a little while would certainly have floated her, notwithstanding the protests of the master of the tow, who cried out that he was damaging the tow, Floyd tried to 'twist' her off by alternately slacking or slowing down, and then going ahead at full speed. His own testimony on this subject is exceedingly injurious to his side of the case. He said: 'I pulled her just as hard as I could pull her, right straight down the river. I kept her as near heading down the river all the time as it was possible for me to do with my boat.' He was asked, 'How far starboard did the tide swing the vessel? Answer. It swung the vessel until she headed almost across the river.' This was when her bottom was on the rock. He continued: 'When the vessel swung, it carried the tug around with her. Pulling all we could pull, the tide carried the vessel's bow right around after her, so as to be nearly about across the river. After the vessel had swung around as far as she was going, I held up pulling for a few minutes. Question. For what purpose did you stop? Answer. I did not want the vessel to swing any further. Question. You waited a few minutes? Answer. After I found that the vessel had stopped swinging, I slowed the boat down a little; gave one bell. I waited for about ten minutes, and then I, what we call, "hooked" her up again—that is, rang the jingle bell—and that pulled the vessel's head down the river then about a point and a half or maybe two points; not over two points. I found she was not going any further. I slowed the boat down again, and waited about fifteen minutes, and then hooked the boat up again, and the vessel jumped right off the obstruction, just slid off, and swung around behind the boat, and you could see the vessel settling down in the water. Question. She sunk immediately? An-

swer. Yes, sir.' Now, it does not seem difficult to discover bad judgment from these facts. It is not difficult to account for the injury to the Ingersoll which caused her to sink in five minutes. It is plain that her bottom under the mizzenmast was ground into nothingness by the alternate action resulting from pulling with full speed and slowing up on the part of the tug. It will be observed that the hawser from the tug was attached to the port bow of the Ingersoll. The Ingersoll was grounded near her stern. She was not so fastened, however, but that the tide readily swung her up stream. The resistance of her full length was offered to the tide when the tug would slow up pulling. This would make her swing with the tide, and when it would go ahead at full speed, superadd to the power of the tug the power of a mighty lever to be found in the bark, 142 feet long, which was constituted by the hull of the ship. This would impart reverse action. It is probable that there are not many wooden vessels which could have long withstood this grinding movement, and when in a few minutes the tide had arisen sufficiently to float her, she immediately sank. It is true that a number of witnesses from Brunswick, where the tug is owned, testified that this was the proper way to get the tow off, but two or more were stockholders in the defendant company, and the court does not feel obliged, on account of expert testimony of this sort, to disregard what seems to be obvious inference, even from the evidence of Floyd. Since subsequent soundings also made by Floyd at the equivalent stage of the tide found 17 feet of water on this mound, it does not admit of a doubt that an exhibition of a half hour's patience would have floated the bark off without damage. It may have been desirable on his part to make haste in order to cross the shoals below, but it was much better to lose a tide than to lose a ship. An attentive consideration of the evidence satisfies the court that, notwithstanding the irreconcilable conflicts in the evidence, the testimony of the witnesses for the libelant is entitled to credence. Capt. Christopher Edwards appeared and testified orally, and seemed to be telling the truth. The testimony of the master of the tug seems incredible. He testified that nobody on the bark sung out or gave any call to him for help in all the time the bark was fast. In view of the imminent peril of the bark, the fact that she was aground for nearly a half hour, the contradictions by the libelants, and the utter improbability of this statement, it is wholly disregarded by the court, and throws the gravest doubt on all the testimony of Floyd."

The testimony in the trial below on the merits, with the exception of that of one witness, was given in the presence of the judge. It was in a remarkable degree conflicting on many of the issuable questions of fact. The line of cleavage between the witnesses for libelant and claimant is clearly marked by their testimony, which cannot in any view of the transaction be harmonized. The judge sitting at the trial can see the witnesses, hear their statements, observe their demeanor, and compare their varying degrees of intelligence. In this he has a decided advantage over an appellate tribunal in discovering where the truth lies, and coming at the real nature of the transaction. Because of this, his findings of fact are entitled to consideration and weight. The Quickstep, 9 Wall. 665, 19 L. Ed. 767. Every reasonable presumption in favor of their correctness should be accorded them, and they should not be set aside or modified unless it clearly appears he has fallen into error or mistake. Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Camden v. Stuart, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; Southern Pine Company of Georgia v. Savannah Trust Company (C. C. A.) 141 Fed. 802. In this case the findings of fact by the trial judge are, in our opinion, supported by a preponderating weight of the evidence. His deductions and inferences therefrom are, for the most part, just and fair. We conclude that the tug was at fault in bringing her tow upon the obstruction, and that she was

also at fault in the method adopted to bring her tow clear of the obstruction. She failed to bring to the performance of the duty she assumed reasonable skill and care, and to exercise this skill and care in each step of her work, as she was bound to do. The Margaret, supra; The Quickstep, supra; The Cayuga, 16 Wall. 177, 21 L. Ed. 354; Hughes on Admiralty, p. 123.

But one other question requires consideration. It is contended by claimant that the bark was unseaworthy; that her inherent weakness and decay caused her destruction. It is well settled that the master of a bark offering her for towage represents her as sufficiently staunch and strong to withstand the ordinary perils to be encountered on the voyage. The Edmund L. Levy, 128 Fed. 684, 63 C. C. A. 235, and cases there cited. It is true the Justine H. Ingersoll was an old bark. She was built in the year 1876 at a cost of $34,000. She had been overhauled and repaired at intervals, the last time prior to her loss being in the year 1901. She was then classed as A 1½, which classification obtains for four years. Vessels of that class are regarded as fit for the carriage of all kinds of cargo on all voyages. She sailed in the latter part of November, 1902, from New York to Porto Rico with a cargo of general merchandise, including much refined sugar and paper. From thence she sailed to the Brunswick bar, and was towed up the Satilla river for her cargo of lumber. There is a sharp conflict in the testimony with relation to the condition of her keel and hull at the time of the accident. This evidence, however, was not introduced at the hearing on the merits, but was brought forward before the commissioner, when the case was referred for the taking of testimony as to damages. On the hearing before the judge there was no substantial contention that the bark was unseaworthy. We are of the opinion the testimony adduced before the commissioner was not sufficient to cause the trial judge to recede from his entertained view that the bark was staunch and sound. Besides, we are not prepared to hold that the misadventure resulting in the bark's loss was one of the ordinary perils to be encountered on the voyage down the Satilla river. The tug was not privileged negligently to run the bark on the mound of rock because she was old. Pettie v. Boston Towboat Company, 49 Fed. 466, 1 C. C. A. 314; The Jonty Jenks (D. C.) 54 Fed. 1021. The amount of damages awarded is not deemed excessive, and will not be disturbed.

The decree of the trial court is affirmed.

LATTING v. OWASSO MFG. CO.

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

No. 2,305.

1. APPEAL AND ERROR—REVIEW—HARMLESS ERROR.

The assigning of a wrong reason by a trial judge for directing a verdict for a defendant after the close of the evidence is not prejudicial to the plaintiff, nor ground for a reversal of the judgment, if the direction of the verdict was right upon other grounds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3417.]

2. MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE APPLIANCES.

The death of a plaintiff's intestate, who was an employé in defendant's factory, caused by the falling of an elevator therein, *held*, under the evidence, not due to any defect in the elevator or its operating machinery, or to any want of care or proper inspection, which would render defendant liable therefor, but to the thoughtless act of a fellow servant of the deceased, which could not have been foreseen and against the effect of which the safety device was not designed to guard.

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

Plaintiff's intestate was injured by the fall of an elevator in the factory of the Owasso Manufacturing Company, and as a result he shortly afterwards died. The charge in the petition is that the company negligently permitted the safety brakes of the elevator to become so defective that they failed to respond, and that it did not exercise reasonable care in inspecting and maintaining in proper condition the elevator and its various appliances. The deceased was an employé of the company, his position being that of foreman upon the second or upper story of the factory building. The building was of two stories with a basement beneath. The elevator was used for the movement of materials and manufactured products and for the ascent and descent of the employés. It was an ordinary platform elevator, lifted and lowered by two cables extending from a revolving drum below, operated by steam power, upwards to two wheels or pulleys, and thence downwards to a transverse beam at the top of the elevator. The weight of the elevator and its contents in ascent or descent was upon these cables. Immediately under and about five inches below the transverse beam was a steel spring extending horizontally with the beam almost across the width of the elevator. The strain upon the cables upon which the elevator hung was likewise communicated to the spring. Each end of the spring was pivoted to and near the middle of a metallic dog, the upper end of which was also pivoted to the beam, and the lower end of which was sharpened so as to pierce, in case of emergency, two perpendicular timbers extending the entire length of the elevator shaft and along opposite sides thereof. These timbers, or guides as they were called, and shoes fixed upon the movable elevator, kept the elevator steady in its course. When the strain caused by the weight of the elevator and its contents was upon the cables, and therefore also upon the spring, the latter was bent upward toward the lower part of the transverse beam, and consequently the dogs at either end of the spring were withdrawn from contact with the perpendicular guides. The purpose of this contrivance was that, if there should be an unexpected breaking of the cable, a release of the strain thereon, and also a resultant release of the tension upon the spring, the dogs would be thrown out at the sides, would pierce the perpendicular guides and so prevent the precipitation of the elevator to the botton. There were also two operating cables which controlled the movement of the drum upon which the elevator cables were wound and unwound. A pull upon one of these operating cables shifted a belt at the machinery below and caused the elevator to ascend. A similar manipulation of the other operating cable caused it to descend. The elevator was easily and customarily operated by those who were upon it.

Upon the occasion in question, two employés were taking an empty truck up to the second floor of the factory. When they placed it upon the elevator at the floor below one end of it was pushed beyond the elevator platform, and when they reached the second story the projecting end of the truck encountered the floor of that story, and the truck was tipped up and became tightly wedged between the elevator platform and the floor. One of the employés quickly got off of the elevator, went around to the side thereof, and pulled the operating cable for a descent of the elevator. The deceased went to the assistance of the other employé, wrenched the tilted truck from its wedge-like position, and, the safety dogs not engaging the perpendicular guides, the elevator with the men upon it instantaneously fell to the bottom of the shaft, causing the death complained of. At the conclusion of the evidence the trial court, momentarily overlooking the primary duty of the company to exercise reasonable care to furnish its employés with reasonably safe appliances and to maintain them in like condition, directed the jury to return a verdict for the defendant upon the ground that the employé whose duty it was to inspect the elevator was a fellow servant of the deceased. But, after the verdict was returned and the jury discharged, the court announced that it rested its action upon the absence of evidence of negligence warranting a recovery.

H. F. Auten and J. H. Carmichael, for plaintiff in error.

Ashley Cockrill and J. M. Moore, 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 case was fairly tried. Full opportunity was given the plaintiff to prove his cause of action, if he had one. No obstacle, whether in the reception or rejection of evidence or otherwise, that impeded or prevented him from doing so, was erroneously interposed during the trial. Therefore, if at the conclusion of all of the evidence the absence of a cause of action was so clearly manifest that it was the duty of the trial court to direct a verdict for the defendant, it is not material that in the discharge of that duty a wrong reason was at first assigned. No possible prejudice to the plaintiff could have resulted from the selection of the wrong ground for the action of the court. He could not have been misled to his detriment. He was through with his proofs, and if they were insufficient the defect was past cure. In such a case, so circumstanced, if the destination was right it matters not what road was taken to reach it. If, as the court held after a verdict had been directed and returned upon an untenable theory, there was no substantial evidence warranting a recovery by the plaintiff, the verdict should not be disturbed.

We are of the opinion that the plaintiff made no case. The mere fact that the elevator fell upon the occasion in question does not give rise to a presumption or inference of negligence, since the deceased was an employé of defendant, and in such cases the doctrine res ipsa loquitur does not apply. Railway Co. v. O'Brien, 67 C. C. A. 421, 132 Fed. 593. The evidence conclusively showed that the elevator was of an approved pattern, in general use, made by a responsible concern, and had given very satisfactory service for some years. It also appeared that it had frequently been examined, and that a commendable degree of care had been exercised in inspection and supplying new parts as conditions required. About six months before the accident, the elevator was overhauled, and new guides upon which

it moved in ascent and descent were inserted. The plaintiff's contention that the spring was too weak to operate the safety dogs is without support, save in the testimony of one Bull, who swore that while he was employed in the factory the dogs failed to work and the elevator fell to the bottom several times. This testimony is at variance with that of all of the other witnesses; but, giving it all of the effect that can properly be claimed for it, it should be said that the occurrences related by Bull happened two or three years before the accident in question and before the elevator was overhauled. Undisputed evidence showed that, several times after Bull left the service of defendant, the last being but a few days before the accident that befell the deceased, the elevator suddenly started to fall, and the safety device operated effectually and checked the descent.

There is no doubt that, when the deceased got upon the elevator platform where it was wedged at the second floor, another employé pulled the operating cable for a descent and caused the drum below to so revolve that the lifting cables, upon which the elevator hung, unwound; and, when the end of the truck was wrenched by deceased from between the elevator platform and the second floor of the building, and the elevator thus released began to fall, the hanging weight of the unwound cables, together with the friction of their passage over the wheels or pulleys above the elevator, prevented the spring from straightening out and sending the points of the dogs into the guide timbers. This was an unusual and exceptional condition caused by the ill-considered, thoughtless act of a fellow servant, and against which the safety device was not designed to guard. Negligence of the defendant cannot be predicated upon it.

It is also claimed that the elevator guides were placed too far from the points of the dogs to permit of operation, even when there was no tension upon the spring. This claim is the result of a misapprehension of the testimony of a witness who described the structure after it had been overhauled. He said that the play between the guiding shoes of the elevator and the upright guides upon which they moved was a half inch on each side, not an inch and a half, as contended. The foregoing conclusions dispose of the case.

The judgment is affirmed.

BELL TELEPHONE CO. v. DETHARDING.

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

No. 1,246.

1. WRIT OF ERROR—REVIEW—REFUSAL TO GRANT NEW TRIAL.

Under the practice of the federal courts, error cannot be assigned on the refusal to grant a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 741.]

2. MASTER AND SERVANT—INJURY OF SERVANT—ASSUMED RISK.

Plaintiff's intestate was employed by defendant telephone company as a "trouble finder," and was sent by his superior, in the line of his duty, to ascertain the cause of the failure of a telephone to work properly,

which was unknown. In climbing a cable pole his hand came in contact with a guy wire, from which he received an electric shock, which caused him to fall, and he was killed. From the effects of a storm on the previous night, or from some other cause not shown, the telephone wires leading from the pole had sagged across electric light wires, and had become heavily charged with electricity, and also charged the guy wire. *Held*, that the risk from such danger was one known to and assumed by plaintiff's intestate as one necessarily incidental to his employment, and that there could be no recovery from defendant for his death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 550.]

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

On May 26, 1904, the "wire chief" of plaintiff in error received word at his office in East St. Louis that certain of the telephones served by the company's drop lines leading to the Metropolitan Building, situate at the northwest corner of Fifth street and Missouri avenue, in that city, were out of order. Intestate of defendant in error, who was at the time in the service of the plaintiff in error as a so-called "trouble man," was sent by the wire chief to what was known as the "cable pole," located in the vicinity of the service complained of, to open the line, and discover whether the trouble lay between the cable pole and the office, or between the cable pole and the disabled telephone. He proceeded to the cable pole, and began to climb it. As he laid hold of a guy wire affixed to the cable pole at the distance of about 10 feet from the ground, he was seen to shudder and fall to the sidewalk, striking upon and fracturing his skull, from the effects of which he died shortly after. To recover the statutory amount for wrongfully causing his death, this suit was brought. The accident resulted from the sagging of the drop lines (which were originally constructed so as to run over and across certain electric light lines carrying a current of high voltage) down upon the latter in such a manner as to charge the drop lines, and through them, by means of certain so-called "bridle lines" upon the cable pole, the said guy wire with a high degree of voltage. It does not appear that either of the parties knew of the condition existing in the said guy wire at the time. From the evidence it appears that the cable pole is wrapped with wire, commencing about 18 inches from the ground, and extending upward to about 6 feet. Fastened around the pole, and in contact with this wrapping of wire, was a peanut stand, so arranged as to form a circuit medium from the wire to the ground. A man standing upon the wire and grasping the guy wire formed a complete circuit.

The first declaration of defendant in error contained two counts. The first charged that it was the duty of plaintiff in error to so equip and maintain its poles and wires and guy wire that it would be reasonably safe to work about them, and that, while using due care, decedent of defendant in error was ascending one of the poles, and came in contact with the guy wire. The second charges that while acting under the express orders and direction, with all due care, he was ascending one of its poles, and his hand came in contact with the guy wire.

To these counts plaintiff in error filed a demurrer, which was confessed, and an amended declaration substituted. This contains one count, which charges plaintiff in error with negligence in constructing and maintaining its said wires over and across the said electric light wires, in such a manner as to permit their contact with said light wires, and thereby to become charged with a current of high voltage and communicate it to said guy wire, whereby, while acting under instructions, the intestate of defendant in error was killed. To this declaration plaintiff in error filed a plea of not guilty, and also, by leave of court, a plea of the statute of limitations, alleging that the amended declaration set out a new cause of action, and that the statutory period for bringing suit had elapsed. To this latter plea defendant in error filed a general replication, which was demurred to, and the demurrer overruled. The cause then went to hearing upon the plea of not guilty, and a verdict for $5,000

was given, upon which judgment was entered. At the close of the evidence for defendant in error, plaintiff in error moved the court to instruct for it, which was denied. The same motion was denied at the conclusion of all the evidence. Among other matters, the court instructed the jury that "the plaintiff has charged in his amended declaration, in effect, that the defendant failed to use ordinary care in the erection and maintenance of its telephone pole and drop wires entering the Metropolitan Building, in consequence of which such drop wires came in contact with an electric wire, and thereby became charged, and conducted such charge of electricity to the guy wire in question, whereby the deceased was shocked and killed"; and in another part of the instructions told the jury: "And if you further believe from the evidence that the said crossed wires was not one of the ordinary hazards assumed by the deceased in his employment, * * * then the jury will find the issues in favor of the plaintiff"; both of which instructions were excepted to by plaintiff in error.

The errors assigned, so far as material here, are: First. The overruling of the demurrer to the replication to the plea of statute of limitations. Second, third, and fourth. The refusal of the court to take the case from the jury. Fifth and sixth. The aforesaid clauses from the court's instructions. Seventh. The refusal of the court to grant a new trial.

Amos C. Miller, for plaintiff in error.

B. H. Canby, for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

After stating the foregoing facts, KOHLSAAT, Circuit Judge, delivered the opinion of the court:

Under the practice of the federal court, no error can be assigned upon the refusal of the court to grant a new trial. Addington v. United States, 165 U. S. 184, 17 Sup. Ct. 288, 41 L. Ed. 679; Blitz v. United States, 153 U. S. 308, 312, 14 Sup. Ct. 924, 38 L. Ed. 725; Waterhouse v. Rock Island Alaska Min. Co., 97 Fed. 466, 477, 38 C. C. A. 281.

The sole ground of action set up is that the telephone company was negligent in the construction and maintenance of its wires over and across the electric light wires, whereby the guy wire became charged with a dangerous current, causing the death complained of. Unless the fact that the wire sagged down upon the electric light wires establishes negligence in construction and maintenance thereof, there is nothing in the record sustaining the charge of negligence. On the other hand, it appears that there was a storm of considerable violence on the evening preceding the discovery of defects in the telephone service. The fact that the failure in the telephone service followed this atmospheric disturbance fairly justifies the inference that the wires were properly maintained up to that evening. It is shown that they had been in position for a number of weeks without complaint being made.

It is the theory of defendant in error that the wires had been gradually sagging, for want of proper construction, for a considerable time, and on this night came down upon the electric light wires. This is mere conjecture. The record discloses no evidence upon which the jury could base such a finding. Moreover, decedent of defendant in error was charged as one skilled in the business with the duty of ascertaining the cause of the interruption of telephone service. He was seeking the very trouble which killed him. He knew there was something wrong, and that the business was very dangerous. He knew he could

protect himself by the use of rubber gloves, and that such precaution was usual. There were no representations made to him that anything about the premises was safe. The crossed wires were not easily discernible. Nobody knew what was the matter. Nor is any lack of diligence on the part of defendant below shown. The danger came clearly within those assumed by him when he entered upon the occupation of "trouble finder" for plaintiff in error. Such being the case, no recovery can be had (Tuttle v. Detroit G. H. & M. Ry. Co., 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114; Northern Pacific R. R. Co. v. Herbert, 116 U. S. 655, 6 Sup. Ct. 590, 29 L. Ed. 755; District of Columbia v. McElligott, 117 U. S. 621, 6 Sup. Ct. 884, 29 L. Ed. 946), and the motion to take the case from the jury should have been granted. The amended narr. does not in our judgment present such a departure from the cause of action assigned in the original declaration as to make it a new cause of action. In view of the foregoing, it becomes unnecessary to pass upon the other errors assigned by plaintiff in error. The judgment is reversed, and the cause remanded for a new trial.

EVERETT v. MANSFIELD. In re PEASLEY. Ex parte EVERETT.

(Circuit Court of Appeals, First Circuit. October 31, 1906.)

No. 642.

VENDOR AND PURCHASER—BREACH OF CONTRACT BY VENDOR—LIEN OF PURCHASER FOR INTEREST.

Where a vendor has failed to make title as required by his contract for a sale of land, the purchaser is in equity entitled to recover interest on any advances made on the purchase money, whether with a stakeholder or paid to the vendor, and is also entitled to a lien on the land for the amount of such deposits and the interest; and these rules apply in bankruptcy proceedings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 985.]

For opinion below, see 137 Fed. 190.

John Everett, for appellant.

Jesse M. Barton (Alfred L. Mansfield, on brief), for appellee.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. In this case Everett, the appellant, made a bargain for the purchase of real estate from Peasley, the bankrupt, whose trustee in bankruptcy is Mansfield, the appellee. It is well to put the case in that form, although the contract for the purchase of the property was made by one Bradshaw, and assigned by him to Everett. The terms of the purchase were $200 down, $1,000 in the course of a few days, and the balance, namely, $3,400, "upon the delivery to said Bradshaw by said Peasley of a deed conveying a good title to the said Bradshaw of the real estate in question." It was stipulated that Peasley was to have 30 days in which to furnish the deed. The payments of $200 and $1,000 were duly made to Peasley. The $3,400, according to the contract, was deposited in the hands of a stakeholder.

Peasley did not make a good title within the 30 days, and the case states that a satisfactory deed was never furnished by him. Some litigation grew out of the transaction, and pending that litigation Peasley went into bankruptcy. Thereupon the litigation was dismissed, and Everett, as the assignee of Bradshaw, claimed repayment of the $3,400, which was ordered, and also a lien on the real estate or its proceeds for the repayment of the two sums, $200 and $1,000, which lien was established by the court in bankruptcy, and that money has been received. The court also allowed a lien for the interest on the two items of $200 and $1,000; but, Everett having petitioned for interest on the $3,400 and a lien therefor, the petition was denied, and Everett appealed to us. The only possible suggestion for a distinction between interest on the $1,200 and on the $3,400 is that the former was paid to the bankrupt as purchase money, while the $3,400 was deposited with a stakeholder. Of course, the agreed period during which a deposit may lie idle may, perhaps, be regarded as days of grace, and therefore exceptional, provided the deposit is returned before it expires.

By Lord Cairn's Act certain questions touching this topic were settled by statute in England, but none of the authorities which we cite are colored by that fact. The case relates only to liquidated amounts; that is, the amounts paid on the purchase money or deposited with the stakeholder. It has no relation to unliquidated damages, such as the difference between the value of property bargained for and the bargained price, which unliquidated damages, although the same may be allowed on a bill to cancel a contract for the default of the vendor, may not be protected by a lien. Cornwall v. Henson (1900) 2 Ch. 298, 305. The text-writers and cases speak of a deposit. Williams on Vendor & Purchaser (1906) 22, says that in London the deposit is usually put into the hands of the auctioneer, but at country sales into the hands of the vendor's solicitor, adding that, when the deposit is paid to an auctioneer, he receives it as a stakeholder. Strictly speaking, a deposit is not a payment to the vendor, and therefore is a fund put into the hands of the auctioneer or some other stakeholder, as in the present case. Nevertheless, in the English authorities the word "deposit" covers advanced payments to the vendor. It must also be borne in mind that, under some circumstances, the purchaser pays interest on the balance of the purchase money; and the greater portion of the discussion about interest in the English authorities is with reference to that fact. It is necessary that their discussion of the two classes of interest should not be confused.

The general rule applicable to this case as stated in Fry on Specific Performance (4th Eng. Ed. 1903) 621, 622, as follows:

"This lien in the case of a purchaser extends to all installments of the purchase money, interest thereon at 4 per cent. per annum, sums paid under the contract as interest on the unpaid purchase-money, interest thereon, and the costs of an unsuccessful action by the vendor against the purchaser."

The general rule is also stated in Dart's Vendors & Purchasers (7th Eng. Ed. 1905), as follows:

In case of default on the part of the vendor, "the purchaser, if he have paid all or any part of the purchase money, will have a lien for it, with interest,

on the land and title deeds, even though he may have taken an independent security, and also have his costs of suit."

The rule in regard to the lien in question is also declared in general terms by Sugden on Vendors (Perkins' 8th Am. Ed.) 671.

The right to the lien was first clearly stated in 1855 in Wythes v. Lee, 3 Drewry, 396, by Vice Chancellor Kindersley, although the principles which establish it, as said there and subsequently elsewhere, are old in the equity law. They were fully stated in 1864 in Rose v. Watson, 10 H. L. C. 672, 678, 682, 684. They are based on the well-known fundamental rule that in equity what is agreed to be done is regarded as done; so that, from the time that a contract is made for the purchase of real estate, the vendor is often held as, in a certain sense, a trustee for the purchaser, and the purchaser is regarded, in a certain sense, as the real owner of the land, so that each, on the ordinary equitable rules, has a lien for his protection. The whole practice in equity with reference to such contracts is clearly on the basis that the parties are under mutual equitable obligations to each other, so that either one party or the other should receive interest on his money as against the rents and profits, which are also, under certain circumstances, to be accounted for.

Wherever the question of interest on a deposit is raised in these authorities, interest is said to be allowed, and a lien given for it. Nowhere in any text-book or case that we have found is any distinction made between strictly a deposit in the hands of the auctioneer, or other stakeholder, and a deposit made in the form of an advance payment to the vendor. On the other hand, the extent to which equitable rules apply to this matter of interest appears from some cases and authorities in which a question of lien did not arise. For example, in Lord Anson v. Hodges, 5 Sim. 227, 228, decided by Vice Chancellor Shadwell in 1832, it was said that the vendor had failed to make good his representations as to the property, "and therefore justice would not be done to the defendant"—that is, the purchaser—"unless he was allowed interest on his deposit." The rule stated here, it will be seen, is the mere rule of justice. In Sugden on Vendors (edition already cited) 640, referring to an action at law, it is said that where the purchaser recovers a deposit only from the auctioneer, in this case the stakeholder, he may in an action against the seller recover interest on it. Further, Sugden, at the same page (640), says: "If a vendor cannot make a good title, and the purchaser's money has been lying ready, without interest being made by it, the vendor must pay interest to the purchaser"; and this rule is reiterated in Dart (edition we have already cited), at page 990. These last citations, of course, relate to actions at law for damages, but they illustrate the broad principle on which the rules rest.

These authorities show that the rules as to allowances of interest are of the broadest character, and go to the full extent of making the purchaser entirely good in case of default on the part of the vendor, as the vendor is made good in the case of default on the part of the purchaser. One receives the land with all the rents and profits, and the other his money with all interest thereon; and, so long as the question relates to liquidated payments of purchase money and deposits,

it is impossible to perceive any substantial principle which should fail to give a lien wherever one party or the other is entitled to his interest. To sum up, all the authorities use language broad enough to cover a deposit, whether it is paid into the hands of a stakeholder or to the vendor, and none of them make any distinction on that account; and there is no distinction in principle that we can see. Therefore, in this case, the purchaser had not only a claim against the bankrupt for interest on the deposit, but also a lien on the land therefor.

The decree of the District Court is reversed; the case is remanded to that court, with directions to enter a decree allowing interest on the deposit and a lien on the land, or the proceeds thereof, to secure the payment of the same, in accordance with our opinion passed down this day; and the appellant recovers his costs of appeal.

PITTSBURGH PLATE GLASS CO. v. EDWARDS.

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

No. 2,332.

BANKRUPTCY—VOIDABLE PREFERENCE.

A chattel mortgage given by a debtor, covering all of his personal property, nine days before his bankruptcy, and when hopelessly insolvent, to secure a comparatively small debt, *held* voidable, as a preference under Bankr. Act July 1, 1898, 30 Stat. 562, c. 541, § 60b [U. S. Comp. St. 1901, p. 3445], as amended by Act Feb. 5, 1903, 32 Stat. 799, c. 487, § 13 [U. S. Comp. St. Supp. 1905, p. 689], on evidence that the creditor had practically ceased selling the bankrupt goods some time before and had been repeatedly pressing for payment of his account through his agents and the attorney who took the mortgage, and that checks previously given him by the bankrupt had been dishonored; such facts, which were known to the attorney, and his avoidance of obvious and reliable sources of information of the bankrupt's condition, being sufficient to charge him with notice of the insolvency and to give him reasonable cause to believe that a preference was intended.

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

L. G. Susemihl (T. A. Murphy, on the brief), for appellant.

W. E. Blake (Harold J. Wilson, on the brief), for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. The question in this case is whether a chattel mortgage taken by the appellant upon the property of the bankrupt constitutes a voidable preference under section 60b of the bankruptcy act (Act. July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1905, p. 689]. Since it appears without dispute that the mortgage was secured within four months before the filing of the petition and the maker was insolvent at the time, the question may be more narrowly stated: Had the appellant or its attorney who attended to the matter reasonable cause to believe that a preference was intended by the bankrupt? The referee answered in the affirmative, and he was sustained by the District Court.

We are of the opinion that they were right. For several months prior to the taking of the mortgage the appellant had almost wholly ceased its sales to the bankrupt, and was insistently pressing for a full satisfaction of its account. Two agents of appellant had recently visited the bankrupt to secure payment. An attorney then went to the city where the bankrupt did business with instructions not to do anything if the agent who last preceded him had secured a substantial payment on the demand. The agent had secured such a payment and also a check for the balance. The attorney learned of the payment and returned home. The check was subsequently dishonored. One previously given had also been dishonored. The attorney went again and secured another check, dated ahead, for the balance then due, and also a note for the same amount secured by a chattel mortgage uopn all of the bankrupt's tangible personal property, consisting of machinery, materials, and manufactured stock, worth many times the amount of the debt. This was nine days before the adjudication in bankruptcy. By agreement the mortgage was not to be placed on record if the bankrupt should send a draft for the amount of the debt by the time the date of the check came by. This check, the third one, was also dishonored and the mortgage was recorded the day before the adjudication. The bankrupt was hopelessly insolvent. That he intended a preference is inferred as a necessary consequence of his act in giving the mortgage while in such financial condition, and an examination of the record impresses us with the belief that the appellant's attorney was so well satisfied of the bankrupt's insolvency and its effect upon the mortgage he was about to take that he purposely traveled as close to the edge of actual knowledge as he could without obtaining it. He testified to efforts to ascertain the bankrupt's financial condition, whether he owed certain parties, and that he relied on the information obtained, but he ignored other sources of information which were at hand and were so obvious and so much more accurate and reliable that in view of the undisputed facts of the case intentional avoidance is suggested. The finding that the representative of appellant had reasonable grounds for believing that a preference was being intentionally given is sustained.

The order is affirmed.

BOWERS v. UNITED STATES.

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

No. 2,337.

POST OFFICE—STEALING LETTER FROM POST OFFICE—INDICTMENT.

The provision of Rev. St. § 5469 [U. S. Comp. St. 1901, p. 3692], which makes it a criminal offense to steal from a post office any letter, is designed to preserve the sanctity of the mails, and not merely to punish the theft of another's property, and an indictment thereunder is not governed by the rules applicable to one for larceny, but is sufficient if it charges that the defendant unlawfully stole from a designated post office a letter, described sufficiently for its identification, and it is unnecessary to aver that it contained anything of value, or whose property it was, or that it was in the post office for transmission through the mails.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Post Office, §§ 75–77.]

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

Writ of error to review a judgment upon conviction of a postal offense under section 5469, Rev. St. [U. S. Comp. St. 1901, p. 3692].

Robert J. White and Charles E. Warner, for plaintiff in error.

James K. Barnes, U. S. Atty., for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. The only question presented is whether the indictment charges an offense against the laws of the United States. The charge is:

"That the said Charles D. Bowers, on the fourteenth day of November, in the year 1903, in the said division of a said district, and within the jurisdiction of said court, did unlawfully and feloniously, steal and take a certain letter, directed to Sears, Roebuck & Co. at Chicago, Ill., from the post office of the said United States at Paris, Arks., which said letter then and there contained an article of value, to wit, a United States postal money order of the value of thirty-one dollars and forty cents, contrary," etc.

Section 5469, Rev. St. [U. S. Comp. St. 1901, p. 3692], under which the indictment was found, is somewhat complicated and involved, but the following may fairly be extracted from it as defining a distinct and complete offense:

"Any person who shall steal the mail or steal or take from or out of any mail or post office, branch post office or other authorized depository for mail matter, any letter or packet * * * shall, although not employed in the postal service, be punishable by imprisonment at hard labor for not less than one year and not more than five years."

Counsel seek to have the indictment measured by the strict rules that obtain in some jurisdictions in cases of larceny, and contend that it is insufficient because it does not charge that the letter was the property of some one other than the accused, and that, while the value of the inclosed postal money order is given, there is no statement of the amount for which it was drawn, of the person who procured it, or of the

person to whom it was payable. It is also said that the description of the letter is not sufficient, and that there is no charge that it was in the post office for transmission through the mails.

This is not the ordinary case of larceny, and it is not governed by the same rules. The statute creating and defining the offense of which Bowers was charged and convicted was designed to preserve the sanctity of the mails, not merely to punish the theft of another's property. United States v. Falkenhainer (C. C.) 21 Fed. 624; United States v. Trosper (D. C.) 127 Fed. 476. It will be observed that the indictment follows the language of the statute quite closely. It is made an offense "to steal from the post office any letter." The indictment charges that Bowers unlawfully and feloniously stole from a designated post office a letter of a specified description. This is sufficient, without further averment that the letter was in the post office for transmission through the mails. The letter was not addressed to Bowers, and it was not necessary to aver expressly that it belonged to some one else. The value of the letter and its contents is wholly immaterial. Indeed, it matters not under the clause of the section quoted if the letter contained nothing whatever of value. The averment in the indictment that it contained a postal money order worth a certain sum of money should be taken not as of a substantive element of the statutory offense, but as descriptive of the letter, and this, in connection with the address of the letter and the place where it was charged to have been stolen, was sufficient to apprise the accused of what he had to encounter at the trial, to enable him to prepare his defense and also reasonably sufficient for his protection in case of another prosecution for the same offense, though as to the latter oral evidence would be admissible if necessary for the purpose of further identification.

The judgment is affirmed.

LIBRARY BUREAU v. FRED MACEY CO., Limited.*

(Circuit Court of Appeals, First Circuit. October 9, 1906.)

No. 614.

PATENTS—VALIDITY AND INFRINGEMENT—CARD RECORDS.

The Williams patent, No. 623,857, for improvements in card records, is void for lack of invention, in view of the prior art, as are also claims 3 and 4 of patent No. 624,597 to the same inventor; but claims 1 and 2 of the latter patent, which cover a group of laterally reversible twin tab cards, disclose patentable novelty and invention. Also *held* infringed.

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

For opinion below, see 134 Fed. 886.

Odin Roberts (Roberts & Mitchell on the brief), for appellant.

Fred L. Chappell, for appellee.

Before PUTNAM and LOWELL, Circuit Judges, and BROWN, District Judge.

*Rehearing denied January 3, 1907.

BROWN, District Judge. The two patents to Stephen T. Williams, for improvements in card records, No. 623,857, dated April 25, 1899, and No. 624,597, dated May 9, 1899, relate particularly to the reversal of index record cards.

In the prior patent to J. M. Gunn, No. 583,227, dated May 25, 1897, are shown groups of cards serially indexed by index tabs projecting above the upper edges of the cards. Viewing the group of cards from the front, the first index tab is at the extreme left, the index tab of the second card is at the right of the tab on the first card, the index tab on the third card at the right of the index tab on the second card, and so on throughout the series. Were it desired to use the back of one of the Gunn cards, and to reverse it back for front, such card, when reversed and placed in the group, if turned bottom up, would display no index tab, and if turned sideways would show the index tab out of its proper position in the series, and turned with its back to the observer.

Williams, in patent No. 623,857, makes provision for reversing the card by turning it bottom side up. He provides an additional tab, or a "twin tab," as it is called, on the bottom edge, this tab being marked on the opposite side with an index number. The card being turned upside down, the top tab disappears entirely from sight, and its place is taken by the bottom tab. The series of tabs is thus preserved. In order to indicate the fact that the card has been reversed, Williams provides for a color distinction between the bottom and top tabs. Looking at the entire series, it is possible to tell at once which of the cards have been reversed, and the fact of a reversal may be utilized to convey information as to the length of the record, etc.

In patent No. 624,597, provision is made for reversal side for side, and back for face. An additional tab is provided, so that the card shows always two projecting tabs. The original tab does not disappear from sight, as it would if the card were turned upside down, but still remains visible.

Williams provides each card in the group with two tabs; the first card having a tab on each end of the upper edge, and the last, or tenth card of the group, having two tabs placed centrally side by side, while the intermediate cards each have twin tabs which are equidistant from the edges. Viewed from the front, we see this difference from Gunn: That, whereas Gunn has a single series of tabs running from left to right, Williams has two series of tabs starting at the outside edges and meeting in the center at the back.

No anticipation of this arrangement is shown. This is not a mere duplication of the Gunn series, and such a group of cards is capable of performing functions which could not be performed by the Gunn arrangement with a mere duplication of its tabs. The provision of a double series meeting at the center of the back card of the group prevents the interference of one series of tabs with the other series. Were the tabs of the Gunn series so disposed as not to pass the center of the group, it might be possible to reverse the cards laterally by the provision of an additional tab for each card so placed that, upon reversal, each additional tab would occupy the position of the original

tab; but such an arrangement is not suggested by the Gunn patent Nor does the Langstroth patent, No. 475,043, dated May 17, 1892 suggest the use of a double series of index tabs meeting in the center. It is true that Langstroth uses the following language:

"If cut away at any other point than the center, it will be manifest that the card must be cut equidistant from the center upon each side, to allow the card to be reversed in the box and both sides used."

While Langstroth discloses the idea of reversing a card, if such an idea needed disclosure, and the further idea that spaces, and perhaps projections, upon a card must be so arranged as to preserve the same relative position when the card is reversed, yet there is more than this in the Williams double series. The idea that, by the use of a double series of tabs, one series on each side of the center, the cards can be reversed without disturbance of the serial order of the tabs, is a decided advance upon anything disclosed by Langstroth, who was not dealing at all with series of index tabs.

We are of the opinion that patent No. 624,597 discloses a patentable novelty in the group of laterally reversible twin tab cards therein described. It is apparent, however, that our reasons for upholding this patent are not applicable to patent No. 623,857, and that we cannot regard Williams as the inventor of a "twin tab system" broad enough to comprehend the devices of both of these patents. Save for the fact that Williams provides for showing by color difference that a card has been turned upside down, his patent discloses merely a duplication upon the bottom edge of the Gunn series of cards, of what is shown by Gunn upon the top edge. When the front face of the card is filled, the original tab on that card is turned down out of sight, and performs no further function, so far as is disclosed by patent No. 623,857.

While it is suggested by the patentee that, in his patent No. 624,597, the space for indexing is limited to one-half the length of that edge of the card on which the index is placed, and therefore such card must be of considerable length to admit of double indexing, and that, in the present patent, No. 623,857, he can use cards shorter than any that would be practical with cards having twin tabs of the kind shown in his other patent, yet the prior art, against which we must view this patent, is not that of Williams' other patent, but as disclosed in the Gunn patent; and this distinction of using a shorter card is not applicable to avoid anticipation by Gunn. We think there is no more invention in making the bottom of the card similar to the top, and reversing it, than there would be in putting a new card in its place.

We agree with the contention of the defendant's counsel that this is a mere duplication, a repetition of the Gunn series on the bottom or sides, and introduces nothing novel or patentable. We do not lose sight of the fact that the color differentiation is used to indicate the fact of reversal. Color indications for various purposes are shown in the Gunn patent, and we do not think that this simple device of a reversal signal entitles Williams to cover by this patent the elaborate system of signals which can be produced by the use of

various colored tabs brought into successive positions by the turning of the card.

Claim 5 was intended to cover the construction of corner tabs of greater projection than the intermediate tabs in order to protect the intermediate tabs. This claim must be regarded simply as for a mechanical device for protecting the index tabs, by providing legs to carry the weight of the cards, or projections as a guard against abrasion or injury. A similar result is attained by the use of wooden strips to elevate the tabs. This is shown in Fig. 4 of patent No. 623,857. While it is doubtless useful, in a reversible card, to have the card itself carry the means for protecting the tabs, and while such a construction of the cards enables them to be slipped into an ordinary box without further provision for protecting them, we agree with the conclusion of the learned Circuit Judge that this does not amount to a patentable invention.

We therefore agree with the conclusion of the Circuit Court that patent No. 623,857 is void for want of invention. This brings us to the question whether the defendant infringes patent No. 624,597, which covers the group with the double index on the cards.

It is claimed by the complainant that its card ledger embodies both patents. Its cards as manufactured contain twin tabs, both upon the top and on the bottom. The defendant's cards are similar in structure. The first difference to be noted is that the defendant's card is reversed by turning it bottom up; the printing for the second page of the record on that card being upside down until the card is reversed. Upon reversal from top to bottom, the defendant's card, it is said, uses the twin tab arrangement of patent No. 623,857. This we have found to be a mere duplication of the Gunn system, and therefore open to the defendant to use.

The defendant, however, has upon both the top and the bottom edges of the card a second or additional tab, so that, whether the defendant's card is in its normal position or bottom side up or reversed end for end, it shows two tabs, and a group of the cards presents the same symmetrical arrangement of tabs as is shown in patent No. 624,597.

It is the contention of the defendant that in its device there is one set of tabs to produce consecutive indexing, and another set of tabs for signal purposes and for nothing else. In other words, the defendant contends that it does not use the two tabs on the top of the card for the purpose of substituting the index number in lateral reversal, but that it uses the additional tab to put into the series a tab of different color, and to indicate by this color, and not by an index numeral, a special fact.

The patentee says, however:

"It is obvious that the twin tab system of indexing is not confined to a decimal enumeration of the indices, but that the indexing may be by the days of the week, or the months, or by the letters of the alphabet—in fact, by any index character that may be suitable, according to the nature of the record which is to be kept."

While it was doubtless contemplated that, upon the lateral reversal of a card having twin index tabs on its upper edge, the second index tab should bring a numeral of different color in place of the original tab, we think it apparent that the inventor contemplated the use of any character for the substituted tab that might be suitable. His novel mechanical arrangement permits of the preservation of the numerical order upon one series of tabs, and also of the giving of a signal by color change in the other series of tabs. The utility of these twin index tabs for lateral reversal, and the value of a double series of tabs on the same edge, are demonstrated by practical use.

We do not think the patent can be evaded upon the ground that the defendant uses the backs of the tabs in a somewhat different way from that of the complainant. The defendant's cards are in structure substantially the same as complainant's. While the defendant is doubtless at liberty to use twin tabs on opposite edges for the purposes of reversal, we do not think the defendant is entitled to use twin tabs upon the same edge in such manner as to secure the advantage of the double series of tabs of the complainant. We are of the opinion that claims 1 and 2 of patent No. 624,597 are valid and are infringed by the defendant. As we are of the opinion that the patentable novelty is only in the group of laterally reversible twin tab cards, claims 3 and 4 for a single reversible index card must be held invalid as not disclosing a patentable invention.

The judgment of the Circuit Court is reversed as to claims 1 and 2 of patent No. 624,597, and is affirmed as to claims 3 and 4 of said patent and as to patent No. 623,857; and the case is remanded to that court for further proceedings not inconsistent with this opinion; and neither party recovers costs in this court.

NATIONAL CASH REGISTER CO. v. GROBET et al.

(Circuit Court, S. D. New York. September 26, 1906.)

PATENTS—INFRINGEMENT—RECONSTRUCTION OF PATENTED MACHINE.

Complainant manufactured and sold without restriction two styles of patented cash registers, numbered, respectively, 78 and 79. The two were alike, except that No. 79 contained an additional printing device, which, in combination with the other parts, was covered by a separate patent. Defendants, who were repairers of cash registers and dealers in second-hand machines, becoming the owners of one of each style of machine, removed from the No. 79 the printing device, which was its distinctive feature, and attached it to the No. 78, without the addition of any new parts, making in effect a No. 79 machine. *Held*, that such action was not an infringement of the patent covering such printing attachment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 397.]

In Equity. On motion for preliminary injunction.

Kerr, Page & Cooper and Mr. Hayward, for complainant.
Samuel O. Edmonds, for defendant.

HOUGH, District Judge. The complainant is the owner of patent No. 483,511, issued on September 27, 1902, to one Cook, and covering "a printing attachment" for cash registers and indicators intended to print "both detached checks and a permanent record." Apparently before, and certainly since, Cook's invention cash registers have been put on the market by the complainant, producing, when properly actuated, a check bearing printed details of the transaction in respect of which information is wanted. Preservation of the checks produces a business record. Cook's invention secures successive impressions of the type, one upon the check, which on receiving its legend is ejected from the machine, and a second impression on a continuous roll of paper, which, by the same force that causes the printing upon it, is made to unwind before the type, and after receiving the imprint previously given to the check is rewound upon a cylinder, from which it may be at any time removed, thus giving to the owner of the machine a list or record of every check emitted therefrom, and therefore of every transaction had, since the next previous removal of the record roll. The machine which produces only checks is covered by various patents other than Cook's, and that which also keeps the "permanent record" of checks produced is covered by the same patents, and by Cook's patent also. The style of register which does not embody Cook's patent is designated by the complainant as its "No. 78," while that which does contain Cook's patented machinery is known as "No. 79," and sells for a considerably higher price. This suit is based on Cook's patent, and in the usual form alleges an infringement thereof by the defendants, in respect of which a preliminary injunction is asked.

It is obvious that the No. 79 machine performs every function that does the No. 78; but gives in addition the permanent record, and gives this added product solely by the added machinery of Cook's invention. The defendants are expert machinists, who repair cash registers and other intricate machinery, and are also dealers in second-hand registers. They aver that, having an old No. 79 machine lawfully in their posses-

sion, they detached therefrom Cook's patented device, and affixed the same to an old No. 78 machine, also lawfully in their possession, thereby producing what may be fairly described as a "second-hand No. 79." This allegation is substantially admitted by the complainant's counsel, who declares "that the defendants have added to the old 78 machine the precise invention, no more, no less, that is stated in the patent in suit," and who does not deny that the machinery was taken by the defendants from something once duly and unreservedly sold by the complainant. The view hereinafter taken of this matter renders it unnecessary to consider any point raised in argument, other than the question whether the above admitted facts constitute infringement. It will therefore be assumed (but not decided) that the patent in suit is valid, and that the complainant is neither guilty of laches nor debarred from enforcing its rights herein by any want of equity in itself.

In Morrin v. Robt. White Engineering Works (C. C.) 138 Fed. 81, the learned court endeavored to digest the law as set forth in the reported cases regarding the repair, reconstruction, or change of patented articles unreservedly sold by the patentee. It is there said that the "attempted generalization" was "probably imperfect," and, in the sense that human foresight cannot foretell what human ingenuity will devise, I find that to be the case; for exactly as presented, this cause must be regarded as one of first impression. It is obvious that the defendants' acts have deprived the complainant of profits, by prolonging the useful life of Cook's patented product, and delaying the sale of a new No. 79 machine; and it is equally obvious that the defendants, unless scrupulously regardful of a patentee's rights, must be frequently tempted to the apparently easy act of making a few new wheels or cams, to render more successful the transfer of the patented adjuncts from a No. 79 to a No. 78. But this case is left with the court, without any doubt cast upon the defendants' assertion that in making the change complained of "no parts" were used manufactured "by any other concern save the National Cash Register Company." Taking, therefore, the above statement as true, it seems to me clear that the defendants have neither repaired, reconstructed, nor replaced any patented article, nor any material part of such article.

The test of lawful repairing is that the "identity of the machine" must be retained (Gottfried v. Brewing Co. [C. C.] 8 Fed. 322), provided that in executing such repairs a separately patented part be not replaced by one not made under the authority of the patentee (Singer Mfg. Co. v. Springfield Foundry Co. [C. C.] 34 Fed. 395), and when the machine is "practically worn out" repair cannot extend to reconstruction—the owner must "cast it aside and buy a new one from the patentee." Shickle, etc., Co. v. St. Louis, etc., Co., 77 Fed. 739, 23 C. C. A. 433. These are, I think, illustrative cases, and the defendants' acts are not obnoxious to their doctrine. National Phono. Co. v. Fletcher (C. C.) 117 Fed. 149, presented a procedure as new when brought to the court's attention as these defendants' operations seem to me. In that case the defendant claimed:

"The right to gather up all the complainant's output, recast the same, subtract what he will, add his own parts, good or bad, and put it afloat again as

the patented product simply because he used some of the original parts, each in itself unchanged."

The court there found that this might destroy the merit of the patented article, in substituting something of the defendant's, and therefore enjoined the practice. Here, however, these defendants have added no parts of their own, have used only the defendants' products, and are not obnoxious to the charge of substituting anything for the complainant's genuine article; for, indeed, the only difference between the machine complained of and any similar machine in complainant's factory is that the former was not assembled by the complainant's workmen.

The real and only question here presented is whether the complainant as a consequence or part of its rights as patentee is solely entitled to put together the "printing attachment" of Cook and the other patented contrivances common to the No. 78 and No. 79 machines, and solely to vend the resultant combination. It is not denied that the owner of a patented article freed from the lawful monopoly by an unrestricted sale may "improve [the same] as he pleases in the same manner as if dealing with property of any other kind." Chaffee v. Belting Co., 22 How. 217, 16 L. Ed. 240. Nor that one licensed to use the whole of a machine "does not become an infringer because he uses a part only." Young v. Foerster (C. C.) 37 Fed. 202. The sale or use of a duly patented element, in combination with an unpatented, unpatentable, or otherwise free element, is permissible. Morgan Envelope Co. v. Albany Paper Co., 152 U. S., at page 433, 14 Sup. Ct. 627, 38 L. Ed. 500; George Frost Co. v. Kora Co. (C. C.) 136 Fed. 487 (affirmed 140 Fed. 987, 71 C. C. A. 19). Applying these considerations to the case in hand, I see no difference between what the defendants have done and what they might have done had complainant separately sold all the new parts requisite to the composition of No. 79 machines, at prices which enabled competent machinists to assemble them at a profit. If they continue to conduct this business honestly, their field is limited, but in this instance they absolutely owned enough of complainant's output, without adding anything of theirs but mechanical skill, to produce a machine which as much belonged to them as did the component parts constituting it.

I am not unmindful that the completed machine became the property of one Késsler, but in legal intendment the machine was the defendants while they performed the acts complained of. It is quite true, as urged at the argument, that some of the language in the Cotton Tie Case (106 U. S. 89, 1 Sup. Ct. 52, 27 L. Ed. 79) may be taken as limiting the right of any person to use again a patented article when the original construction as designed by the patentee has come to an end. But that case, as explained in Morgan Envelope Co. v. Albany Paper Co., supra, must be understood to rest entirely upon the effect given to the limited license under which patented cotton ties were sold. I do not think it applicable here. These defendants have changed the style number on the machine to which they have added their specimen of Cook's invention, by covering the figures "78" in the case front with a metal plate bearing the figures "79." Of course, this

machine is not complainant's style "79." If they have the exclusive right to the use of that number as applied to cash registers, such right does not rest on the patent law. Its use by defendants may be unfair competition, but it is not infringement. Geo. Frost Co. v. Kora Co., supra.

The application for preliminary injunction is denied.

RUSSELL v. WINCHESTER REPEATING ARMS CO.

(Circuit Court, D. Connecticut. November 2, 1906.)

No. 979.

1. PATENTS—INFRINGEMENT—COMBINATIONS.

A combination patent is not infringed by a device which is not only structurally different, but does not perform by reason of its combination various functions which are inherent necessities of the patented combination and have been specifically pointed out in the specification.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 382–389.]

2. SAME—MAGAZINE GUN.

The Russell patent No. 501,367, for a magazine gun, claims 4, 8, and 29, construed, and, as limited by the prior art, their language, and the proceedings in the patent office, *held* not infringed.

In Equity. On final hearing.

Watrous & Day and James H. Hayden, for complainant.
George D. Seymour, for defendant.
Francis H. Parker, U. S. Dist. Atty.

PLATT, District Judge. This is a bill in equity alleging infringement of United States letters patent No. 501,367, dated July 11, 1893, for improvements in magazine guns. Only three claims are now in issue, and the usual demand for an injunction and accounting follows. Complainant's invention has never been embodied in a practical working form. That fact is not decisive against him, but it compels the court to carefully scrutinize his specifications and claims, and to so restrict his monopoly that it shall not be extended an iota beyond what he has accurately and clearly disclosed. He made his own bed, and he must occupy it gracefully. The exhibits have had a checkered career, but it is hoped that those remaining will enable the trier to deal justly between the parties.

To find the disclosure and what is thereby covered by the grant, we go naturally to the arena in which the contract was, step by step, brought into form, beginning with the application and studying its career until finally reduced to concreteness in the granted patent. The claims finally left at issue, after a struggle which began with 4 patents and 91 claims, are 4, 8, and 29 of letters patent No. 501,367:

"(4) In a fire arm the bolt, the firing pin having a projection, the brace pivotally connected to the bolt, the handle connected to the brace and having a recess therein, in combination with the receiver, whereby when the handle is swung toward the bolt the projection on the pin engages said handle and holds the handle into proximity with the bolt, all substantially as described."

"(8) In a magazine gun, the magazine having a passage through which a cartridge package case may pass without obstruction, and a detent in the line of movement of cartridges in said case, in combination with an open-ended cartridge package case constructed to pass directly through the magazine leaving the cartridges therein, substantially as described."

"(29) In a magazine gun, the magazine having a passage through which a cartridge package case may pass without obstruction, and a detent in the line of movement of cartridges in said case, in combination with a cartridge package case constructed to pass through the magazine, and having a yielding catch for the cartridges, whereby the cartridges remain in the magazine when the package case is passed therethrough, substantially as described."

These are the siftings from an earlier voluntary reduction to 11 claims out of the 37, which attempt to cover the disclosures of this patent. They represent the possibilities which have persisted in the minds of the inventor and his expert assistants. On general principles one must be inclined to doubt the probability that infringement will be found, and this is especially true when it appears that the alleged infringing mechanism is constructed in exact accordance with the disclosures found in the patents to J. P. Lee, Nos. 547,583, 522,603, 506,322, and 506,319. To overcome the presumption arising from these grants a very clear case ought to be presented by the complainant.

Let us see what kind of case has been made out. For convenience we will first look at claim 4, which is the only breach mechanism claim at issue. It is conceded by the complainant that all the elements of this combination claim are old, and that, if they are to be construed literally, there is no infringement. To be a trifle more specific, it is conceded that it was old in rotary bolt guns to use the firing-pin spring to hold the handle rigid in its bolt operating positions, and in straight pull guns to hold a pivotal bolt handle rigid with respect to the bolt by a spring. The only semblance of novelty would be the using of the firing-pin spring in a straight pull gun to produce the rigidity. The claim is silent in that respect, and the patentee does not talk about it in the specifications. He knew how the Patent Office would have been likely to meet a suggestion of such novelty, and he naturally told us about other things which the combination would do and which he thought to be patentable.

The defendant insists that, if all the elements of the claim are old, there is no room for patentability, unless we find a new and useful result proceeding from the coaction of all the elements. The results are, the defendant contends: (1) Taking care of the brace by using the handle as a lever to raise and lower it, so that it may not jam or wedge when the bolt is moved back and forth. (2) Engagement of the handle directly with the bolt, so as to take its forward thrust off the brace and thereby relieve the strain on the pivot of the brace. Also that the brace of claim 4 must have a recoil-taking function, and that it must really be a brace, with the necessary and characteristic functions of a brace.

I cannot find in the specifications or claims any suggestion that holding the handle in rigid connection with the bolt was novel and represented the essence of the invention. On the contrary, it appears very clearly that the handle shall be held "into proximity with the

bolt," and those words of their own vigor preclude the idea of rigidity. The law is settled that the combination of an alleged infringing device is not that of the patent because it will do the same work in one of the several operations which it is designed to effect in substantially the same way, and it does not infringe when it is not only structurally different, but performs the other operations in a substantially different way. Is not the complainant in worse plight when the alleged infringing device is not only structurally different, but does not perform by reason of its combination various functions which are inherent necessities of the patented combination, and have been specifically pointed out in the specifications? In short, the "brace" of the disclosure cannot be found in defendant's construction.

Let me add an extra word or two bearing upon that proposition. In the specifications (lines 70–78) the patentee says:

"The handle piece is connected to the brace by a pin, 14, in the brace entering a groove in the handle, or by other connection which permits a free longitudinal movement of the handle relatively to the recess in the brace."

Nothing but a locking brace of that description is disclosed in the specifications, and in preparing claims to meet the disclosure such a locking brace is, in one way or another, always specifically mentioned, except in claim 4. There the word locking is not found, and for that reason the complainant's experts are able to build up the ingenious theory which permits them to find infringement.

There is no suggestion in the patent of a brace which does not lock. We can hardly expect to find a pioneer claim in a patent based upon a function which is not mentioned either in specification or claim. It is certainly asking too much to demand such a construction of an isolated claim in a patent which confessedly has added nothing of practical commercial advantage to the world's knowledge. The "brace" had many functions, among which may be instantly discovered anti-friction and wedging, taking the recoil thrusts, and protecting the brace pivot. These functions are not present in that portion of defendant's actuator which the complainant insists must be called the brace, and which he separates from the handle by some vague, intangible, imaginary line, and which, thinking that he has found, he wishes to endow with a function which, if it were the only one in his patented combination, might give him the chance to argue with some plausibility that the defendant invades the territory preoccupied by claim 4.

Complainant's Exhibit Model No. 3, prepared under complainant's direction, would seem to settle the question of fact as to whether the handle and brace of the patent in suit can be made integral and still perform the suggested functions of claim 4. They are certainly not integral in the exhibit, and it is not conceivable that complainant would have overlooked such an opportunity to demonstrate the feasibility of making them so. Claim 4 is not infringed.

Claim 8, above set forth, stands at the head of the numerous claims which were framed to cover the patentee's disclosure of what he had done to improve the method of feeding cartridges to the magazine and the construction of the magazine. It omits one element found in the

combination of claim 29, and therefore, if there is no infringement here, no time need be wasted on the latter claim. Its language seems plain and well adapted to cover a combination which expresses a definite inventive thought. It apparently states a combination of mechanical elements in a magazine gun which will enable the user to load the magazine in a better way than had been known before. As we study the disclosure we become convinced that the inventor's concept was like this: One requires a magazine with a passage through which a cartridge package case holding several cartridges can easily and unobstructedly pass, leaving the cartridges in the magazine ready for service. The cartridges, of course, cannot pass, because an obstruction appears in the line of their movement, and the cartridge package case cannot go through that portion of the magazine in which the cartridges are detained. Obviously the passage referred to must be found in the unobstructed portion. The only unobstructed portion is that made free for the desired purpose by cutting away the lower left-hand corner of the magazine.

To be sure about the contract, however, it is right to study with great care what the patentee says in his application, and what he has said about his application while seeking his grant. We find him saying in the patent in suit:

"My purpose is to feed a packing case filled with cartridges into the magazine, and pass the case directly through the magazine, leaving the cartridges behind in the magazine. It is common, as in the Mannlicher gun, to put a cartridge package in a magazine, and permit the empty case to be withdrawn from the magazine after the cartridges have been fired. But this is objectionable, since the cases in which cartridges are packed should be light, so as not to load the soldier with needless weight. Being made of thin metal usually, the cases are liable to indentation, and in such case the cartridges become clogged by the packing case against the action of the magazine spring, and the gun is temporarily disabled. There are other cartridge packages which are put wholly or partly into the magazine or applied to the mouth thereof, and the cartridges are forced from the case into the magazine, when the cases are withdrawn from the loading end of the magazine. To avoid this reversal of movement I have arranged to pass the packing cases right through the magazine, although in the magazine of the present invention the former course may still be pursued in filling the magazine."

What the patentee, who knew the art, had in mind, was to get rid of the clip before firing the gun, and so provide for a cheap clip that could be thrown away, and which could not endanger the gun by remaining in it during the whole or a part of its actual firing use. He seems to have admitted in cross-examination that his change of construction from the Mannlicher gun consisted in making the magazine open at the bottom, and also at the sides, so that the clip could be taken out forcibly, and this use was emphasized by roughening the end of the clip, so that a better grip could be taken upon it by the hand. The patentee intended to get rid of the clip in advance and to avoid the "reversal of movement" then in vogue by forcibly passing the clip right through the magazine.

It will be understood that, in practicing the reversal of movement method, the cartridge clip was stuck into the magazine from above by hand, the cartridges stripped out as peas are stripped from a pod, and the clip then pulled up and out at the top. To improve upon this

way of doing, he cut away the lower corner and formed a passage in the side wall of the magazine to let the clip through, and a vertical slot in the side wall, so that the hand could easily get at the lower end and pull it away, leaving the cartridges behind. The patentee wanted a method claim when he began the hunt for the grant which the patent in suit covers. He called that one 8, and it was as follows:

"The method of loading a magazine, which consists in passing an open ended cartridge packing case into the magazine, retaining the cartridges in the magazine, and withdrawing the packing case by a continuation of the movement of inserting the same, thus passing the case through the magazine."

The examiner required a division, and the patentee resisted. In his petition to the commissioner we find, inter alia, these things:

"Applicant claims a peculiar magazine gun, and a mode of manipulating it. The gun is made with a passage through it, and the cartridges are fed into the gun in a clip or packing case, when, by carrying the hand to the reverse side of the gun, the clip is drawn through, leaving the cartridges in the gun.

"The eighth claim in the application is as follows:

" 'The method of loading a magazine, which consists in passing an open ended cartridge packing case into the magazine, retaining the cartridges in the magazine, and withdrawing the packing case by a continuation of the movement of inserting the same, thus passing the case through the magazine.'

"Other claims in the case are based on the structure by which it is made possible to pass the clip or feed case directly through, leaving the cartridges behind, as, for instance, claims 9, 13, and 14, which claims relate to the structure of the gun frame; and claims 17 and 18 relate to the combination of the feed case with the gun."

It appears, therefore, that at the very outset his inventive thought was limited to a method of forcibly passing a cartridge case through a fixed magazine by a substantially continuous movement of the hand, so as to get rid of it and leave the cartridge behind. If that was his method, it must follow that the means which he conceived must have been adapted to exploit his method, and nothing else. On page 30 he says:

"In box magazine guns there are several methods of loading. One method is to apply a full box or magazine at the bottom of the gun, and feed from this box into the gun, removing the box or case by hand after it is exhausted. Another plan is to apply the full clip or packing case at the top of the gun, where, as in the pending case, it is held up by the follower until all the cartridges are exhausted, when it drops out by gravity. The present invention is an improvement on this latter plan. The desirability of the improvement arises from the fact that the clip or casing does not always drop out when empty, and the cartridges may become clogged in the clip, thus disabling the gun."

"The construction of the gun and feed case are but slightly changed from the old form last mentioned, but the advantage gained is considerable, since the clip or case can be passed right through the frame with almost a continuous movement, and is then thrown away."

And so it appears that the patentee had in his mind a clear distinction between a gun in which the clip is forcibly removed at the time of charging and one in which it is permitted to remain in the magazine and drop out by gravity.

One more glimpse at the patentee's mind may be had on page 48, when, in reply to an objection to certain claims because there was no mechanical connection between the feed case and the clip, he says:

"As to the lack of combination between the feed case and the clip, for what purpose was the magazine cut away, but to permit the entry of the fingers to enter and grasp the clip? For what purpose was the clip roughened and strengthened, except to permit this grasp, while the clip is in the position in the magazine at which the fingers find it when entering the recesses? The structures have a peculiar form, for a single purpose, namely, the convenient withdrawal of the clip."

The appeal resulted in his losing his method claim. The board in their decision used this language:

"It appears that the applicant has merely made a magazine gun which is loaded by putting the cartridge package into one end of the magazine and pulling it out."

Thereupon the patentee canceled the disputed method claim 8, and offered in lieu thereof the claim 8 now at issue. In support of it he refers to the guns of the prior art which the examiner had cited, and says, on page 61: "Not one of these permits the package to pass through the magazine and leave the cartridge behind." This was the last expression of his inventive thought prior to the grant. It helped to push claim 8 past the doubts of the examiner. He must not repudiate it now. Any expansion of claim 8 beyond what it then meant to the patentee would amount to a reissue of the patent by the court with "passage" and "directly," and the mandatory clause about passing the clip "through the magazine leaving the cartridge therein," eliminated. It is not for us to inquire whether he was forced by the art to so limit his claim. The fact remains that he did so limit it, and the rights of the public demand that he shall keep to his bargain.

This matter has been more thoughtfully considered than might perhaps appear from the rather broad way in which this opinion treats it. There is no end to the good reasons which might be written out in support of the final conclusion which has been reached. One look at defendant's clip shows that, under the construction of claim 8 which seems to be forced upon it, there can be no shadow of reason for claiming infringement, and so it would be wasteful to analyze its construction. Claim 8 is not infringed. It would be worse than wasteful to multiply words respecting claim 29. I am satisfied that there is no infringement there.

Let the bill be dismissed, with costs.

GOSS PRINTING PRESS CO. v. SCOTT.

(Circuit Court, D. New Jersey. February 13, 1906.)

PATENTS—SUITS FOR INFRINGEMENT—ACCOUNTING BEFORE MASTER.

Semble that, on a reference for an accounting by defendant under a decree finding infringement of a patent, the defendant is the only "party accounting" within the meaning of equity rule 79, and complainant cannot be required to bring in an account as therein provided.

In Equity. On accounting before a master.

See 134 Fed. 880.

C. E. Pickard, for complainant.

Benjamin F. Lee and James G. K. Lee, for defendant.

CROSS, District Judge. A decree has been entered in the above cause declaring that the defendant has infringed a certain patent owned by the complainant for printing presses, and the ordinary reference was thereupon made to a master to ascertain the complainant's damages and the profits which the defendant has realized from said infringement. This accounting has proceeded for some time, and the complainant has rested its case without claiming damages. They were waived upon the argument, if indeed such waiver does not appear in the case upon the record before the master. The motion now before the court is that the complainant be required to present an account on its part.

The claim is made that proper practice requires the complainant to take and state an account in the form of debtor and creditor, as required by equity rule 79, and thereupon the defendant will have a right to disprove or surcharge the same. The complainant has taken proofs, which, it must be concluded, were satisfactory to it, since it has rested its case, showing the profits made by the defendant from the use of the complainant's patent. Nevertheless, upon demand made by defendant's counsel, it furnished a statement or claim, which subsequently upon further demand was particularized, in order that the defendant might know the extent and particulars of its claim. Counsel of complainant did this, as he says, ex gratia. The master having declined to further yield to the defendant's request, the matter is now before the court upon an application for an order directing the complainant to amplify and particularize and state in debit and credit form his said account. The defendant relies upon rule 79, but I think that rule has no applicability. It refers expressly to "parties accounting," and the complainant is not a party accounting. The defendant is the only party directed to account, and the only party accounting within the meaning of that rule. I have not been referred to any case holding that, under the circumstances here disclosed, the complainant is obliged to furnish to the defendant a claim, as it was called under the old chancery practice.

It is unnecessary, however, to determine that question upon this application, since I think the complainant has done all that can properly be required of it in any event. It makes no difference whether what he did was done compulsorily or by favor. It has been done, and is a part of the record; and it now remains for the defendant to admit the claim, or disprove or surcharge it, and, unless admitted, he should proceed thereto at once.

GOSS PRINTING PRESS CO. v. SCOTT.

(Circuit Court, D. New Jersey. April 5, 1906.)

WITNESSES — CROSS-EXAMINATION—PATENTS — SUIT FOR INFRINGEMENT — ACCOUNTING BEFORE MASTER.

The defendant, on an accounting before a master for infringement of a patent, is not entitled to cross-examine complainant's counsel on a so-called "statement" filed by him at the close of complainant's evidence, and being merely a summary prepared from the evidence taken which does not constitute original evidence.

In Equity. On accounting before a master.
See 134 Fed. 880.

J. J. Kennedy and A. H. Adams, for complainant.
B. F. Lee and J. G. K. Lee, for defendant.

CROSS, District Judge. Counsel for the complainant has moved the court to strike out certain testimony of C. E. Pickard, one of complainant's counsel, heretofore taken by the defendant on its behalf, and to discharge said Pickard from further attendance before the master as a witness. The examination of the witness has been directed exclusively to certain alleged facts and figures appearing in a paper called a "statement," which the complainant at the close of its evidence placed on the record, and which appears from the testimony, and from statements of counsel on the argument, to have been prepared entirely from evidence taken by the complainant on an accounting to ascertain profits made by the defendant, pursuant to a decree in this cause, adjudging the defendant to have infringed the complainant's patent.

On a previous motion, I decided that, in furnishing this statement, counsel for the complainant had done all that the defendant could expect. This ruling was made upon a motion by the defendant to require the complainant to take and state an account in the form of debtor and creditor under equity rule 79. I did not then, and do not now, consider that statement as primary evidence, although I did say, obiter, that it might operate as an estoppel upon the complainant. It was useful to guide the defendant, and the court; but it did not purport to be, and the testimony of Pickard shows clearly, that it is not original evidence. It was a summary of what counsel claimed the evidence of complainant disclosed. As counsel of complainant, the witness does not claim to be an expert accountant or otherwise, and has stated over and over again that he has no personal knowledge of the figures shown by the statement; but that they are collated from the evidence in the cause, which is as open to the defendant as to the complainant. The examination of the witness has already proceeded for several days, and at very considerable expense to the parties and inconvenience to the witness, notwithstanding which the witness' examination as to the statement has covered only a few, 5 or 6, of the 40 machines mentioned therein. Inasmuch as the testimony is clearly hearsay, and cannot ultimately be considered by the court, except so far as it may be supported by the testimony upon which it is based, and as its continuance would involve a great and useless expenditure of time and money, I deem it my duty to stop the further examination of the witness with reference to the statement at this point, and to strike from the record the testimony he has already given; and, further, as it is not claimed that the witness has substantive knowledge as to any other matter pertinent to the accounting, he will be discharged from further attendance before the master.

The witness has verified the statement upon information and belief. If defendant desires to move to suppress this affidavit, although I do not regard it as at all probative, he will be heard thereon.

WHITING-SAFETY CATCH CO. v. WESTERN WHEELED SCRAPER CO. et al.

(Circuit Court, N. D. Illinois, E. D. May 23, 1905.)

No. 27,256.

PATENTS—SUIT FOR INFRINGEMENT—PARTIES.

A corporation and an individual may be joined as defendants in a suit for infringement of a patent, where it is alleged that the individual defendant owns practically all of the stock of the corporation and personally directs its affairs, and that they conspired together to commit the acts of infringement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 459, 471.]

In Equity. On demurrer to bill.

W. A. Panneck and Francis A. Hopkins, for complainant.
Offield, Towle & Linthicum, for defendants.

KOHLSAAT, Circuit Judge. The cause comes before the court on demurrer to complainant's bill. The bill joins the defendant corporation with its principal stockholder and manager, Smith, in a proceeding for infringement and accounting. It alleges (clause 4) that the defendants, conspiring to injure complainant and deprive it of the profits arising from certain letters patent, jointly and severally unlawfully used and sold articles covered by the patent in suit; that (4a) Smith is the owner of all but a mere nominal amount of the stock of defendant corporation and directs its affairs, and is personally active in directing the infringement complained of, and himself commits the infringement.

The main ground of demurrer is that there is a misjoinder of parties defendant, in that it is attempted to join an officer of the defendant corporation with the corporation. In the case of Glucose Sugar Refining Co. v. St. Louis Syrup & Preserving Co. (C. C.) 135 Fed. 540, it is laid down that an official of a solvent corporation cannot be joined with the corporation in a suit for infringement and accounting, merely because as such he directed the business of the corporation. See, also, cases therein cited. In Hutter v. De Quincy Bottle Stopper Co. et al., 128 Fed. 283, 62 C. C. A. 652, Judge Coxe, speaking for the Circuit Court of Appeals for the Second Circuit, says that, in the absence of proof establishing the official's infringement by himself as an individual, to join him is unwarrantable and reprehensible. "An injunction," says the court, "against the corporation, restrains all its officers, agents, and servants, and there is little justification for making these persons defendants, except in rare instances, where it is shown that they have infringed the patent as individuals or have personally directed infringement." In National Cash Register Co. v. Leland, 94 Fed. 502, 37 C. C. A. 372, a majority of the court, speaking by Judge Lowell, hold that a director who, by his vote or otherwise, specifically directed the infringement, may be joined with the corporation in a suit brought to recover damages for such infringement. To the same effect

are Robinson on Patents, § 912; Ferguson v. Earl of Kinnoull, 9 Clark & F. 251.

Applying the rule to the case at bar, the facts would seem to bring it squarely within the exception named in Hutter v. De Quincy Bottle Stopper Co., supra; for here it is alleged that the defendants, conspiring together, did the acts complained of and that Smith, being in full control of the corporation himself, through it, did infringe. This is a liberal statement of the substance of the bill, for it comes very near alleging that Smith alone committed the act of infringement. The matter is one fairly to be considered after the evidence is in, and the court should not be called upon to dispose of it upon demurrer, in view of the somewhat mixed, but still sufficient, allegations of the bill.

The demurrer is overruled.

THE NEW YORK PHONOGRAPH CO. v. EDISON et al.

(Circuit Court, S. D. New York. September 24, 1906.)

ATTORNEY AND CLIENT—MOTION FOR DISCHARGE OF SOLICITOR—BREACH OF CONTRACT.

The question whether a solicitor in a pending suit has been guilty of a breach of his contract of employment will not be determined on a motion for his summary discharge, where the facts are in dispute, but will be left for decision in a plenary action for the breach, and a substitution will be permitted only on the giving of security to protect his rights, should he prevail in such action.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, §§ 113–115.]

On Motion for Discharge of Solicitor.

Max J. Kohler, for the motion.
Mr. Mellville, opposed.

LACOMBE, Circuit Judge. The motion summarily to discharge the solicitor for complainant on the ground of alleged breaches of his contract of employment is denied. The questions of fact raised on the papers are too numerous, too complicated, and too sharply controverted to be thus disposed of. Whether any one, who was a party directly or by privity to the contract of employment of solicitor and associate counsel, has broken such contract, is a matter to be determined by plenary action between the parties interested, in which action damages appropriate to the conclusion reached will be awarded, and proper consideration given to any sums of money which may have passed between parties down to the time when such judgment may be entered.

Complainant, however, should not be compelled to continue the employment while such controversy with the employés is in progress; but it must provide abundant security against possible loss. A mere preservation of lien on the ultimate recovery will not be sufficient, because the new solicitor and counsel may so mismanage the cause as to make the accounting barren of pecuniary results, which present solicitor and counsel might secure if they were allowed to proceed with it. Substitution will be granted upon these terms:

First. It shall be sent to a master to determine what compensation, on the basis of a quantum meruit, would be now due to solicitor and counsel, including disbursements. The expenses of such inquiry by the master to be borne by complainant.

Second. The sums so found to be earned shall be paid in cash, but only upon the payee giving sufficient security to repay the same, or any part thereof, should the judgment in a plenary suit against him, to be brought in 30 days, decree that by reason of any neglect or misconduct on his part complainant had suffered a loss properly chargeable against the amount of his earned services.

Third. If the payee elect not to give security, the money shall be deposited in court to await the result of such plenary suit.

Fourth. The lien provided for in the contract of employment shall remain in force against the proceeds of the litigation, so that, in the event of the court's holding that the employé committed no breach and that forcible substitution is a breach by the employer, such employé may be made whole for the loss sustained by being forced out of the further prosecution of a profitable litigation.

UNITED STATES v. GEORGE LUEDERS & CO.

(Circuit Court, S. D. New York. July 11, 1906.)

No. 4,082.

CUSTOMS DUTIES—CLASSIFICATION—BLOOD CHAR—CARBON—SIMILITUDE.

Blood charcoal a substance which, like bone char, is composed chiefly of carbon, and is used for decolorizing sugar, is not dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 97, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1625], as an article composed of carbon, but either under paragraph 10, Schedule A, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1627], as bone char by similitude, or at the similar rate provided in section 6, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], for unenumerated manufactured articles.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision below reversed the assessment of duty by the collector of customs at the port of New York, the action of the Board of General Appraisers therein being taken on the authority of a former ruling, G. A. 6,076, T. D. 26,508, which reads as follows:

Sharretts, General Appraiser. These protests are lodged against the assessment of duty at the rate of 35 per cent. ad valorem under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 97, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633], on certain merchandise invoiced as bone char and blood charcoal, respectively, which was classified by the collector as carbon and is alternatively claimed by the importers to be dutiable at the rate of 20 per cent. ad valorem under the provisions of section 6, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], or paragraph 10, Schedule A, § 1, of the present act, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1627]. We find from the testimony adduced at the hearings in the case that the said merchandise is not the ordinary bone char of commerce; it being made from the blood and not the bones of animals.

We further find that it is not commercial carbon. Analysis of the substance in dispute by comparison with genuine bone char gives the following results, namely:

	Blood Charcoal.	Bone char.
Carbon	65.39 per cent.	64.23 per cent.
Alumina	16.44	13.45
Water	14.80	14.00

In addition to which, and common to each, are small percentages of ferric oxide, silica, magnesia, and lime. It will thus be seen that the separation of bone char and blood charcoal into their constituent elements establishes the fact that they are very similar, if not identical; and, as shown by the record, both are suitable for use in decolorizing sugar.

In addition to blood charcoal and bone char, there are many allotropic forms of carbon, such as the diamond, graphite, wood charcoal, and coal; none of which is classified in trade as carbon. We are therefore of the opinion that the collector's return was erroneous, and reverse his decision in each case, the Board holding the merchandise to be a manufactured article not enumerated in the act; and, although we incline to the opinion that, inasmuch as blood charcoal is similar in material, quality, texture, and intended purpose of use, to bone char, by similitude, it is dutiable under paragraph 10, without deciding specifically whether the merchandise falls under section 6 or paragraph 10, we sustain the claim in the protest that it is dutiable under one or the other of these provisions of the tariff act, at 20 per cent. ad valorem.

Charles Duane Baker, Asst. U. S. Atty.

Hatch & Clute (J. Stuart Tompkins, of counsel), for importers.

WHEELER, District Judge. On opinion of Board, decision affirmed.

WEISS et al. v. HAIGHT & FREESE CO.

(Circuit Court, D. Massachusetts. July 13, 1906.)

No. 208.

1. EQUITY—MASTER'S REPORT—EVIDENCE.
   It is not necessary nor usual for a master to report all of the evidence taken before him, unless required by the order of reference.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 901.]

2. EVIDENCE—FRAUD BY CORPORATION—LETTERS OF OFFICERS.
   If the issue to be determined concerns the honesty or fraud of corporate dealing, letters written by those who control the corporation which describe and characterize its fraud may be given in evidence.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 916, 917.]

3. SAME—PROOF OF KNOWLEDGE OF PERSON DECEASED—STATEMENTS.
   Where knowledge, intention, or other mental state of a person deceased is a proper and material fact to be proved in a case, statements of such person in his lifetime, from which such knowledge, intention, or other mental state may reasonably be inferred, are admissible in evidence in an action by his personal representative.

4. CORPORATIONS—INSOLVENCY PROCEEDINGS BY CREDITOR—FRAUDULENT BUSINESS.
   Where a corporation represents to the public by advertisement and otherwise that it is doing the business of a legitimate stockbroker, while in fact it carries on merely the business of a bucket shop and makes no real purchases of stocks, using the money of its customers to carry on such business, and being itself insolvent while its officers convert its

property to their own use, a suit in equity will lie by a customer who has paid money to it without knowledge of its fraudulent character, in his own behalf and on behalf of others similarly situated, for the appointment of a receiver and for an accounting and distribution of its assets among its creditors.

In Equity. On exceptions to report of master.

May 8, 1905, the following bill in equity was filed by complainant, as administratrix of Charles Weiss, deceased:

To the Judges of the Circuit Court of the United States for the District of Massachusetts:

Anna L. H. Weiss, of Needham, in the county of Norfolk and commonwealth of Massachusetts, as she is the administratrix of the estate of Charles Weiss, late of said Needham, deceased, intestate, the plaintiff being a citizen of said commonwealth of Massachusetts, brings this, her bill, against Haight & Freese Company, a corporation incorporated under the laws of the state of New York, but having a usual place of business in Boston in the county of Suffolk and commonwealth of Massachusetts, having appointed the commissioner of corporations of said commonwealth its attorney for service of process.

And thereupon your orator complains and says that she brings this bill as a creditor of the said defendant on her own account and in behalf of all such other creditors as may choose to join herein. That your orator is informed and believes, and therefore alleges, that the defendant at the times hereinafter mentioned, and thereafter, has pretended to carry on the business of buying and selling stocks, bonds, commodities, and securities upon commission, and to execute orders for the purchase and sale of the same. That, with the purpose of deceiving and defrauding such persons as may be induced to deal with it, the defendant has organized offices to carry on such pretended business in Boston aforesaid, and in New York and Philadelphia, with other branch offices and connections elsewhere. That the said defendant, although authorized by its charter to buy and sell stocks, bonds, and securities upon commission, in reality executes no orders for the purchase or sale of the same, except when it becomes necessary to do so for the purpose of covering up and concealing the real nature of its business, which is in substance to accept all orders for the purchase and sale of any stocks, bonds, commodities, or securities which may be given to it at the market prices, and by inducing its customers to execute powers of attorney or other authority for the purchase and sale of the same, and by permitting customers to trade upon a very slight margin, to take advantage of market fluctuations in such a way that the account of each customer may be pretended and represented to have been sold out at a price showing a loss to such customer. That, in pursuance of the aforesaid fraudulent scheme the defendant charges its customers a commission for the pretended execution of their orders of purchase and a similar commission for pretended execution of orders of sale, and interest computed upon the difference between the amount paid by such customer as margins and the whole market value of the securities supposed to have been purchased as aforesaid, and upon fictitious loans and balances, so that the interest so charged amounts to a very large sum. That, for the purpose of carrying on the said pretended business, the defendant has a special form of contract with its customers, which is as follows:

"When stocks are purchased this order may be executed in any city or place, whether on any exchange through a member thereof and subject to its customs and rules, or by private purchase, as Haight & Freese Company may elect; and any other client of Haight & Freese Company may be the seller. But Haight & Freese Company is not to be obliged to disclose the name of any client in any event. The purchase may be made delivery on purchaser's demand. Haight & Freese Company may pledge for any amount the securities, when bought, mingled with the securities of other customers or of brokers themselves, and may loan any stock, giving bor-

rowers the right to sell and to return different certificates, and may, without any demand of or notice to me whatever, and on any exchange, or by private sale, close out all transactions on margin: (1) As to securities, whenever margin is less than one-half of one per cent. of the aggregate of the par value of all the securities being carried for me on margin, and (2) as to commodities whenever margin is exhausted. All orders to buy, hereafter or heretofore given, are to be considered as subject to the above unless otherwise expressly stipulated therein."

And when stocks are sold, as follows:

"This order may be executed in any city or place, either on any exchange through a member thereof and subject to its customs and rules, or by private sale, as Haight & Freese Company may elect, and any other client of Haight & Freese Company may be the buyer. But Haight & Freese Company is not to be obliged to disclose the name of any client in any event. Haight & Freese Company may, without any demand of or notice to me whatever, and on any exchange, or by private purchase, close out all transactions on margin: (1) As to securities, whenever margin is less than one-half of one per cent. of the aggregate of the par value of all the securities being carried by me on margin, and (2) as to commodities whenever margin is exhausted. All orders to sell, hereafter or heretofore given, are to be considered as subject to the above unless otherwise expressly stipulated therein."

That if the account of any customer dealing with said defendant is not closed out so as to show a loss, or if the result of the double and illegal commissions so charged, and interest charges as aforesaid, do not exceed any apparent profit made by such customer, he is induced to continue his trading until the account shows a loss, or until the same has been closed out for lack of sufficient margin; but in fact no business is transacted, and all transactions are entirely fictitious and fraudulent as against its customers.

That your orator is informed and believes, and therefore alleges that, in pursuance of the above-described fraudulent scheme and pretense, the defendant induced your orator's intestate, Charles Weiss, on or about the 2d day of September, 1902, to begin to give it orders for the purchase and sale of stocks and securities, and induced him to pay to it from time to time between the said 2d day of September, 1902, and the 31st day of January, 1905, various sums of money amounting in the aggregate to $5,380. That the said sums were paid by him to the defendant as margins against his account, and for commissions and interest charged as aforesaid. That the said Weiss was fraudulently induced by said defendant to believe that his orders for the purchase and sale of securities had been duly executed, and that his said transactions had resulted in large losses. That the said Weiss continued to deal with said defendant as aforesaid up to within a short time of his death, which occurred on the 17th day of February in the current year, 1905. That thereafter your orator, being the widow of the said Weiss, having been duly appointed administratrix of his estate, and having duly qualified as such administratrix, had an interview with one of the employés of said defendant with reference to the said account of her intestate, and the said defendant represented to your orator that there was due to her under said account only the sum of $160, as the alleged balance thereof, and falsely pretending and representing that that was the entire amount due to your orator, induced her to accept the same and sign a receipt therefor. That your orator was then ignorant of the fact that the defendant's transactions with her intestate under said account had been fictitious, and that no stocks or bonds had been purchased or sold thereunder; but she has since been informed, and now believes, and therefore alleges, that in fact no actual purchases or sales were made for her intestate under said account, and that the said account was wholly fraudulent and fictitious, and so manipulated as to show a loss of the money paid in as aforesaid. That the defendant now owes your orator the said sum of $5,380 less the said amount of $160 received by her as aforesaid, to wit, $5,220 with interest thereon.

That your orator is informed and believes, and therefore alleges, that many other persons besides her intestate have been deceived and defrauded in the same manner as above stated. That by means of large advertisements in the newspapers the public have been induced to believe that the defendant is engaged in legitimate business, whereas in fact said business is a mere swindling device known as a "bucket shop." That the defendant has made and is making large profits from its customers, which its officers and persons controlling its affairs constantly withdraw and convert to their own use. That the defendant has no capital, and keeps no regular books of account, but, in order to conceal the real nature of its business, has prepared and keeps false and fictitious books of account. That the defendant has a large number of creditors and has not sufficient assets to pay their claims, but is carrying on its business operations from day to day by means of the money received from customers dealing with it.

To the end, therefore, that the defendant may, if it can, show why your orator should not have the relief hereby prayed, and may, according to the best of its knowledge and belief, full, true, direct, and perfect answer make, but not upon oath, which is hereby waived, to the allegations herein contained; and, inasmuch as your orator has no adequate remedy at law, she prays:

(1) That a writ of injunction issue restraining the defendant, Haight & Freese Company, its officers, agents, and servants, from paying over or delivering any of the property in its hands or control to any person other than a receiver to be appointed by this honorable court as hereinafter prayed, and restraining and enjoining all other persons or corporations, and particularly all banks, trust companies, and safety deposit companies having in their possession or control any property belonging to said defendant, whether standing in its name or in the name of Charles H. Poor, Jr., manager, or William G. Conkling, or in the name of William H. Lillis, vice president or treasurer, or of one Beardsley, cashier, or in the name of any of the directors of said corporation, including one George G. Turner and Harvey Watson, from paying over or transferring the same to any person other than such receiver, or from permitting the defendant or either of said persons named, other than a receiver of this court, from removing the same; and particularly from allowing the contents of any safety deposit box standing in the name of the defendant or of any or either of said persons mentioned from being withdrawn, except by such receiver, until the further order of this court.

(2) That a proper and suitable person may be appointed to receive, collect, and take possession of all the property of said defendant, including all of its assets, choses in action, accounts and books of account, correspondence, papers, and memoranda, whether in the possession of said defendant, or of either of the persons above mentioned, or of any other person acting in the defendant's behalf, with authority to receive and hold the same as such receiver of this court, until further order of this court.

(3) That an account may be taken of the amount due to your orator, and of such other creditors as may join in this bill, and that such amounts as may be due upon an accounting, as aforesaid, may be ordered to be paid.

(4) That said defendant may be perpetually enjoined and restrained from carrying on the above-described fraudulent business and transactions, and its property may be distributed among its creditors, and that it may be ordered to be dissolved.

(5) That your orator may have such other and further relief in the premises as the nature of the case shall require and to your honors shall seem meet.

And may it please your honors to grant also unto your orator a writ of subpœna to be directed to said defendant Haight & Freese Company, commanding it to appear and make answer to the aforesaid bill of complaint, at a certain time, and to abide by the further order of the court.

After the appointment of a receiver and the filing of an answer and amended answer by defendant, the issues were referred to Marcus Morton, as master, who reported as follows:

In accordance with the order of reference, dated January 25, 1906, I have heard the parties and their counsel, have taken the testimony, and herewith report to the court the findings of fact and conclusions of law on the issues.

The plaintiff, as administratrix of the estate of her husband, Charles Weiss, brought the bill in suit in behalf of herself and all creditors of the defendant corporation to obtain the appointment of a receiver and an accounting.

Ervan E. Chesley, Gilbert R. Ellis, Oscar A. Ritzman, Frederick C. Rafter, Herbert F. Dowell, Peter N. Campbell, Charles R. Coombs, and William M. Silberstein were admitted by the court as parties plaintiff and were heard by the master.

George L. K. Loeser, Marius Berry, Adolph Kaufman, and Samuel Brimberg were also admitted and heard as plaintiffs, but their claims were subsequently withdrawn without prejudice.

The plaintiffs whose accounts were presented claimed to be entitled to recover the amount paid in by them to the defendant company as margins in certain stock transactions, on the ground that the defendant company fraudulently pretended to carry on and held itself out to the public as carrying on a legitimate stock brokerage business, and in pursuance thereof to actually execute orders given by customers for the sale and purchase of stocks and commodities, whereas it was in reality only a "bucket shop" so called, not actually executing customers' orders, but only pretending so to do.

It appeared that the defendant corporation was organized in 1900.

W. H. Lillis and George G. Turner owned practically all the stock, were the officers of the company, and with one Harvey Watson managed the business.

Branch offices were established in some 70 different places throughout the United States; the general method of carrying on the business being the same everywhere.

The defendant's place of business in Boston was at 85 State street. The company occupied the second floor of the building and several floors above. The rooms on the second floor were for customers and were fitted out with all the conveniences necessary to carry on a brokerage business and such as were used by all stockbrokers. There were stock boards and tickers, telephones and telegraph machines, telegraph operators and clerks, and "buy and sell" slips for customers' orders.

The defendant issued and distributed to the public a "Guide to Investors," containing notices from papers referring to them as "Bankers and Brokers," and also published from time to time market letters, in which they advertised themselves as buying and selling stock.

Customers, including all the plaintiffs, who ordered stock bought would receive a notice on a printed form that the stock had been bought. These notices, as also the order slips, contained a provision that the order could be executed on any exchange in any place by private purchase from any other client of the defendant or any one else, and also that the plaintiff could pledge securities mingled with the securities of other clients or its own, or loan such securities, giving the borrower the right to sell and to return other certificates, and also to close out the securities and commodities without notice to customers when the margin reached a certain minimum point.

Statements were also rendered by the company from time to time to customers, including the plaintiffs, in which it appeared that they were charged commissions upon transactions, interest upon the purchase cost of stocks, or commodities bought, and were allowed interest upon the balance in their favor. Dividends declared upon stock alleged to have been bought by defendant for customers and held as security were also credited on customers' accounts. Statements also indicated the stocks of which the customers were "long."

The orders when they were given to the telegraph operator on the second floor at 85 State street were telegraphed to the floor above, where there were other operators to receive the orders from downstairs and from other branch offices.

The orders were handed by the operator to a clerk, who would fill them by putting upon the order a price which he obtained from the stock board or tape. The clerk then signed upon the order the time when and the price at which it was filled, and this information was then telegraphed downstairs.

Among the books of the plaintiff there was found only one which showed that any stocks had been actually purchased, and that book contained relatively but a few transactions. No book or books were found by the receivers showing any loan transactions or deposit of collateral with banks or trusts companies or transactions between the defendant company and a member of any stock exchange. One book showed some transactions between the said Lillis and a firm of brokers named W. X. Fuller & Co., then members of the Boston Stock Exchange, which apparently was a company book, but the transactions were relatively few in number.

There was a Philadelphia wire in the offices, and some orders were apparently transmitted to a broker on the Consolidated Exchange of Philadelphia. There was nothing, however, in the books of the company to indicate how many orders were so executed, and no officer of the company appeared to testify as to such orders.

A card catalogue was kept indicating some few stock transactions.

The accountant for the receivers could not tell from an examination of the books whether or not the defendant company had on hand at any given time stock ordered to be purchased.

In view of the fact that the accounts of the company were carefully kept, the absence of such book or books was significant.

It also appeared that at the time that the receivers took possession there were on hand in the Boston office only about 110 certificates of stock, worth at that time about $13,000, and other certificates worth about $3,000 in the branch offices.

The court subsequently ordered the return of most of these to certain creditors.

None of the certificates which the books of the company indicated that the plaintiffs were "long of" were included in those so found.

The defendant company also used a form of release which is given in full hereafter to protect it against liability under the acts referred to therein and commonly designated as the "Bucket Shop" acts.

The plaintiff also put in evidence the books of the company and statements in the cashier's handwriting apparently made up from the books, checks and check books and account books used by persons claimed and proved to be officers or agents of the company, and the testimony of S. S. Fitzgerald, who was acting for the receivers in taking possession of the assets of the company in explanation of them.

The defendants duly excepted to this line of evidence.

The evidence of the method of conducting the business other than that indicated by the evidence of the books so conclusively established the nature of the business that I excluded from my consideration the somewhat complicated system of keeping the books and the testimony of Fitzgerald in regard to the same.

The evidence clearly showed, and I find, that the defendant company fraudulently held itself out to the public as a legitimate stock brokerage house and as actually buying and selling the securities ordered by customers. Its whole method of advertising, conducting its business, and dealing with customers indicated that it intended that the public should so believe. It was equally clear, and I find, that the defendant company was not conducting such a business, but was in reality running a so-called "Bucket Shop."

The transactions with their customers, although on the face actual transactions, were fictitious ones and were intended by the company to be fictitious, except possibly in a very few instances which did not affect the general practice.

Correspondence between said Lillis and Turner plainly indicated that they considered the business to be illegitimate.

The legal right to recover the amount paid to the defendant company by the various plaintiffs is based upon the proposition that the payment had been

made upon the understanding on the part of the plaintiffs that they should be applied by the defendant company for the purpose of buying stocks to be carried on margins, and that they were received by the defendant company upon the implied agreement that they should be so used, and that they had not been so used.

The proposition assumed that the plaintiffs in each case believed and understood that they and the defendant company were carrying on actual transactions and were not engaged in such gambling transactions as the law stamps as illegal.

Excluding for the present a consideration of the Weiss and Silberstein claims, the evidence was quite clear, and I find, that all the other plaintiffs believed and understood that the company was actually carrying for them on margin the stocks ordered, and that the transactions were actual and legitimate ones.

The method of carrying on business by the defendant company, as has been stated, would naturally induce such a belief and would fairly warrant its inference in the absence of evidence tending to show the contrary.

It also warrants the inference, and I find, that the defendant company agreed to use the margins for the actual purchase of stock.

There was evidence to show affirmatively that the plaintiffs Chesley, Ritzman, and Campbell believed and understood that the defendant company was actually filling their orders. Chesley testified that at times he bought and paid for the shares and received the certificates. Ritzman testified that he did not buy more than he could pay for so that he could take the certificates up if the price went down. Campbell bought and paid for and received in a number of instances the certificates, and testified that he supposed that the defendant company was actually buying the stock for him.

The plaintiff Ellis, as appeared from the cross-examination, never asked for or received any stock. The plaintiff Rafter did not have money sufficient to take up some of his stock and did not want the certificates. The plaintiff Dowell opened an account for margin trading, never called for or desired the certificates, was setting off his purchases against his sales, and "was playing the market for a profit."

Such evidence was not inconsistent with legitimate margin transactions, and did not in my opinion overcome the effect of the other evidence.

I find therefore that the plaintiffs under consideration were led to believe by and did believe that the defendant company was actually buying and selling stock for them, that the defendant company impliedly so agreed, and that it did not keep its agreement.

Weiss Claim.

The evidence in this claim was contradictory. The same methods were used with Mr. Weiss as with the other customers, and, as has been stated, those methods would naturally lead him to believe that the transactions were real.

The plaintiff Berry testified that he complained to Weiss about the interest charged by the defendant company, and said to him that he, the witness, might as well "go out to a bucket shop," and that Weiss persuaded him from doing so and said it was a first-class house.

The witness also testified that he said to Weiss: "Suppose these shares are not actually bought?" And Weiss said that they were; that they were actually bought on the Exchange in New York, and were held there by the banks who loaned money as collateral.

To meet this evidence the defendants relied upon the testimony of one Stover and six releases which Weiss had signed.

Stover testified that he was a close friend of Weiss, and that he had often talked with him about the business of the defendant company; that Weiss asked him whether the defendant company was a "bucket shop" and was told that it was; that Weiss also asked about the strength of the company and was told that the witness' experience had been satisfactory.

On cross-examination it appeared that the witness took customers to the defendant company and received a percentage of the commission from the customers and the company for so doing.

The releases were as follows:

"Boston.

"Received of Haight & Freese ——— dollars on account, and I hereby release and discharge Haight & Freese Co., its officers, agents, servants and each of them from any and all right of action, claim or demand under or by virtue of chapter 437 [p. 338] of Acts of Massachusetts for the year 1890 or any amendment thereof; or under or by virtue of any law or statute whatever, for any payment at any time heretofore made or value of anything at any time heretofore delivered on any contract or transaction whatever, and I covenant never to sue therefor them or either or any of them and I hereby waive all rights under said act and under all amendments thereof.

"Witness my hand and seal this ——— day of ———."

These releases, which were used with all customers to whom money was paid, were undoubtedly intended by the defendant company to protect it from claims under the so-called "Bucket Shop Act."

In the absence of other controlling evidence, the signing of such a release would fairly raise a doubt as to the knowledge of a customer of the nature of the transaction.

It is perfectly possible, however, that a customer who was called upon to sign such a release could sign it without appreciating its significance. It seems hardly fair to charge the plaintiff with a knowledge of the fictitious nature of the transaction because he signed such releases when he had been led to believe by repeated actions of the defendant company that the transactions were genuine.

The evidence of Stover, a man working for the defendant's interests, did not carry to my mind the weight that Berry's testimony did. I find that the plaintiff Weiss was led to believe by and did believe that the defendant company was actually buying and selling stock; that the defendant company impliedly so agreed; and that it did not keep such agreement.

A release signed by the plaintiff Mrs. Weiss was also put in evidence. This release under seal was in the same form as the releases signed by Mr. Weiss, except that they were "in full of all demands" instead of "on account."

The release upon its face, as has been stated, was designed to relieve the defendant company from liability under the so-called "Bucket Shop Act," and might fairly be interpreted as being confined to such purpose. I find that all the releases by their terms purported to discharge the defendant company only from liability under the Acts of 1890 therein referred to, and were not intended nor did they discharge the defendant from liability for the claim in suit.

I report the following evidence, and make findings of fact thereon in case my interpretation of the release is erroneous:

Mrs. Weiss testified that, in response to a message purporting to come from the office of the defendant company, she went there on March 31, 1902, with one Schmitt. She asked for the money that was due her husband and upon request showed the certificate of her appointment as administratrix and was given $164.62. She was told by the cashier that it was all that was due. She started to go out with the money and was then asked to sign the release, being told "that it was only a matter of form," and that she thereupon signed it and Schmitt witnessed it. She stated that she never had had any business experience. She did not ask for an account because she thought that they would do what was right by her. That neither she nor Schmitt read the release.

Schmitt testified that he did not read the release.

The cashier of the defendant company testified that Mrs. Weiss asked for the balance of her husband's account and was requested to show her administration certificate. That the release was passed to her to read, and she signed it and passed it back and was then given the money. He also testified that he told her that it was a release in full, and that both Mrs. Weiss and Schmitt read it over.

It was claimed that the release was fraudulently obtained and was therefore not binding.

The evidence did not satisfy me that the cashier had misrepresented to Mrs. Weiss the contents of the instrument or its purport. She had ample opportunity to examine it and learn its contents.

The company and its officers, however, were knowingly conducting an illegitimate business.

The officers, and the cashier, must be presumed to have known of the liability of the company to repay the margins.

The nature of the receipt itself would tend to indicate this.

The cashier did not state to Mrs. Weiss the true facts, but led her to believe, if he did not openly state, that the amount paid to her was all that was due.

A failure on the part of an officer or employé of a corporation which was carrying on, to his knowledge, an illegitimate business to state all material facts to a customer who had been actively misled into believing that the business was legitimate and his rights duly protected is, in my opinion, such a fraud in fact and law as would avoid a release obtained from said customer.

The fact that the defendant company occupied a position in relation to its customers more or less of a fiduciary nature makes the concealment of the true facts still more culpable.

The plaintiffs had paid in as margins, from time to time, different amounts, and had, in some instances, drawn out cash.

The net balance due to each was as follows:

Ervan E. Chesley $3,996; G. R. Ellis $5,897.25; O. A. Ritzman $180.50; F. C. Rafter $560; H. F. Dowell $320; C. R. Coombs $4,043.40; Peter N. Campbell $18,467.31.

Carl Weiss had paid in $5,380 and had drawn out $327.50. Crediting his account with the amount paid to Mrs. Weiss, $164.62, the net balance due to her is $4,887.88.

It is agreed that the claim of the plaintiff Silberstein for $100 should be allowed, and that he had a preferred claim, inasmuch as the amount was paid in by him only a few minutes before the receivers took possession.

I also find, at the request of the plaintiffs, that at the time the receivers were appointed the entire assets of the defendant company did not exceed $150,000, and that the liabilities of the company to customers were over $500,000, whether such liability existed to repay to customers the excess of margins paid in and not drawn out or to pay them the amount which would have been due had the business, as conducted, been liquidated according to the books when the receivers were appointed.

I find, therefore, that the defendant company was insolvent.

I report, at the request of the defendant, that there was no evidence that the defendant had failed to meet its obligations in the ordinary course of its business prior to the appointment of the receivers. I did not consider the good will, if any, in stating the assets of the defendant, and there was no evidence offered that it had any value.

The defendant, after the hearings before me had been closed and the draft report had been submitted, for the first time requested me to report all the evidence.

I refused this request, inasmuch as the rule to the master did not direct me to report the evidence.

The defendant took the following exceptions to the admission of evidence:

The plaintiff offered in evidence the following conversation held by clerks of the defendant company with Stephen S. Fitzgerald, associate counsel for the receivers, who took possession, with others, of the company's premises:

The conversation and the conditions under which it was held was testified by Mr. Fitzgerald to be as follows:

The rooms taken possession of on the third floor were a storage room, a room occupied by clerks adjoining the storage rooms, and the room occupied by Mr. Lillis the other side of the room with the clerks. The room with the clerks in it had a blackboard on one side, a lot of tickers, and a number of clerks at the tickers. In the middle of the room was a long table on which there were a number of slips of paper and a man standing over them. Fitzgerald asked the clerks to stop doing business. They were writing out

figures on little slips of paper. He asked what the figures were, and they told him they were orders from the branch offices. On the middle of the table there was a lot of similar orders with figures in heavy pencil with a ring around them. Some of the clerks were writing out figures on a little blackboard which was given to them by a clerk at the end of the blackboard, who was reading from a tape. In the center of the room was a clerk who was examining the orders which were arranged in groups, and the orders which had been filled were separate from the orders which had not been filled. He looked at the blackboard and then down at the orders. Mr. Lillis was in his room, and the door between the rooms was open. He was clearly within earshot.

The defendant duly objected and excepted to the admission of the conversation contained in this testimony.

The testimony of two plaintiffs, Ritzman and Campbell, to the following effect, was admitted:

The plaintiff Ritzman, on direct examination, testified in part as follows:

"Q. On any of these purchases or sales of stock were you informed by the defendant company or by any of its officers or agents that they were not actually executing the order which you put in?

"A. No, sir.

"Q. So far as you knew they were executing the orders?

"A. Certainly.

"Q. You intended them to execute them?"

This question was objected to and admitted and exception duly taken.

"A. I never knew any difference."

The plaintiff Campbell, on direct examination, testified in part as follows:

"Q. Had you any reason to believe that they (the defendant corporation) were not actually buying and selling these stocks?

"A. No. I had no reason to believe but what they were buying them just as they stated.

"Q. What was your intention as to the execution of the orders, whether you intended that they should buy the stock when you told them to buy it?"

This question was objected to and admitted subject to the defendant's exception.

"A. I supposed that they would buy it, supposed they were buying it the same as I have dealt with other brokers, and they say they buy their stocks and have them on hand, hold them. I supposed they were doing the same thing."

The plaintiffs offered in evidence a conversation of the plaintiff Berry with Charles Weiss, the intestate of the plaintiff Anna L. H. Weiss in December, 1902, in substance as follows:

"Charles Weiss told me how money could be made in stocks and explained things to me. Mentioned how several men had made money and said the defendant actually bought shares on the Exchange in New York, and that they were held there by the banks, who lent money as collateral, and further that a uniform rate of interest at 6 per cent. was charged because they could not change the rate of interest every time the money market fluctuated."

The defendant objected and duly excepted to the admission of this testimony.

The defendant objected to the evidence of the plaintiffs other than Weiss, including those whose claims were subsequently withdrawn, as to their individual transactions with the defendant being considered as evidence in the Weiss case; there being no evidence that said transactions were known to Charles Weiss.

I admitted the testimony of these plaintiffs in the first instance as evidence necessary to prove the claim of each plaintiff and made no ruling as to its admissibility as evidence in the Weiss case. I subsequently considered and gave weight to it in the Weiss case only so far as it tended to show the general method of business which the defendant company was holding itself out to the public as conducting. The evidence apart from this testimony was, in my opinion, sufficient to warrant the findings which I made as to the apparent method in which the defendant conducted its business.

The plaintiff offered evidence as to the general methods of the business of the defendant corporation, some of which methods were not shown to have been brought to the notice of any of the plaintiffs.

The defendant objected and duly excepted to the admission of such evidence.

The plaintiff offered in evidence certain letters marked Exhibit 5, 6, and 7, which were as follows:

"April 24, 1905.

"Dear Bill: Nine interments here to day. Three suits started against us as a result of newspaper notoriety. Have engaged Al Shields to defend. We are in delicate position; if we confess gambling by stocks on margin which lets us out in this state. The d——n paper might encourage proceedings by the losers against us as a gambling house—if we defend regularly books may be made to be produced. I will defend with view to delay. The 'system' should take in some cash to-day and wipe out some obligations. I have recovered my serenity and am again 'on the perch.' N. A. to-day pursued Parrish & Co. members of Con. Looks as if charter would be annulled upon technicalities.

"As ever, G."

"Fahey was down and gone home again."

"Boston, Oct. 18, 1904.

"Mr. G. G. Turner & Mr. Harvey Watson: As far as possible when our customers attempt to draw cash against paper profits we endeavor to have them retain fair sized margins on their holdings, though it is not prudent to hold off in every case. It depends entirely upon circumstances, and where we think it desirable we explain our reasons in about the following way: It is hardly necessary to call your attention to this matter, as you undoubtedly are taking the same stand yourself, and you might perhaps be able to make some suggestion to us to add to the explanation.

"The fact that we try to exact more than the ordinary margins does not alter the distinctly bullish attitude we have maintained for many months, but when speculation broadens out to its present dimensions a broker has, for the protection of all his customers, to take a more conservative stand and must expect more than the usual co-operation from his customers. As stocks rise in value the sums required by the broker between the usual margin and the market cost to take on new lines increases enormously while banks insist upon a large security on loans, and furthermore, there are many issues, good ones too, which banks discriminate against and which a broker must lock up in his safe. As we do a tremendous business in fractional lots, it is an impossibility at all times to give an account the minute scrutiny it requires as to margins, and therefore, for our own protection as well as for our customers as a whole, stop loss orders have to be kept in and the usual courtsey of calling additional margins omitted in many cases. With an account amply margined the broker's lot is just so much easier as he has the opportunity to care for such accounts and give due notice if more funds should be required. Many promising accounts have been utterly sacrificed by exhaustion through slim margins during some sharp decline where co-operation with the broker would have carried them back on the rallies to their original condition. Our conservatism, which is an insurance to our customers, sometimes diverts business, but we would rather be sure than sorry. It has enabled us to keep continuously in business for a score of years with capital unimpaired, while houses which have undertaken to care for business on too small margins frequently dropped from the ranks; traders not only losing accrued profits but margins as well.

"The above line of argument, of course, would not apply to pyramiding, as you would undoubtedly be willing to accept trades of that nature on nominal margins.

"Yours truly.".

"Philadelphia, Mar. 17, 1904.

"My Dear Bill: Your letters received and contents duly noted. I trust you will live up to the conclusions contained therein not only for the common benefit but for your own special good and health, as well.

"I don't know whether or not my scheme will stand water but I incline to the opinion that it will help some ——— in the shape that I have exhaustively outlined it to T. Fahey. You know my sentiments as to selling; anything that would let us out now with $300,000 each or more I would feel inclined to accept. You and I could go into some nice legitimate business together where, if the profits were not so large, they would be certain without molestation and with our capital to utilize in arbitrage, stock borrowing and carrying for interest, etc. I am sure we could without killing ourselves make it earn safely 15 per cent. per annum, which would not only keep the wolf from the door but keep us sufficiently occupied so as not to become rusty, and we could get three or four months each annually for traveling and pleasure as long as we were together knowing as we do that we can trust each other.

"There is always the fear in my mind that something might happen when markets are high to drive us out of business in which case it would be oblivion. I don't fear bull markets, but other things; hence my extreme willingness to listen to a good offer now. What can and will Rand's folks positively do and in what way will they guarantee to us the carrying out of their offer. It should be if accepted—Spot cash! Sorry you can't be on deck Friday. Am half inclined to run up to Boston Saturday night—meeting you there Sunday for a talk. Do the Fall River boats still run Sundays? I think the Met, Pattee and as many others as are good from Boston should be brought into alliance with H. & F. Loring, McLean and Labaree Baxter. Labaree and McLean have joined issues with H. & F. Loring. We between us could build up and make Con. Ex of Phila. safe and have a 'stock Co. of Names.' The Exchange would do well on clearances alone far more than paying expenses. It should be talked over. Note Labarees paper—'member Con. Ex of Phila. and Correspondents of N. Y. Cotton Ex. N. Y. Coffee Ex. & Chi. Board of Trade.' How is that for nerve? If I don't see you there hope to hear from you in N. Y. These matters are well worthy of consideration for the common benefit of all interested. Together in some such manner we are a power—separately we are vulnerable and amenable to the law and the shyster lawyer.

"As ever, G."

The defendant objected and excepted to the admission of these letters. It was clearly proved that they were written by one of the officers of the corporation to another officer.

The plaintiff offered evidence of the manner in which the defendant conducted its business, including the literature and the letters above referred to, which was not shown to have been brought to the attention of said Charles Weiss.

The defendant objected to the admission of this evidence as evidence in the Weiss case. I considered and gave weight to the evidence only so far as it tended to show the apparent and actual method in which the defendant corporation conducted its business.

William P. Maloney, Asa P. French, George Hogg, and James S. Allen, Jr., for complainants.

I. R. Clark, G. F. Ordway, and Franklin Bien, for defendant.

LOWELL, Circuit Judge. Anna Weiss, the complainant, administratrix of Charles Weiss, filed this bill in equity in behalf of herself and all such other creditors of the defendant as should join therein. The bill alleged, in substance, that Charles Weiss had employed the defendant as broker to buy stocks on margin; that the defendant had deceived and defrauded Charles by pretending to do this as a legitimate broker, while in fact it carried on merely a bucket shop, and had made no real purchase of stocks. The bill further alleged the defendant's insolvency, its keeping of false and fictitious books of account, and the conversion of its property by its officers to the use of the latter. The

bill prayed for a receiver who should distribute the corporate property among the creditors.

James D. Colt was appointed receiver, and took possession of a large amount of property belonging to the defendant in this commonwealth. Like proceedings were begun in Connecticut, New York, and Pennsylvania, and considerable sums of money were taken by the receivers appointed in those states. Many persons, alleging themselves to be creditors of the defendant, have intervened, and have been made parties complainant in this proceeding. The defendant's answer, as amended, set out that it was not a bucket shop, but actually bought and sold stocks for its customers, including Charles Weiss. It set out further that it was not bound to make actual purchases of stock, and that Charles Weiss did not intend that any purchases should in fact be made; that he understood fully the nature of the business; that he, during his lifetime, and Anna Weiss, as his administratrix after his death, executed full releases to the defendant of all claims against it. The answer further denied insolvency and fraud. The case was referred to a master, who has reported in favor of the parties complainant on substantially all the issues raised. To this report the defendant has filed sundry exceptions.

Most of these exceptions may be disposed of summarily. The defendant objected that the master failed to report all the evidence, but this was not required by the order of reference, and is not usual. Objection was made to the master's use of the phrase "bucket shop" and "long" of stocks. The meaning of the report is plain. Objection was made to the master's finding of fraud, but the defendant's fraud was proved, not only by the general method of its dealings, as shown in evidence, but also by letters written by the persons who directed its operations. The letters were admissible in evidence. If the issue to be determined concerns the honesty or fraud of corporate dealing, letters written by those who control the corporation, which describe and characterize its fraud, may be given in evidence. The defendant had $150,000 of property, and owed $500,000, and therefore it was insolvent. The defendant objected that the master made no allowance for the good will of the business. As the defendant's officers characterized this business as that of a "gambling house" and as "vulnerable and amenable to the law," the master's omission was obviously necessary. That many, if not all, of the intervening creditors were deceived, and thus defrauded by the defendant, also appeared. It follows that a decree may be entered conformable in general to the prayer of the bill.

There remain only to consider certain exceptions relating to the original complainant Weiss. Whatever conclusion the court may reach regarding this claim, the decision of the case as a whole will be the same. The defendant contended in argument that Weiss knew that the defendant was merely a bucket shop, and so was not deceived or defrauded; therefore, that his administratrix cannot recover. It is to be noticed that the defendant set up in its amended answer: First, that its business with Weiss was that of a legitimate broker; and, second, that Weiss knew that the business was that of a bucket shop. The inconsistency of these defenses does not strengthen the defendant's position.

To support her contention that Charles Weiss was deceived by the defendant, the complainant offered the evidence of Berry, who testified to conversation with Charles Weiss, in which the latter asserted in effect that the defendant's business was that of a legitimate broker, and that stock was actually bought by the defendant. To the admission of this evidence the defendant objected, but its admissibility seems well settled by binding authority. The issue was Charles Weiss' knowledge of the defendant's business, the state of his mind upon the subject. To prove intention, knowledge, or other mental state the statements of the person in question are held admissible. In Mutual Life Insurance Company v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706, the issue concerned a journey alleged to have been taken by Walton, who was a party to the suit. The letters of Walton stating his intention to take this journey were admitted against objection. Whether Walton was living or dead at the time of trial was uncertain. His previous intention to take the journey in question made the journey more probable, and his statement of intention was admitted for the ultimate purpose of proving that the journey was taken. So, in Commonwealth v. Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235, the statement of a person deceased that she intended to commit suicide was held admissible to prove that she had killed herself and so had not been murdered by the defendant. These cases go further than this court is required to go in the case at bar, for in them the statement of intention was used to prove the doing of the act intended. The speaker's mental condition was irrelevant, except so far as it tended to prove the doing of the physical act. In the case at bar, the opinion or knowledge of Charles Weiss was the ultimate fact to be proved, and to prove it his statements regarding his knowledge or opinion were admissible. Lake Shore Railway Co. v. Herrick, 49 Ohio St. 25, 29 N. E. 1052.

The defendant further objected that the receipts, signed first by Charles, later by Anna, released the defendant from the cause of action here sued on. The master was of opinion that they released only the special right of recovery given by Rev. Laws Mass. c. 99; but they are of broader scope, and were expressed to release all Weiss' claims against the defendant connected with these transactions.

The complainant contended these receipts were obtained by the defendant's fraud. Upon the whole, considering that Weiss had been deceived by the defendant, and that he supposed that the defendant was doing a legitimate business, considering the incongruous and disreputable character of the defense set up in the answer, and the relation of the parties, I do not think it is going too far to hold that the releases given by Charles Weiss were obtained by fraud, and I have less doubt on this head regarding the releases which were signed by Anna Weiss.

The receiver has asked for an allowance on account for himself and for his counsel. The circumstances are extraordinary. The exceptional energy and vigilance of the receiver and his counsel have secured large sums of money for the creditors of this fraudulent gambling house. The litigation has been long and has been hard fought, and the compensation of an officer of the court should not be postponed

until the decree of distribution. I shall allow on account $5,000 to Mr. Colt, the receiver; $5,000 to Mr. Turner, his principal counsel; and $1,000 to Mr. Fitzgerald, who has rendered valuable and necessary services in a subordinate capacity. Counsel for the complainant has also asked for an allowance, but this should be deferred until distribution.

UNITED STATES v. BRADFORD et al.

(Circuit Court, E. D. Louisiana. December 23, 1905.)

No. 2,413.

1. CRIMINAL LAW—LIMITATIONS—CONSPIRACY.

An overt act being necessary to sustain a prosecution for conspiracy to defraud the United States, under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], the statute of limitations does not begin to run against such a prosecution until the commission of an overt act; and since every such overt act is a renewal of the conspiracy, a prosecution may be instituted within three years after the commission of any overt act, although more than that length of time may have elapsed since the conspiracy was first formed or the first of such acts was committed thereunder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 275.]

2. CONSPIRACY—INDICTMENT.

Averments in an indictment for conspiracy, under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], that defendants conspired to fraudulently obtain the issuance by the United States of land scrip in satisfaction of a confirmed private land claim, which scrip when issued could be located on public lands of the United States, and that such conspiracy was carried out by fraudulenlty procuring the appointment of an administrator of the succession of the true claimant, on whose application the scrip was issued, and by whom it was sold, and the proceeds converted by defendants to their own use, are sufficient to sustain the charge that the conspiracy was one to defraud the United States.

3. SAME—CONSPIRACY TO DEFRAUD UNITED STATES—ELEMENTS OF OFFENSE.

To constitute a conspiracy to defraud the United States, within Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], it is not necessary that there should have been a purpose to defraud the United States of a thing of pecuniary value, or that the conspiracy should have been successful, or that the conspirators received pecuniary advantage therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, §§ 35, 39, 41.]

4. SAME—INDICTMENT.

Where an indictment, under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], charged that defendants conspired to defraud the United States by unlawfully and fraudulently procuring the issuance of, and converting to their own use, certain land scrip, and that to effect the objects of the conspiracy they "unlawfully, knowingly, falsely, and fraudulently" applied for and procured the appointment of a pretended administrator of the succession of a person to whom a private land claim had been confirmed, on whose application the scrip was issued, it was not necessary that the government should prove that defendants had actual knowledge of the true facts in relation to the succession, knowledge or that the allegations made in their petition for the appointment of the administrator were false; but it is sufficient if defendants had no knowledge of their truth, or reason to believe them to be true, and they were in fact false. This is true although the indictment avers actual

knowledge, such an averment being surplusage, and one which need not be proved.

5. JUDGMENT—COLLATERAL ATTACK—CRIMINAL PROSECUTION.

A prosecution for conspiracy to defraud the United States, averred to have been effected in part by procuring the appointment of an administrator by a state court which was without jurisdiction, is not a collateral attack upon the judgment of such court; nor, even if so, would such judgment be a bar to the prosecution, since a collateral attack may be made in a criminal case when its purpose is to punish a crime committed by means of the decree, judgment, or record attacked.

Indictment for Conspiracy to Defraud.

On February 26, 1904, the grand jury found and returned into court an indictment against James L. Bradford, William H. Wright, George Baldey, and Francis Lowry, Jr. The indictment contained three counts. The first count charges, among other things, that the four defendants, "on the ninth day of August, A. D., one thousand nine hundred and two, in the Eastern District of Louisiana, * * * did unlawfully, knowingly, willfully, and feloniously conspire, combine, and confederate and agree together and among themselves to defraud the United States of certain certificates of location, otherwise known as land scrip, of the value of five thousand dollars, and of the title and possession of public lands of the United States and within the United States of great value, to wit, five thousand dollars, upon which said scrip could by law be located, by unlawfully and fraudulently procuring and converting to their own use and benefit certain certificates of location, otherwise known as land scrip, of the United States, provided and to be issued in and by virtue of the provisions of a certain act of Congress of the United States approved June second, one thousand eight hundred and fifty-eight [here setting out the title of the act], which certificates of location, otherwise known as land scrip, were to be issued in satisfaction of the following described land claims of one William Miller, namely [here setting out the land claims], which said private land claims were the property of the said William Miller, who died in the year one thousand eight hundred and forty-five, and after his said death were the property of his heirs and legal representatives residing beyond the limits of the state of Louisiana, and which said certificates of location, otherwise known as land scrip, when issued in satisfaction of said claims, would also be, and were, the property of the said heirs and legal representatives of the said William Miller; that thereafter, to wit, on the ninth day of August, A. D., one thousand nine hundred and two, in the city of New Orleans * * * to effect the object of said conspiracy, combination, and confederation and agreement, the said [here naming the defendants] did unlawfully, knowingly, feloniously, and fraudulently apply in the name of one John C. McCants, a person unlawfully interposed by and on behalf of the said [here naming defendants], as the pretended administrator of the succession of the said William Miller, deceased, to and receive of and from the United States Surveyor General of the District of Louisiana at New Orleans five of said certain certificates of location, otherwise known as land scrip, issued under said act of Congress of June 2, 1858 (11 Stat. 294, c. 81), and described particularly as follows [here describing the certificates]; that thereupon and thereafter said [here naming the defendants] falsely and fraudulently caused said certificates of location, otherwise known as land scrip, to be illegally sold at private sale by said pretended administrator, John C. McCants, the person unlawfully interposed for their benefit, as aforesaid, and received the proceeds thereof, and converted them to their own use; that thereafter the said certificates of location, otherwise known as land scrip, were located on the public lands of the United States, and the United States was deprived and defrauded of the title and possession of said public lands, and especially of the following described public lands in the New Orleans land district of Louisiana, to wit [here describing the lands], and the United States was also left exposed to claims in said premises for said certificates of location, otherwise known as land scrip, or their value, by the heirs and legal representatives of said William Miller, deceased, the facts in reference to the said pretended admin-

istration of the succession of said William Miller being, and well known to the said [here naming the defendants] to be, that said William Miller left the state of Louisiana in the year one thousand eight hundred and twenty-five, and never thereafter resided in said state; that he died in the year one thousand eight hundred and forty-five in the city of Cincinnati, state of Ohio, where he resided at the time of his death; that his succession was opened in said city of Cincinnati, and his last will and testament, which he had left, was duly probated there, and his heirs and legatees put in possession and his succession closed; that he left no property and no debts in the state of Louisiana, and his succession owed no debts, taxes, local assessments, or charges of any kind in the state of Louisiana, and yet, on the eleventh day of March, A. D., one thousand eight hundred and ninety-eight, the said [here naming the defendants] did apply to the honorable the Sixteenth Judicial District Court for the parish of Washington, state of Louisiana, in the name of said John C. McCants, a person unlawfully interposed for their benefit, for letters of administration on the estate of said William Miller, deceased, and for the appointment of an attorney for absent heirs, and for an appraisement and inventory, falsely and fraudulently alleging and causing it to be alleged in said application that the said William Miller was domiciled and died in said parish of Washington, state of Louisiana, and that his succession was largely in debt, and owed state, parish, and municipal taxes and local assessments and charges; that in said proceedings the said [here naming the defendants] caused the said claims of said William Miller for certificates of location, otherwise known as land scrip, under said act of Congress (chapter 81) aforesaid, of the public acts of Congress of eighteen hundred and fifty-eight, approved June 2, 1858, to be falsely appraised, in all at $78, when in truth and in fact the said certificates of location, otherwise known as land scrip, were well worth at that time the sum of fourteen hundred dollars—contrary to the form of the statute, etc."

The second count is framed substantially on the same lines as count 1. It charges a conspiracy by and between the defendants on the 20th day of April, A. D. 1903, with regard to certain certificates of location, which were to be issued in satisfaction of a certain private land claim of one Maria Taurus, deceased. The count charges that on the 20th of April, A. D. 1903, to effect the object of the conspiracy, the defendants "did unlawfully, knowingly, falsely, and fraudulently apply in the name of John C. McCants, as the pretended administrator of the succession of Maria Taurus, to, and receive of and from, the United States Surveyor General of the District of Louisiana fourteen certificates of location, which they falsely and fraudulently caused to be illegally sold at private sale by the pretended administrator, and received the proceeds thereof, and converted them to their own use, etc. That thereafter the said certificates were located on public lands of the United States." The count goes on to charge: "The facts with reference to the said pretended administration of the succession of the said Maria Taurus being, and well known to the said [here naming the defendants] to be, that said Maria Taurus did not die in the parish of Washington, state of Louisiana; that she was never domiciled therein, and that her succession owed no debts, taxes, local assessments, and charges of any kind in said parish of Washington, and yet, on the eleventh day of March, A. D. one thousand eight hundred and ninety-eight, the said [here naming the defendants] did apply to the honorable the Sixteenth Judicial District Court for the parish of Washington, state of Louisiana, in the name of said John C. McCants, a person unlawfully interposed for their benefit, for letters of administration on the estate of said Maria Taurus, deceased, and for the appointment of an attorney for absent heirs and for an appraisement and inventory, falsely and fraudulently alleging, and causing it to be alleged in said application, that the said Maria Taurus was domiciled and died in said parish of Washington, state of Louisiana, and that her succession was largely in debt, and owed state, parish, and municipal taxes and local assessments and charges; that in said proceedings the said [here naming the defendants] caused the said claim of said Maria Taurus for certificates of location, otherwise known as land scrip, under said act of Congress (chapter 81, etc.), aforesaid, of the public acts of Congress of 1858, approved June 2, 1858, to be falsely appraised in all at thirty-two dollars, when in truth and in

fact the said certificates of location, otherwise known as land scrip, were well worth the sum of $640—contrary to the form of the statute," etc.

The third count is framed substantially on the same lines as counts 1 and 2. It charges a conspiracy by and between defendants on the 9th day of November, A. D. 1901, with regard to certain certificates of location which were to be issued in satisfaction of a certain private land claim of one Charles Smith, deceased. The count charges that on the 9th day of November, A. D. 1901, to effect the objects of the conspiracy, the defendants did "unlawfully, knowingly, falsely, and fraudulently apply in the name of one John C. McCants, * * * as the pretended administrator of the succession of said Charles Smith, deceased, to and receive of and from the United States Surveyor General of the District of Louisiana, at New Orleans, two of said certificates of location; * * * that thereupon and thereafter the said [here naming the defendants] falsely and fraudulently caused the said certificates of location * * * to be illegally sold at private sale by said pretended administrator, * * * and received the proceeds thereof, and converted them to their own use; that thereafter the said certificates of location * * * were located on public lands of the United States," etc. The count further charges that "the facts with reference to the said pretended administration of the succession of the said Charles Smith being, that on the eleventh day of March, A. D. one thousand eight hundred and ninety-eight, the said [here naming the defendants] did apply to the honorable the Sixteenth Judicial District Court for the parish of Washington, state of Louisiana, in the name of said John C. McCants, a person unlawfully interposed for their benefit, for letters of administration on the estate of said Charles Smith, deceased, and for the appointment of an attorney for absent heirs, and for an appraisement and inventory, falsely and fraudulently alleging and causing it to be alleged in said application that the said Charles Smith was domiciled and died in the said parish of Washington, state of Louisiana, and that his succession was largely in debt, and owed state, parish, and municipal taxes and local assessments and charges; that in said proceedings the said [naming defendants] caused the said claims of Charles Smith for certificates of location, otherwise known as land scrip, under said act of Congress (chapter 81), aforesaid, of the public acts of Congress, approved June 2, 1858, to be falsely appraised, in all at thirty-eight dollars, when in truth and in fact the said certificates of location * * * were then well worth the sum of six hundred dollars, and whereas in truth and in fact, as said [here naming defendants] then and there well knew, the said Charles Smith did not die in the parish of Washington, state of Louisiana; that he was not domiciled there, and that his succession owed no debts, taxes, or local assessments and charges of any kind in said parish of Washington, state of Louisiana—contrary to the form of the statute," etc.

The defendants Bradford, Wright, and Baldey having been tried together and, at the same time, the defendants Bradford and Wright were found guilty on counts one, two, and three, and the defendant Baldey was acquitted. The defendants Bradford and Wright, having been sentenced, sued out a writ of error to the Circuit Court of Appeals, and the trial judge annexed to the bill of exceptions his reasons for the action complained of in the bill.

W. W. Howe, U. S. Atty., and Rufus E. Foster, Asst. U. S. Atty.
Farrar, Jonas & Kruttschnitt, for defendant James L. Bradford.
Frank L. Richardson, for defendant William H. Wright.
Walter H. Rogers, for defendant George Baldey.

PARLANGE, District Judge (after stating the facts). In my opinion, the only important questions raised on behalf of the defendants and reserved by their bills of exception are: (A) Is this criminal action barred by the statute of limitations? (B) Does the indictment set out and the proof show that the conspiracy was for the purpose of defrauding the United States, within the intendment of Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676]? (C) Was the government required to make affirma-

tive proof beyond a reasonable doubt of the actual knowledge of defendants with regard to the facts in the successions, as averred in the indictment, and was the court's charge on that point correct? (D) Does this case involve a collateral attack on the appointment of the administrator in the successions, which attack the government was debarred from making?

A. The statute of limitations. At common law, the conspiracy alone constitutes the offense, without any overt act, and the conspirators can be prosecuted from the instant the conspiracy is formed. But under Rev. St. § 5440, no conspiracy can be prosecuted until an overt act is committed. I am fully aware of the statements found in the decisions to the effect that under Rev. St. § 5440, the gist of the offense is the conspiracy, and that the overt act is no part of the offense. Mr. Justice Woods so stated in United States v. Britton, 108 U. S., at page 204, 2 Sup. Ct., at page 534, 27 L. Ed. 698. It may be interesting to notice, in passing, that it seems the same learned jurist had previously held the reverse in United States v. Dennee, 3 Woods, at page 50, Fed. Cas. No. 14,948. But those statements have never been made with regard to or as affecting the question of the statute of limitations here presented. I agree fully that the overt act is not an element of the offense in the sense in which, in criminal law, a specific criminal intent, for instance, is an ingredient of an offense. Such ingredients are, as I believe, always culpable per se; whereas the overt act may be per se, and, considered independently of the conspiracy, a perfectly innocent act. But the indisputable fact remains that an offense under Rev. St. § 5440, cannot be prosecuted until an overt act is committed. A criminal offense against the sovereign, which he cannot prosecute and punish, is, it seems to me, a matter which the legal mind cannot grasp. It is plain, then, that the statute of limitations is not set in motion by the forming of the conspiracy, but that the moment the conspiracy is formed, and an overt act is committed by one of the conspirators to effect the purpose of the conspiracy, that moment the offense can be prosecuted, and the statute of limitations begins to run as regards that conspiracy and that particular overt act. But I am absolutely unable to agree that if, after committing the first overt act, the conspirators do nothing more for three years, and they are not prosecuted within that time, they can thereafter continue the conspiracy, or renew it either publicly or secretly and as often as they please, and that they can commit as many acts as they choose to effect the object of the conspiracy, and yet have absolute immunity from prosecution for the conspiracy. It is well settled, as I have already said, that the overt act need not itself be an offense. It might therefore be absolutely noncriminal per se, and, being such, it could not attract the attention or arouse the suspicion of the government. That immunity from prosecution for the conspiracy would result from the lapse of three years after the commission of the first overt act, although the conspiracy were thereafter continued or repeatedly renewed, and many other overt acts committed under it, is, to my mind, an utterly irrational conclusion, which the law could never have contemplated.

It was said during the trial that my view would lead to the conclusion that for the same offense persons might be subjected to many prosecutions. But this is entirely incorrect. While the conspiracy per se might be the same, yet if the conspirators chose to renew it, or to continue it in existence, and to commit new overt acts to carry it out, the conditions under which the right of the government to prosecute would arise, would be different every time a new overt act was committed. If, under such circumstances, the conspirators are subjected, so far as the statute of limitations is concerned, to a prosecution every time they commit an overt act, that result is not brought about by any act of the prosecution in splitting up a continuous offense, as was attempted to be done in Re Snow, 120 U. S. 281, 7 Sup. Ct. 556, 30 L. Ed. 658, a prosecution for unlawful cohabitation with several wives, or by tolling the statute of limitations; but the result flows directly and exclusively from the acts of the conspirators themselves. It might be said of their complaint, as was said by the Supreme Court of Vermont, quoted by the Supreme Court of the United States in O'Neill v. Vermont, 144 U. S., at page 331, 12 Sup. Ct., at page 696, 36 L. Ed. 450 (a prosecution for unlawful selling of liquor, in which the defendant was convicted of 307 offenses, and sentenced, in the aggregate, to a fine of $6,638.72 and to imprisonment for more than 55 years) that the result is brought about, not by the law, nor by any interpretation of it, nor by any act of the prosecution, but solely by the fact that the complaining defendants committed too great a number of offenses. Obviously, if the defendants had been charged with numerous different conspiracies, completed, as regards the ability of the government to prosecute, by the commission of many different overt acts, they would not be heard to complain of a situation brought about entirely by their own criminal acts, and which subjected them to many prosecutions. What difference, so far as regards the statute of limitations, is there in principle between the condition just stated and the proposition that there may be as many prosecutions as there are overt acts, when the same conspiracy is renewed as each different overt act is committed? The conspiracy C, plus overt act A, create a criminal condition for which the government can prosecute under the terms of Rev. St. § 5440, during three years from the date of overt act A. The same conspiracy C, or any other conspiracy, plus overt act B, create another and a different criminal condition, for which the government can prosecute during three years from the date of overt act B. And so on. No court has ever held that under Rev. St. § 5440, the statute of limitations begins to run from the original formation of the conspiracy, and before the commission of any overt act. As I have said before, it is inconceivable to me that the statute of limitations should begin to run before the government could prosecute. The difference of opinion is: (1) Whether the statute of limitations begins to run from the commission of the first overt act, regardless of any subsequent overt acts? Or (2) whether a prosecution begun within three years of any overt act, committed to effect the purpose of a conspiracy then in existence and in full operation, is maintainable. The first view has been upheld by Judge Deady, The Dorris Eckhoff (D. C.) 32 Fed. 556, and Judge Bunn, Northwestern Mut.

Life Ins. Co. v. Cotton Exchange Real Estate Co. (C. C.) 70 Fed. 159, for whose opinions I have the greatest respect, but with whom I am entirely unable to agree. The extraordinary result of such a doctrine I have already referred to. The second view, which in my opinion is the correct one, has been ably set out by the Supreme Court of Mississippi in American Fire Ins. Co. v. State (May 24, 1897), 22 South. 99; by the Supreme Court of Pennsylvania in Com. v. Bartilson, 85 Pa. 487; by the Supreme Court of Illinois in Ochs v. People, 124 Ill. 429, 16 N. E. 662; by Judge Speer in United States v. Greene et al. (D. C.) 115 Fed. 343; by the Supreme Court of New York in People v. Mather, 21 Am. Dec. 122–147, 4 Wend. (N. Y.) 259, and by other authorities.

It is well and fully settled that the commission of an overt act is, per se, a renewal of the conspiracy. Bishop's New Cr. Proc. vol. 2, § 206, and vol. 1, § 61; A. & E. Enc. Law (2d Ed.) vol. 6, verbo "Conspiracy," p. 844, text and notes; American Fire Ins. Co. v. State (Sup. Ct. Miss., May 24, 1897) 22 South., at pages 102 and 103; Com. v. Bartilson, 85 Pa. 487–489; People v. Mather, supra, and other cases. However, I did not so charge the jury, although I would have been entirely justified in so doing. I charged, favorably to the defendants, that the jury had to find that the conspiracy existed and was in operation within three years, and that then they had further to find that an overt act to effect the object of the conspiracy had also been committed within the three years.

It is settled that the jury need not have found that the inception of the conspiracy took place within the three years. They had the right to go back to its origin for the purpose of determining whether it was continued or renewed and existed and was in operation within the three years. American Fire Ins. Co. v. State, supra; McKee v. State, 111 Ind., at page 382, 12 N. E., at page 512; Judge Speer in United States v. Greene et al. (D. C.) 115 Fed. 343, and other cases. The doctrine as to the point under consideration, which, in my judgment, is the correct one, is set out fully in the text of Am. & Eng. Enc. of Law (2d Ed.) verbis "Limitation of Actions," vol. 19, at page 165. In footnotes on that page, it is made to appear that the doctrine of the text is not in accordance with the decision of Judge Bunn (United States v. McCord et al. [D. C.] 72 Fed. 159), and the decision of Judge Deady (United States v. Owen et al. [D. C.] 32 Fed. 534), already referred to by me. Those two cases are the only ones cited in opposition to the text on the question of limitation. It should be noticed that while in one of the same notes, the case of Dealy v. United States, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545, is cited, that citation is evidently meant to show that under Rev. St. § 5440, an overt act is required, and that the same is not part of the offense. Dealy v. United States does not refer in any way to the question of limitation involved in this cause.

B. Defrauding the United States. That the indictment alleges and the proof shows a conspiracy to defraud the United States seems to me to be obvious. The indictment charges that defendants "unlawfully, knowingly, willfully, and feloniously" conspired to defraud the United

States out of certain certificates of location, otherwise known as land scrip, and of the title and possession of public lands of the United States, upon which said scrip could by law be located. The indictment further avers that the scrip when issued would be and was the property of certain persons named. The indictment further avers the obtaining of the scrip by the defendants, the sale of it by them, and their appropriation of the proceeds. It is further averred that subsequently public lands were located under the scrip. It was contended that the indictment sets out a scheme to defraud the persons named as being the lawful owners of the scrip, and not a scheme to defraud the United States. But it is evident to me that the result of the conspiracy was to defraud both the United States and the rightful owners of the scrip, and the fact that other persons besides the United States were to be defrauded cannot, of course, benefit the defendants. Even if it were true that to sustain the indictment in this case it was requisite to show that the carrying out of the conspiracy was to cause pecuniary loss to the United States, I am satisfied the proof established that fact. Where scrip in satisfaction of a confirmed private land claim is obtained from the United States, unlawfully, by fraud and artifice, and land is located under the scrip, and the lawful owner has been guilty of no laches or other fault, I am clearly of opinion that it is the duty of the United States, although they may not be coercible, to indemnify the lawful owner. By confirming a private land claim, the United States solemnly acknowledge their obligation to the claimant. No one doubts that a debtor is not liberated by payment to one who has falsely and fraudulently, and without any laches or other fault of the lawful creditor, imposed upon and deceived the debtor by representing himself to be the lawful creditor. The United States fully recognize their obligation to make the rightful claimant whole under such circumstances. They have made to that effect a rule or law for themselves. I so understand from reading an official letter on file in the United States General Land Office, of date May 31, 1904, from Hon. W. A. Richards, Commissioner of the United States General Land Office, to the Honorable Secretary of the Interior, and the approval on file in the same office, under date of June 11, 1904, by the latter official, of the action suggested by the former. New scrip was issued to Miss Fletcher for that portion of the scrip which she had been unable to recover in the cases of Fletcher et al. v. McArthur et al. (Sixth Circuit) 68 Fed. 65, 15 C. C. A. 244; same court, 117 Fed. 393, 54 C. C. A. 567. The action of the Land Department was based on the following authorities: Secretary Stuart's decision; Lester's Land Laws, vol. 1, p. 612, Nos. 621, 622; Opinion of Hon. R. B. Taney, Attorney General, 2 Op. Atty. Gen. p. 501; Opinion of Attorney General John Nelson, 4 Op. Atty. Gen. p. 298; Opinion of Attorney General Reverdy Johnson, 5 Op. Atty. Gen. p. 183; Opinion of Attorney General Cushing, 8 Op. Atty. Gen. p. 377; Case of Charles D. Mousso, 22 Land Dec. Dep. Int. 42.

The case of Antonio Vaca, 4 Land Dec. Dep. Int. 13, in which it had been held that the Land Department was functus officio after scrip had been issued in satisfaction of a private land claim, and could

not issue new scrip although the scrip issued was fraudulently obtained, was expressly disapproved in the official communications just mentioned, with the statement that the Antonio Vaca decision has not been followed by the Land Department.

It may be of interest to note that in the case of Grevemberg v. Bradford (one of the defendants in this cause), 44 La. Ann., at page 403, 10 South., at page 786, the contention was made on behalf of the defendant, Bradford, that even if the sale of the scrip which he had purchased was void for reasons similar to those averred in this cause, yet as he(the defendant, Bradford) had purchased the scrip in good faith, he could not be deprived of the land which he had located under it, and that the claimant had a remedy against the United States, as if no scrip had issued; citing authorities, some of which are cited by the Commissioner of the General Land Office in his said letter of May 31, 1904. It should be noticed that in the Fletcher Case, 117 Fed., at pages 395 and 396, 54 C. C. A. 567, the land itself was not awarded to the claimant, because the purchasers of the scrip under which they located the land were in good faith. Miss Fletcher was only awarded the value of the scrip. And in the official letter of date May 31, 1904, above referred to, the Commissioner of the General Land Office advised the Secretary of the Interior that, even if the statute of limitations had not run, the United States should not sue to annul the patents issued on the scrip, "for the reason that the scrip was bought by persons upon representations made by officials of the government that it had been properly issued and delivered."

It is thus made plain beyond question how the United States may be and are defrauded of their land by such a scheme as that set out in the indictment. But while, under the proof, the question does not arise in this case, it is beyond question, in my opinion, that to constitute a conspiracy to defraud the United States under Rev. St. § 5440, it is entirely unnecessary to either allege or prove a purpose to defraud the United States of a thing of pecuniary value. The confusion as to the contention made that to constitute a conspiracy to defraud, under Rev. St. § 5440, there must be a purpose of defrauding the United States of pecuniary value, arises from the failure to distinguish between the purpose of statutes intended to punish cheats and frauds by private persons committed against other private persons, and the purpose of Rev. St. § 5440, which is intended to punish frauds against the sovereign. So far as my knowledge goes, all the statutes of the former class, both in this country and in England, provide, either in express terms or by clear intendment, that the cheating or defrauding must be of a thing of value. Such is the entire extent to which those statutes go, and, of course, in prosecutions under them, it is essential to allege and prove that the purpose of the defendants was to defraud others of things of value. But no such restriction is found in Rev. St. § 5440, either in terms or by intendment. It uses the broadest possible language. It punishes all who conspire to defraud the United States "in any manner and for any purpose." It is certainly just as important that the government should not be defrauded with regard to its operations, even if no pecuniary value is involved,

as that it should not be defrauded of its property. In fact, I believe that it is far more important that the government should be protected against the former class of frauds, and it would be astonishing, indeed, if Congress had failed to afford protection against such frauds.

The matter is so fully and ably discussed in the unanimous decision of the Circuit Court of Appeals for the First Circuit in the case of Curley v. United States, 130 Fed. 1, 64 C. C. A. 369 (a conspiracy to defraud in a civil service examination), that I deem it unnecessary to attempt to deal further with the matter. Specially notice McGregor v. United States (Fourth Circuit) 134 Fed., at page 195, 69 C. C. A. 477, and cases there cited.

Although I have stated herein my opinion that the United States may be defrauded even when no pecuniary value is involved, it should be specially noted that, under the facts of this cause, the court did not go into that question with the jury. It should also be noted that the court granted without modification special instruction No. 11 concerning conspiracy, etc., requested on behalf of defendant Bradford, but applying by its language to both defendants.

While the following matters of law may have but little bearing on this cause, as an effectual and successful conspiracy was shown, they may still have some value in the general consideration of the cause. In prosecutions under Rev. St. § 5440, it need not be averred or shown that the conspiracy was successful. Gantt v. United States (Fifth Circuit) 108 Fed. 61, 47 C. C. A. 210. It is not necessary to show that the conspirators received pecuniary advantage from the conspiracy. United States v. Newton (D. C.) 52 Fed. 275; United States v. Allen, Fed. Cas. No. 14,432.

C. Averment in indictment as to defendants' knowledge of the facts in the successions. (1) The indictment charges, inter alia, that the defendants "unlawfully, knowingly, willfully, and feloniously" conspired to defraud the United States. (2) The indictment then further charges that the conspiracy was to be effected by the defendants "unlawfully and fraudulently" procuring and converting to their own use and benefit the certificates of location. (3) The indictment then further charges that the defendants, to effect the objects of the conspiracy, "unlawfully, knowingly, falsely, and fraudulently" applied in the name of one John C. McCants, "a person unlawfully interposed," by and in behalf of the defendants, "as the pretended administrator of the succession of said William Miller, deceased, to and received from the United States Surveyor General of the District of Louisiana" five of the certificates of location; that the defendants "falsely and fraudulently" caused the certificates of location "to be illegally sold at private sale by said pretended administrator, John C. McCants, a person unlawfully interposed for their benefit," and that the defendants received the proceeds, and converted them to their own use. It should now be specially noticed that there is no complaint, as I understand (but, if there be any, it is utterly without basis) as to the averments of intent, fraud, and falsity made concerning the matters just mentioned under Nos. 1, 2, and 3. The general charge shows that the defendants' rights were fully guarded in those

respects. I am perfectly clear that the indictment could have stopped there, and have been entirely sufficient and valid. It may be that it would even then have been redundant. What deficiency could have been suggested? It avers the conspiracy with redundancy as to intent, etc. It sets out the means which are averred to have been unlawful and fraudulent, and it may be said, in passing, that it was possibly unnecessary to set out the means. See Mr. Justice Woods in United States v. Dennee, 3 Woods, 47, Fed. Cas. No. 14,948, approved by the Fifth Circuit in Gantt v. U. S., 108 Fed. 63, 47 C. C. A. 210. See Bishop's New Crim. Proc. vol. 2, §§ 207, 208; United States v. Benson (Ninth Circuit) 70 Fed. 596, 17 C. C. A. 293; and it would seem Gantt v. U. S. (Fifth Circuit) 108 Fed., at page 63, 47 C. C. A. 210. The indictment sets out the overt acts, and avers that they were committed "falsely and fraudulently." The overt acts averred are: The application for the scrip; the sale of the scrip; the appropriation of the proceeds of the sale. The overt acts were no part of the offense. United States v. Britton, 108 U. S. 204, 2 Sup. Ct. 531, 27 L. Ed. 698; Gantt v. U. S., 108 Fed. 62, 47 C. C. A. 210, and other cases. While it is well settled (Gantt v. U. S., 108 Fed. 63, 47 C. C. A. 210, and other cases there cited) that the indictment need not show how or in what manner the overt act would tend to affect the object of the conspiracy, in this cause the overt acts are manifestly acts tending to and culminating in the successful carrying out of the conspiracy. Proof of any one of the overt acts, coupled with proof of the conspiracy, would have been sufficient. It is obvious, therefore, that the indictment would have been abundantly sufficient even if it had ended with the averments concerning the matters referred to above under Nos. 1, 2, and 3. It would have set out with more than legal sufficiency the conspiracy, the means, and the overt acts. However, if it could be conceived that it would thus have been insufficient, the defendants' remedy would have been by bill of particulars. Bishop, Crim. Pr. vol. 2, § 209.

But the prosecutor unnecessarily chose to go further, and by way of amplification and general averment he set out the true facts as to the successions, and averred that they were "well known" to the defendants; and he further set out that in the application for the administration the defendants "falsely and fraudulently" alleged and caused to be alleged the facts which were therein set out. It should again be specially noticed that, as I understand, the complaint is not as to the averment that the allegations with regard to the successions were falsely and fraudulently made by the defendants, but, if I have misconceived the full scope of the complaint, the general charge shows that defendants have no cause whatever to complain as to the averment of falsity and fraud just mentioned. My understanding is that the only cause of complaint as to this whole matter is that the court refused to charge, as requested by defendants, that the government must prove beyond a reasonable doubt that the defendants knew the true facts in the successions. The court, in its general charge, instructed the jury, inter alia:

"Now, it is for you [the jury] to say whether the government has or has not proven these allegations [jurisdictional allegations in the petitions for administration] to be false."

And:

"As to the knowledge of the defendants that the facts stated in the petitions in the successions of Miller, Taurus, and Smith were false, I charge you that it was not requisite that the government should have proven that the defendants actually knew that the facts were false. It is sufficient on that one point that the defendants made the allegations in the petitions in the successions of Miller, Taurus, and Smith in bad faith, and without regard as to whether they were true or not, and without having any knowledge whatever of their truth, or any reason to believe that they were true, and with the intent and for the purpose of defrauding the United States, as charged. On this point you will remember the testimony of the defendant Bradford. He said, as I remember (but this is a matter entirely for you), that he had a vague recollection that some one had told him that Miller lived in Washington parish, and possibly he testified that he had some vague information about Smith."

In Cooper v. Schlesinger, 111 U. S. 148, 4 Sup. Ct. 360, 28 L. Ed. 382, the Supreme Court, through Mr. Justice Blatchford, said:

"The jury were properly instructed that * * * a statement recklessly made, without knowledge of its truth, was a false statement knowingly made, within the settled rule."

This language was used in approving the charge of the trial judge, in which he had said:

"It is not necessary to constitute a fraud that a man who makes a false statement should know precisely that it is false. It is enough if it be false, and if it be made recklessly, and without an honest belief in its truth, or without reasonable ground for believing it to be true, and be made deliberately, and in such a way as to give the person to whom it is made reasonable ground for supposing that it was meant to be acted upon, and has been acted upon by him accordingly."

Statements not known to be true by the person making them are in law false. Lynch et al. v. Mercantile Trust Co., 18 Fed. 486. Specially see A. & E. Ency. Law (2d Ed.) verbis "Fraud and Deceit," vol. 14, pp. 95–97, 99, 101, text and notes. In law to "know" is to possess information. Bouvier's Law Dict. verbo "Knowingly." Hence, one who states a fact without possessing information does not know the fact, and makes a false statement. But the averment of knowledge with regard to the jurisdictional facts in the successions was entirely unnecessary; especially so, as the prosecutor charged that the defendants had made the allegations "falsely and fraudulently." Averment of knowledge unnecessarily stated may be rejected as surplusage. Bouvier's Law Dic. verbo "Knowingly," and cases there stated. The indictment is perfectly good without it. If the jury found that the conspiracy itself, with all its ingredients of intent, fraud, etc., existed, and that after its formation the defendants had for the purpose of effecting the object of the conspiracy "unlawfully, knowingly, falsely, and fraudulenly" committed the overt acts, or any one of them, and, assuming that it was necessary to go further, if the jury had found that the jurisdictional facts were "falsely and fraudulently" averred by the defendants in the application for administration, the jury would

have been warranted in finding the defendants guilty. As a matter of defense, the defendants could have shown that they were in good faith in making the jurisdictional averments. But the court did not charge that the onus of proving good faith was on the defendants, though it is believed such a charge would have been lawful. The court virtually charged, favorably to the defendants, that the onus of proving bad faith, etc. (as stated in full in the general charge), was on the government. This was all that the defendants were entitled to. It was, as I believe, much more than they could claim.

The "Whisky Prosecutions" in this court, in or about the year 1876, attracted great attention throughout the country. There were very able counsel engaged for the prosecution and for the defense. Every point was carefully and exhaustively examined and contended for. The indictments were all, as I believe, on the same printed forms. I have examined one of those cases (United States v. Fehrenback et al., No. 513 of the U. S. Circuit Court, Eastern District of Louisiana) which went up on writ of error to Circuit Judge Woods, afterwards Mr. Justice Woods. See 2 Woods, 175, Fed. Cas. No. 15,083. The indictment in that case, which was closely scrutinized in both the trial and the appellate courts, first states the conspiracy to defraud the United States of internal revenue tax on a large quantity of spirits. The indictment then goes on to allege a number of overt acts, each one of which was the removal of a certain quantity of spirits upon which the tax had not been paid. No averment is to be found that the defendants knew that the tax had not been paid on the spirits alleged to have been removed. It is plain, therefore, that the government was not called upon to prove the actual knowledge of the defendants as to that matter, and it was left to the defendants to prove, if they could, as matter of defense, that they did not know that the tax had not been paid, or that they honestly believed it to have been paid. If the averment had been added that the defendants knew that the tax had not been paid, would the government have been held to prove actual knowledge? Clearly not. If an indictment for larceny of a horse, after charging that A. B. feloniously took, stole, and carried away a certain horse, the property of C. D., contained the further unnecessary averment, "He, the said A. B., well knowing that the said horse was the property of the said C. D.," would the prosecution have to prove, and be limited to proving, actual knowledge? Clearly not. It would suffice for the prosecution to prove that the defendant did not honestly believe that he was the owner. A. & E. Enc. Law (2d Ed.) verbo "Larceny," vol. 28, p. 525. In fact, the Supreme Court has said in a similar case that the matter of an honest mistake was one of defense. Stone v. U. S., 167 U. S., at page 189, 17 Sup. Ct., at page 782, 42 L. Ed. 127. This supposed case concerning larceny is stronger than the case at bar, for in larceny the fact that the thing stolen is the property of another is an element of the offense, whereas the matter under consideration involves only an averment of knowledge as to a matter which is no part of the offense.

Doubtless, the doctrine of surplusage does not apply, when the unnecessary allegation is as to the identity of the thing which is the object of the crime, as if in larceny the defendant is charged with stealing a black horse. In such a case, as a matter of fairness to the de-

fendant, the prosecution will be held to the proof of the unnecessary qualificative. But the matter in hand involves no possible question of unfairness or surprise to the defendants, and is governed by totally different considerations.

D. Collateral attack. There is no collateral attack on the appointment of the administrator by the state court, involved in this criminal cause. There was no judicial sale of the scrip, and it was conceded that the private sale of the scrip was null and void under the law of Louisiana. In fact, part of the argument to sustain the contention that the United States were not and could not be defrauded by the conspiracy was that the sale of the scrip was an absolute nullity, and that therefore no right of the United States was affected by it.

The question then, is, whether the appointment of the administrator was an insuperable bar to the prosecution by the United States of the fraud committed upon them. It may be said incidentally that it was shown that the appointment was made by the clerk and without proof. Strange indeed would it be if such action, denominated a judgment, had the effect of paralyzing the arm of the government when it seeks in this cause to vindicate its criminal laws. If, in a civil suit, a party seeks to attack collaterally the appointment of an administrator, he is told that his remedy is a direct attack in the court which made the appointment. But in this cause no remedy has been or could be suggested to the government. It has not been even pretended that the government would have had a standing in a civil suit in the court of Washington parish to ask the annulment of the appointment. The proposition means, therefore, that whenever a criminal fraud is committed on the United States, they are absolutely powerless to prosecute the offenders, if the fraud has been committed by means of a state court judgment. Such a proposition is self-refuting.

But I repeat that there is no collateral attack on the appointment of the administrator involved in this cause. A collateral attack on the oppointment of an administrator in a civil suit has invariably for its object his removal, or the denial or disregard of his authority, or the recovery of some property or property right. The appointment of the administrator McCants—such as it is—has in no manner whatever been disturbed by this prosecution or its result. No property of any kind, no right whatever in or to property, has been or can be affected by any action in this cause. It is utterly immaterial to the government whether or not McCants continues indefinitely to be administrator. How, then, can it be said that there has been a collateral attack upon his appointment? But, conceding, arguendo, what is clearly untrue, viz., that a collateral attack was permitted in this cause, what then? In a criminal action, such an attack can be made under circumstances similar to those appearing in this cause. The sovereign who prosecutes, not for the purpose of disturbing the civil judgment or any civil right arising from it, but for the sole purpose of vindicating his criminal laws, cannot be debarred by a civil judgment obtained by the wrongdoer for the very purpose of committing the offense. No authority has been or can be produced to support the contrary. Mr. Wharton tells us (Criminal Evidence [9th Ed.] section 595):

"Whenever a party seeks to avail himself of a former judgment fraudulently obtained, the opposite party may show the fraud, and thus avoid the judgment. In criminal issues, this is settled law." Numerous cases cited.

The same distinguished author, in the same work (section 570a) says:

"Nor is the fact that an issue was determined in another trial between the defendant and a private suitor, or between the sovereign and another defendant, conclusive as to persons not parties to such issue. Thus, when parties are indicted for procuring a fraudulent divorce, the prosecution may go behind the record, and inquire into the merits; and, on an indictment for conspiring to falsely accuse an innocent man of crime, the prosecution can go behind the record of conviction, and show that the conviction was the result of fraud"—citing cases.

The same author, in same work (section 570a) says:

"It is as much an indictable offense to cheat by fraudulently obtaining a judgment as it is to cheat by fraudulently obtaining a bond."

Answering the contention that the sovereign in such a case should sue to annul the judgment in the court which rendered it, the same author, in the same work (section 570a) says:

"But the commonwealth of Massachusetts was not a party to the judgment alleged to have been fraudulent, and could not have been heard on a motion to open it. Judgments, as we will see, can be impeached collaterally for fraud."

The same author, in same work (section 595) says, in speaking of collateral attack, that an acquittal or conviction, fraudulently obtained, can be so attacked. As to prosecutions for procuring fraudulent marriages, see same author, same work (section 590a), and same author (Criminal Law [8th Ed.] vol. 2, § 1362). A person indicted for forging a will cannot set up the probate of the will as even prima facie a defense. Same author (Criminal Evidence [9th Ed.] § 597). See, as to the inadmissibility of civil judgments in criminal prosecutions, 1 Greenl. Ev. (15th Ed.) § 537; A. & E. Ency. Law (2d Ed.); Verbis "Res Judicata," vol. 24, pp. 831, 832. At the latter page it is said (note) that the civil judgment is inadmissible, even if there is mutuality of parties—citing Stone v. United States, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127, and other cases. I deem a further citation of authorities on this point unnecessary.

Again, assuming that this were a civil action, in which a collateral attack on the appointment of the administrator was actually attempted, under the circumstances set forth in this cause as to the successions, I find that the attack would unquestionably be allowable as to the Miller succession, and it would seem such an attack could also be made concerning the Taurus succession. Death; an existing succession (that is to say, an estate not previously administered and finally wound up by a competent court); inhabitancy or citizenship of the state; property within the state; and, semble, in Louisiana, debts—are fundamental facts, some of which, at least, must co-exist before probate power can validly be exercised. What doubt could possibly exist that the attempt to reopen the Miller succession in Washington parish in 1898, more than half a century after his estate had been fully

and finally wound up in Cincinnati in a competent court, after his estate had been wholly merged into the ownership of his heirs, and after all his debts had long since been paid or extinguished, was an utter and absolute nullity? No authorities can be needed as to such a question. Still, see Garrett v. Boeing (Sixth Circuit, Judges Taft, Lurton, and Severens), 68 Fed., at page 60, where it is said:

"The question constantly remains, what are the matters relating to the [probate] jurisdiction, without the existence of which the court is without power to proceed? Doubtless, the person whose estate is to be administered must have deceased. There must be a succession—that is, an estate—subject to the laws of the state, and susceptible of administration in the courts appointed for that purpose, and the property to be administered must be of that succession, and the succession must not have been already judicially administered. In the latter case, it is no longer in the succession, but has passed finally into new ownership. Probably there are other things of like general character, the existence of which might defeat the jurisdiction," etc.

See, also, Fletcher et al. v. McArthur et al. (Sixth Circuit) 68 Fed. 65, 15 C. C. A. 224, and 117 Fed. 393, 54 C. C. A. 567.

After the settlement of an estate, "the probate jurisdiction determines, and can no more be revived. The mortuaria proceedings cannot be reopened." Chief Justice Bermudez, in Atkinson v. Rodney, 35 La. Ann. 314. A succession being closed, it can never be revived by administration. Cross on Successions, § 21, p. 15, and other cases and authorities.

Even if Miller's succession had not been finally settled half a century prior to the attempt to administer upon it in Washington parish, that attempt would have been an absolute nullity because Miller did not die an inhabitant or citizen of Louisiana, nor did he leave property situated or debts due in Louisiana. I am not aware that any state has attempted to deal with decedents' estates where the decedents were not inhabitants or citizens of the state, and where they did not leave property within the state. Louisiana has not attempted to do so. A state has control only over its inhabitants or citizens and the property within its borders. In Perry v. St. Joseph R. R., 29 Kan. 420, it was held that a probate court has no jurisdiction to issue letters of administration where the decedent was not an inhabitant or resident of the state, and left no estate in the state. As already stated, the probate laws of a state can affect only the inhabitants or citizens of that state or the property within its borders, and an appointment of an administrator where there is no property within the state, or where the decedent was not an inhabitant or citizen of the state, is an absolute nullity. See Mr. Justice Peckham in Bolton v. Schriever (N. Y.) 31 N. E. 1001, 18 L. R. A. 242; Brown on Jurisdiction, page 444, § 131b. See Judges Taft, Lurton, and Severens in Fletcher v. McArthur et al. (Sixth Circuit) 68 Fed. 65, 15 C. C. A. 224, and 117 Fed. 393, 54 C. C. A. 567, and other cases.

In every proceeding of a judicial nature there are one or more facts which are strictly jurisdictional, the existence of which is absolutely necessary, and without which the act of the court is a mere nullity. Noble v. Union River Logging R. R., 147 U. S., at page 173, 13 Sup. Ct., at page 273, 37 L. Ed. 123. Death of the person whose estate is

sought to be administered is such a fact. The fact that the person was not an inhabitant or citizen of the state, coupled with the further fact that he left no property in the state, absolutely deprives any probate court of a state from attempting an administration. Of course, it is well settled (though the jurisprudence of the Supreme Court of Louisiana has varied on the point) that where the fundamental jurisdictional facts really exist, and a secondary question arises as to which one of several probate courts in a state has the right to administer the estate by reason of some fact arising or existing within its territorial limits, then the finding of the court in favor of its jurisdiction on this secondary question is prima facie valid, and is not subject to collateral attack, however erroneous the finding may be. If erroneous, the decree is voidable but not void, and the nullity can be declared only by means of a direct attack in the court which made the finding. Such would seem to be the present jurisprudence of Louisiana, although formerly it was not, and collateral attacks were allowed based on the fact that the decedent died a resident of a parish in the state other than that in which his estate was administered. Miltenberger v. Knox, 21 La. Ann. 399; Succession of Williamson, 3 La. Ann. 261; Clemens v. Comfort, 26 La. Ann. 269, and other cases. But where, because of the lack of the fundamental jurisdictional fact or facts, no court of probate in a state would have power to administer an estate, the situation is totally different, and the erroneous finding by a court of the fundamental jurisdictional fact or facts cannot confer jurisdiction, and the appointment of an administrator and all his acts are absolutely null and void, and can be attacked collaterally anywhere by any party in interest. The clear-cut and radical difference between the two classes of cases is well illustrated by two decisions of the Circuit Court of Appeals for the Sixth Circuit, rendered on the same day: Garrett v. Boeing, 68 Fed. 51, already cited, in which a collateral attack was not permitted. It was based, inter alia, on the fact that the decedent died domiciled in the parish of St. Mary, La., and not in the parish of Lafayette, La., where the probate proceedings involved in the cause had taken place. But in the case of Fletcher et al. v. McArthur et al., 68 Fed. 65, 15 C. C. A. 224, already cited, the same court, on the same day, permitted a recovery by a collateral attack on probate proceedings carried on in a Louisiana court in the succession of one who had died a citizen of Mississippi. See, also, same court in 117 Fed. 393, 54 C. C. A. 567. Notice Simmons v. Saul, 138 U. S., specially at pages 441, 447, 448, 451 et seq., 11 Sup. Ct. 369, 34 L. Ed. 1054.

As to the Taurus succession, it would seem that in Louisiana a collateral attack could have been made on the pretended appointment of the administrator, had this been a civil case, because Maria Taurus left no debts. I am fully aware that there is authority in other states to the effect that the existence of debts is not a jurisdictional fact in probate matters. But in the case of Burton and Wife v. Brugier and Sheriff, 30 La. Ann. 478, the Supreme Court of Louisiana held that the appointment of an administrator when there are no debts is absolutely null, and a judicial sale at the instance of the administrator is an absolute nullity, and the purchaser at the sale and the sheriff are mere tres-

passers if they enter upon the property sold. This case was decided by Chief Justice Manning, and on rehearing by Mr. Justice Spenser, two of the ablest jurists who have sat on the bench of the state Supreme Court. Under the civil law doctrine, "le mort saisit le vif," set out in the Louisiana Civil Code (articles 940 et seq.), a succession in Louisiana is transmitted to the heir by the mere fact of the death of the de cujus and the operation of law. When there are no debts, there cannot be even a temporary suspension of the full operation of the legal transmission. The property becomes absolutely and without restriction the full property of the heir from the very instant of the death of the de cujus. The private land claim of Maria Taurus was confirmed to her in 1825. She was a widow in 1815, and had cultivated the land since a time anterior to the year 1800. The pretended appointment of McCants as administrator took place in 1898. The longest prescription applicable to any debts she might have left is 10 years. It is therefore certain that she could not in 1898 have had any existing debts. To summarize: (1) No collateral attack was made in this cause. (2) A collateral attack may be made in a criminal case when its purpose is to punish a crime committed by means of the decree, judgment, or record collaterally attacked. Especially is this true in such a case as this. No man can claim impunity for a criminal fraud committed on the United States because he committed the fraud by means of a false state court decree. (3) Even in a civil case the appointment of McCants as administrator could be attacked collaterally under the averments in the indictment of the facts set out as to the succession of Miller. His estate had been lawfully and finally settled in a competent court in Ohio more than half a century before the attempt made in Washington parish to administer upon his estate. He died an inhabitant of Ohio. He left no debts in Louisiana or elsewhere which could have been in existence in 1898.

As to the Taurus succession, it would seem that, under the law of Louisiana, the appointment of an administrator to her estate was void, because she left no debts.

NOTE.—As to the matter of the statute of limitations, it should be noticed that the sole point at issue on that branch of the case was whether, as regards the statute of limitations, a prosecution for conspiracy under Rev. St. § 5440, is maintainable if instituted within three years of the commission of the last or of any overt act. The prosecution in this cause was the first one instituted on the conspiracy involved. No question of double or multiple prosecution or punishment for the same offense was presented for decision. What was said by defendants' counsel in the matter was merely by way of argument, in an attempt to show that the court's conclusion would lead to erroneous results. Whether, because of the peculiar nature of the offense denounced by Rev. St. § 5440, separate punishment can be lawfully inflicted every time an overt act is committed on a renewal of the original conspiracy, when previously the conspirators have been convicted and punished with regard to one of the overt acts, is a matter which was not involved, and did not arise, and which therefore did not call for decision by the court.

UNITED STATES v. SCOTT.

(District Court, W. D. Kentucky. October 23, 1906.)

COMMERCE—POWERS OF CONGRESS—STATUTE RELATING TO INTERSTATE CARRIERS AS EMPLOYERS.

Section 10 of Act June 1, 1898, 30 St. 428 [U. S. Comp. St. 1901, p. 3210], entitled "An act concerning carriers engaged in interstate commerce and their employés," which section makes it a criminal offense for any employer subject to the provisions of the act or any officer, agent, or receiver of such employer to require any employé to agree as a condition of his employment not to become or remain a member of any labor organization, or to threaten his removal, or otherwise discriminate against him because of such membership, or to attempt or conspire to prevent any employé who has been discharged or has quit from obtaining employment, is not in the constitutional sense a regulation of commerce or of commercial intercourse among the states, inasmuch as its essential object manifestly is only to regulate certain phases of the right of an employer to choose his own servants, whether the duties of those servants when employed shall relate to interstate commerce or not; and its provisions being thus broad and general, without limitation to transactions relating to interstate commerce, but applicable equally to matters beyond the control of Congress, it is unconstitutional and void.

On Demurrer to Indictment.

George Du Relle, U. S. Atty.
Morton K. Yonts, for railroad telegraph operators.
Jas. P. Helm & Ben. D. Warfield, for defendant.

EVANS, District Judge. Congress passed an act concerning carriers engaged in interstate commerce and their employés, which was approved June 1, 1898 (30 Stat. 424–428, c. 370 [U. S. Comp. St. 1901, pp. 3205–3211]). By its first section the act was made to apply to common carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by river for a continuous carriage or shipment from one state to another. Section 10 (30 Stat. 428 [U. S. Comp. St. 1901, p. 3210]) of the act is in this language:

"That any employer subject to the provisions of this act and any officer, agent, or receiver of such employer who shall require any employé, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; or shall threaten any employé with loss of employment, or shall unjustly discriminate against any employé because of his membership in such a labor corporation, association, or organization; or who shall require any employé or any person seeking employment, as a condition of such employment, to enter into a contract whereby such employé or applicant for employment shall agree to contribute to any fund for charitable, social, or beneficial purposes; to release such employer from legal liability for any personal injury by reason of any benefit received from such fund beyond the proportion of the benefit arising from the employer's contribution to such fund; or who shall, after having discharged an employé attempt or conspire to prevent such employé from obtaining employment, or who shall, after the quitting of an employé, attempt or conspire to prevent such employé from obtaining employment, is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was com-

mitted, shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars."

The indictment in this case contains six counts; but it will suffice to say that in substance each of them charges, in appropriate language, that the Louisville & Nashville Railroad Company is a common carrier engaged in the transportation by railroad of passengers and property by continuous carriage or shipment from one state into another; that the accused, J. M. Scott, is and was its agent and chief train dispatcher, and as such had supervision and control of the employment for the said company of certain telegraph operators, including those mentioned in the indictment, who were, as such, in the employment of the said railroad company; and that the accused did threaten them and each of them with the loss of their said employment if they joined a certain labor association known as the "Order of Railroad Telegraphers," which order was a corporation organized under the laws of the state of Iowa, but the aims and purposes of which are not otherwise shown.

The defendant has demurred to the indictment upon the ground that the provisions of section 10 of the act are not such as Congress is authorized by the Constitution of the United States to enact, and thus is raised a question of great delicacy as well as interest and importance, and one which therefore has called for very deliberate consideration. The subject has been carefully investigated by the court, and its conclusions are now to be stated.

It is conceded that there are no clauses of the federal Constitution which can support the tenth section of the act, unless it be those found in article 1, § 8, of that instrument. It is there provided that:

"The Congress shall have power [among other things] to regulate commerce with foreign nations, and among the several states, and with the Indian tribes [and] to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

The interpretation of the last of these clauses is governed by the rule laid down by the Supreme Court in McCulloch v. Maryland, 4 Wheat. 421, 4 L. Ed. 579, which, ever since its announcement in 1819, has been accepted by that court (and, of course, by all other courts) as perfectly accurate. Speaking through Chief Justice Marshall, the court said:

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

In respect to the legislation now in question, emphasis may profitably be laid upon the elements of the rule requiring that legislation "shall be within the scope of the Constitution," that it shall "be plainly adapted" to constitutional ends, and be consistent with the spirit of that instrument.

Certain other elementary and well-understood propositions may also be noted at this point. First. Unless congressional legislation be supported by constitutional authority, it cannot be supported at all. The rule in this respect is different from the rule applicable to state legislation, which is usually valid unless expressly forbidden. In other words, congressional legislation must have warrant in the language of the Constitution, while state legislation may be valid unless expressly prohibited. Second. Every congressional enactment is presumed to be a constitutional exercise of power until the contrary is clearly established, and proper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to this presumption, unless the lack of constitutional authority to pass an act in question is clearly demonstrated. United States v. Harris, 106 U. S. 635, 1 Sup. Ct. 601, 27 L. Ed. 290; Trade-Mark Cases, 100 U. S. 96, 25 L. Ed. 550. Third. But, if the unconstitutionality of an act is demonstrated, the courts of the United States, whether the highest or the lowest of them, and especially the former, have not hesitated so to decide. The well-established rule for our guidance in such cases is stated by Chief Justice Fuller in Pollock v. Farmers' Loan & Trust Co., 157 U. S., at page 554, 15 Sup. Ct., at page 679 (39 L. Ed. 759), as follows:

"Necessarily the power to declare a law unconstitutional is always exercised with reluctance, but the duty to do so, in a proper case, cannot be declined, and must be discharged in accordance with the deliberate judgment of the tribunal in which the validity of the enactment is directly drawn in question."

A number of congressional enactments have been held to be void, but we will note only a few of them, such as Hepburn v. Griswold, 8 Wall. 610, 19 L. Ed. 513, which nullified the legal tender legislation, the Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550, which overthrew the legislation respecting trade-marks, the Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835, which declared the legislation of Congress designed to protect civil rights under the fourteenth amendment to be invalid, the case of Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759, which disposed, in the same way, of the legislation imposing an income tax, and the case of James v. Bowman, 190 U. S. 127, 23 Sup. Ct. 678, 47 L. Ed. 979, which held that the legislation designed to protect the right of suffrage under the fifteenth amendment, which expressly gave Congress the power to enforce the amendment by appropriate legislation, was unconstitutional. We can hardly fail to observe that the legislation in each of the cases just named was of much greater moment than that embraced in section 10 of the act of June 1, 1898, although that fact of itself might not be particularly important in its effect upon judicial action.

While the tide of advancing events has wisely and inevitably forced upon the courts the necessity of giving broad and apparently ever-expanding latitude to the commerce clause of the Constitution, still it may be that there should be a limit to its elasticity, and possibly it might not be an altogether unmixed evil for some of the people now, as was once the habit, to call for a strict construction of that instru-

ment. If such call served no other purpose, it might be useful as the occasional hoisting of a cautionary signal. Our government was organized and has greatly prospered under a system of "checks and balances," and it should always be remembered that those checks and balances yet remain for most essential purposes. Certainly the writer will always cherish the highest respect for the Congress of the United States, and in a particular sense for that Congress which enacted the legislation now before the court, but that respect should not prevent a careful and attentive investigation of the questions involved in this case when they are raised by a citizen in his own defense against a serious criminal charge.

The word "commerce" as used in the Constitution, has been defined by the Supreme Court. In the great case of Gibbons v. Ogden, 9 Wheat. 189, 6 L. Ed. 23, it was said:

"Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribed rules for carrying on that intercourse."

The power conferred upon Congress is to regulate this commercial intercourse and the carrying on thereof among the states, and unquestionably it may devise any proper and necessary means for doing that particular thing. Does the legislation now in question, in any fair sense, regulate commercial intercourse among the states, or does it only regulate certain phases of the intercourse between employer and employé? If the latter is all, even though this legislation is associated in the same act with other provisions which do regulate commercial intercourse among the states, can it be maintained as constitutional? It is elementary that one provision in an act may be constitutional and another unconstitutional. One may stand and the other fall if they may be separated, as here they easily can be as between section 10 and the other clauses of the act; so that section 10 might fall and the remaining portions of the act of June 1, 1898, be constitutional. It is true it has been judicially determined that Congress has the power, in regulating interstate commerce, to impose duties upon carriers which have reference to the safety of employés while actually discharging duties pertaining to interstate commerce, as well as to that of passengers and property; but it can hardly be fairly contended that the provisions of section 10 have any such purpose in view.

Those provisions relate, not to the safety of the employés while actually discharging duties pertaining to interstate commerce, but to their being members of labor unions, and, in the matter of making and enforcing contracts for hiring them, forbids discriminations against them on that ground. Indeed, we cannot, and we certainly should not, shut our eyes to the fact (which is clear enough upon the face of the section as well as otherwise) that the essential purpose of the enactment was not to "regulate commercial intercourse among the states," but was to prevent, generally, discriminations against what is called union labor in one state alone as well as in more than one. We cannot too strongly emphasize this obvious fact. If this proposition be true (and it seems to us that no one can fairly doubt it),

then the question is settled; for, whatever the states might do in such matters through their own Legislatures, the Constitution of the United States does not confer upon Congress by any express language, nor by any fair implication from any language used, the power, when servants are employed, to prevent discriminations against union labor, either in Kentucky alone or in several states, even if the hirer at the time does happen to be engaged in interstate traffic. Such legislation for such a purpose cannot be supposed to have been in the contemplation of the framers of the Constitution. The legislation to prevent discrimination against union labor in respect to employing or retaining servants, therefore, is not, in the opinion of the court, a regulation of commerce, and certainly it is not a "regulation of commercial intercourse among the states" within the meaning of the Constitution, and yet the regulation of that one thing, namely, the matter of discrimination against members of labor unions in respect to the employment and retention of servants, is the clear and only purpose of section 10. Looking squarely at the language of the section, this would seem to be the only conclusion that is possible.

Viewing the matter from another and somewhat narrower standpoint, we find another most cogent objection to section 10 of the act. In the Trade-Mark Cases, 100 U. S., at page 96, 25 L. Ed. 550, Justice Miller, speaking for the court, said:

"Governed by this view of our duty, we proceed to remark that a glance at the commerce clause of the Constitution discloses at once what has been often the subject of comment in this court and out of it, that the power of regulation there conferred on Congress is limited to commerce with foreign nations, commerce among the states, and commerce with the Indian tribes. While bearing in mind the liberal construction that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the states means commerce between the individual citizens of different states, there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same state, is beyond the control of Congress. When, therefore, Congress undertakes to enact a law which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several states, or with the Indian tribes. If not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same state, it is obviously the exercise of a power not confided to Congress. We find no recognition of this principle in the chapter on trade-marks in the Revised Statutes."

See, also, Baldwin v. Franks, 120 U. S. 686, 7 Sup. Ct. 656, 763, 32 L. Ed. 766.

Now, it cannot be overlooked that the legislation, the constitutionality of which is drawn in question by the demurrer to the indictment in this case, undertakes to punish any discrimination against union labor by any railroad company which is actually engaged in interstate commerce, whether such discrimination be in respect to the hiring or retention of telegraph operators employed in respect to purely local and state traffic, or to the hiring or retention of those employed in respect to commerce among the states. Properly construed, the indictment fails to show whether the operators named therein were em-

ployed upon one or the other description of commerce, but whether this is so or not, the characteristic we have imputed to section 10 would seem manifestly to bring the objections to it within the reach of those sustained by the Supreme Court in its condemnation of the trade-mark legislation.

Again, it may well be said that section 10 regulates in a certain respect the outside conduct of those railroad companies which, as part of their business, engage in interstate commerce, but it does not regulate the commerce itself, and what it does regulate has as much and probably more relation to state commerce than to that which is interstate. Section 10 of the act, in short, does not differentiate cases where the telegraph operator is employed in merely local and state traffic from cases where the work relates to interstate traffic. Both those who work upon local and state traffic and those who work upon interstate commerce are embraced by the legislation indiscriminately. In other words, all are equally embraced in the provisions of section 10, whether the operator works upon local or state business only or upon interstate traffic. In the opinion of the court it cannot reasonably be doubted that this brings section 10 within the rule laid down in the Trade-Mark Cases.

While section 10, as a whole, is easily separable from other provisions of the act of June 1, 1898, its own clauses are not separable from each other, and other observations of the Supreme Court in its opinion in the Trade-Mark Cases, 100 U. S., pp. 98, 99, 25 L. Ed. 550, may very appropriately be referred to in this connection. It was there said:

"It was urged, however, that the general description of the offense included the more limited one, and that the section was valid where such was in fact the cause of denial. But the court said, through the Chief Justice: 'We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is constitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not there now. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. * * * To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.' If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable that we should do what, if the matter were now before that body, it would be unwilling to do, namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances, under the act of Congress, and in others under state law."

The same view was also taken in Baldwin v. Franks, 120 U. S. 687, 7 Sup. Ct. 656, 763, 32 L. Ed. 766.

The able arguments of counsel have included a discussion of many collateral questions supposed to have more or less bearing upon the main points involved, such as the question of class legislation and the objection thereto, the question of the right of private contract, and the danger of interfering therewith, and the question of the alleged public,

and overwhelming necessity that the carriers of the country shall be left in full control of the matter of the employment of their own servants and in the exclusive exercise of the right to select them and discipline them. Certainly it might be pertinently contended that that was class legislation, and possibly very unfair legislation, which, favoring a certain class, made it criminal to discriminate against it, and yet permitted that very class of labor to discriminate arbitrarily against everybody else. Justice might rather demand (if, indeed, the questions of fitness and freedom of choice are to be ignored or minimized) that any discrimination by any class against any other class of laborers should be forbidden, if any is, inasmuch as one class of laborers is probably no more sacred than another, and the weaker class is quite as much entitled to protection against the powerful as the latter is against the former. To forbid discriminations against union labor, while discriminations by it against others, if made, are allowed, would not seem to be a very palpable or conspicuous example of equal and exact justice to all, and might be open to the criticism that it is class legislation. But, while all these considerations might have weight in other connections, still the court prefers to put its judgment in this case upon two propositions, viz.: (1) That section 10 of the act of June 1, 1898, is not, in the constitutional sense, a regulation of commerce or of commercial intercourse among the states, and cannot justly nor fairly be so construed or treated, inasmuch as its essential object manifestly is only to regulate certain phases of the right of an employer to choose his own servants, whether the duties of those servants when employed shall relate to interstate commerce or not; and (2) upon the ground that section 10 is so broad as to be condemned by the rule laid down in the Trade-Mark Cases.

These considerations have brought the court to the very clear and deliberate conclusion that section 10 of the act of June 1, 1898, is not sustained by constitutional warrant, and is therefore insufficient to support the indictment.

The demurrer must be sustained.

ORDER OF R. R. TELEGRAPHERS v. LOUISVILLE & N. R. CO.

(Circuit Court, W. D. Kentucky. November 17, 1906.)

1. REMOVAL OF CAUSES—VALUE IN CONTROVERSY—HOW SHOWN.

In a suit in a state court for an injunction, based upon a law of the United States, where the value in controversy is not shown by the complainant's pleading, for the purposes of removal of the cause, it may be shown in the petition for removal.

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

2. COMMERCE—REGULATION OF INTERSTATE CARRIERS—CONSTITUTIONALITY OF STATUTE.

Act June 1, 1898, c. 370, § 10, 30 Stat. 428 [U. S. Comp. St. 1901, p. 3210], which makes it a criminal offense for any interstate carrier as an employer to require any "employé or person seeking employment" to enter into an agreement not to become or remain a member of any labor organization, or to threaten any employé with loss of employment or un-

justly discriminate against any employé because of his membership in such labor organization, is void, as not within the constitutional power of Congress to regulate interstate commerce.

2. MASTER AND SERVANT — PREVENTING EMPLOYÉS FROM JOINING LABOR UNIONS—RIGHTS OF LABOR ORGANIZATIONS—CONSTRUCTION OF STATUTE.

If such section be assumed to be constitutional, and to give by implication a right to a civil remedy, such remedy is confined to "employés" or "persons seeking employment," and it cannot be made the basis of a suit for an injunction by a labor corporation to restrain a carrier from preventing by intimidation or threats complainant's representatives, who are neither employés nor seeking employment, from soliciting members from among defendant's employés.

In Equity. On demurrer to bill.

Morton K. Yonts, for complainant.
Helm & Helm, for defendant.

EVANS, District Judge. The complainant filed its petition (hereinafter to be called its "bill of complaint") in the Jefferson circuit court, in which it alleged that it was a body corporate, organized under the laws of the state of Iowa, and was "an organization instituted for the purpose of uniting railroad telegraphers, line repairers, levermen, and interlockers, employed on railroads, for the protection of their interests, to elevate their social, moral, and intellectual condition, to promote the general welfare of its membership, and to promote and encourage a mutual benefit department for the aid and comfort of the beneficiaries of deceased members." The bill of complaint further shows that the complainant is engaged in lawful business in Kentucky and elsewhere; that it derives revenue for its existence from the collection of dues from its members; that it has been endeavoring to secure members from among the railroad telegraph operators employed by the defendant, and for that purpose has sent out representatives to solicit members among the railroad telegraph operators employed by the defendant, but that the defendant, to prevent its said employés from joining the order, has sent forth various detectives for the purpose of inaugurating a system of intimidating and terrorizing complainant's representatives, and have done so to the extent of deterring them and making them afraid to solicit such operators employed by the defendant to become members of the complainant order; that the defendant, to accomplish its purpose, has carried on a campaign of intimidation against complainant's representatives in the work aforesaid; that the defendant, through its agents, has followed complainant's representatives, and has endeavored to dissuade its telegraph operators from becoming members of its order by threats of dicharge from service, and has thus put its employés in fear; that the defendant's agents have listened to complainant's agents when they talked to defendant's operators, and have prevented said operators, by threats of force and violence and by putting them in fear, from engaging in conversation with complainant's representatives, so as to ascertain the objects and purposes of complainant's organization, and have threatened complainant's representatives with great bodily harm, and by intimidation and a display of force and arms, and by threatened intimidation, have endeavored to compel complainant's representatives to desist from their efforts to secure members from among

defendant's said telegraph operators. The bill avers that the complainant "is engaged in the good and lawful business aforesaid, and that the sole and only purpose of its organization is to promote the business and welfare and interests of railroad telegraph operators throughout the country, and that if it is enabled to exercise its rights and privileges under the law it can and will secure a great number of members for the said order from among the railroad telegraph operators employed by the defendant, and that it will derive large revenue in the shape of dues from said prospective members." The bill then sets forth the relief to which the complainant claims to be entitled, to wit, an injunction to compel the defendant to cease and altogether to desist from the conduct described in the bill, and states that "all the acts aforesaid which have been committed by the defendant, and its agents, servants, and employés, in the way and manner as set forth in this petition, and which the said defendant will continue to do unless enjoined and restrained by the orders of this court, are in violation of an act of Congress of the United States of America, of date June 1, 1898, 30 Stat. 424, c. 370 [U. S. Comp. St. 1901, p. 3205], entitled "An act concerning carriers engaged in interstate commerce and their employés"; and more particularly are the said acts which defendant and its agents, servants, and employés have committed, and will continue to commit unless enjoined and restrained, in violation of section 10 of said act (30 Stat. 428 [U. S. Comp. St. 1901, p. 3210]), which is in words and figures as follows, to wit:

"That any employer subject to the provisions of this act and any officer, agent, or receiver of such employer who shall require any employé or any person seeking employment as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization, or shall threaten any employé with loss of employment, or shall unjustly discriminate against any employé because of his membership in such a labor corporation, association, or organization, or who shall require any employé or any person seeking employment, as a condition of such employment, to enter into a contract whereby such employé or applicant for employment shall agree to contribute to any fund for charitable, social, or beneficial purposes; to release such employer from legal liability for any personal injury by reason of any benefit received from such contribution to such fund; or who shall, after having discharged an employé, attempt or conspire to prevent such employé from obtaining employment, or who shall, after the quitting of an employé, attempt or conspire to prevent such employé from obtaining employment is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was committed, shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars."

The bill also avers that the defendant is a common carrier engaged in interstate commerce. Upon the petition of the defendant the action was removed to this court, and subsequently the defendant demurred to the bill. Pending the consideration of the questions raised by the demurrer doubts arose in the mind of the court as to whether the case was removable, and an argument was directed upon that question. It is, of course, manifest that the suit arises, at least in part, if not entirely, under the laws of the United States, but as the complainant did not (and under the state practice need not) show any value in

controversy, the question arose whether the value of the matter in dispute could be shown in the petition for removal alone. Whether we should as to this question follow the rule in Tennessee v. Union & Planters' Bank, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511, Postal Telegraph Co. v. Alabama, 155 U. S. 487, 15 Sup. Ct. 192, 39 L. Ed. 231, Oregon Short Line Ry. v. Skottowe, 162 U. S. 495, 16 Sup. Ct. 869, 40 L. Ed. 1048, Arkansas v. Kansas & Texas Coal Co., 183 U. S. 185, 22 Sup. Ct. 47, 46 L. Ed. 144, which requires that the facts showing that the case arose under the Constitution or laws of the United States shall appear by the plaintiff's pleading and not elsewhere, or whether we should follow the rule in Stevens v. Nichols, 130 U. S. 231, 9 Sup. Ct. 518, 32 L. Ed. 914, and City of Ysleta v. Canada (C. C.) 67 Fed. 6, which permits the fact of diverse citizenship to be shown in the petition for removal, was the question to be solved. We found it in some confusion, some cases holding one way and some the other; but upon the averments of the petition for removal, as now amended and not controverted (Dishon v. Cincinnati, N. O. & T. P. Ry. Co., 133 Fed. 471, 66 C. C. A. 345), and upon the consideration that such an injunction as that prayed for, if granted, would represent a considerable money value, we have reached the conclusion not to remand the case.

This brings us to the questions arising upon the demurrer. At the argument some contention was made by the complainant that the bill bore wider than a claim to relief under section 10 of the act of June 1, 1898, and possibly there might be some color for the suggestion if, as will be seen from the averments copied from the bill of complaint, the complainant did not charge the acts complained of to be violative of that statute and claim relief entirely upon that ground. Otherwise the averments of the bill as to the acts and conduct of the defendant as to force, intimidation, and violence are too general, vague, and indefinite to make a case for the exercise of the power of the court to grant extraordinary relief, without giving the party defendant an opportunity to try the issues of fact by a jury. Granting an injunction should never be done, except in a clear case. It is always a matter of sound discretion, and one should never be granted unless the facts are very explicitly disclosed and appear to be such as to warrant the relief where there is no plain and adequate remedy at law. The complainant is an Iowa corporation, which states the objects of its corporation to be at least partly social. It claims to be soliciting, through "representatives," persons in the employment of the defendant to join it; but, while it shows that the defendant is opposed to its employés doing so, and is endeavoring to prevent it by a campaign of intimidation, etc., no one of such "representatives" is named, nor is any specific instance of intimidation or violence set out or described in such form as to identify it. Without something much more definite than this, there is no equity in the bill, when viewed from the standpoint of general equitable principles; that is to say, no case is disclosed by the bill which would properly authorize the relief asked. And especially does this appear to be true when we reflect that, if any injury has been or should be done to those "representatives," they, as individuals, will personally

have a plain remedy thereon. For such injury to its "representatives," in the absence of a conspiracy, the complainant in its own name does not appear to be entitled to any relief.

But, apart from those considerations, we think the proper construction of the bill of complaint limits it to a claim to relief under section 10 of the act of June 1, 1898, and nothing else. That section seems to be relied upon as the single basis of the relief sought, and the demurrer will be disposed of from that point of view. Otherwise, if complainant claims to be entitled to relief upon two separate and distinct grounds, the bill is open to the objection of multifariousness. Brown v. Guaranty Trust Co., 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468.

1. We have heretofore, in the case of United States v. J. M. Scott, held section 10 of the act to be unwarranted by the Constitution. In the opinion delivered in that case (148 Fed. 431), the grounds for that conclusion were stated at large, and need not be repeated.

2. We think, however, we need not have gone that far in this case, because we think that no proper construction of section 10 would include the case stated by the complainant. That section makes certain things criminal when done by a common carrier engaged in interstate commerce, as the defendant here is; but it covers only "employés" of such carriers and "persons seeking employment" from such carriers. It is neither claimed nor averred in the bill that the complainant is an "employé" or a "person seeking employment" from the defendant, and for that reason the complainant in no way shows itself to come within the provisions of section 10. Indeed, it is obvious, from the nature of the complainant, that it could not itself be an employé nor a seeker of employment for itself.

3. Section 10 does no more than make certain acts criminal and punishable by criminal proceedings. Certainly it does not, in terms, give any right to a civil remedy even to "employés" or to "persons seeking employment." If the right to a remedy by civil action could be implied in their favor from the prohibitions of the statute, it certainly must be that the complainant is much too remote from any inclusion in the terms or purposes of the legislation to be entitled to a still further implication of a nature to entitle it to a civil remedy thereunder. It would seem, therefore, to be entirely clear that, whether section 10 be constitutional or not, and whether its prohibitions would by implication give a civil remedy to "employés" or to "persons seeking employment," the complainant, being neither one or the other, is not entitled to any of the benefits of legislation which by no proper interpretation can be said to embrace it.

4. Besides, if section 10 be criminal only in its scope, and if it cannot be implied from its terms that any civil right or remedy was intended thereby to be given, then the effect of the complainant's bill is to seek an injunction against the commission of a crime. This, under the federal jurisprudence, is not admissible.

For these reasons the demurrer will be sustained, and the bill will be dismissed, with costs.

CHICAGO, R. I. & P. RY. CO. v. WILLIAMS et al.

(Circuit Court, D. Kansas, First Division. October 31, 1906.)

No. 8,416.

1. EMINENT DOMAIN—DELEGATION OF POWER—PROPERTY PREVIOUSLY DEVOTED TO PUBLIC USE.

General power conferred by the Legislature upon a local board to establish highways does not empower such board to condemn for highway purposes land which has previously been appropriated under the power of eminent domain, and is being used for a different public purpose, such as the station grounds of a railroad company, which use would be interfered with or destroyed by such second appropriation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 107, 108.]

2. SAME—ACTION BY BOARD IN EXCESS OF POWERS—REVIEW BY COURTS.

When a local board or body attempts to exercise a power of eminent domain not conferred on it by the Legislature, its action is subject to review and control by the courts, state or federal.

In Equity. On demurrer to bill.

M. A. Low and Paul E. Walker, for complainant.
Garver & Larimer, for defendants.

POLLOCK, District Judge. The bill of complaint in this case avers complainant, in the operation of its road at the station of Rexford, Thomas county, this state, to be the owner and to maintain a depot, depot platform, main line, siding, passing tracks, station grounds, buildings, and other improvements, all acquired by it under the laws of the state, and all necessary for the transaction of its business as a common carrier for hire.

The bill further avers that defendants, acting under the authority of the county board of Thomas county, have laid out and are about to open for travel a highway 60 feet in width over and across the station grounds, platforms, tracks, and other improvements of the company located at said place, and that unless enjoined defendants will open said highway, and thus destroy and render useless said property of complainant at said place in the carrying out of the public use to which it is now devoted. To this bill defendants demur.

The theory of complainant, as made out by its bill, is that, as the property now sought to be appropriated to highway purposes is already appropriated to and necessary for the discharge of a public use, the same may not be taken for another wholly inconsistent public use, without such power has been expressly conferred upon defendants by legislative sanction, or by clear and necessary implication from legislative enactments; and that no such express or implied legislative authority is conferred upon defendants in this case.

The theory of defendants, as stated in the brief of their solicitors, is:

"(1) The laying out and opening of a public highway to accommodate public travel is the exercise of the political power of the state, exclusively within the control of the Legislature or such tribunals as it may vest with the power, and entirely beyond the control or supervision of the courts. (2) The

act which is sought to be enjoined by this suit is one within the rightful power of eminent domain, a sovereign right of the state, and cannot be interfered with by the federal courts so long as such power is being exercised within the limitations of authority granted by the Legislature."

In so far as the second proposition stated by defendants' solicitors is concerned, it must be conceded, if the insistence be that the authority to lay out and open this highway across and over the property of complainant in the manner attempted by defendants is found to be expressly granted by the Legislature of the state to defendants, or granted by necessary implication from legislative enactments found, then a federal court will not enjoin the exercise of such power. Neither will a state court, for the power of eminent domain is a sovereign power of the state. But if it be thought by solicitors for defendants that a federal court (the requisite jurisdictional facts being made to appear) may not interpose its mandate in any case in which a state court might rightfully interfere, merely because it is a federal court, then such contention cannot be allowed to prevail, for the judiciary act provides:

"The Circuit Courts of the United States shall have original cognizance concurrent with the courts of the several states of all suits of a civil nature at common law and in equity," etc.

The questions, therefore, arising for determination on this demurrer are: (1) Is the laying out of the public highway in question, under the laws of the state, the exercise of a purely political power, delegated to defendants to determine the necessity for its exercise and to enforce such determination, entirely uncontrolled by the courts? If so, the demurrer must be sustained. (2) If not, has the power here attempted to be exercised by defendants been granted by the Legislature to defendants in express terms, or by such clear implication as to preclude interference on the part of the courts? If so, the demurrer must be sustained.

It must be conceded, and is conceded, by the solicitors for complainant, that the laying out and opening of a highway for the purpose of public travel, under the power of eminent domain, is the exercise of a legislative power. It must also be conceded, and is conceded, that the Legislature cannot, by authorizing a railroad company to exercise the sovereign power of eminent domain in the acquisition of its right of way, station grounds, etc., deprive itself of the power of eminent domain to the extent that it will in future be precluded from again retaking the same property, once condemned and devoted to a public use, through its lawfully constituted agents, for another public use, although inconsistent with the former, should the necessity for such retaking arise. But such power of reappropriation, and the power to determine the necessity for it, must be either exercised by the Legislature itself, or granted to its lawfully constituted agent in clear and express terms or by necessary implication. The right to exercise such power of reappropriation by an agency of the state will not be presumed.

From an examination of many adjudicated cases touching this subject, I am of the opinion the following principles may be deduced: (1) When an attempt is made to exercise the power of eminent do-

main in the taking of private property devoted to a private use by a lawfully constituted agency of the state, on which the Legislature has conferred the general power of eminent domain, the question of the necessity for the taking is left to the decision of the agents exercising the sovereign power, and the existence or nonexistence of the necessity for the appropriation cannot be questioned in the courts. (2) When property once taken through the lawful exercise of the sovereign power of eminent domain is devoted to and necessary in the carrying out of such public use for which it was taken, is sought to be reappropriated by the sovereign power itself, or through its lawfully constituted agent, on which agent the express or necessarily implied power to so do has been conferred by the Legislature, the power to determine the necessity for the retaking rests in the sovereign or its agent, and the existence or nonexistence of the necessity will not be controlled by the courts. (3) Where an attempt is made by an agency of the state, on which agent there has been conferred only the general power of eminent domain, to appropriate property theretofore taken under such general power, which property at the time it is sought to be retaken is actually and necessarily used in carrying out the public purpose for which it was first taken, in such case the agency of the state attempting the exercise of the power is not the sole and exclusive judge of the necessity for the re-exercise of the power, and the courts are not in such case precluded from examining into the necessity for such retaking.

While there is an apparent conflict in the many adjudicated cases bearing on this subject, yet I am of the opinion their seeming inconsistencies may be reconciled, and that many of them, at least, may be brought into harmony with the above-stated principles, as the examination of a portion of the cases cited and relied upon by solicitors for defendants will show. For example, in the case of Com'rs of Wabaunsee Co. v. Bisby, 37 Kan. 253, 15 Pac. 241, there was an attempt to take private property devoted to a private use for a public highway. It was held the only question triable on appeal was the amount to be awarded the owner of the property. The same is true of Jockheck v. Com'rs of Shawnee Co., 53 Kan. 780, 37 Pac. 621. It was thought in that case the homestead character of the private property sought to be taken was material. The court held it was not. The same may be said of Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; Shoemaker v. United States, 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170; Backus v. Fort St. Union Depot Co., 169 U. S. 557, 18 Sup. Ct. 445, 42 L. Ed. 853. In each of these cases the state, through its lawfully constituted agency, upon which it had conferred the power of eminent domain, sought to appropriate private property, devoted to a private use, to a public use. Irrigation Co. v. Klein, 63 Kan. 484, 65 Pac. 684, was precisely of the same character. The question there litigated was the right of the irrigation company to exercise the power of eminent domain at all, and the good faith of its attempted exercise. In C., B., U. P. R. Co. v. A., T. & S. F. R. Co., 28 Kan. 453, the single question presented was the constitutionality of that part of the statute allowing the defendant railroad company to enter upon the land condemned upon payment to the county treasurer of the amount of the award made by the

commissioners condemning the land. In K. C. R. Co. v. Com'rs of Jackson Co., 45 Kan. 716, 26 Pac. 394, the sole question litigated was the right of the railroad company to recover damages for the laying out and opening of a highway over its right of way and track. In Railway Co. v. Railway Co., 67 Kan. 569, 70 Pac. 939, 73 Pac. 899, the question now under consideration seems to have first received the attention of the Supreme Court of this state. In that case section 267 of Lewis on Eminent Domain (2d Ed.) vol. 1, is quoted with approval, as follows:

"The general authority to locate and construct a railroad from one point to another does not authorize the taking of property already devoted to railroad uses. In one of the cases cited the court says: 'A charter to build and maintain a railroad between certain points, without describing its course and direction, but leaving that to be determined and established by the corporation, as provided by the general laws, does not prima facie give any power to lay out the road over land already devoted to, and within the recorded location of, another railroad. It is not to be presumed that the Legislature intended to allow land thus devoted to one public use to be subjected to another, unless the authority is given in express words or by necessary implication. And such implication can only be found in the language of the act, or from the application of the act to the subject-matter; so that the railroad could not be laid, in whole or in part, by reasonable intendment, on any other line.' The Legislature may authorize one railroad to take the property of another, and, as indicated in the opinion just quoted, this may be done by express words or by necessary implication. These general rules are undoubted, but their application to particular cases is often attended with much difficulty, as will appear from the following sections."

On rehearing, it is said by Burch, Justice, delivering the opinion:

"The record, therefore, fairly presents a case of an attempted condemnation by one railroad company, under the general statutes of eminent domain, of land owned by another railroad company already in actual and necessary use for railroad purposes.

"Under the authority of the text quoted in the former opinion (Lewis, Em. Dom. [2d Ed.] § 267), and the adjudicated cases upon which that text is based, this cannot be done except by express statutory warrant, or by necessary implication from the language of the statutes, when an effort to apply the law is made. The latest decisions of the courts support this doctrine."

—Citing Western Union Tel. Co. v. Pennsylvania R. Co. (C. C.) 120 Fed. 362; Western Union Telegraph Co. v. Pennsylvania R. Co., 123 Fed. 33, 59 C. C. A. 113; Indianapolis & V. R. Co. v. Indianapolis & M. R. Transit Co. (Ind. App.) 67 N. E. 1013.

The courts of other states have had occasion to pass upon the question now under consideration. In Albany Northern Railroad Company v. Brownell, 24 N. Y. 345, it is said:

"The question is then presented whether, when a railroad company has acquired the title of a piece of land for the site of a building necessary for its business, the local authorities can occupy the ground for a highway, and thus prevent the company from erecting the proposed building. I am of opinion that it cannot be lawfully done."

In Matter of Boston & Albany R. R. Co., 53 N. Y. 574, it is said:

"The sole question, then, is whether the Legislature has conferred upon the applicant the power to enter upon and take possession of property already held and dedicated by authority of law to one public use for another and entirely different use, also declared to be public. The authority must be sought in the statutes, by which all the powers which railroad corporations

may exercise over property without the consent of the owners are conferred, and, if not found, then it does not exist. It must be expressly conferred —that is, in direct terms or by necessary implication—and the implication does not arise if the powers expressly conferred can, by reasonable intendment, be exercised without the appropriation of property already actually held and used for another public use."

Again, in Matter of City of Buffalo, 68 N. Y. 167, Folger, Justice, rendering the opinion, said:

"In determining whether a power generally given is meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, the extent to which that use would be impaired or diminished by the taking of such part of the land as may be demanded for the subsequent public use. If both uses may not stand together, with some tolerable interference which may be compensated for by damages paid; if the latter use, when exercised, must supersede the former—it is not to be implied from a general power given, without having in view a then existing and particular need therefor, that the Legislature meant to subject lands devoted to a public use already in exercise to one which might thereafter arise. A legislative intent that there should be such an effect will not be inferred from a gift of power made in general terms. To defeat the attainment of an important public purpose to which lands have already been subjected, the legislative intent must unequivocally appear. If an implication is to be relied upon, it must appear from the face of the enactment, or from the application of it to the particular subject-matter of it, so that by reasonable intendment some especial object sought to be attained by the exercise of the power granted could not be reached in any other place or manner."

In Prospect Park & C. I. R. R. Co. v. Williamson et al., 91 N. Y. 552, Mr. Justice Rapallo, rendering the opinion, said:

"These lands having already been lawfully appropriated, under the right of eminent domain, to a public purpose, express and direct legislative authority is necessary to justify their appropriation by proceedings in invitum to a different public purpose, and that general laws authorizing the laying out of highways are not sufficient. In respect to the crossing of railroad tracks by highways, such express authority is contained in the general railroad act, but this authority does not extend to lands taken for depot purposes."

In Jeduthun Wellington et al., Petitioners, etc., 16 Pick. (Mass.) 87, 26 Am. Dec. 631, the Supreme Court of Massachusetts held:

"We think, therefore, that the rule applies to this case, that where the Legislature have appropriated any territory to a specific public use, and the laying a highway over it would be inconsistent with such public use, and contrary to the terms and provisions of such appropriation, the general power of the county commissioners to lay out highways, so far as such appropriated territory is concerned, is suspended and superseded."

In Proprietors of Locks & Canals v. City of Lowell, 7 Gray, 223, the Supreme Court of Massachusetts held:

"It is undoubtedly true that land or other property which has once, in conformity with the provisions of the Constitution, been devoted to the public use, may afterwards in like manner be again taken and appropriated to the public service under a subsequent statute duly enacted, if such a purpose is expressly, or by unavoidable implication, authorized by its provisions; for, in every exigency that can from time to time occur, the right to take private property for public use must remain paramount in the state, or its power to promote the general welfare would be paralyzed and destroyed. It belongs to the Legislature to determine when these exigencies arise, and upon what occasions this extreme right of the government shall be exer-

cised and enforced. Thus, a portion of land laid out for a public common may by special provision of law be converted into a public highway; and again, a portion or the whole of a public highway may be appropriated to the service of a private corporation empowered to construct, and required to maintain for the public use, an iron railway. Wellington, Petitioners, 16 Pick. (Mass.) 103, 26 Am. Dec. 631; Springfield v. Connecticut River Railroad, 4 Cush. (Mass.) 72. These cases afford illustrations of the general power of the Legislature to devote to another and new service, for the use and accommodation of the public, any species of private property, although it may have before, for a similar purpose, but in a different manner, been specially set apart and appropriated. But if such an appropriation has once been made, the property cannot afterwards be interfered with, or the right of holding and enjoying it in that definite manner be interrupted or disturbed, except under the provisions of some subsequent statute, expressly or by necessary implication authorizing its subjection to public service in another and different manner. This principle, applied to the present case, is decisive of the rights of the parties in relation to the point in controversy between them. The plaintiffs have under their charter already acquired the exclusive right to the possession and occupation of the lands upon and through which the defendants have caused their drains to be laid and constructed. But the defendants contend that this right has been superseded by the same authority from which the grant of it was derived. This undoubtedly could have been done, for it is, as has already been shown, clearly competent for the Legislature, in order to meet a pressing emergency and to accomplish some object of immediate public necessity or importance, to determine that a new appropriation of these lands ought to be allowed. If it should be found essential or reasonably necessary for the public good, as, for instance, to preserve or promote the health of the inhabitants of a city rapidly increasing in population, to take the lands and use the canal of the plaintiffs for the purpose of drainage, such an appropriation might undoubtedly be made under statutes containing suitable provisions, and conferring the requisite authority. But no such necessity is declared, nor is any such right given to the defendants by any of the provisions of their city charter. The city council are, indeed, therein allowed, by a provision expressed in very general terms, to lay down drains and sewers through streets and private lands; but in this there is no such directness and particularity as to import that a new appropriation to the public use of land which had already been lawfully taken, and was still held and devoted by the plaintiffs to another public service, was intended by, or even at all in the contemplation of, the Legislature."

In rendering the opinion in Boston & Maine R. R. v. Lowell & Lawrence R. R. Co., 124 Mass. 368, Mr. Justice Gray said:

"The general principle is well settled, and has been applied in a great variety of cases, that land already legally appropriated to a public use is not to be afterwards taken for a like use, unless the intention of the Legislature that it should be so taken has been manifested in express terms or by necessary implication. For instance, a highway cannot be laid out across a navigable river without authority of the Legislature, and such authority is not to be implied from a general statute empowering courts of sessions or county commissioners to lay out highways. Commonwealth v. Coombs, 2 Mass. 489; Commonwealth v. Roxbury, 9 Gray (Mass.) 451, 494, and other cases there cited. In Commonwealth v. Coombs, Chief Justice Parsons said: 'The statute gives a general authority to the sessions to lay out highways; but the statute must have a reasonable construction. This authority, therefore, cannot be extended to the laying out of a highway over a navigable river, whether the water be fresh or salt, so that the river may be obstructed by a bridge. A navigable river is, of common right, a public highway, and a general authority to lay out a new highway must not be so extended as to give a power to obstruct an open highway already in the use of the public.'"

In City of Seymour et al. v. Jeffersonville, M. & I. R. Co. et al. (Ind.) 26 N. E. 188, the Supreme Court of Indiana held:

"We do not doubt the power of the Legislature to authorize the condemnation of land owned and occupied by a railroad company. The question here, however, is not as to the existence of that power in the Legislature, but the question is as to whether that power has been exercised. It is settled beyond controversy that land already appropriated to a public use cannot be appropriated to another public use unless the statute clearly confers authority to make a second seizure."

In Milwaukee & St. P. Ry. Co. v. City of Faribault, 23 Minn. 167, the court held:

"The rule is well settled that in cases of this kind the legislative intent must be made to appear by express words or by necessary implication, * * * and such implication never arises except as a necessary condition to the beneficial enjoyment and efficient exercise of the power expressly granted, and then only to the extent of the necessity. Hickok v. Hine, 23 Ohio St. 523, 13 Am. Rep. 255. That the general power in question may be beneficially enjoyed and efficiently exercised, without any such interference with plaintiff's exclusive easement in its depot grounds as practically to destroy its value, seems too plain a proposition seriously to be controverted. It cannot be presumed that the Legislature, in conferring this general power, ever contemplated its exercise in such a way as would result in the destruction of the site for the Deaf and Dumb Asylum, the removal of county buildings located at Faribault, or the abandonment of the depot grounds of the plaintiff; the property in each of these cases being specifically appropriated to an important public use by express sanction of law. It is claimed by defendant that the city council in this case was the sole and exclusive judge as to the public necessity and propriety of laying out the proposed street, on the ground that the necessity and expediency of laying out highways is exclusively a legislative, and not a judicial, question. This is undoubtedly a correct rule as applied to the Legislature itself, and also to a municipal body when acting within the conceded limits of its delegated powers. But when, as in this case, the jurisdiction of the inferior tribunal over the particular subject-matter depends, not upon an express grant of power, but upon the existence of an alleged necessity from which the disputed power is to be implied, the decision of such tribunal upon the existence of the necessity is neither final nor conclusive upon the courts."

In St. Paul Union Depot Co. v. City of St. Paul, 30 Minn. 359, 15 N. W. 684, it is held:

"It is also the general rule that a general statutory authority in a charter cannot be presumed to authorize the taking of land already lawfully appropriated and needed as a site for a depot and its necessary appendages, or car shops, etc., or land within the lines of the location of a railroad and parallel with the track, for the purposes of a street or highway, for the reason that it has already been set apart for a specific public use under the sanction of law, and it cannot, therefore, be diverted to another public purpose, except the power be expressly given or necessarily implied. And there can ordinarily be no necessary implications of the existence of such authority from the grant of a general statutory power to lay out streets, because there is ample authority to appropriate other lands, and especially where, as in this case, the public necessity for the particular street is not demonstrated."

In Armiston & C. R. Co. v. Jacksonville, G. & A. R. Co. (Ala.) 2 South. 710, the Supreme Court of Alabama held:

"By what power can this supreme function of government be exercised? Not under the general power to take private property for public use,

in the exercise of a jurisdiction conferred on the courts of the country. Such power does not extend to property already dedicated to, or condemned, or acquired and held by, another corporation for public use, unless it is expressly given by the statute conferring the jurisdiction. Lands once taken for a public use, pursuant to law, under the right of eminent domain, cannot, under general laws, and without special authority from the Legislature, be appropriated by proceedings in invitum to a different public use. It requires legislative authority for destroying a corporate franchise or corporate rights, by merging them in another, deemed more beneficial to the public."

In Baltimore & O. & C. R. Co. v. North (Ind.) 3 N. E. 144, the Supreme Court of Indiana held:

"The law seems to be well settled that lands once taken for a public use cannot, under general laws, without an express act of the Legislature for that purpose, be appropriated by proceedings in invitum to a different public use. The Legislature, as the supreme and sovereign power of the state, may doubtless interfere with property held by a corporation for one purpose and apply it to another; but the legislative intention so to do must be stated in clear and express terms, or must appear from necessary implication."

In City of Ft. Wayne v. Lake Shore & M. S. Ry. Co. (Ind. Sup.) 32 N. E. 215, 18 L. R. A. 367, 32 Am. St. Rep. 277, the Supreme Court of Indiana held:

"While the construction of a street or other public highway across a railroad track is generally attended with some inconvenience to the company, yet it is not ordinarily inconsistent with the use of the railroad for the purposes for which it was constructed. But even this rule, which allows the construction of streets and other public highways across railroad tracks, has its limitations. They cannot be so constructed where by doing so the railroad would be unable to use its tracks at the point of the crossing for the purposes for which they were constructed; in other words, the crossing must occur at a point where the use of the highway or street will not deprive the railroad of the use of its tracks."

While it cannot be doubted under the power of eminent domain in this state, a highway may be laid out and opened for travel over the right of way and track of a railway company, just compensation being paid to the company; yet, under the statutory provisions of this state, and in the light of the foregoing adjudicated cases, I am of the opinion where it is sought, as averred in the bill in this case, to lay out and open a highway for travel over and across property already appropriated and necessary to a public use, such as the depot platform, yards, station grounds, side and passing tracks of a railway company at its station, under the general power of eminent domain, where such taking will destroy or render useless such property for the public purpose to which it is dedicated, a court of equity is not precluded from an examination into the necessity of such reappropriation. And further, that there is no such express or necessarily implied authority conferred upon the defendants in this case as will authorize the defendants, by the attempted exercise of such power, to conclude the question of such necessity from examination in the courts.

Therefore, the demurrer to the bill is overruled.

ST. LOUIS MIN. & MILL. CO. v. MONTANA MINING CO., Limited.

(Circuit Court, D. Montana. October 11, 1906.)

No. 538.

1. COURTS—FEDERAL AND STATE COURTS—RIGHT TO PROTECT—PRIOR JURISDICTION.

A party who has appeared in a federal court, and contested an action therein through both trial and appellate courts, the result being a final judgment against him, will not be permitted to render such judgment ineffectual by instituting and maintaining a new suit in a state court, the purpose of which is to relitigate the questions determined by such judgment with the same adversary.

2. SAME—ENJOINING SUIT IN STATE COURT.

Rev. St. § 720 [U. S. Comp. St. 1901, p. 580], which prohibits a federal court from granting an injunction to stay proceedings in a state court, does not prevent a federal court from enjoining a party to an action before it from prosecuting a suit in a state court when necessary to protect its own prior jurisdiction, or to make effectual its own prior judgment, determining the rights of parties before it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1418.

Enjoining proceedings in state courts, see notes to Garner v. Second Nat. Bank, 16 C. C. A. 90; Central Trust Co. v. Grantham, 27 C. C. A. 575; Copeland v. Bruning, 63 C. C. A. 437.]

In Equity. On petition for injunction.

This case has been before the courts a long time, and has twice been considered in its different phases by the Circuit Court of Appeals of the Ninth Circuit Montana Mining Company, Limited, v. St. Louis Mining & Milling Company of Montana, 102 Fed. 430, 42 C. C. A. 415, and St. Louis Mining & Milling Company of Montana v. Montana Mining Company, Limited, 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725. The action at law was to recover damages for trespass upon a vein, the apex of which lies inside the surface lines of the St. Louis mining claim, but which vein in its downward course departed from a perpendicular, and crossed the vertical side lines of the St. Louis claim, entering under the surface of the adjoining claim, owned by the Montana Mining Company, Limited, where the trespass upon the vein by the Montana Mining Company is charged to have been committed. Plaintiff alleged ownership of the vein, which it charged defendant extracted ore from.

The defendant, among other defenses, pleaded an estoppel by deed, alleging that plaintiff is estopped from claiming any of the mineral found, or which may hereafter be found, in a certain piece of ground called the "30-foot strip," or "Compromise strip," because about March 7, 1884, one Charles Mayger, who was then and there the predecessor in interest of plaintiff, made, executed, and delivered to William Robinson, James Huggins, and Frank P. Sterling, who were and are the predecessors in interests of this defendant, a bond for a deed, wherein and whereby he covenanted and agreed to convey the said 30-foot strip or compromise ground to the predecessors in interest of this defendant, or their assigns, with all the mineral therein contained; that thereafter, and after the said Charles Mayger had obtained a United States patent for the whole of said St. Louis lode mining claim, including said 30-foot strip or compromise ground, the said Mayger, in order to cheat and defraud the defendant, assumed to convey the said compromise ground to the above-named plaintiff; that thereafter the defendant demanded of and from the said defendant and from the said Mayger a deed for the said compromise ground, in accordance with the terms and provisions of the bond aforesaid, and the said defendant and the said Mayger having refused and declining to make, execute, or deliver such a deed, the defendant thereafter, and on or about the 6th day of September, 1894, commenced an action in the District Court of the First Judicial District of the state of Montana, within and for the county of Lewis

& Clarke, wherein the defendant was plaintiff and the above-named plaintiff, together with the said Charles Mayger, were defendants, to compel the specific performance of the said bond for a deed hereinbefore mentioned and set forth; that thereafter such proceedings were had in said action as that on the 1st day of June, 1895, judgment was duly made and entered therein in favor of the defendant, the plaintiff therein, and against the plaintiff, defendant in said action, whereby, among other things, it was ordered, adjudged, and decreed that the said bond hereinbefore mentioned be specifically performed, and that the defendant, the above-named plaintiff, make, execute, and deliver to this defendant a good and sufficient conveyance in fee-simple absolute, free from all incumbrances, for the premises mentioned and described in the complaint in said action and in the bond hereinbefore mentioned; that in pursuance of said judgment, order, and decree, the said plaintiff, on or about the 1st day of July, 1895, made and executed a deed to this defendant of and for the said premises, and of all the mineral therein contained, and thereafter the said deed was duly delivered to this defendant. And this defendant avers that in and by the said proceedings and the said deed the said plaintiff is estopped from claiming any part of the said compromise ground or 30-foot strip, aforesaid, or my mineral contained therein.

The plaintiff, by replication, denied that it was estopped for any cause. It admitted the execution of the bond, as stated in the answer, and averred that the same was executed and made on account of an application of one William Mayger for a patent to the St. Louis lode mining claim, and on account of an adverse claim interposed by the defendant's predecessor in interest of the said compromise ground, as being a part of what was known as the Nine Hour quartz claim. Plaintiff admitted that Mayger agreed to convey the compromise piece of ground, with all minerals therein contained, to the predecessor in interest of the defendant, and averred that the said claim comprised no minerals contained in or beneath the compromise ground, except such as were contained in leads, lodes, or ledges which had their tops or apexes within the St. Louis mining claim, exclusive of the 30-foot strip or compromise ground. Plaintiff, by replication, further averred that it was seeking to recover only such quartz, rock, or ore, and the value thereof, and the damages for the removal and conversion of the same, as comprised lodes having their apexes within the boundary lines of the St. Louis claim, exclusive of the 30-foot strip or compromise ground. Plaintiff admitted that Mayger received a patent for the 30-foot strip or compromise ground, and alleged that the 30-foot strip or compromise ground was at all times a part and portion of the quartz lode mining claim known as the Nine Hour; that the same was never a part or portion of the St. Louis mining claim; that in the action in the state court wherein the Montana Mining Company was plaintiff, and the St. Louis Company and Mayger were defendants, the action was based upon the agreement mentioned in the answer in said suit, and was brought to compel defendants therein to make a good and sufficient deed for the premises known as the 30-foot strip or compromise ground; that the court found that said strip was at all times a part of the Nine Hour mining claim, and was by the parties to said agreement agreed to be a part thereof; and that the said agreement was made for the purpose of settling and determining a boundary line between the Nine Hour mining claim and the St. Louis mining claim, which had been in controversy; but that the deed conveyed no other title than such as was attached and incident to the said 30-foot strip or compromise ground, and that the minerals therein contained were intended to comprise, and did comprise, all such minerals as were contained in veins, lodes, or ledges having their apexes inside of the 30-foot strip.

A reference to the cases reported and heretofore cited will show that the principal controversy between plaintiff and defendant in the action in trespass in the Circuit Court was whether the deed executed and delivered by the plaintiff on the 1st of July, 1895, conveying the 30-foot strip or compromise ground to the defendant, included the extralateral right of a vein apexing within the boundaries of the St. Louis claim, but passing on its downward course beyond the vertical side line of such claim into the 30-foot strip or compromise ground. There was also involved a question of the exact extent of

the extralateral right, inasmuch as the vein had a width of about 25 feet, and crossed the vertical side line at an angle.

The issues thus generally stated were tried in the Circuit Court of the United States for the District of Montana in August, 1905, and verdict rendered in favor of plaintiff, upon which a judgment was entered for $195,000. The Montana Mining Company, Limited, appealed to the Circuit Court of Appeals, where upon August 13, 1906, the judgment of the Circuit Court was affirmed. 147 Fed. 897. The Circuit Court of Appeals has consistently upheld the views of the Circuit Court that the conveyance by the St. Louis Company to the Montana Company of the land in controversy, in pursuance of a decree of the state court in Montana, had no other effect than to fix the surface boundary of the side line between the two claims in accordance with the original contention of the grantee, the Montana Mining Company, and did not deprive the grantor of any extralateral right under the ground so conveyed. After the decision of the Circuit Court of Appeals, the St. Louis Mining & Milling Company filed a motion in this court, asking that the injunction which had been granted several years prior, in an action ancillary to the law case, be dissolved, to the end that the St. Louis Mining & Milling Company might be permitted to enter upon and extract mineral from the vein within the compromise strip, but which had its apex within the limits of the St. Louis claim. This motion to dissolve was granted. Thereafter the Montana Mining Company, Limited, applied to the judge of the District Court of the First Judicial District of the state of Montana for the issuance of an order upon the St. Louis Mining & Milling Company to show cause why a writ of injunction should not be issued, restraining the St. Louis Mining & Milling Company and Charles Mayger from asserting any right, title, or interest, of any kind or character, in or to the compromise ground described in the decree made by the state court, heretofore referred to, and entered about June 1, 1895. A temporary restraining order was issued by the state court.

The St. Louis Mining & Milling Company now asks this court for an order requiring the Montana Mining Company to appear and show cause why it should not be enjoined from further prosecuting the application made to the judge of the district court of the state for an injunction against it, and prayer is added for a restraining order, preventing defendant from prosecuting such application for an injunction. The petitioner sets up that by the judgment of this court in the action at law, to which the injunction suit was ancillary, it was adjudged that the conveyance made in conformity with the directions of the judgment referred to in the state court did not convey to the Montana Mining Company, Limited, any part of the vein which had its apex within the surface boundaries of the St. Louis claim, and outside of the compromise ground; but, notwithstanding such judgment by this court, that defendant is now seeking, by application to the state court for an injunction against the St. Louis Mining Company, to obtain a decision of the state court contrary to the decision of the federal court, and contrary to the judgment in the action at law to which the suit in injunction was ancillary.

J. B. Clayberg, M. S. Gunn, and Bach & Wight, for complainant.
W. E. Cullen, W. E. Cullen, Jr., and E. C. Day, for defendant.

HUNT, District Judge (after stating the facts). The decree in the specific performance suit, made June 1, 1895, in the district court of the state, did not determine what extralateral rights the owners of the St. Louis claim had beneath the surface in the compromise strip. It appears very plainly that the owners of the adjoining claim were not assailing such extralateral rights in the specific performance suit referred to, and that "the purpose of that action was to fix a boundary line between the two mining claims, reserving to each claim the rights that would have attached if the boundary line had been settled without controversy." Montana Mining Company, Limited, v. St.

Louis Mining & Milling Company of Montana, 102 Fed. 430, 42 C. C. A. 120, 56 L. R. A. 725. Such is the language of the Court of Appeals in its opinion, and so free from ambiguity is it that the argument of defendant that the decree made by the state court determined that this defendant has a right to mine the ground in controversy in the law suit, No. 291, in the federal court, and that plaintiff herein has not such right, cannot possibly be sustained. It was by the litigation in this court that afterwards there was a trial of the question of ownership and title to the portion of the Drum Lummon vein which had its apex within the limits of the plaintiff's St. Louis claim, and which extended downward beneath the surface of the compromise strip, and it was in this court that the very contention that is now made, as to the force of the judgment in the specific performance suit, was earnestly put forward by way of a plea in bar, and it is in the federal courts that that contention has been invariably held unsound, whether presented before the trial court or the appellate tribunal of the Ninth Circuit.

The parties voluntarily submitted themselves to the jurisdiction of the federal court in the law action, No. 291, and have sought the equitable aid of the same court to protect the identical property involved in the law action. They have contested the right of plaintiff to mine in the compromise strip, and it is not for the Circuit Court now to deny its jurisdiction to have tried the questions it did try, or to decline to act in the ancillary action.

Judge Hawley, in one of his vigorous opinions (Rogers v. Pitt, 96 Fed. 668), used this language, which is most pertinent to the case at bar:

"Whatever the rights of the defendants may have been at the time of the institution of the suit in this court, if they had taken proper steps to stay the proceedings in this court, as a matter of comity between the state court and this court, it is clear to my mind that, by coming into this court after service of process upon them, and submitting themselves to its jurisdiction, they waived their rights to have the case tried in the state court. The defendants ought not, after voluntarily submitting themselves to the jurisdiction of this court, and contesting the proceedings herein, and obtaining what they deemed to be an adverse ruling, to them endeavor to have a change of the place of trial, and take their chances in another court, on the ground that they might have brought the complainant within the jurisdiction of the state court had they taken the necessary steps so to do."

So I regard the jurisdiction to hear and decide the law action as having been complete, and the question of jurisdiction as concluded and beyond successful dispute.

Jurisdiction to try title to the ground in controversy in the action at law having existed in this court, and the questions presented in action No. 291 having been alone tried herein, it is the duty of the federal court to sustain its judgment, as affirmed by the federal court of appeals; and, if necessary to make the decree dissolving the injunction in the ancillary suit brought in this court effectual, this court has the power to restrain the defendants from proceeding to prosecute the application for an injunction now pending in the state court, which, if granted by the state court, would prevent plaintiff from mining the identical ground that, by the judgment of the court of appeals, belongs

to it, and which it has a legal right to mine. The effect of an injunction by the state court would be to render ineffectual the judgment of the United States Circuit Court of Appeals in a case over which it had and exercised jurisdiction.

But it is said that injunction against the defendant herein by the federal court is not the proper remedy, inasmuch as section 720 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 580] forbids a federal court to grant a writ of injunction to stay proceedings in a state court. If the question presented by the learned counsel for defendant were before the court as res integra, its manifest importance would make decision far more difficult than it now is; for the courts of the two jurisdictions, federal and state, must be permitted to exercise their full powers, without interference with one another and without conflict. Fortunately this principle is so generally adhered to that encroachments seldom occur, and I have no doubt that its obvious wisdom would be found the basis for perfect accord between the federal and state courts in this matter, should the learned judge of the state court be called upon to examine the whole record in this case, and to decide as to his course in the premises. But the present petition for injunction to restrain the defendants being now before the federal court in which the law action between these parties was decided, and in which the injunction issued in the ancillary suit was dissolved, after the judgment of this court was appealed from and affirmed, the duty of the federal court is to act in aid of its own jurisdiction, and to render its decree effectual, retaining jurisdiction for all purposes within the general scope of the equities to be enforced in the suit ancillary to the law action tried.

The Supreme Court of the United States has laid down the doctrine which this court must follow: In Julian v. Central Trust Co., 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 624, where a sheriff was proceeding to sell property which had been conveyed by a decree of the federal court, and where the contemplated action of the sheriff had the effect of annulling and setting aside the decree of the federal court, the Supreme Court said in such a case a supplemental bill could be filed in the federal court, with a view to protecting the prior jurisdiction of such court, and rendering effectual its decree. "In such cases," said the court, "where the federal court acts in aid of its own jurisdiction, and to render its decree effectual, it may, notwithstanding section 720, Rev. St., restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction." To sustain this rule Justice Day cites French v. Hay, 22 Wall. 250, 22 L. Ed. 799. In that case the appellant argued to the Supreme Court, as does the defendant before this court, that under section 720 injunction would not lie when issued by a federal tribunal against a party suing in the courts of the state. But the Supreme Court refused to sustain the reasoning of the appellant, and said:

"Having the possession and jurisdiction of the case, that jurisdiction embraced everything in the case, and every question arising which could be detemined in it, until it reached its termination, and the jurisdiction was exhausted. While the jurisdiction lasted, it was exclusive, and could not be trenched upon by any other tribunal."

The court also speaks of the results which would follow if relief could not be given by the federal tribunals where their jurisdiction attached, and demonstrates that their decrees might be nullified, in so far as any protection could be given by them. "Instead of terminating the strife between him and his adversary, they would leave him under the necessity of engaging in a new conflict elsewhere. This would be contrary to the plainest principles of reason and justice. The prohibition in the judiciary act against the granting of injunctions by the courts of the United States, touching proceedings in state courts, has no application here. The prior jurisdiction of the court below took the case out of the operation of that provision." This decision is applicable, because, as heretofore stated, it was in this (the federal) court that the right of the parties to mine the ground involved in the law action in this court was involved; there never having been, as indicated, any issue in the state court wherein such right was adjudicated. In Dietzsch v. Huidekoper, 103 U. S. 494, 26 L. Ed. 497, Justice Woods, for the court, expressly stated that "a court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a state court." In that case the action of the Circuit Court of the United States enjoining appellants from proceeding in an action at law brought on a replevin bond was sustained. Again, in the very recent case of Riverdale Mills v. Manufacturing Company, 198 U. S. 188, 25 Sup. Ct. 629, 49 L. Ed. 1008, the Supreme Court, through Justice Brewer, reversed the Circuit Court of Appeals of the Fifth Circuit, and affirmed the order of the Circuit Court granting an injunction preventing defendant from prosecuting a suit instituted in the courts of the state of Alabama. The effect of section 720, Rev. St., was considered, and it was distinctly held that:

"A federal court, exercising a jurisdiction apparently belonging to it, may thereafter, by ancillary suit, inquire whether that jurisdiction in fact existed. It may protect the title which it has decreed as against every one a party to the original suit, and prevent that party from relitigating the questions of right which have already been determined."

The cases cited are authority for issuing the injunction prayed for in this proceeding. They demonstrate that, as incidental to a case to which the constitutional and statutory powers of the federal courts are extended, injunctions to restrain parties from proceeding in state courts will lie, and are not infrequently issued. They further establish that section 720 was not intended to impair the jurisdiction of the federal courts, as that jurisdiction had been conferred by the Constitution and laws, which empower courts of equity to interfere and effectuate their own decrees by injunction or writs of assistance, in order to avoid the relitigation of questions once settled between the parties. Story's Equity Jurisprudence, § 959; Central Nat. Bank v. Stevens, 169 U. S. 432, 18 Sup. Ct. 403, 42 L. Ed. 807; Foster's Federal Practice, § 211; Desty's Fed. Prcedure. vol. 2. p. 803.

The substantial rights of the parties in the law action having been litigated in the federal courts, I am of the opinion that the duty of this court is to uphold its jurisdiction in the ancillary suit by issuing the injunction prayed for.

THE TRANSFER TUG NO. 9.

THE CALDERON.

(District Court, S. D. New York. September 29, 1906.)

COLLISION—STEAM VESSELS MEETING—MUTUAL FAULT.

The steamship Calderon, passing out to sea, and a transfer tug with a car float on each side, meeting in New York Harbor about half way between the Battery and Governor's Island in the early morning, both *held* in fault for a collision between the Calderon and the car floats—the Calderon for initiating an agreement to pass to the left and after it was assented to attempting to pass to the right, also for excessive speed, which was probably 12 or 14 miles an hour, and for her failure to sooner stop and reverse; the Transfer for assenting to the signal to pass to the left and attempting to carry out the agreement when her heading was such that a passing to the right was apparently proper, and she was showing a red light to the Calderon, and also for not sooner stopping and backing.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 40.]

In Admirality. Cross-suits for collision.

Wing, Putman & Burlingham, for the Calderon.

William Greenough, Henry G. Ward, and William S. Montgomery, for Transfer No. 9 and the floats.

James J. Macklin, for the cargo on the floats.

ADAMS, District Judge. These were cross actions to recover the damages sustained through a collision between Transfer Tug No. 9 with 2 loaded floats in tow, one on each side, and the steamship Calderon, loaded and bound to sea, which occurred on the 28th day of January, 1906, just before daylight, about half way between the Battery and Governor's Island in New York Harbor. The original action was brought by the Societe Anonyme de Navigation Royale Belge Sud-Americaine, as owner of the steamship Calderon, against the steamtug Transfer No. 9 and her car floats to recover damages alleged to amount to $10,000, and shortly thereafter the New York, New Haven & Hartford Railroad Company, as owner of the Transfer tug and floats, brought the cross action, alleging damages at $30,000.

The tug was about 100 feet long and the car floats were each about 275 feet long. They had started early in the morning from Dock 6 of the Central Railroad of New Jersey at Communipaw. The tug had float No. 2 on her starboard side and float No. 12 on her port side. The floats had 14 or 15 cars on them but they were not unusually loaded and the tug had no difficulty in handling them. They proceeded across the North River, the last of the ebb tide, which was prevailing there, setting the tow down the river somewhat so that when she reached the East River current, from the beginning of the flood tide, she was well in the center of the river, betwen the Battery and Governor's Island.

The Calderon was about 390 feet long and 47 feet 5 inches beam. She was bound to Manchester, England, and being fully loaded she started from her pier 8 in Brooklyn, a short distance above the Wall

Street Ferry, with the assistance of the tug Dalzell. She was at first set up the river slightly with the flood current but the tug straightened her down the river and she then proceeded, under her own steam, between the Battery and Governor's Island.

The Transfer's account of the matter is as follows:

"That said floats were laden with fifteen cars containing merchandise; the tow thus made up started from her said pier 6 at about 6:25 A. M. bound for Oak Point, New York, the tide being slack water in the North River at said time and about the first of the flood tide in the East River.

That when said steamtug "Transfer No. 9" and said floats were rounding the Battery and about half way between said Battery and the two red lights on Governor's Island those in charge of the navigation of the said steamtug "Transfer No. 9" obsered a steamship coming down the said East River, which steamship afterwards proved to be the "Calderon," the said steamer exhibiting, of her side lights, only the green, to that of the green light of the said steamtug, the said steamer at the time being a little below the South Ferry on the Manhattan shore. That while the vessels were in this situation and proceeding green to green, the said steamship blew a signal of two whistles to the said steamtug "Transfer No. 9," which "Transfer No. 9" immediately answered with a signal of two whistles and starboarded her wheel. That in company with the said steamship coming down the East River and a little astern of her and on her starboard side was a Sound steamer and also bound up the river and a little ahead of the steamtug "Transfer No. 9" with her tow was a steamtug. That said Sound steamer sounded a signal of one whistle which was answered by both, said steamtug having a tow a short distance ahead of and on the port hand of "Transfer No. 9," but in order to clear the said Sound steamer it was not necessary for the said steamtug "Transfer No. 9" to port her wheel; that said steamship then blew a signal of one whistle, she approaching at a high and unlawful rate of speed and ported her wheel giving the said steamship a rank sheer to starboard; whereupon alarm whistles were sounded by the said steamtug "Transfer No. 9" and her engines reversed full speed astern, but that said steamship coming on, struck float No. 2 to-wit the starboard float, on her port bow with the port bow of the said steamer, breaking the said float loose from her fastenings as well as the float on the port side of said tug and doing such damage to said car float No. 2 that she subsequently sunk at the Quartermaster's dock on Governor's Island, where she was taken to in order to prevent her from sinking in deep water, the cars and contents of the same on said float being submerged and the cargo in said cars very seriously damaged and considerable quantity of the same lost.

That said steamtug "Transfer No. 9," as well as the said car floats, although it was substantially daylight or break of day, had all their lights required by law properly set and brightly burning, and that a proper lookout was maintained and that said steamtug as well as the said tow were properly officered and manned by competent and skilful persons.

That said collision occurred in the vicinity or abreast of the City Dump Docks at the Battery and about 700 feet therefrom.

Fourth: That said collision was wholly owing to the fault, negligence and carelessness of those in charge and controlling the said steamship:

(1) In proceeding at a high and unjustifiable rate of speed.

(2) In not keeping a proper lookout.

(3) In not conforming with her signal of two whistles and proceeding to the starboard of the said steamtug "Transfer No. 9" and her said floats to-wit starboard to starboard.

(4) In not slowing, stopping and backing before collision and in time to avoid the same.

(5) In blowing a signal of one whistle.

(6) In not sounding alarm whistles.

(7) In not doing anything to prevent collision."

The Calderon's account of the matter is as follows:

"Second. On January 28th inst., at about 6:30 A. M. being not yet daylight, the Calderon left Pier 8, Brooklyn, laden with a general cargo, bound for Manchester, England. She was fully manned and equipped, in charge of an experienced master, with a skilled Sandy Hook pilot to take her to sea. The weather was clear, with light drizzling rain; tide in the East River slack, or the first of the flood, with light easterly wind. The Calderon was assisted out of her slip by a tugboat, which she dismissed when headed down the river. A lookout was forward at the steamship's bow; the chief officer with a seaman was also on the forecastle head looking out. The master, pilot, and third officer were on the bridge, where was also the quartermaster steering the ship. The Calderon had set and burning her regulation lights including two white masthead range lights, all of which were showing brightly.

Third. When the Calderon was about in the middle of the fairway between New York and Governor's Island, and heading westerly, a red light was seen bearing about a half point on the starboard bow and about a third of a mile off, from which came a single blast of the whistle. The Calderon answered with one blast, and ported her helm swinging towards New York. This red light crossed over to the Calderon's port bow, when both the red and green lights showed, followed by only the green light, upon which the Calderon's engines were stopped. Immediately afterwards the other vessel blew two blasts of her whistle and appeared to starboard her helm; whereupon the Calderon also starboarded her helm but reversed her engines full speed. It was seen that the approaching object consisted of two large carfloats lashed on each side of the steamtug called the Transfer No. 9, which had turned to the eastward, across the Calderon's bow.

Although the Calderon's engines continued to go back full speed, the starboard carfloat came in violent contact with the steamer's port bow, breaking several plates and frames near the stem. She was afterwards struck by the other carfloat, damaging her starboard bow; whereupon the carfloats parted, the port float passing on by her momentum along to the starboard of the Calderon, and the tug and starboard carfloat upon the Calderon's port side.

After the collision the Calderon stopped backing, investigated her damages, and then went to an anchorage off Liberty Island.

Fourth. The Calderon's hurt was so serious that she had to put back and repair. Her damages with the delay incident thereto will amount to about $10,000.

Fifth. Said collision was not due to any fault or negligence on the part of the Calderon, but was wholly due to the faults of those navigating the tug and the carfloats, which were lashed together as one vessel; in that they had no proper lookout, or no lookout properly stationed; did not exhibit the regulation lights; that after blowing one blast and receiving an assent thereto, they did not follow the course thus signalled, but changed their course without assent; and blew two blasts improperly. On the part of the tug in that it had no proper officer in charge or in a place to view approaching vessels, lacked the power to handle a tow so unwieldy, that it did not sooner stop and back and in having miscalculated the force and effect of the tide; and in other faults which will be shown on the trial thereof."

The testimony of each party supports, in a general way, its own allegations.

The colliding vessels were at first slightly to the starboard of each other but nearly head and head, in positions which in a straight channel would have required them to pass port to port. There is a sharp conflict as to the signals exchanged, the Transfer contending that there was originally a two signal agreement, while the Calderon urges that the first signal given and answered was one of one blast. The testimony shows that the contention of the Transfer should be sustained in this respect, notwithstanding more witnesses testified in

conformity with the Calderon's contention. The master of the tug W. A. Sherman, which was proceeding up the river ahead of the Transfer and on her port hand, was not interested. He testified that his attention was called to the matter by the Calderon blowing a signal of two blasts, which he at first thought was for him, although there was no occasion for signals, but just as he was about replying, he happened to turn around and saw the Transfer coming, so he concluded that the steamship was blowing to her and he then heard the Transfer answer. He said that the Transfer and Calderon were then in positions to pass clear of each other starboard to starboard. He said that the Sound steamer Plymouth came down the river and blew him a single blast, to which he replied with the same immediately, and the Transfer also subsequently blew a single blast to the Plymouth which she replied to.

It is evident that this last single blast was regarded by the Calderon as indicating a course for her to the right, whereupon she ported and attempted to pass the Transfer port to port. The Transfer starboarded at about the same time.

The consequence of the change towards the Battery brought the vessels into collision, notwithstanding an almost immediate change thereafter towards Governor's Island; the Calderon first striking the starboard float and then the port float. The consequence of the blows was that both floats were broken loose from the Transfer. The Calderon passed her port to port.

The Calderon urges that the one blast signal was the first one and that it was proper under the starboard hand rule, which required the Transfer to keep her course and speed while the Calderon should avoid her, which she was endeavoring to do by going astern, but it does not seem to be a case for the application of that rule. Whether the Transfer exhibited her green light to the Calderon is more than doubtful. All the witnesses from the Calderon say that she showed her red light, which seems probable from the courses of the vessels which were apparently crossing at an angle of about two points, the Calderon heading about west by north while the Transfer was heading about east by south, and I do not think that the positive testimony can be overcome by a suggestion that the Transfer must have been heading somewhat up the river in consequence of the effect of the ebb current in the North River. It seems to have been a case for the application of the Bend Rule. The Victory & The Plymothian, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519. The Transfer's course in rounding the Battery, would naturally have carried her to the northward and eastward of the Calderon, though the Transfer showed a red light, especially in view of the fact that such a course had been indicated and agreed upon by the exchange of the two blast signals.

Nor do I think that the Calderon can be excused from not following the original agreement by the fact of the single blast having been given to the Plymouth. The Sandy Hook pilot who was navigating the Calderon to sea, knew of the Plymouth following the Calderon down and should have known that she was the vessel to which the single blast was blown after the agreement of a two blast course be-

tween his vessel and the Transfer. He testified that there was no two blast agreement but it seems to me that there can be no reasonable doubt of that fact.

The Calderon got straightened down the river at 6:33 A. M. and the collision happened at 6:40 A. M. The distance travelled was about a mile which she covered in 7 minutes. At first she went slowly and it was after the expiration of a few minutes that her engines were put at full speed, which is said to have been 13 or 14 miles. She evidently acquired nearly that speed without delay and just before the collision must have been going at the rate of 10 or 12 miles in a part of the river where an excess of 8 miles is forbidden by the state statute. She was in fault in this respect.

The Calderon was also in fault for attempting to cross to the right in the face of an agreement to go to the left.

The Transfer was in fault for agreeing to go to the left and attempting to do so when her heading was such that a passing to the right might have been intended and which had the effect of making the Calderon believe that she was going to the right, especially in view of the one blast signal to the Plymouth, which the Calderon might easily and did believe was designed for her and to indicate such a passing.

Both were in fault for proceeding when it became evident that there was a misunderstanding and for persisting in their attempts until it was too late to avoid a disastrous collision. The Calderon should have seen that the Transfer was signalling to go to the left while exhibiting a red light and passing to the right was apparently a proper manœuvre. The Transfer should have seen that there would be no probability of the Calderon attempting to go to the left while the Transfer was exhibiting a red light, under the circumstances. Both should have blown alarm signals and stopped and reversed much sooner than they did and should not have attempted to proceed until an agreement could be reached for a safe passing.

There will be a decree condemning both vessels, with orders of reference.

BUCKLEY v. NEW YORK, N. H. & H. R. CO.

(Circuit Court, D. Connecticut. October 24, 1906.)

No. 581.

RAILROADS—KILLING OF LICENSEE ON TRACK—NEGLIGENCE OF PERSON KILLED.

Plaintiff's intestate was employed by a contractor with other workmen in widening a deep cut on defendant's railroad in which there was a sharp curve of the track. During the 10 days he had worked, a passenger train had passed each morning within a very few minutes of the same time. This train was required by law not to sound a whistle before approaching the cut, but to ring the bell. On the morning in question deceased had gone across the track from his work and when the train, which was on time, approached, was standing on the ends of the ties dipping water from the ditch into a pail. When the train came around the curve at a speed of about 10 miles an hour, and when about 150 feet distant he was seen by the engineer who blew an alarm whistle and applied the brakes. Deceased straightened up, looked, and then picked up his pail and started back across the track. He passed from the engineer's sight in front of

the engine when it was 15 or 20 feet distant and making a speed of 4 to 5 miles an hour, but was struck and killed. He might have escaped by stepping across the ditch and standing next to the bank on the side of the track where he stood. The bell was being rung, but, owing to the noise made by stationary engines on the work, could not well be heard. *Held*, that defendant was not negligent, and also that deceased was clearly guilty of negligence which was the proximate cause of his death, both in going upon the track at the time the train was due, and by his inattention afterward.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1285–1296.]

At Law.

Schutz & Edwards and William A. Pew, for plaintiff.
Watrous & Day, for defendant.

PLATT, District Judge. This is an action at law, asking damages for the death of the plaintiff's intestate, which is claimed to have occurred by reason of the defendant's negligence, and the jurisdiction of the court is ample. The defendant suffered a default, gave the lawful notice, and thereupon, in accordance with our state practice, the matter has come before me on a hearing in damages; and, after listening to the evidence presented by the parties, and the arguments of counsel, I find the following facts:

On August 31, 1905, plaintiff's intestate, Joseph Bertoni, late of Quincy, Mass., was employed by John Cashman at Putnam, Conn., as a laborer upon a job of rock and dirt excavation, which said Cashman was doing under a contract with defendant for the general purpose of widening a cut and reducing the curves on the railroad at that point. He began work there on August 22, 1905. He was 35 years old, in good health, and had a wife and one child. He was rarely ill, and earned on this job $2.08 per day. His wages varied on different jobs, never running higher than $2.50, nor lower than $2 per day. His particular employment was to look after and keep in condition the drills used in boring holes for the blasts. In doing this he was obliged to keep water in the holes, so that the drills should not become overheated. There is an arch bridge over the Quinnebaug river about 1,000 feet south of the Putnam station. Between the bridge and the station, the single track, at that time, ran for about 400 feet through a rather deep cut upon a sharp curve. The contract work was directed toward widening this cut on the westerly side, leaving the easterly wall of the cut intact. The defendant ran a regular passenger train over the Norwich Branch of the Shore Line Division, leaving New London at 5:30 a. m., and reaching Putnam at 7:25 a. m. From August 22d to 31st, inclusive, this train reached the described cut at substantially the same time each morning, which was between 7:20 and 7:25. Cashman employed about 30 men on his job, and they began work at 7 o'clock a. m. There were two engines set up on the westerly side of the cut about 250 feet apart, each operating a set of drills; the southerly one being just around the first bend of the cut after coming over the arch bridge, and back from the track, perhaps 15 feet. It operated drills which were south of it, and several feet from the track.

On the morning of the accident Bertoni, soon after reporting for work at 7:00 a. m., had gone across the track with a pail and dipper, and was standing upon the end of the ties scooping up water from the ditch made by the track and the easterly wall of the cut. It is not possible to give the distance from the ties to the wall of the cut at the precise point where he stood, because no one can tell just where he stood, and the surface of the roadbed has been materially changed, although the wall remains. The witnesses vary in their estimates of the width of the ditch at about that point; some making it as narrow as 2½ feet, others making it 4 feet. The wall beyond was at least 5 feet high, in a practically perpendicular direction, and then sloped off, so that its general height was about 15 feet. It was not possible to climb it quickly, but there was room enough between the track and the wall, so that the deceased could have pressed against it in an upright position, or have thrown himself flat in the ditch, and, by either means, have avoided contact with the passing train. Defendant's train referred to reached the arch bridge practically on time. Upon petition of the selectmen of Putnam the railroad commissioners had passed an order, which was then in force, that no whistles should be blown at crossings from the arch bridge on the south to a certain point north of the station, but that a bell should be rung in lieu thereof, and recommending that the use of the whistle in the operation of the road within those limits be reduced to the least possible minimum consistent with the safe operation of the railroad. In accordance with such order the blowing of the whistle had been for more than a month, and was, on August 31st, omitted after reaching the bridge, but the bell was kept constantly ringing after passing a post just north of the bridge. Before reaching the bridge on the morning in question, the train had been going perhaps 30 miles an hour. At the bridge the engineer applied the service brake —the one ordinarily used on such occasions, and this reduced the speed, so that when he reached the cut the train was under control, running at a rate of about 10 miles an hour. While going at this speed, Bertoni, standing on the ties, stooping over, and bailing up water, as described, came into his vision from the right hand cab window, out of which he had been watching the track. The engine was then about 150 feet away from Bertoni. The engineer at once sounded the danger alarm whistle, and applied the service brake. When the alarm sounded, Bertoni straightened up, looked around toward the engine, then turned back, picked up his pail, and started across the track toward the west, going out of the engineer's sight. The fireman at the left hand cab window said, "All right!" and the engineer then released the brake, but at once applied it again, stopping the train in the length of three cars. The mangled and dead body of Bertoni was found lying across the track just between the last two coaches of the train. When the engineer first saw Bertoni the speed of the train, as I have said, did not exceed 10 miles per hour. At that rate, it would have taken about 10 seconds to have reached Bertoni, but the service brake was applied within two or three seconds, and the speed must have been at once materially reduced, so that when the engine came abreast of Bertoni it was not going faster than four or five miles an hour. He had disappeared from

the engineer's sight when the engine was 15 or 20 feet away from the place where he was first seen. It is difficult to know what interfered with his getting safely across to the west. The testimony tends to show that he was quite slow in starting, and that his course across the track was diagonally toward the north. The probabilities are that he miscalculated and was swept back upon the cowcatcher of the engine, just as he was at the very point of safety.

A fellow workman was standing on the westerly bank, some nine feet from the track, marking out places for drill holes with a long pole. He heard the warning whistle, and saw Bertoni straighten up, look around, and take a step onto the track toward his side. He dropped his pole and rushed over the nine feet of ground which separated him from the track, but finding the engine upon him, he dodged backward, and fell over upon the westerly bank. He was seen falling backward by the fireman, who, not having seen Bertoni, naturally supposed that he was the one on account of whom the engineer blew the danger signal, and whose escape led him to say, "All right."

The law of the case is not difficult. The engineer stood in the place of the master. It was his duty to operate the train through the cut in the way that a reasonably prudent man ought to have done it. He was bound to know and take into account all the circumstances of the case and govern himself accordingly. It was a very dangerous cut and curve. It was his duty to go through it with his train under control, keeping a sharp lookout. When danger appeared he was bound to act promptly and vigorously. Now that the thing is over, we can see that if when he saw Bertoni he had applied the emergency brake, the life would have been saved, but we cannot say that the error in not doing so, if it be an error, is one which should compel the defendant to pay substantial damages. There is no suggestion that he was not entirely competent. There is nothing in his actual conduct which condemns him as incompetent. As to defendant's negligence, the case is reasonably close; but, on the whole, I am bound to find that the defendant, by the evidence, has disproved the charge of negligence, which, by our peculiar method of pleading, it had admitted. I am the more willing to do so, because on the cognate charge of the contributory negligence of plaintiff's intestate I am unhesitatingly in accord with the defendant.

Plaintiff's intestate had been working on the ground for a week or more. Every morning, with unusual regularity, this same train had come through that cut at practically the same moment. It was in the very beginning of Bertoni's morning work upon the job. Whistles were not blown, except in cases of danger, and the noise of the excavating machines made it difficult to hear the ringing bell upon the engine. These things Bertoni knew, or ought to have known. The defendant's license or invitation to him to go upon the track presupposed a condition of at least comparative safety upon the track. The risk which he ran in going there at the time he selected was an obvious one, and it was his duty in that situation to look and listen. An ordinarily prudent man would have done so; but he did not. He was so sluggish of intellect that the sharp signal of danger, which alarmed several people

at greater distances, did not arouse him to instant action. The precious moments passed, and the dreadful end of life came to him, because when first warned, he wavered. It was very close to negligence to go upon the track at the time he chose for the excursion. To act as he did after he was upon it, was careless beyond peradventure, and if he had not so acted, he might to-day be able to support his family. His negligence was the proximate cause of his death.

There are no other questions in the case. I think that the defendant has, by a hair, disproved the allegations of negligence, and that it clearly appears from the evidence that the plaintiff's intestate was guilty of contributory negligence.

It follows, under our practice, that the plaintiff is entitled to only nominal damages, which, in this case, may be fixed at $25.

In re DUNCAN.

Ex parte ELLIOTT.

(District Court, D. South Carolina. August 9, 1906.)

BANKRUPTCY—PROPERTY VESTING IN TRUSTEE—NOTE TRANSFERRED AFTER FILING OF PETITION.

A debtor, 10 days before the filing of a petition in bankruptcy against him, through his attorney offered a note of a third party as collateral security to a bank, which held his own unmatured notes on condition that the bank would agree to extend his notes. The president of the bank answered that he would consider the proposition and would make some investigation as to the value of the collateral, and the attorney left, retaining the note in his possession. A month later, and after the filing of the petition, he was notified of the acceptance of the offer and delivered the note to the bank. *Held*, that until the acceptance there was no contract which passed title to the note, and that such title, being in the bankrupt at the time of the filing of the petition, could not thereafter be transferred by him, but on his adjudication vested in his trustee.

In Bankruptcy.

Miller & Whaley, for Wm. Elliott, Jr., trustee.
Buist & Buist, for South Carolina Loan & Trust Co.

BRAWLEY, District Judge. The petition of William Elliott, trustee of the above-named bankrupt, asks that the South Carolina Loan & Trust Company be required to surrender to him as a part of the bankrupt's estate a note for $10,000 of the Union Manufacturing & Power Company, dated December 3, 1905, payable to the order of Thomas C. Duncan, and pledged to said loan and trust company as collateral security subsequent to November 13, 1905, when the petition in bankruptcy was filed, and the case comes up upon the rule to show cause and return thereto. Testimony has been heard thereon, and arguments submitted, and after consideration I find the following facts:

Thomas C. Duncan was the president of the Union Manufacturing & Power Company, and was the owner and holder of sundry notes of said corporation, among others of a note for $36,519.88, dated November 3, 1905, payable to the order of said Duncan, 30 days from date,

with interest at 7 per cent. He had been president of the Union Cotton Mills and of the Buffalo Mills, which in the early autumn of 1905 were heavily involved in financial difficulties, culminating in the bankruptcy of the Union Mills and the reorganization of said mills and its affiliated companies. Duncan was also heavily involved personally, and employed J. P. K. Bryan, Esq., as counsel to assist him in arranging with his personal creditors, doubtless apprehending that the impending bankruptcy of the Union Mills, against which a petition in bankruptcy had been filed October 3, 1905, would involve him in like proceedings. Among his personal creditors was the South Carolina Loan & Trust Company, which held two notes of $5,000 each, secured by shares in the Union Cotton Mills, and the president of that company wished additional security. As the result of these negotiations the above-described note was turned over to the company December 5, 1905. A petition in involuntary bankruptcy was filed against Duncan November 13, 1905, and he was adjudged a bankrupt January 30, 1906. The petitioner claims as trustee that, inasmuch as the said note was delivered to the bank subsequent to the date when the petition in bankruptcy was filed, it is a part of the bankrupt's estate to be administered by him in due course, while the bank claims title to the note as the result of the negotiations which will now be considered in detail.

In support of its title it presents a letter of date November 5, 1905, written by T. C. Duncan and addressed to it as follows:

"Pursuant to our recent conference I beg to say that I hold for you as collateral to my two notes, which you hold, the note of the Union Manufacturing & Power Company for $10,000.00, which is adequate security for you."

Mr. Duncan testifies that this letter, purporting to have been written at Union, S. C., on the date mentioned, was actually written in Mr. Bryan's law office in this city, and that at that date he did not hold any note of the Union Manufacturing & Power Company for $10,000, but that, as he held a note for $36,519.88, he had power as president of that company to divide the note, and that he prepared a note for $10,000, which he left with Mr. Bryan, his attorney, as the form of a note which he was willing to deliver to the South Carolina Loan & Trust Company, if as the result of the negotiations between Mr. Bryan and that company it would agree to accept the same, and that the note for $10,000 actually delivered was not executed until December 3, 1905, when the note of $36,519.88, which was payable within 30 days, was due, and when the power company executed two notes, one for $10,000 and the other for something over $26,000 were taken in exchange. Mr. Bryan testifies that he took the note for $10,000, which Duncan refers to, to the president of the South Carolina Loan & Trust Company on or about November 5, 1905. This note was dated November 3d. It was offered to Mr. Ficken, president, as collateral for Mr. Duncan's notes above referred to; Mr. Bryan's object being to obtain from the loan and trust company forbearance on its part from pressing its claims against Duncan. Mr. Ficken, president of the company, told him that he would consider the proposition and would make some investigation as to the value of the note offered as col-

lateral, and Mr. Bryan left with him a copy of the note proposed to be offered, and it appears that he heard nothing further from Mr. Ficken until on or about December 5th, when Mr. Ficken sent to him for the note, and the same was delivered to the bank. Mr. Bryan's testimony is that he held the note of November 3, 1905, until the substituted note of December 3, 1905, was sent to him, when the first-mentioned note was destroyed, and that at any time during the month of November he would have delivered it to the loan and trust company if said company had notified him of the acceptance of Mr. Duncan's offer, but that no such notice was received by him prior to December 5th. Mr. Ficken's testimony, as stated in his letter of April 7, 1906, which has been accepted in evidence, is that his bank held two notes of Mr. Duncan for $5,000 each, dated August 10, and August 21, 1905, each for four months, which were renewals of former notes given for money loaned, and that the bank held 90 shares of Union Cotton Mills stock as collateral for these notes. In this letter he says:

"When the mills got into trouble recently, and the stock depreciated in value, Mr. Duncan, evidently to avoid being pressed for payment of the notes at their maturity, applied in advance for a further extension of time, offering to put up additional collateral. For obvious reasons we readily consented to grant the desired extension, provided the collateral offered proved satisfactory. Shortly afterwards Mr. J. P. K. Bryan, the legal adviser of Mr. Duncan, notified us that Mr. Duncan had deposited with him as additional collateral for Mr. Duncan's above-mentioned indebtedness to our bank a $10,000.00 note of the Union Manufacturing & Power Company, dated 3d of November, 1905, payable at 30 days. Confirming this, Mr. Duncan wrote to this bank under the date of the 5th of November, 1905, stating that he had set aside the last-described note to be held as collateral security for his above-mentioned indebtedness. We took the matter up promptly and instituted inquiries as to the financial responsibility of the said power company. Having become satisfied with the collateral note, we accepted Mr. Duncan's previous disposition thereof in our favor. This collateral note matured and was renewed whilst in Mr. Bryan's custody. The renewed note was for 90 days and was not actually delivered to our bank until the 5th of December, 1905. We still hold it as collateral security."

Mr. Ficken further testifies that Mr. Bryan at the interview stated that Duncan was perfectly solvent and would furnish additional satisfactory collateral security, if the indulgence desired was granted. The note in controversy was not issued until December 3, 1905, at which date the previous note of $36,519.88 matured, and this note for $10,000 and another for $26,732.91, which has been turned over to the trustee in bankruptcy, were issued in renewal. The note of $10,000 left with Mr. Bryan and offered to Mr. Ficken does not appear on the books of the power company, and Duncan testifies that this note was intended by him only as the form of a note to be given to the trust company; but, assuming that Mr. Duncan is mistaken, and this note was a legal obligation of the power company, and the note of December 3d merely a substitution of one note for another, we come to the decisive question in the case, and that is, whether there was a valid binding transfer of this note prior to November 13, 1905. If Mr. Duncan's letter of November 5th stood alone, and the transaction was otherwise unimpeachable, it would seem to be such an unconditional setting apart

of a security as would confer upon the trust company at least an equitable title to the note; but this letter was manifestly intended to be a part of the negotiation which Mr. Bryan, as attorney and agent, was to have with Mr. Ficken, and was delivered at the same time these negotiations were undertaken. In point of fact Mr. Duncan did not hold the note as the letter states. It was in the hands of Mr. Bryan, not for the purpose of being delivered unconditionally to the trust company, but was offered to it upon terms; that is, Mr. Bryan agreed to give up this note as additional security, provided Mr. Ficken would agree to an extension of time and forbearance. Mr Bryan was called as a witness by the trust company, and the substance of these negotiations, as given in his testimony, is:

"When I made the tender to Mr. Ficken of the note dated November 3, 1905, and delivered to him the letter of Mr. Duncan dated November 5, 1905, that offer of further security was made with the view of and the understanding that if he accepted the security the bank would extend time and forbear; but Mr. Ficken never did say to me that he would forbear, but it was understood between us that if he accepted the security that he would forbear, because it was a part of the original proposition. If Mr. Ficken had accepted it on that day then and there taking the note, he would have been bound to forbear under the terms of the agreement. That was the whole object and purpose of offering the security when we did."

Being asked the question:

"So far as you know he never communicated with you his determination to accept the security on those terms?"

—his answer was:

"He never called for it until after December 3d. That is my knowledge, but what he himself thought about it I cannot say. I can only tell you what I did."

Another question and answer are as follows:

"Q. Mr. Ficken did not, when you visited him, accept the proposition you made? A. He simply said: 'I will consider it.' His phrase was, 'I will investigate it. I will investigate the note'; that is, what the note represented."

And, further on in his testimony, he says:

"I held that note for him when he called for it. That was my idea of it. But as to when he made up his mind, or when he determined to call for it, I can't say. That is a matter which Mr. Ficken will have to answer."

The fact is Mr. Ficken did not call for the note until December 5th, and at no time did he notify Mr. Bryan or Mr. Duncan that he accepted their proposition. During the time he was considering the proposition he took no steps, so far as appears, towards collecting the note.

If the trust company is entitled to the note, it must be by virtue of a contract. Now, on what date was such a contract made? It was certainly not on November 5th, for neither of the two witnesses for the trust company, Messrs. Ficken and Bryan, testify that a contract was made on that date. The essential features of a contract are lacking; that is, an agreement of two minds. Mr. Duncan, personally, had no negotiations or communications with the trust company after

that date, and Mr. Bryan, as his agent and representative, simply made an offer which was not on that date accepted. Nor is there any evidence of any agreement on the part of Mr. Ficken to accept the offer until December 5th, several weeks after the petition in bankruptcy was filed.

It cannot be pretended that Mr. Ficken was bound as the result of the negotiations of November 5th. He was free at any time after that date to take any steps that he might be advised towards the collection of his note. All that he agreed to do was to investigate the nature of the collateral offered. He had Mr. Bryan's assurance that Mr. Duncan was perfectly solvent and able to furnish satisfactory collateral. He was in Charleston; the power company, whose note was offered, was in Union. Its solvency, to say the least, was doubtful, and Mr. Ficken took time to consider whether he would accept the collateral offered. He was not bound by any contract to accept the collateral or to forbear the exercise of any of his rights. If he was not bound, Duncan was not bound. He had made an offer, it was not accepted, and he was free to withdraw it. Fair dealing would have required him to give notice to Mr. Ficken of his withdrawal of the offer, so, Mr. Ficken, in fairness, should have notified Mr. Duncan of his refusal of the offer before taking any further steps to enforce the payment of the note; but I am unable to find in these negotiations the essential elements of any binding contract, and must conclude, therefore, that on and prior to November 13, 1905, the title to the note in question was in Duncan, and not in the trust company. If that conclusion is correct, did the transfer of the note by Mr. Bryan to the trust company on December 5, 1905, confer a good title?

By the terms of the bankruptcy act the trustee is vested by operation of law with title of the bankrupt to all property of which he was in possession as of the date on which he is adjudged a bankrupt. The filing of a petition against him is a caveat to all the world, and all persons dealing with him during the interval from that date to the date of final adjudication do so at their peril. The property of the bankrupt, after the filing of the petition against him and before adjudication thereon, is in custodio legis. It is subject to the prehensory power of the court, and the person against whom such petition has been filed cannot make any legal disposition of it. No creditor can lay hands on it, and no court, state or federal, can attach it. It is under the sole and exclusive jurisdiction and control of the bankruptcy court, and, if such court adjudges the party a bankrupt on the petition, the title to his property vests in the trustee as of the date of the filing of the petition; that date being the point of cleavage.

The learned counsel for the trust company insists that the fact that the bankrupt, in his schedules, has set forth this note as collateral held by the trust company to secure its indebtedness, is an admission of its title. These schedules were filed some time after the note in question had been actually delivered to the trust company, and as a simple statement of fact it is true that the trust company holds the note as collateral. Whether such holding is legal is the very point at issue. Certainly its title is not good, if it rests upon anything done by Duncan

or his agent after November 13th. From that date he was as to all of his property civiliter mortuus. He could make no disposition of it to the prejudice of his creditors save through the sanction of the court of bankruptcy, and any transfer of property made after that date would be simply void. Any such transfers within four months of the date of the filing of the petition would be invalid, if the person receiving it had reasonable cause to believe that the party making it was insolvent, and, although it might be fairly claimed by the trust company that on November 5, 1905, it had no reasonable cause to believe that Duncan was insolvent, such claim could scarcely be made on December 5th, after a petition in bankruptcy had been filed against him.

The case of Wilder v. Watts (D. C.) 138 Fed. 426, is cited in support of the contention of the trust company. There the bank had advanced to a country merchant solvent at the time moneys to be laid out in the purchase of a stock of merchandise under a contract that the same was to be insured and the policy assigned as collateral to his note. The goods were insured and the policy taken out and lodged for safekeeping in the safe of a neighboring store. It was not delivered or assigned to the bank until after the fire as the result of which the merchant became insolvent. Certain creditors filed a petition alleging that the transfer was a preference and an act of bankruptcy, and it was held that the bank was entitled under its contract to the policy of insurance, that the mere manual possession of it was not necessary, that it had an equitable lien on it which the bankrupt act was not intended to disturb. The other cases cited rest upon the same principle, and under it the title of the trust company would be protected, if the testimony showed clearly that at any time anterior to November 13th it had agreed to accept the security proffered, and thus perfected its title; but the facts as found are that it was still considering and investigating the value of the collateral offered at the time when the petition was filed, and was at full liberty to reject it. It had no title to it until it had agreed to accept it upon the terms upon which it was offered. At the time when it did accept, December 5, 1905, it was too late. The title to the note was no longer in Duncan, all of whose property was then under the control of the court of bankruptcy subject to the law which requires that it be distributed equally among all the creditors.

It is therefore adjudged that the trustee is entitled to the possession of the note.

HARTFORD PRINTING CO. v. HARTFORD DIRECTORY & PRINTING CO.

(Circuit Court, D. Connecticut. July 30, 1906.)

No. 1,193.

1. COPYRIGHT—INFRINGEMENT—PROFITS RECOVERABLE.
On an accounting by a defendant for profits realized from the sale of a directory which infringed complainant's copyright, the amounts received from advertisers are to be included in the gross receipts, to be accounted for, less the necessary cost of producing and disposing of the copies sold.

2. SAME.
In computing the profits realized by an infringer of a copyright for which he is accountable to the owner, where a greater number of copies of the infringing publication were printed than were sold, he is entitled to have deducted from the gross receipts all of such items of cost as would have been the same, had no more copies been printed than were sold, such as providing the copy and composition.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Copyrights, § 81.]

In Equity. On accounting.

For former opinion, see 146 Fed. 332.

The following is the stipulation:

Whereas, the parties in the above-entitled action are able and ready to agree upon all the material facts which would be proved before a master if an accounting were taken in the above-entitled case; and whereas, the only disagreement between the parties relates to the materiality of certain items and to the rule for determining the profits, if any, to which the complainant is entitled; and whereas the above matters of disagreement are purely matters of law, which would come before this court for decision after a finding by a master, if an accounting were taken: Therefore, the parties respectfully request that this court will determine said matters of disagreement in the first instance and without any prior reference to a master for an accounting, which reference is hereby waived by both parties; and, if this court will agree and consent to take such jurisdiction, the parties hereto do hereby stipulate and agree that the facts, in so far as they are deemed material hereto by the parties, or either of them, are as follows:

(1) There were 5,000 "dollar" directories printed for the defendant. Of these, 4,548 copies were bound, and 452 copies were not bound. After the modification of the restraining order granted in this case, 959 copies were repaired at a cost of $14.25 in order to permit of further sales, 1,394 copies were sold prior to the issuance of the restraining order, and 113 copies were sold after the modification thereof.

(2) The gross receipts of the defendant were as follows:

(a) By payments for insertion of advertisements in the directories	$2,779 80
(b) By mining stock received in part settlement for advertisements of Douglas, Lacey & Co., said mining stock being received by defendant at a valuation of 15 cents per share	45 00
(c) By sale of 1,394 directories before the issuance of the restraining order	1,394 00
(d) By sale of 113 directories after the modification of said restraining order	112 53
Total	$4,331 33

And in further explanation of said items of gross receipts it is stipulated and agreed that the first item (a) for the insertion of advertisements represents, in the case of several of the advertisements included, a compromise payment, an allowance having been made from the contract price by reason of the

decreased number of directories sold over those which the defendant had expected to sell, and, further, that in the case of several advertisements no pay ment whatever was made by the advertiser. The item as stated above represents, therefore, the actual receipts from advertisers, but without any deduction for commissions paid defendant's solicitors or collectors. The mining stock mentioned in the second item (b) was received by reason of such a compromise agreement. It was accepted by defendant only because a cash settlement could not be obtained, and is of no value.

(3) It is also stipulated and agreed that a conservative estimate of the present value of the lead slugs from which the defendant's directory was printed, and which have not as yet been sold, is $350.

(4) The gross disbursements of the defendant, to which it claims to be entitled to be credited, were as follows:

(a) To expenses of compiling, as follows:			
To payroll for canvassers, verifiers, office help, etc.	$2,186 55		
To Robert C. Lawson for soliciting advertisements and services on business directory	219 83		
			$2,406 38
(b) To expenses of publishing, as follows:			
To Martin Slattery for linotype work done by himself and his assistants	$1,315 32		
To National Lead Company for metal for type	450 45		
To A. Pindar & Co. for cuts for advertisements	43 07		
To Dodd Lithographic Company for maps	65 00		
To Plimpton Manufacturing Company for furnishing necessary stock, setting advertisements, and press-work on 5,000 copies, and for binding 4,548 copies (an allowance of 7 cents per copy for the 452 copies not bound, or $31.64, being made from the original contract price for 5,000 copies)	2,449 61		
			4,323 45
(c) To cost of repairing 959 copies after modification of restraining order (Plimpton Manufacturing Company)			14 25
(d) To expenses of sale, as follows:			
To Guilfoil & Dolan for advertising	$ 10 00		
To General Advertising Company for advertising	18 50		
To Hartford Times for advertising	52 75		
To Smith & McDonough for commissions on directories sold	15 20		
			96 45
(e) To miscellaneous items of expense connected with the publication and sale of the directories, as follows:			
To Case, Lockwood & Brainard Company for bill heads and blank sheets	$ 11 90		
To Peck & Co. for advance printing	30 25		
To expense of obtaining copyright	8 18		
To J. W. Rockwell for boxes to preserve the type metal after setting the same	58 40		
To other small miscellaneous items	252 62		
			361 35
(f) To other miscellaneous items, as follows:			
To C. C. Fuller for office desk	$ 48 50		
To Merganthaler Linotype Company for matrices	77 50		
			121 00
Total			$7,322 88

The defendant also claims the sum of $25 a week for four months, being salary agreed to be paid Mr. Slattery as officer of the defendant, which was not in fact paid, but is due from the defendant. This salary is claimed in addition to payments actually made to Mr. Slattery for linotype work done by him. Also the sum of $140 due Mr. Goldman as salary for seven months; his whole salary being $25 per week and only $20 per week having been

paid, which $20 per week is included in item (a) above. Also $8 due Mr. Slattery for office rent. It is further stipulated and agreed that the above items of disbursement and claims include all outstanding debts material to this action, as well as all disbursements actually made.

(5) It is further stipulated and agreed that the court may draw all proper and reasonable inferences of fact from the above statement of account in the same manner as a master might do if the above evidence were before him on an accounting. The Hartford Printing Company,

By Ralph O. Wells, Its Attorney.

The Hartford Directory & Publishing Co.,

By Charles E. Perkins, Augustine Lonergan, Its Attorneys.

In compliance with the above request Platt, District Judge, appointed the 1st day of October, 1906, at 11 a. m., at the courtroom in Hartford, Conn., as a time and place for final hearing in the above matter.

Ralph O. Wells, for plaintiff.

A. Lonergan and C. E. Perkins, for defendant.

PLATT, District Judge. By their stipulation filed July 30, 1906, which accompanies this memorandum, the parties have agreed upon the essential facts which might have been found and reported by a master, and it becomes the duty of the court to order the issuance of a final decree based upon such facts. The stipulation has been carefully studied, for the purpose of finding what receipts are properly chargeable to the account of the infringement, and what was the actual reasonably necessary cost of producing and disposing of the infringing copies. If the gross receipts exceed such cost, the difference is the amount which the defendant ought to pay. To that extent it would have profited by its wrongdoing. In looking for the gross receipts we must include the amounts received from advertisers. The stipulated facts put them there; but, beyond that, they belong there on principle. It is true that the advertisements do not, per se, infringe upon the plaintiff's rights; but they were procured for and placed in a directory which is tainted with bad faith from A to Z. The defendant cannot, on any theory of honest dealing known to the court, retain the moneys received therefor. We therefore start with "Gross receipts, $4,331.33."

Taking up the problem of actual cost of the directories from the viewpoint of a reasonable man, we find that 5,000 directories were printed and 1,507 of them were sold. The plaintiff insists that the way to get at the cost is to find what it actually cost, looked at fairly, to produce the entire 5,000 copies, and that the cost of the infringing volumes will be found by the simple mathematical process of dividing the total cost by the fraction $^{1507}/_{5000}$. The trouble with that is this: A certain portion of the expenditures for labor and materials is a fixed charge, which could not materially vary, whether the number of directories produced was 5,000 or 1,000. In other words, in many respects it would have cost about as much to produce 1,507 copies as it did to get out the whole 5,000.

Taking up specific items found in the stipulation:

Paragraph 4, subdivision (a):

To expenses of compiling, as follows:

To pay-roll for canvassers, verifiers, office help, etc.	$2,186	55
To Robert C. Lawson for soliciting advertisements and services on business directory	219	83
	$2,406	38

Subdivision (b):

To expenses of publishing, as follows:

To Martin Slattery for linotype work done by himself and his assistants	$1,315	32
To National Lead Company for metal for type	450	45
To A. Pindar & Co. for cuts for advertisements	43	07
To Dodd Lithographic Company for maps	65	00
	$1,873	84

Here is a total expenditure of $4,280.32, which must have been incurred, no matter what number of copies were to be finally put upon the market. In this line of reasoning, of course, the principle of "de minimis" must be recognized.

The contract with the Plimpton Manufacturing Company provided that they should furnish the stock and perform the work necessary to produce 5,000 bound copies for $2,500, and so, after the preliminary general expense, it cost the defendant an additional 50 cents for each bound copy ready for delivery. Defendant sold 1,507 copies, and is entitled to credit on account of them of $753.50. Adding this amount to the $4,280.32 already found, we have a total of $5,033.82, which is considered the actual reasonably necessary expense incurred by the defendant in the production ready for delivery of the 1,507 infringing copies.

This rough glance at the situation, drawn in free hand, shows that the actual reasonably necessary cost was considerably greater than the gross receipts, and the court is, for that reason, relieved from the necessity of intruding upon the labyrinth which threatens to open up if the other items of claimed expense are analyzed. Since no profit resulted from the infringement, the damages must be fixed at the nominal amount of 6 cents.

If counsel for defendant wish to be heard on the question of costs, the court will hold the matter in abeyance for a reasonable time before ordering the entry of a final decree in accordance with this opinion.

CAPUCCIO v. BARBER & CO., Inc.

(District Court, S. D. New York. November 1, 1906.)

1. SHIPPING—CHARTER PARTY—FREIGHT.
   In a dispute between a steamer owner and a charterer with respect to a deduction by the charterer of 1 per cent. from prepaid freight, *held*, that under the terms of the contract the owner was entitled to full freight without deduction.
2. SAME—SHORING FOR CARGO—PART OF EXPENSE OF STOWAGE.
   Where a charter party provided that the steamer should pay for the stowage and the charterer should be in no way liable for improper stowage, the vessel was liable for the cost of shoring for the cargo, which was

necessary to render her seaworthy for the voyage and to enable her to obtain insurance, notwithstanding a further provision requiring the charterer to furnish the dunnage not on board.

3. SAME—LOADING CARGO—EXTRA EXPENSE OF NIGHT WORK.

Under a charter party requiring the vessel to furnish the use of its steam winches for loading cargo day or night, but providing that the charterer should pay the extra expense, if any, incurred by reason of night work, the vessel is entitled to recover for extra wages paid to members of the crew for running the winches at night.

In Admiralty.

Convers & Kirlin and John M. Woolsey, for libellant.
Butler, Notman & Mynderse, for respondent.

ADAMS, District Judge. This action was brought by Luigi Capuccio, the owner of the steamships Dora Baltea, Cerea and Soperga, to recover certain deductions made by Barber & Company, the charterer, in settling the accounts of the vessels between the parties. The controversies turn upon the construction to be given to the charter parties under which the steamers were operated by the respondent.

The Dora Baltea.

The charter party in this case was dated the 7th day of March, 1904. It was one of the affreightment not a demise. Under it the steamer was to proceed to Baltimore and there load a complete cargo of steel billets and proceed with them to a port in England or Wales, as ordered, and there deliver the cargo on being paid freight of nine shillings and nine pence per ton. The charter also contained the provision:

"10. * * * All steam winches to be at charterers' disposal during loading, and steamer to provide men to work same both day and night if required, charterers agreeing to pay extra expense, if any, incurred by reason of night work."

The steamer loaded at Baltimore a complete cargo of steel billets, consisting of $446^{1570}/_{2240}$ tons, and duly delivered the same at Newport, Monmouth, England, whereupon there became due the sum of £2158.0.4. The respondent before paying the freight, it is alleged, deducted £21.11.7, amounting to $105.09 and the further sum of $969.59. In addition to these sums, the libellant claims a further sum of $93.93, consisting of $22.50, extra expense of donkeymen; $48.75, extra expense for coal, and $22.68 extra expense for water. These several sums making $1168.71, the libellant now seeks to recover.

The charter party also contained the following:

"7. Charterers to have the option of appointing the Tally Clerks to receive Cargo at Steamer's loading pier, also the Stevedore to load and stow the Cargo and Bunker coals at port of loading—under the Master's supervision—Steamer paying expense of same at 35c. per 2,240 lbs. of cargo shipped, and Charterers to be in no way liable for improper stowage.

8. Charterers to provide necessary dunnage required beyond dunnage on board and steamer to load under the inspection of Underwriters' Surveyors nominated by Charterers, whose instructions as to stowage and draft of water are to be carried out.

9. The Master or person appointed by him shall sign Bills of Lading as presented without prejudice to this Charter, and the freight as per Bills of Lading to be accepted in liquidation of the amount due under this Charter; any

difference between Chartered and Bills of Lading freight being settled on clearance—if in Charterers' favor, by Captain's draft payable three days after arrival at Port of Discharge; if in Steamer's favor, in cash less 1% for interest and insurance. Charterers' liability to cease on cargo being shipped and difference of freight and/or demurrage, if any, paid, Steamer having a lien on the cargo for freight."

The respondent denies that the cargo was delivered at the charter party rates and further denies that the freight amounted to £2158.0.4 and alleges that the charter party did not provide for payment of freight at the rate of 9s. 9d. per ton in all cases but only for said rate after deduction therefrom of an amount equal to 1% of the difference, if any, by which the freight computed at the said rate exceeded the freight reserved under the bills of lading to be paid at destination and further that there was no freight reserved to be paid at destination under the bills of lading and the deduction of 1% amounted to £21.17.7 and the net freight amounted to £2136.8.9. The respondent further alleges that at the request of the master of the vessel, it disbursed the sum of $969.59 for necessary shoring for the cargo and that the freight accounts between the libellant and the respondent were duly settled at Baltimore at which time the said sum was refunded to the respondent. The respondent admits that a part of the cargo was loaded at night and that certain extra expenses were incurred for donkeymen which the respondent has at all times been willing to pay and now is upon the presentation of proper vouchers but denies that any extra expense was incurred for coal or water by reason of night work.

The Deductions from the Amount of Freight.

The dispute in this connection has particular reference to the deduction of $105.69 from chartered prepaid freight. It is alleged by the respondent that this sum consisted of 1% of the difference between the chartered freight and the bill of lading freight to cover interest and insurance, and that such deduction was authorized by the provisions of clause 9 of the charter party above quoted.

This seems to be somewhat in conflict with the earlier provision of the contract, "payable on right and sure delivery of the cargo as per Bills of Lading in cash without credit or discount" but the provisions in connection with the facts seem to make the case clear.

The contract in the third paragraph provides for a payment of freight at destination at a stipulated rate, "as per bills of lading in cash without credit or discount." The original assumption apparently was that the bills of lading would reserve a freight payable under them at the same rate as the chartered freight and a provision was made that the master should sign such bills of lading as the charterer might present in case the freight under the bills of lading should be different from the chartered freight. If larger, the master was to sign a draft to cover the difference; if smaller, the charterer was to pay the difference in cash. It is further provided that upon payment of the difference in cash the charterer should be allowed a deduction of 1% "for interest and insurance." It appears that there was no bill of lading freight and that the chartered freight, the whole freight, was paid in advance. It is agreed that it amounted to £2158.0.4, paid

in advance, on which 1% was £21.11.7 or $105.09, the amount in dispute.

The prepayment of the freight was not in accordance with the contract provision and there is nothing to show that there was any arrangement between the parties for a prepayment. For all that appears, it might have been to the libellant's advantage to have had the freight paid at the port of destination in the saving of cost of exchange and the payment of commissions to his agents in this country on the collection.

In the subsequent charters of the steamships Cerea and Soperga, the right which is contended for here by the respondent was given to the charterer by providing that the charter freight could be prepaid at the place of shipment and that it would then be subject to a deduction of 1% but it was not stated to be for interest and insurance as here but merely a flat 1% deduction, leaving an inference that the parties construed this charter at least subject to doubt in such respect, which should be removed by a plain stipulation. Here no such right was given and the deduction seems to have been arbitrary and without merit. The owner was entitled to the stipulated freight in the absence of a clear understanding of some kind and that the amount was to be reduced in favor of the charterer. It is claimed that Par. 9, quoted supra, shows such a right to the charterer but if so it is not clear enough to have warranted the deduction.

In this respect the libellant is entitled to recover.

The Deduction for Shoring.

Section 8 of the charter party, supra, provides that the charterer shall furnish the dunnage required, when not on board. The form of charter originally provided that the steamer should furnish the necessary dunnage but the word "steamer" was stricken out and the word "charterer" substituted with an interlineation after the word "dunnage" as follows: "required beyond dunnage on board and steamer" to load, etc. This paragraph was therefore materially changed but the preceding one, providing that the steamer should pay for the stowage and the charterer "be in no way liable for improper stowage" remained the same. The change affected the character of the transaction to some extent but it does not seem that taken altogether, it materially altered the relations of the parties with respect to their obligation regarding the stowage and the owner still remained responsible for the proper character thereof.

Dunnage consists generally of loose wood or other material usually placed upon the flooring of a vessel for the cargo to rest upon, or pieces of wood, mats, etc., jammed between barrels and other cargo to prevent motion, while shoring is used to secure the cargo after it is stowed. It is practically the same as tomming, that is fastening the cargo down to prevent motion where it does not entirely fill the space in which it is stowed and would be liable to displacement by the vessel's motion in a seaway.

As appears above (§ 7) the charterer was not to be liable for improper stowage, which was to be done at the steamer's expense. Shoring is of the same general character and with respect thereto, it is

shown by the testimony of the master that he paid the expense of it, but before doing so he protested in writing, sending the protest to the charterer. When he applied to the underwriters for a certificate of insurance they declined to give it because they did not consider the vessel seaworthy without such precaution. It does not appear that the shoring was absolutely necessary for the protection of the cargo but to have been required by the vessel for insurance purposes. See Premuda v. Goepel (D. C.) 23 Fed. 410. It was a disbursement essential to make the vessel seaworthy in such respect and as that duty was incumbent upon the owner, the charterer should not be called upon to pay such expense. Tweedie Trading Co. v. Dene Steam Shipping Co., Limited (D. C.) 140 Fed. 779, 782.

The libellant in this respect is not entitled to succeed.

The Extra Expense for Night Work, etc.

The claim in this connection is for donkeymen, $22.50, coal $48.75, and water $22.68, making $93.93.

These sums are said to be due under clause 10 of the charter quoted above, which provided for the charterer's use of the steam winches, etc

It appears that the charge for donkeymen was an expense recoverable from the charterer. It is alleged that the steamer was called upon to make extra disbursements for the services of these members of the crew, said to have been $22.50; also that the other items would fall under the agreement of the steamer to work at night if required. It is not clear that the last two items are recoverable but further proof may be taken by a commissioner, if necessary.

The Claims Against the Cerea and Soperga.

These are similar to the extra services and expenses in the Dora Baltea. The libellant is entitled to recover upon proof of the amount paid out by the steamer in this connection, for which purpose a reference will be necessary.

Decree for the libellant for $105.09, with an order of reference to determine the amounts due for extra work under § 10 of the charter parties.

LA BRETAGNE.

(District Court, S. D. New York. October 30, 1906.)

1. COLLISION—STEAM VESSELS MEETING—MUTUAL FAULT.

The steamship La Bretagne, passing out to sea from North river, when in the main channel, opposite Liberty Island, met a tug with a car float on each side coming up on the west side of the channel, the two vessels being then on courses to pass safely starboard to starboard. The Bretagne gave a signal of one whistle and ported her wheel. The tug did not answer the signal, but the Bretagne kept her course to starboard. Both blew danger signals and reversed, but too late to avoid collision; the Bretagne striking the starboard tow on the starboard side. *Held*, that the Bretagne was clearly in fault for attempting to pass to the right under the circumstances without the tug's consent, and that the tug was also in fault for being on the wrong side of the channel in violation of arti-

cle 25 of the inland rules (30 Stat. 96 et seq. [U. S. Comp. St. 1901, p. 2883]), without which the collision would not have occurred.

[Ed. Note.—Signals of meeting vessels, see note to 30 C. C. A. 630.]

2. SAME—NAVIGATION OF NARROW CHANNELS—APPLICATION OF RULE.

The main channel opposite Liberty Island, New York Bay, which is there 4,500 feet wide, is a narrow channel to which art. 25 of the inland rules (30 Stat. 96 [U. S. Comp. St. 1901, p. 2883]) applies, and requires steam vessels when safe and practicable to keep to the side which is on their starboard hand.

In Admiralty. Suit for collision.

Butler, Notman & Mynderse, for libellant.
Edward K. Jones, for claimant.

ADAMS, District Judge. This action was brought by the Baltimore & Ohio Railroad Company against the steamship La Bretagne to recover the damages arising from a collision between that steamship and libellant's car float 160 N. in tow on the starboard side of the tug Narragansett. This float was laden with 14 cars, 9 of which were forced overboard and injured, with their contents. The damage is alleged to have amounted to $30,000. The collision occurred near Liberty Island, New York Harbor, between 10 and 11 o'clock in the morning of the 17th day of March, 1904. The tug had another shorter float, No. 67, on her port side, and was bound from St. George, Staten Island, to pier 32 North River. The Bretagne, about 550 feet long, was proceeding to sea from her pier at the foot of Morton Street, North River, at the rate of from 8 to 10 miles an hour. The tug was 95 feet long, the starboard float about 300 feet long and the port float was about 200 feet long. The sterns of the floats were somewhat, 15 or 20 feet, aft of the stern of the tug. They both projected considerably ahead of the tug, the starboard one at least 150 feet. She was proceeding at the rate of 4 or 5 miles per hour. The weather was fair and the tide was ebb.

The claim of the libellant is that the Narragansett and tow were proceeding up the extreme westerly side of the channel close to the anchorage ground in order to escape the current of the ebb tide, and the Bretagne was coming down the middle of the channel bound to sea, and the vesesls as they approached were bearing on the starboard of each other; that when a comparatively short distance apart, the steamer blew a signal of one blast, hard-a-ported her wheel and took a rank sheer to the westward, bringing about the collision by the steamer striking with her stem the starboard float on her starboard side, about a third of the length of the float from the forward end, seriously injuring the float and causing her to sink to the water's edge and the 9 cars mentioned to run off the rails and overboard; that the collision occurred notwithstanding the efforts of the tug to avert it by blowing danger signals and reversing her engines full speed. The steamer is alleged to have been in fault, (1) in not maintaining a vigilant lookout, (2) in proceeding at too high a speed and in not seasonably slowing, stopping or reversing, (3) in not continuing on a course calculated to carry the vessels safely past each other starboard to starboard and in attempting to cross the bow of the Narragansett when the vessels were

too close together to permit such a manœuvre to be safely made and (4) in not taking seasonable measures by the use of her whistle or otherwise to pass the Narragansett and her tow in safety, and in not seasonably indicating her intention of porting her wheel and passing to the westward.

The claim of the Bretagne is that she left her pier at 10 o'clock in the morning, under the charge of a duly licensed pilot stationed on the bridge where she also had her commander, with a full corps of quartermasters and able seamen properly stationed and all attentive to their respective duties; that she proceeded down the channel without special incident until she neared the Statue of Liberty keeping at that point to the right of the channel on a course of S. S. W. and while thus proceeding, and at half speed, those in charge of her navigation noticed about three quarters of a mile ahead and about one half point on her port hand, the tug and her tow of two car floats; that the Bretagne then gave a signal of one blast to indicate to the tow that she would pass on the port side and went to the starboard a few degrees but her signal was not answered; that when the vessels were about 1200 feet apart the tug changed her course across the course of the Bretagne, whereupon the latter's engines were slowed and she gave another blast of her whistle and swung further to the starboard; that the tug without answering the signal of the Bretagne, proceeded across the latter's course, whereupon she reversed her engines full speed and gave the alarm signal but before her speed could be fully arrested, the vessels collided. The Bretagne alleges as faults on the part of the tug, (1) she did not maintain a proper lookout, (2) she wrongfully attempted to cross the bows of the Bretagne, (3) she omitted to turn to her starboard, (4) she refused to yield to the Bretagne and persisted in crowding the latter in her efforts to pass along the starboard side of the channel and (5) she omitted to slacken her speed and stop and reverse in time.

The testimony on the respective sides supports the contentions in a general way, but outside testimony makes it clear that the vessels were on courses to pass safely starboard to starboard if neither had changed. Such testimony comes from several tugs navigating in the vicinity. The Nettie Tice was going up the channel astern of the Narragansett, towing 3 coal laden canal boats bound from Elizabethport, New Jersey, to Jersey City. Her master said that the Narragansett passed her on the port side, on a parallel course; that the Tice saw the Bretagne approaching head and head with herself and broad on the Narragansett's starboard on a course shaped to pass fully a thousand feet to the eastward of the latter's course; that at this time the Tice blew the Bretagne a signal of one whistle and a few seconds afterwards the latter blew a similar signal; that then, after proceeding about a length, the Bretagne started to sheer to starboard and approached the Narragansett, whereupon the latter blew danger signals, which were immediately followed by similar signals from the Bretagne and both vessels reversed but too late to avoid the collision. The effect of the reversing was to bring the Narragansett to a substantial stop in the water but was not sufficient to fully stop the headway of the

Bretagne, which, aided by the tidal current, was going forward at the time of impact. The master of the tug Overbrook, proceeding up the bay and having passed between the vessels corroborated this account except as to the distance there would have been between the Bretagne and Narragansett in passing. He estimated it at 500 or 600 feet. The tug Independent, heading about south, was passed by the Bretagne on the tug's port hand. The master saw the vessels in collision near the anchorage grounds and attributed it to a sheer on the Bretagne's part. The tug N. Y. Central No. 10 was taking a lighter from the Erie Basin bound up the North River. The master saw the Bretagne coming down off Castle William and the Narragansett going up to the westward. He heard the danger signals and noticed a change of course on the part of the former to the westward of about 4 points, bringing about the collision. The tug Charles Runyon was coming up the bay from Barren Island to the North River, slightly to the starboard of the Tice and about 1000 or 1200 feet to the eastward of the Naragansett. The master saw the Bretagne coming down on a course parallel with that of the Narragansett. He heard the Tice's signal of one whistle and the steamer's answer, then saw the latter haul sharply to the starboard and rather exaggerated her sheer, which he said was almost across the channel. He then saw the collision. There were numerous other witnesses from these outside vessels in court but the advocate for the Bretagne objected to their examination as being merely cumulative and stipulated that their testimony would agree with that already given, whereupon the Narragansett agreed not to examine them.

The testimony of the pilot of the Bretagne was that when he saw the tug and floats, they were slightly on his port hand, about ½ point, and headed to pass in that way; that the steamer then off Bedloes Island, was slowed and blew a signal of one whistle; that the Narragansett did not respond to the whistle but sheered slightly to starboard and showed the port side of the western float, whereupon he ordered the steamer to proceed at half speed again; that everything then appeared clear, and the steamer went on, when suddenly the tow took a sheer to the westward, the steamer then blew one whistle and slowed and immediately afterwards reversed but the collision took place 200 or 300 feet to the eastward of the anchorage buoys. This contention was not fully sustained by the master who was on the bridge, who said he saw the starboard side of the tow looking as if it was trying to cross the steamer's bow and go to the western part of the channel and he asked the pilot "Why do you come on starboard?" The master evidently regarded a wrong manœuvre the steamer's change to the right under the circumstances but subsequently appeared to agree with the pilot and did not relieve him of the command. His testimony was practically the same as the pilot's with respect to the positions of the vessels and the other witnesses for the steamer sustained, in a general way, the pilot's contention.

The great preponderance of the testimony shows that the vessels were in positions to pass safely starboard to starboard and that the collision was produced by a change on the part of the Bretagne to

the starboard, without an agreement to that effect with the tug. I had no doubt of this at the time of the trial and an examination of the minutes of the testimony confirms my belief that she was primarily in fault for the collision. The Narragansett did not have a lookout but it appears that the accident did not occur by reason of the absence of one and such circumstance should be disregarded.

The troublesome feature of the case is the fact that the tug and tow were on the wrong side of the channel under article 25 (Act June 7, 1897, c. 4, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2883]), which provides that in narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

The channel here was about 4500 feet wide. I have had occasion to conclude in several cases recently (verbal opinions delivered in court) that the Hudson River opposite New York, where it is about the same width, was within the rule. It has been stated on appeal in The Bee, 138 Fed. 303, 306, 70 C. C. A. 593, referring to a collision occurring off Bay Ridge, where there are two channels, that the rule did not apply when the channels made an entire body of water, though it does with respect to each channel further down the Bay, where they are separated. In the vicinity of this collision, there was but one channel, that is the main one, in which both vessels were navigating. No reason appears why the rule should not be applied in this case, unless the circumstances were such as to exclude its operation. It is urged that the proximate cause of the collision was the sheer of the Bretagne to the starboard, and The Lowell M. Palmer (C. C. A.) 142 Fed. 937, is cited to sustain the proposition that she should be held solely liable. That was a case of collision in the East River where the tug Wrestler starting from New York and bound up the river with a tow alongside brought about a collision with a descending tow, alongside of the tug Lowell M. Palmer, near the Brooklyn shore. In that case there was a two whistle agreement which required the Wrestler to pass the Palmer starboard to starboard, which the former failed to comply with, alleging that she found it impossible because of an eddy which prevented her bow from swinging up the river. The court however disregarded this excuse of the Wrestler and held her solely in fault. It was concluded that the Palmer was not in fault because the Wrestler could not complain of a violation of law on the part of the Palmer as there was ample opportunity for the vessels to execute the manœuvre agreed upon, the Palmer having gone as near to the Brooklyn shore as safety would permit. The principal distinction between that case and the one under consideration is that there was no agreement to pass to the right. The Bretagne sought to make such agreement but it was not assented to by the tug, which did not answer the former's navigating signals but stopped and backed upon receiving the signal of the Bretagne and seeing her sudden sheer. The tug was aided by the tide in her efforts to stop and probably had overcome her headway at the time of the collision so that there was no observable fault on her part, except that of being on the wrong side of the channel.

Of the Narrow Channel Rule, it is said in Hughes on Admiralty (250):

"This is really a branch of the port-helm rule. The latter rule applies when the vessels are meeting end on, no matter whether they are in a harbor or a narrow channel, no matter whether they are following a channel or crossing it. The starboard-hand rule emphasizes this duty as to narrow channels. It means that each must keep along its own right-hand side, no matter how the relative bearings may be from sinuosities or other causes.

"This rule was only added to the inland rules by the recent act of June 7, 1897 (30 Stat. 96, c. 4 [U. S. Comp. St. 1901, p. 2883]), though it had been in the International Rules since the revision of 1885. The courts, however, are rigid in enforcing it."

Of course, if there had been an agreement to go to the left the Bretagne would be solely liable under The Bee, supra. In the absence of such an agreement, I am unable to see how the Narragansett can be wholly exonerated. Her presence on the western side of the channel was clearly a contributing fault because if she had been where the law required her to be, there would have been no collision.

Decree for the libellant for half damages, with an order of reference.

MALLOY v. AMERICAN HIDE & LEATHER CO.

(Circuit Court, D. Massachusetts. October 12, 1906.)

No. 218.

1. DEATH—STATUTORY ACTION FOR WRONGFUL DEATH OF SERVANT—JURISDICTION OF FEDERAL COURT.

The Massachusetts employers' liability act (Rev. Laws Mass. c. 106, §§ 71–74), which authorizes an action to recover damages for the death of an employé, to be "assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable," is not a penal statute in such sense that an action based thereon may not be maintained in a federal court.

[Ed. Note.—Jurisdiction as affected by state laws, see note to Barling v. Bank of British North America, 1 C. C. A. 513.]

2. COURTS—JURISDICTION OF FEDERAL COURT—PENAL OR REMEDIAL STATUTE.

Whether a state statute is strictly penal, or is so far remedial that an action thereon is within the jurisdiction of a federal court, is a question of general jurisprudence to be determined by that court for itself uncontrolled by local decisions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 818.]

3. DEATH—ACTION FOR WRONGFUL DEATH—PERSON KILLED WHILE VIOLATING THE LAW.

Damages are not recoverable for the death of a boy under 15 years of age, who was killed through the negligence of his employer while he was operating a passenger elevator running at a speed of more than 100 feet a minute, in violation of a statute, providing that such elevators shall be operated only by competent persons not less than 18 years of age, and makes its violation "by operating or causing an elevator to be operated" contrary to its provisions a penal offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 32.]

At Law. On demurrer to the first and second counts of the declaration and demurrer to answer to third count.

Whipple, Sears & Ogden, for plaintiff.
Brandeis, Dunbar & Nutter, for defendant.

LOWELL, Circuit Judge. The first and second counts of the declaration allege a right to recover by reason of the death of the plaintiff's intestate. The action was based upon Rev. Laws Mass. c. 106, §§ 71–74. The material parts of the statute are as follows:

"Sec. 71. If personal injury is caused to an employee, who, at the time of the injury, is in the exercise of due care, by reason of a defect in the condition of the ways, works or machinery connected with or used in the business of the employer * * * the negligence of a person in the service of the employer who was entrusted with and was exercising superintendence * * * the employee or his legal representatives shall * * * have the same rights to compensation and of action against the employer as if he had not been an employee nor in the service, nor engaged in the work of the employer.

"Sec. 72. If the injury described in the preceding section results in the death of the employee, and such death is not instantaneous or is preceded by conscious suffering, and if there is any person who would have been entitled to bring an action under the provisions of the following section, the legal representatives of said employee may, in the action brought under the provisions of the preceding section, recover damages for the death in addition to those for the injury."

"Sec. 74. If, under the provisions of either of the two preceding sections, damages are awarded for the death, they shall be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable."

The first count alleges a defect in the ways, works, or machinery, to wit, an elevator. The second alleges the negligence of a superintendent. To these counts the defendant has demurred, upon the ground that the statute referred to is in its nature so penal that it cannot be made the basis of an action in this court, being enforceable only in the courts of the commonwealth. The defendant admits that, in Boston & Maine v. Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193, the Circuit Court of Appeals for this circuit held that an action was maintainable in an analogous case. That decision is ordinarily binding upon this court, but the defendant contends that, in Hudson v. Lynn & Boston R. R., 185 Mass. 510, 71 N. E. 66, decided in the Supreme Court of Massachusetts, which is charged with the ultimate interpretation of the statutes of the commonwealth, it was held that the statute in question was penal, inasmuch as it "gave a civil remedy for the recovery of a penalty imposed by way of punishment." 185 Mass. 517, 71 N. E. 69. The Circuit Court of Appeals observed, however, that it is not sufficient that the statute in question "is in the nature of a penal statute. The distinction beween a statute strictly penal, or qui tam, and one in the nature of a penal statute, is pointed out in Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. The proper test is that, if it is strictly penal, the remedy is subject to the control of the executive of the state by which the proceeding was authorized, and it may be at any time, either before or after judgment, annulled by a pardon." 108 Fed. 119, 47 C. C. A. 615, 56 L. R. A. 193. That the Governor of Massachusetts can remit a penalty imposed by the statute above quoted has never been suggested. Moreover, in Huntington v. Attrill, the Supreme Court said that:

"The test is not by what name the statute is called by the Legislature or the courts of the state in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against the public or a grant of a civil right to a private person. In this country, the question of international law must be determined in the first instance by the court, state or national, in which the suit is brought. If the suit is brought in a Circuit Court of the United States, it is one of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions." 146 U. S. 683, 13 Sup. Ct. 233, 36 L. Ed. 1123.

It follows that the decision of the Supreme Court of Massachusetts, even if it be taken to hold that this action is not maintainable here, yet does not bind the federal courts. And, in Oulighan v. Butler, 189 Mass. 287, 295, 75 N. E. 726, the Supreme Court of Massachusetts described the statutory proceeding as a "remedy for death by wrongful act," and observed that "the remedy provided was in the nature of a penalty, which must be assessed according to the degree of the defendant's culpability or that of his servants." The remedial intent of the statute was thus recognized. As a higher federal court than this has held the action to be maintainable, this court will regard itself as bound by that decision, notwithstanding the expressions of the Supreme Court of Massachusetts in Hudson v. Boston & Lynn R. R. The defendant's demurrer to these counts is therefore overruled.

The third count of the declaration alleges that the plaintiff's intestate was employed by the defendant in running and operating an elevator in a building occupied by and leased to the defendant, and was injured by a fall of the elevator which was caused by the defendant's negligence. The liability alleged is that arising at common law. To all three counts the defendant has answered, inter alia, that:

"If the deceased, William F. Malloy, was in the employ of the defendant at the time of said alleged accident, if any, or at any other time, then the fact is that at the time when the deceased, William F. Malloy, entered the employ of the defendant he willfully and fraudulently misrepresented to the defendant his age and said that he was of the age of eighteen (18) years whereas he was in fact less than fifteen (15) years of age, and by reason of said falsehood and relying upon said statement of said deceased the defendant employed the said deceased and put said deceased in charge of the elevator mentioned in said declaration, and said elevator was an elevator for the carriage of passengers running at a speed of more than 100 feet a minute. And the deceased made such false representations as to his age, well knowing that it was unlawful for persons under the age of eighteen years to have control of the operation of elevators for the carriage of freight or passengers, running at a speed of more than 100 feet a minute, or for persons under the age of sixteen years to have control of the operation of elevators for the carriage of freight or passengers, in said commonwealth of Massachusetts, and that, if the defendant were informed that the said deceased was under the age of eighteen years, the defendant would not employ the said deceased for such purpose. And at the time of said accident, if any, the defendant under a liability insurance policy issued by the Employers' Liability Company was insured against liability for accidents on or about elevators or otherwise, if such accidents occurred while the elevators were being operated by persons of lawful age; but said policy did not insure the defendant against liability for accidents occurring where said elevators were being operated by persons under the age required by law. And if the deceased had been of the age of sixteen, as he represented himself to the defendant to be, the defendant would have been protected from any liability for said accident, if any, by the terms of said pol-

icy, and, except for said false representation, the defendant would not have employed the deceased, and the deceased would not have been in said elevator at the time that said alleged accident, if any, occurred."

The plaintiff has demurrer to this part of the answer, and has moved to expunge it.

Under the circumstances stated, the plaintiff's intestate at the time of the accident was engaged in an unlawful act. (St. Mass. 1902, c. 350). That the statute covers both employer and employé was not disputed at the argument, and the plaintiff rested his case upon the ground that the act admitted to be illegal did not contribute to the accident.

As was said by the Supreme Court, in Newcomb v. Boston Protective Department, 146 Mass. 596, 602, 16 N. E. 555, 558, 4 Am. St. Rep. 354:

"No case has been brought to our attention, and upon careful investigation we have found none, in which a plaintiff whose violation of law contributed directly and proximately to cause him an injury has been permitted to recover for it; and the decisions are numerous to the contrary. * * * While this principle is universally recognized, there is great practical difficulty in applying it. The best minds often differ upon the question whether, in a given case, illegal conduct of a plaintiff was a direct and proximate cause contributing with others to his injury or was a mere condition of it; or to state the question in another way, appropriate to the reason of the rule, whether or not his own illegal act is an essential element of his case as disclosed upon all the evidence. Upon this point it is not easy to reconcile the cases."

The illegal act of the plaintiff's intestate was the operation of the elevator. His injury occurred "while he was engaged in the performance of his duties on the said day in running and operating the said elevator." The plaintiff's case stands like that of a street car conductor, who, while running a car on Sunday, was struck by a passing car negligently operated (Day v. Highland Street Railway, 135 Mass. 113, 44 Am. Rep. 447); like that of a driver injured by a defect in a bridge while he was driving across it faster than the city ordinance permitted, and where it was not shown that the accident resulted from his rate of speed (Heland v. City of Lowell, 3 Allen, 407, 81 Am. Dec. 670); like that of a man who, while climbing a telegraph pole in violation of a city ordinance, was injured by a street car negligently striking the wire he was carrying (Banks v. Highland Street Railway, 136 Mass. 485). These persons were not permitted to recover. Spofford v. Harlow, 3 Allen, 176, and Steele v. Burkhardt, 104 Mass. 59, 6 Am. Rep. 191, were treated as analogous to suits upon contracts made on Sunday. They were not deemed to be related to the defense here raised, viz., the contributory wrongdoing of the person injured.

Even if this court is not strictly bound by the decisions of the state court (Bucher v. Cheshire R. R., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795), yet I am not disposed in this case to disregard those decisions.

Demurrer to answer overruled. Motion to expunge denied.

UNITED STATES v. TERMINAL R. ASS'N OF ST. LOUIS et al.

(Circuit Court. E. D. Missouri, E. D. October 25, 1906.)

1. WITNESSES—PRODUCTION OF DOCUMENTS—POWERS OF COURT OF EQUITY.
   A court of equity has power to compel the production of books and papers by virtue of its inherent and general jurisdiction, and this power is not confined to the parties to the suit, but extends to third persons.
2. SAME—SUBPŒNA DUCES TECUM—REFUSAL TO OBEY.
   A witness cannot excuse his failure to produce books and papers in obedience to a subpœna duces tecum on the round that the evidence called for is immaterial, irrelevant, or incompetent under the issues in the case; that question being one for the court to determine when the evidence is offered.
3. SAME—GROUNDS FOR ISSUANCE.
   To entitle a party to a subpœna duces tecum to require a witness to produce books and papers, it is not necessary that the court should be satisfied beyond a reasonable doubt of their relevancy and materiality as evidence, but a showing which establishes a reasonable ground to believe they may be so is sufficient, especially where the application is made by the United States in a suit of public interest and importance.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 20.]
4. SAME.
   The fourth constitutional amendment, prohibiting unreasonable searches and seizures, affords no protection to a witness for his refusal to produce books and papers admittedly in his possession in obedience to a subpœna duces tecum issued by a court of equity.

In Equity. On motion of R. M. Fraser to quash subpœna duces tecum.

John F. Lee and E. C. Kramer, for the motion.
D. P. Dyer, C. H. Krum, E. C. Crow, and Chas. Nagel, opposed.

FINKELNBURG, District Judge. The matters now submitted to the court arise in a suit brought by the government of the United States against the Terminal Railroad Association of St. Louis, the St. Louis Bridge Company, the Merchants' Bridge Company, the Wiggins Ferry Company, the Merchants' Terminal Railway Company, and 14 trunk line railroad companies engaged in interstate commerce to and from the city of St. Louis, besides some other parties defendant unnecessary to mention for the purpose of this inquiry.

The bill of complaint is lengthy. It is largely historical. It recites the history of the St. Louis Bridge (commonly known as the "Eads Bridge"), the Merchants' Bridge, and the Wiggins Ferry, the three instrumentalities for transporting freight and passengers across the river at St. Louis, Mo., and it also gives the history of the various terminal railway companies on both sides of the river. After a great deal of detail the bill of complaint, in substance, culminates in the charge that the defendants, intending unlawfully to monopolize trade and commerce, and intending to restrain and suppress competition in interstate commerce at St. Louis, Mo., and East St. Louis, Ill., effected an unlawful combination or consolidation of said bridges and ferries, and of the terminal railways leading up to the same, in the hands of the Terminal Railroad Association of St. Louis, and that said Terminal Railroad Association of St. Louis is, in fact, owned and con-

trolled by the 14 railroad companies who are made defendants in this case. The bill then in effect charges that by reason of the facts set forth the 14 railroad companies aforesaid, through said Terminal Railroad Association, control all the means for transporting freight and passengers across the Mississippi river at St. Louis, Mo., that they arbitrarily fix and exact unreasonable charges and tolls to be paid for freight and passengers to be hauled and transferred in interstate business between Illinois and Missouri, and that all competition has been stifled and destroyed to the detriment of the public and in violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], to protect trade and commerce, commonly known as the "Sherman Anti-Trust Act." The bill finally charges that the properties aforesaid are so operated by the defendants as to constitute a monopoly in their employment and conduct of interstate commerce between the states of Illinois and Missouri and the various states of the United States and foreign countries, and so as to exclude from participation therein all carriers other than those named as parties to the alleged unlawful combination and conspiracy.

The answer of the defendants is also lengthy. It also goes over the history of these bridges and ferries and of the terminal railways leading to and from the same, and sets forth in detail the various transfer and traffic arrangements by which they have come under the single management of the Terminal Railroad Association of St. Louis; but defendants deny that the various steps by which this was done were unlawful, or that it was intended thereby to restrain interstate commerce or stifle competition, or establish a monopoly, or that a monopoly was, in fact, created thereby. Defendants deny all the charges of unlawful combination, conspiracy, or contracts or agreements to restrain or monopolize in any manner or to any extent interstate trade or commerce, and they deny that they have established or exacted unreasonable or exorbitant rates, tolls, or charges. On the contrary, defendants aver that the bringing together of all the former disjointed and diverse interests under the single management of the Terminal Railroad Association resulted in the better handling of traffic, both freight and passenger, and that, instead of restraining trade or commerce, it fostered and promoted the same by affording greater and more expeditious facilities at lower charges. I have stated the issues made by the pleadings only in a very general way, without any attempt at great accuracy, and only in so far as they seem to me to bear on the question now before the court.

It appears from the pleadings, then, that this case is one of public interest, not only to the people of St. Louis, but indirectly to the people of the United States generally; and the bill of complaint states that it is brought by the United States Attorney for the Eastern District of Missouri under the direction of the Attorney General of the United States. When the issues were made up, an examiner was appointed to take the testimony under the sixty-seventh rule governing proceedings in equity, and the taking of this testimony has been in progress for several months, and is now in progress before such examiner. A few days ago the attorneys for the government came and by an ap-

plication in writing showed to the court that certain record books and papers of certain "traffic associations" and "freight committees" in this city were needed by the government as evidence before the examiner in this case. They asked for a subpœna duces tecum against R. M. Fraser, in whose possession these records and papers were alleged to be. The application was in the usual form, and was verified. A subpœna duces tecum was thereupon issued for the production of these books and papers before the examiner. The associations whose records are called for are the following: The St. Louis Coal Traffic Bureau and the St. Louis Coal Traffic Association, the East-Bound Freight Committee of St. Louis, the St. Louis & Cincinnati Freight Committee of St. Louis, and the St. Louis & Belleville Freight Committee.

Mr. Fraser, the person against whom the subpœna was directed, appeared before the examiner, stated his official connection with these associations, and admitted having the books and papers called for in his possession, but refused to produce them, and he has filed a motion to vacate the subpœna for certain reasons in his motion set out, and which will be presently referred to. The attorneys for the government, upon the other hand, have moved for and obtained an order on Mr. Fraser to show cause why he should not be committed for contempt of court, to which counsel for Mr. Fraser have filed a return, setting up substantially the same matters which are made the ground for the motion to quash the subpœna. Both these applications have been heard and are submitted together.

The first reason stated in the motion to quash is that the traffic associations and freight committees whose books and papers are called for are not parties to this suit, and that therefore this court has no right to require their production. This ground for the motion was not much relied on in the argument, and clearly it involves a misconception of the powers of this court. It is well settled that a court of equity has power to compel the production of books and papers in virtue of its inherent and general jurisdiction, and this power is not confined to the parties to the suit, but extends to third persons. U. S. v. Babcock, 3 Dill. 569, Fed. Cas. No. 14,484; 3 Greenleaf on Evidence, § 305; Hale v. Henkel, 201 U. S. 43, 73, 26 Sup. Ct. 370, 50 L. Ed. 652.

The second ground in the motion to quash is that the evidence called for in the subpœna "is wholly immaterial, irrelevant, incompetent, and improper evidence to the issues in said cause." This objection deals with the materiality of the proposed evidence when the books and papers are produced, and it might be sufficient to say that it is no excuse for not producing them at all. In other words, it is not for the witness to say, "I will not produce these records and papers because I believe, or I am advised, that they would not be material if I did produce them." That would leave the determination of the whole matter with the witness himself and the court would be powerless. Nor, it seems to me, can this question be properly decided in advance by this court upon an application to produce these books and papers, but must ultimately be passed on at the hearing when the trial court has all the evidence before it and the actual situation of the case with all

its issues and bearings is made apparent to the court, so that it may act intelligently, and so that a refusal to admit the testimony may be excepted to and made part of the record in case of an appeal. Edison Co. v. Electric Co. (C. C.) 44 Fed. 296; U. S. v. Babcock, 3 Dill. 569, Fed. Cas. No. 14,484. I cannot bring myself to agree with the contention of respondent's counsel that it devolves upon the government to satisfy this court, beyond any reasonable doubt, that the books and papers called for in this subpœna are relevant and material. I think that for the present all that is required is that there should be shown to be a reasonable ground to believe that they may be relevant and material—not palpably foreign to the subject of inquiry—and I think a sufficient showing has been made in that direction. The government attorneys state to the court that the books and papers called for are relevant and material evidence on behalf of the government, and that it is necessary for the government to introduce them in evidence. In the case of U. S. v. Babcock, 3 Dill. 566, Fed. Cas. No. 14,484, the court, under similar circumstances said: "When the district attorney asserts that they are material papers, we must assume, for the present, that he is fully informed and that they are material." The names of these traffic associations and freight committees indicate that they deal with the subject of transportation and freight rates at St. Louis, Mo., the identical subjects involved in the issues in this case. The oral testimony given by Mr. Fraser before the examiner fully confirms this. Their records and circular letters would therefore naturally appear to bear upon the issues in this case. It was suggested in the oral argument by counsel for respondent that these traffic associations operated only upon transportation from East St. Louis eastwardly; but the interlacing of transportation and rates between railroads and terminal facilities on the east and west side of the river at St. Louis is such that this court would not be justified in assuming that they are absolutely distinct for the purpose of this inquiry. The testimony of Mr. Fraser also shows this. Furthermore, it is alleged, and not denied, that 11 out of the 14 railroad companies which are defendants in this case are also members of these traffic associations or freight committees. I think these things taken together are sufficient to raise a reasonable presumption of relevancy and materiality for the purposes of this motion. The Croker-Bullock Case in the 134th Federal Reporter (C. C. page 241), relied upon by counsel for respondent, was a case of legal privilege claimed by the witness, and the case was decided upon that point. The case of Southern Ry. v. North Carolina Corp. Commission (C. C.) 104 Fed. 700, was also a case of privilege claimed on the part of the witness. Nothing of the kind is claimed in the case at bar. Here there is no claim of legal or personal privilege, nor is it shown that the witness or those whom he represents will be prejudiced in any way by the production of these books and papers, so that it resolves itself into a simple question of relevancy and materiality raised by the witness in this case.

The third and last ground mentioned in the motion to quash is that the things called for are the private books and papers of these freight committees and bureaus and to require their production would be in

violation of the provisions of the fourth amendment to the Constitution of the United States, in this: that it would be "an unreasonable search and seizure of the books, papers, and files of said committees and bureaus." Conceding that a subpœna duces tecum may under certain circumstances be equivalent to a search and seizure, I can see nothing unreasonable in the issuance of this subpœna in this case. Considering the nature of the issues, their breadth and importance, the character of these traffic associations, their relation to the defendants and to the subject of this inquiry, I think there is nothing unreasonable in the number of the books called for or the description of what is wanted. Mr. Fraser admits that he has these books in his possession; in fact, he has brought them into court on the hearing of this motion, but declines to produce them before the examiner for the purpose of testimony, though ordered to do so by a court of competent jurisdiction. The fourth amendment is no protection to him.

The subject of transportation has of recent years become one of great public concern. Much legislation tending to control or regulate it has been enacted by both state and federal governments. To a great extent the subject has become res publicæ. I think the books and papers of these traffic associations called for in this subpœna ought to be produced, and that the private interests and convenience of those associations, if any, ought in a matter of this kind to give way to the exigencies growing out of this suit.

The motion to quash will therefore be overruled.

MATHEWS SLATE CO. v. MATHEWS et al.

(Circuit Court, D. Massachusetts. May 11, 1906.)

No. 282.

1. REMOVAL OF CAUSES—GROUNDS—MOTION TO REMAND.

On a motion to remand a cause commenced by a bill in a state court intended to invoke a special statutory jurisdiction of such court, which cannot be exercised by a federal court of equity, the court will not retain jurisdiction merely because the application of the statute to the facts alleged in the bill is in doubt; that being a question properly determinable by the state court on demurrer.

2. COURTS—JURISDICTION OF FEDERAL COURTS—ENFORCING STATUTORY EQUITABLE REMEDY.

Rev. Laws Mass. c. 159, § 3, cl. 7, which provides that the supreme and superior courts shall have jurisdiction in equity of suits by creditors to reach and apply in payment of a debt any property or interest of a debtor which cannot be reached to be attached or taken on execution in an action at law, is a statute enlarging the equitable jurisdiction of such courts, rather than one enlarging equitable rights, and does not apply to a federal court which is without jurisdiction to entertain a suit brought thereunder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 797, 798.]

On Motion to Remand to State Court.

LOWELL, Circuit Judge. This was a bill in equity brought in the superior court of Massachusetts against Mathews and King by a receiver suing in the name of the corporation to reach an interest of Mathews, the principal defendant, which was in the hands of King. The bill alleged that this interest could not be come at to be attached in an action at law. The complainant is a Maine corporation, Mathews a citizen of Vermont, and King a citizen of Massachusetts. The defendant Mathews sought to remove the cause to this court, but the state court denied his motion. He then filed his petition for removal to this court, and the case is now heard on the complainant's motion to remand.

Rev. Laws Mass. c. 159, § 3, cl. 7, provides that the supreme and superior courts shall have jurisdiction in equity of:

"Suits by creditors to reach and apply, in payment of a debt, any property, right, title or interest, legal or equitable, of a debtor, within or without this commonwealth, which cannot be reached to be attached or taken on execution in an action at law, although the amount of the debt is less than one hundred dollars or the property sought to be reached and applied is in the hands, possession or control of the debtor independently of any other person or cannot be reached and applied until a future time or is of uncertain value, if the value can be ascertained by sale, appraisal or by any means within the ordinary procedure of the court. In such suit, the interest of a partner of the defendant in the partnership property may be reached and applied in payment of the plaintiff's debt; but unless it is a judgment debt, the business of the partnership shall not be enjoined or otherwise interrupted further than to restrain the withdrawal of any portion of the debtor's share or interest therein until the plaintiff's debt is established; and if either partner gives to the plaintiff a sufficient bond with sureties approved by the clerk, conditioned to pay to the plaintiff the amount of his debt and costs within thirty days after it is established, the court shall proceed no further therein than to establish the debt; and upon the filing of such bond, any injunction previously issued in such suit shall be dissolved."

The complainant's contention may be summarized thus: The federal Constitution and laws give to federal courts of equity that jurisdiction, neither less nor more, which inheres in a court of chancery as such, and apart from statute. This cause is without the jurisdiction which is inherent in a court of chancery, as such, and is cognizable by a court sitting in equity only by virtue of the statute above quoted. Therefore this cause is without the jurisdiction of a federal court in equity, inasmuch as that jurisdiction is unaffected by state statutes. Therefore this court, if it permits the cause to be removed here, must upon demurrer or other objection, duly taken by the defendant, dismiss the bill for want of jurisdiction in equity. From these considerations it follows that the cause must be remanded. The defendant is not permitted to remove into a federal court a cause pending in a state court of equity, if the equitable jurisdiction invoked in the bill rests altogether upon a state statute. The cause cannot be removed from a court which has jurisdiction thereof in equity into a court which has no jurisdiction. Removal into a federal court will not be permitted altogether to defeat the complainant's statutory right. The vindication of the right must be left to that tribunal which alone has jurisdiction to enforce it.

The complainant relies upon Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 977, 37 L. Ed. 804. There a bill in equity was filed by a simple creditor in a court of Mississippi, seeking to apply to the payment of his debt property conveyed by the debtor in fraud of creditors. The defendant removed the cause to the Circuit Court. On appeal, the Supreme Court held that the statute of Mississippi did not affect the jurisdiction of a federal court of equity; that the federal court was without jurisdiction of the cause, and must dismiss the bill if it was originally brought therein; and that the removal of the cause could not be permitted if it would deprive the complainant of his statutory right. The cause was therefore remanded to the state court. In order to bring himself within the rule laid down in Cates v. Allen, the complainant must show: (1) That this bill invokes the jurisdiction given by statute to the state courts of equity; and (2) that the jurisdiction thus invoked does not inhere in a court of chancery as such, and so cannot be entertained by a federal court. If the complainant can establish these two propositions, the cause here in question must be remanded to the superior court of Massachusetts. If either proposition fails of proof, the motion to remand must be denied. This result is admitted on both sides.

1. The defendant contends that the bill does not state a case within the statute. He argues that the claims alleged against Mathews sound in tort, and not in contract, and so are not "debts" within the meaning of the statute, nor is the complainant the defendant's "creditor." The complainant cannot resist removal merely because his bill is wanting in equity, and would be dismissed by this court upon that ground. He is not allowed to take his chance in a state court in the hope that that court may take a broader view of the general jurisdiction of a court of equity than does this court. On the other hand, this court is not required to construe in detail a state statute, in order to determine if the allegations of the bill which invoke the statutory jurisdiction are sufficient. Let us suppose, for the sake of the argument, that there is doubt of the application of the statute to the claims alleged in this bill. The construction of the statute is for the state court. That is the ultimate tribunal authorized to determine finally if the statute has, in fact, conferred upon the court a jurisdiction which the Legislature of the state might undoubtedly confer if it so willed. If the state court construes the statute so as to entertain jurisdiction of this bill, the defendant will find himself where the statute has placed him. If the state court construes the statute more narrowly, the defendant loses nothing by the remand. It is not to be supposed that the state court will deem the statute inapplicable, and yet retain jurisdiction of the cause in the exercise of its ordinary equitable powers. The bill here in question is manifestly intended to invoke the statutory jurisdiction, and that alone. If it is demurrable, it will be dismissed on demurrer, and that question cannot be decided on a motion to remand.

2. Has this court jurisdiction of the cause? Only for want of jurisdiction in this court will the cause be remanded to the state court. If this court can determine the controversy, it will do so, whatever may be the jurisdiction which the complainant sought to invoke. The

case will be remanded only upon the concurrence of two conditions, viz., an equitable statutory jurisdiction invoked in the state court, and a want of equitable jurisdiction in this court.

That this bill could not be maintained in the absence of the statute is admitted by the defendant. It is settled that the "jurisdiction of the federal courts, sitting as courts of equity, is neither enlarged nor diminished by state legislation." Mississippi Mills v. Cohn, 150 U. S. 202, 204, 14 Sup. Ct. 75, 76, 37 L. Ed. 1052. If Williams v. Crabb, 117 Fed. 193, 54 C. C. A. 213, 59 L. R. A. 425, holds a contrary doctrine, the case is inconsistent with the decisions of the Supreme Court.

Inasmuch as a court of chancery, in the absence of statute, is without jurisdiction in the case at bar, and inasmuch as the jurisdiction of this court is not enlarged by the statute, it would seem to follow that this court is here without jurisdiction. But, as was said in Reynolds v. Crawfordsville Bank, 112 U. S. 405, 410, 5 Sup. Ct. 213, 216, 28 L. Ed. 733:

"It may be conceded that the Legislature of a state cannot directly enlarge the equitable jurisdiction of the Circuit Court of the United States. Nevertheless, an enlargement of equitable rights may be administered by the Circuit Courts as well as by the courts of the states. Broderick's Will, 21 Wall. 503, 520, 22 L. Ed. 599. And, although a state cannot give jurisdiction to any federal court, yet it may give a substantial right of such a character that, when there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, admiralty, or common law. Ex parte McNiel, 13 Wall. 236, 243, 20 L. Ed. 624."

And, in Cates v. Allen, the court said:

"Doubtless new classes of cases may by legislative action be directed to be tried in chancery, but they must, when tested by the general principles of equity, be of an equitable character, or based on some recognized ground of equity interposition."

It is not always easy to determine whether a given statute of a state (1) enlarges equitable rights, in which case the jurisdiction of the federal courts in equity may be indirectly increased; or (2) enlarges the jurisdiction of a court of equity, in which case it is without application to the federal courts. Only by a comparison of decided cases of binding authority can this court determine into which class the statute here in question properly falls.

The following statutes, among others, have been held to be within the first class, as enlarging equitable rights rather than enlarging equity jurisdiction, viz.: A statute authorizing one having title and possession, or one claiming title, whether in or out of possession, to bring a bill in equity without previous suit at law in order to remove a cloud upon the title to real estate. Clark et al. v. Smith, 13 Pet. 195, 10 L. Ed. 103; Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52; More v. Steinbach, 127 U. S. 70, 8 Sup. Ct. 1067, 32 L. Ed. 51; Wehrman v. Conklin, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. Ed. 167; Gormley v. Clark, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. Ed. 909; Bardon v. Land River Improvement Co., 157 U. S. 327, 15 Sup. Ct. 650, 39 L. Ed. 719; Prentiss v. Duluth Co., 58 Fed. 457, 7 C. C. A. 293. A statute giving a court of equity jurisdiction to relieve against a deed void on its face. Reynolds v. Crawfordsville Bank, 112 U.

S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733. A statute (or constitution or judicial interpretation) allowing one interested in an estate to attack a will by a "direct proceeding." Richardson v. Green, 61 Fed. 423, 9 C. C. A. 565. In that case the proceeding in the state court was not specifically equitable, but the federal court held the case to be one of equitable relief. A statute allowing a court of equity to enjoin the collection of taxes. Cummings v. National Bank, 101 U. S. 153, 25 L. Ed. 903; Grether v. Wright, 75 Fed. 742, 23 C. C. A. 498. A statute authorizing a simple creditor to maintain a bill in equity for the appointment of a receiver and for the sale and distribution among creditors of the property of an insolvent corporation. Darragh v. Wetter Mfg. Co., 78 Fed. 7, 23 C. C. A. 609; Jones v. Mutual Fidelity Co. (C. C.) 123 Fed. 506; Land Title Co. v. Asphalt Co., 127 Fed. 1, 62 C. C. A. 23.

The following statutes, among others, have been held to be of the second class, as enlarging the jurisdiction in equity rather than giving equitable rights, viz.: A statute authorizing a simple creditor to bring a bill in equity in order to reach and apply his debtor's property. Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 977, 37 L. Ed. 804; Hollins v. Brierfield Coal Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113. A statute authorizing three simple creditors to reach and apply in equity the property of an insolvent corporation. Atlanta R. R. Co. v. Western R. R. Co., 50 Fed. 790, 1 C. C. A. 676; Harrison v. Farmers' Loan & Trust Co., 94 Fed. 728, 36 C. C. A. 443. If we confine ourselves to the cases in the Supreme Court, we shall find that the Massachusetts statute in the case at bar resembles those which a federal court does not recognize more closely than those which it does recognize.

Following certain expressions of the Circuit Court of Appeals for the Eighth Circuit in Darragh v. Wetter Mfg. Co., the defendant urges that Cates v. Allen has been questioned and, in effect, overruled. I can find no trace of this. The case has often been cited by the Supreme Court, always with approval, never with doubt. The authority of Darragh v. Wetter Mfg. Co., and the cases which have followed it in the same court, is thus considerably weakened, indeed, as being based upon a misconception of Cates v. Allen.

The opinion of the Circuit Court of Appeals for the Sixth Circuit rendered in Grether v. Wright suggests that the decision in Cates v. Allen rests altogether upon the following considerations: The Mississippi statute there in question, by providing a remedy in equity, in effect denied the defendant the right of jury trial. To have permitted this denial in a federal court would have contravened the seventh amendment to the federal Constitution, and the statutory proceeding was therefore deemed inadmissible. Now the courts of Massachusetts have held that the Massachusetts statute, though providing for proceedings in equity, must be construed so as to leave to the defendant his right of jury trial. Powers v. Raymond, 137 Mass. 483. And hence, if the federal courts adopt in their entirety the proceedings of the Massachusetts statute, a jury trial will still be preserved to the defendant, and so the seventh amendment will not be contravened. The

defendant argues that the statutory jurisdiction may thus be entertained by this court.

But the decision of the Supreme Court in Cates v. Allen, and in other cases above referred to, was not rested wholly upon the unconstitutionality of the statutory proceeding. Moreover, to permit the complainant to proceed here in equity, while the defendant retains a right to jury trial, not merely for the trial of issues framed by the court, but in general as guarantied by the Constitution, would so disarrange federal procedure in equity as to leave it at the mercy of any state statute which does not contravene the seventh amendment.

The defendant urges that this court should follow the statutory procedure, upon the ground that it does not provide what is in reality a bill in equity, but a special statutory proceeding at common law. Cowley v. No. Pacific R. R., 159 U. S. 569, 16 Sup. Ct. 127, 40 L. Ed. 263. But the Massachusetts statute is explicit in providing a suit in equity, and the procedure in Massachusetts under it shows plainly that the state courts treat the statutory proceedings as equitable. Wilson v. Martin Wilson Fire Alarm Co., 151 Mass. 515, 24 N. E. 784, 8 L. R. A. 309; Snyder v. Smith, 185 Mass. 59, 69 N. E. 1089. That the statute of Kentucky which was in controversy in Courtney v. Pradt, 196 U. S. 89, 25 Sup. Ct. 208, 49 L. Ed. 398, differed materially from the statute of Massachusetts before this court, appears from the report of that case in the Circuit Court. 135 Fed. 818, 821.

It follows, therefore, that the statute is deemed to enlarge equitable jurisdiction so that the federal courts cannot enforce it; that the federal court must therefore dismiss this bill, if the cause remains here; and, finally, that the cause must be remanded to the superior court, in which it originated, and which alone has cognizance of it.

Cause to be remanded

THE BRITANNIA.

(District Court, E. D. Virginia. October 30, 1906.)

1. TOWAGE—DUTIES OF TUG.

The duty rests upon a towing tug to exercise at least reasonable skill and care in everything relating to the undertaking, having due regard to the extent of the voyage and any special hazards incident to the seas to be traversed, including, not only proper and safe navigation of the tug on the voyage, but also to see to the proper make-up of the tow and the furnishing of safe, sound, and suitable appliances and instrumentalities for the service to be performed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, § 4.]

2. SAME—LOSS OF TOW—MUTUAL FAULTS.

A tug, which undertook the towage of two scows from Charleston to Baltimore, carried but one hawser, which parted twice in calm weather, and owing to the consequent delay the tow encountered a storm when at a dangerous part of the coast, during which the hawser parted a third time, and the scows were lost. *Held*, that the tug failed in her duty in using a hawser which was not in a suitable and sound condition, and in not being provided with an extra one for such a voyage; that the owner of the scows was also chargeable with fault contributing to the loss, in that they were not sufficiently seaworthy for the voyage, but leaked and were

largely filled with water before the last breaking of the line, in consequence of which mutual faults the damages should be divided.

In Admiralty. Suit to recover for loss of scows in tow.

On the 24th day of July, 1905, Charles W. Eaton, representing the Standard Dredging Company, a corporation, contracted with the American Towing & Lightering Company of Baltimore for the towage of four scows from Mobile, Ala., to Baltimore, Md. The four scows left Mobile in tow of respondent's tug Buccaneer, and in due course put into Charleston S. C. At this point it was deemed desirable to divide the tow, in view of the voyage around Hatteras, and the towing company thereupon agreed to furnish their tug Tormentor to assist in the tow. The latter tug, however, was not used, being under charter, and, with the consent of the libelant, the Britannia was substituted for her, and left Baltimore on the 17th of August for Charleston, to perform the service at an agreed compensation of $150 per day from Baltimore south and return to Baltimore, including the use of one 9-inch manila 250-fathom sea towing hawser.

On the 11th of August, 1905, the tug Buccaneer left Charleston with scows Nos. 1 and 2 of said original tow, bound for Baltimore, and, while passing through Charleston Bar, the tug fetched up, breaking her shoe, rudder post, and wheel, causing her to return with her tow to Charleston for repairs. Subsequently, on the 22d day of August, the Britannia, having several days before reached Charleston, about 6 o'clock of that morning, put to sea with scows No. 1 and 2, on a 9-inch manila hawser, 240 fathoms long. At the same time, the Buccaneer started towing scows 3 and 4. The voyage thus commenced was proceeded with under favorable weather, and without special incident, until on the morning of the 23d of August, when off Cape Romaine, near the port of Georgetown, S. C., the hawser of the Britannia parted about 30 feet aft of her stern. The parted ends were knotted together, and the tug resumed her voyage with the said scows. The Buccaneer, in the meantime, proceeded without interruption. About 7:30 o'clock of the same morning, the weather conditions remaining favorable, and while still in the vicinity of Georgetown, the Britannia's hawser again parted some 10 feet aft of the first break. A further stop was made, the hawser picked up, the knotted ends taken into the tug, and the remainder of the hawser made fast to the stern bits of the tug. The original length of the hawser was considerably reduced, say from 240 to 190 fathoms. Several hours were lost by the Britannia, occasioned by the two breaks of her hawser, and she never again overtook the Buccaneer. Capt. Muir, as the representative of the libelant, was on the Britannia from Charleston, and upon the scows were two 200-fathom new Plymouth cord 6-inch lines, which he claims could have been easily used for towing, and that he suggested their use to the Britannia's master after the second break. This, however, the latter denies, and further insists that they could not have been used on the occasion in question. The Britannia proceeded with this shortened hawser until about 9 o'clock on the morning of Saturday, the 26th of August, when off life saving station 9, Currituck Beach, a strong wind blowing from the E. N. E., with considerable sea; that, owing to these conditions, the tug dropped back and took the men off the scows, as waves were breaking over them; that said scows were at this time leaking, the head scow being about three feet above water, and the latter one foot; that the tug continued with said tow until about 4 o'clock of the same day, the storm having in the meantime increased in violence, when off the coast several miles to the north of Currituck Lighthouse the hawser parted for the third time, near the tug, and, it being impracticable to again make fast to the scows, under the then weather conditions, the same were abandoned, and proved a total loss.

Floyd Hughes and J. Warren Coulston, for libelant.
R. H. Smith and H. H. Little, for respondent.

WADDILL, District Judge. (after stating the facts). This libel was filed to recover for the value of two scows lost.

Various assignments of negligence are made by the parties one against the other; but the case turns upon whether the accident arose because of the unseaworthiness of the libelant's scows, or the failure of the tug to exercise the degree of care and caution required of it for the safe conduct of her tow, including, particularly, the furnishing of a proper hawser or hawsers with which to perform the service, or from said causes combined. The duty of the libelant to furnish scows sufficiently seaworthy to make the voyage is apparent, and the law governing the tug's liability is well settled. The tug is not a common carrier, and hence not bound by rules determining liability in such cases; nor is she an insurer of the safety of the tow. Presumptions of negligence do not arise against her, but the same must be established by the libelant. Nevertheless, the law imposes upon the tug the duty of exercising the degree of caution and skill which prudent navigators usually employ in such service. Some of the authorities, the business in hand being one as to which those offering their services are specially familiar, hold that they shall exercise a high degree of care and caution. At least, the burden is imposed to exercise reasonable skill and care in everything relating to the undertaking, having due regard to the extent of the voyage, and any special hazards incident to the seas to be traversed, which includes, not only proper and safe navigation of the tug on the journey, but the furnishing of safe, sound, and suitable appliances and instrumentalities for the service to be performed, and the proper make-up of the tow preparatory to the voyage. These are obligations imposed upon and assumed by the tug from the nature of the employment, and for damage arising from the failure to observe them she cannot escape liability. The Webb, 81 U. S. 406, 414, 20 L. Ed. 774; The Margaret, 94 U. S. 494–496, 24 L. Ed. 146; Transportation Line v. Hope, 95 U. S. 297, 300, 24 L. Ed. 477; The J. P. Donaldson, 167 U. S. 599, 603, 17 Sup. Ct. 951, 42 L. Ed. 292; The Ravenscourt (D. C.) 103 Fed. 668, 671; The Kalkaska, 107 Fed. 962, 47 C. C. A. 100; The Francis King, 7 Ben. (U. S.) 11, Fed. Cas. No. 5,042; Hughes, Admr. 123, 124.

A great deal of evidence was taken in the case, largely before the court, but some by deposition, and as to many questions there was an irreconcilable conflict, some of which it is found unnecessary to pass upon, or, indeed, to enter on a general discussion respecting the same, further than to say that the entire evidence has been fully considered and carefully weighed by the court, and the conclusions reached upon the essential issues of the case are as follows:

First. That the libelant was not free from fault in furnishing scows sufficiently seaworthy for the voyage; and therefore, so far as the same may have entered into and caused the accident in question, should share in the loss sustained. The scows were brought from Mobile to Charleston, en route to Baltimore, on this same voyage, and it was found necessary to go into Charleston partly because of the scows' leaky condition, where they were pumped out. After several days' delay, scows 1 and 2 were placed in tow of the Britannia, and 3 and 4 in tow of the Buccaneer. The first two encountered bad weather in the vicinity of and after passing Hatteras, and began to leak, and,

with the increase of the storm, the last scow in the tow filled with water, and the first one became nearly submerged, and upon the giving way of the hawser herein referred to, off Currituck Lighthouse station, they were lost at sea. The Buccaneer, with scows 3 and 4, being at the time of the storm several hours in advance of the Britannia on the voyage, entered the Virginia Capes in safety, as doubtless numbers 1 and 2 would have done if they had not, by reason of their detention, encountered the full and continued bad weather in question. Storms, however, are perils of navigation incident to such a voyage, and ought to have been anticipated and provided against by the scow owner, and for losses arising therefrom, or into which such conditions enter, the owner must suffer.

Second. That the tug failed to furnish a safe and suitable hawser to perform her contract of towage, which in part caused the accident, and in consequence of which she should share in the loss sustained. It may be conceded that the tug ordinarily would not be responsible for the parting of its hawser, under the circumstances and conditions of this accident, provided due care and caution had been exercised in procuring a suitable one, which had been properly preserved and seasonably inspected; and that the tug owner should not be held liable for a hawser's breaking merely because of the happening of the event. But when the fact is taken into account that upon this same voyage, in good weather, and smooth sea, this hawser had twice before parted, the court cannot say that the defective condition of the hawser did not cause it to part, and certainly that a sound hawser might not have averted such an occurrence.

The libelant claims that the tug should have had an extra hawser on board with which to make ocean voyages of the kind in question, and that such was the custom; and, moreover, insists that upon each of the scows were two six-inch manila hawsers, and that, at the time of the second breaking, those on the front scow were offered to the tug, and should have been accepted, which would have prevented the loss. Respondent says that it was impracticable to use two six-inch hawsers, and that the tug's hawser was sufficient in length and strength after the second breaking, for the safe termination of the voyage, and the first breaking was the result of disturbance in the sea, though the weather was good, from what was known as a ground swell; and that the fact that the shortened hawser withstood the strain upon it from the time of the second breaking to the final parting of the same, six or seven hours of which was during the continuance of a storm, was sufficient evidence of the soundness and suitable condition of the hawser. And the tug denies that there was either necessity for or the existence of a custom to carry more than one hawser on a voyage of that kind. Much of the evidence centered around these last-stated propositions, and the conflict was sharply drawn as to many of them. The court is convinced, however, that, at the time of the first two breakings of the hawser, no such conditions of weather or sea prevailed as to cause a sound hawser to part; and, while it may or may not have been the custom to take an additional hawser on sea voyages of the kind in question, the result in this case proves the great desirability of so

doing, and of the necessity for such a custom, if it does not prevail. Good seamanship would seem to indicate that in so important and dangerous an undertaking, as the towage of scows or barges at sea, on a voyage of the length and probable hazard of the one in question, with a single hawser, too many contingencies were liable to arise to have everything staked upon the parting or giving way of a single rope. The tug insists that neither scow was equipped with a hawser suitable to take the place of the one provided by her. By reason, therefore, of her failure to have a second hawser, she was forced to continue on her voyage, hundreds of miles, and along one of the most dangerous and treacherous parts of the Atlantic seaboard, with a twice broken hawser as her only stay and means of protection for the property and lives of those intrusted to her keeping. Such provision, under the circumstances, did not constitute due care and caution on the part of the tug owner. It is hardly conceivable that a second hawser, if at hand, would not have been used after the first one had twice parted, which in all probability would have averted this loss; and, while it is true the one used did withstand a considerable strain, it cannot be said that a hawser in a suitable and sound condition, and not bearing the strain incident to the shortening of the same, some 40 fathoms at least, because of the previous partings, would not have withstood the strain put upon it. The Burlington, 137 U. S. 386, 392, 11 Sup. Ct. 138, 34 L. Ed. 731. While it appears that the hawser was not an especially old one, it had been exposed to causes which might have affected its strength. The raveled ends of the parted hawser, at the parting which caused the accident, though in the possession of the tug, were not exhibited to the court, though what were claimed to be other portions of it were; and there was some evidence to show the chafing of the hawser, and one witness for the tug testified that the hawser where it first broke was burned.

It is no defense for the tug to say that the scows' six-inch hawsers were not availed of because of their size and insecurity, and hence that they had to use their own broken hawser. The law imposed upon her the duty of making up the tow and seeing that proper lines were provided, either by the tow or herself. If those on the scow were unfit for the service, others should have been provided before entering upon the voyage, and for loss arising from such defective hawser, whether the same were furnished by the tow or tug, the latter is liable. These are obligations imposed upon and assumed by the tug from the nature of the employment, and for damages for her negligence in this respect she should be held responsible. The Quickstep, 76 U. S. (9 Wall.) 665, 671, 19 L. Ed. 767; The Syracuse, 79 U. S. (12 Wall.) 171, 20 L. Ed. 382; The John G. Stevens, 170 U. S., 113, 125, 18 Sup. Ct. 544, 42 L. Ed. 969; The Somers N. Smith (D. C.) 120 Fed. 569, 576; The Emery Temple (D. C.) 122 Fed. 180; The W. G. Mason (C. C. A.) 142 Fed. 913, 918; The Oceanica (D. C.) 144 Fed. 301, 305.

Third. Suggestion was made in argument that the loss in question was the result of a peril of the sea, from which no liability could follow. This suggestion is not put in issue by the pleadings; but it may be said in passing that the condition and character of the storm was not

such, in the estimation of the court, as to have seriously endangered the safe voyage of the tug and tow, had the tug been supplied with suitable hawsers, and the scows in proper condition to withstand storms such as might have been anticipated, particularly at that season of the year. And, in this connection, sight cannot be lost of the fact that the two first partings of the hawser in their result affected the last breaking, in that the time lost in the repair of the first partings delayed the tow, and caused it the longer to encounter the dangers and strains upon its hawser, arising from the existence of the then weather conditions. The Buccaneer, that was not so detained, passed safely into the Capes with her tow, as doubtless the Britannia would have done, but for her detention; and the fact that the Buccaneer with her tow found no difficulty in navigation, arising either from the ground swell referred to at the time of the first parting of the Britannia's hawser, or from the weather on the day of the last parting, goes far to show the nonexistence of such conditions on either occasion as would have seriously endangered the Britannia's tow, had she been equipped with a proper hawser.

It follows, from what has been said, that the loss in this case arose from the concurring negligence of the tug and the tow, and that the damages arising therefrom should be divided between them; and a decree may be entered accordingly.

THE KENTUCKY.

(District Court, S. D. New York. October 25, 1906.)

1. COLLISION—STEAMSHIPS—EXCESSIVE SPEED IN FOG.

A steamship navigating in a fog at such rate of speed that when another vessel, which was practically motionless, came into view, she was unable to stop in time to avoid collision, was in fault for excessive speed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 170.

Collision rules as to speed of steamers in fog, see note to The Niagara, 28 C. C. A. 532.]

2. SAME—VESSEL LYING IN FRONT OF ENTRANCE TO CHANNEL.

A steamship, after passing out to sea from New York Bay through Gedney Channel, stopped to discharge her pilot some 800 to 1,000 feet outside of the entrance to the channel, which is about 1,150 feet wide. She lay to the north of the center of the channel extended, so that both she and the pilot boat which lay near were in the usual pathway of vessels approaching to enter the starboard side of the channel; her position being such that she presented an obstruction some 200 feet in width to an approaching vessel. There was a dense fog, and another steamship approaching to enter the channel at an excessive speed came into collision with her. *Held*, that while it would have been a more prudent course for her to keep to the south side of the channel extended, or to go entirely outside it, yet, being in the open ocean, her failure to do so did not constitute a fault which contributed to the collision, and that she was not liable therefor, no other fault being shown.

3. SAME—SUIT FOR COLLISION—LOG BOOKS AS EVIDENCE.

The log books of a vessel are properly admissible in evidence in a collision suit, when called for by the other party on cross-examination of opposing witnesses, and their testimony is more intelligible by a reference to the books.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 264.]

In Admiralty. Suit for collision.

Butler, Notman & Mynderse, for libellants.
Wing, Putnam & Burlingham, for claimants.

ADAMS, District Judge. This action was brought by Charles G. Hill and another, owners of the steamship Exeter City and bailees of the cargo on board, against the steamship Kentucky, to recover the damages, alleged to amount to about $60,000, suffered by reason of a collision which occurred between those vessels at 5.32 o'clock P. M. on the 27th day of May, 1905, just outside of the buoys of Gedney Channel.

The Exeter City, 286 feet long, left her anchorage near 14th street, Hoboken, with a miscellaneous cargo, including some cattle on deck, bound for Bristol, England, about 2 o'clock P. M. She was under the charge of a Sandy Hook pilot. A little after 4 o'clock P. M., when nearly abreast of Bell Buoy (Main Channel) the steamer ran into a fog bank, which became very dense. At 4.50 o'clock P. M. she made the Gedney Channel buoys and when abreast of the eastern buoy, she heard the siren of a steam pilot boat, which subsequently turned out to be the New York, and she stopped her engines. At 5.23 o'clock, she saw the pilot boat's cutter on her starboard bow and by reversing her engines brought herself to a standstill, except for the effect of an ebb tide. With the effect of the tide and the remnants of her speed, she reached a point probably between 800 and 1000 feet outside of the channel buoys before she lost all momentum from the effect of her engines. So without motion through the water was she that it became necessary to give the engines a touch ahead, causing the steamer to move through the water about 15 or 20 feet, in order to pull the pilot's skiff alongside by means of a line so that he might be discharged. Her head had been turned somewhat to the northward, so that she was finally lying headed about E. N. E. and presented her side to vessels approaching the channel. Through all this time she had an efficient lookout properly stationed and attending to his duties.

The steam pilot boat New York, 150 feet long, was on duty the day of the collision. She was lying outside of the entrance buoys, awaiting the approach of the Exeter City in order to take off her pilot, who was to be discharged when, or soon after, the ocean should be reached. Her position when the Exeter City came out was somewhat to the northward and eastward of that steamer and she was also practically motionless, except for the ebb current, and heading about N. N. E. The two vessels were not far enough apart for any other vessel to navigate between them and they effectually blocked the approach of an incoming vessel to the starboard side of the channel, which altogether was about 575 feet in width, the whole channel being about 1150 feet wide.

The Kentucky left Copenhagen on the 9th of May bound for New York. She carried little more than half cargo and was therefore quite light, drawing but 10.2 feet forward and 15.3 feet aft, a mean draft of 12.8, against an average loaded draft of 21 feet. On the day before she arrived in New York, she was further lightened by casting overboard some 200 tons of ballast carried on deck. Altogether she

was so light that her propeller was not fully immersed, and probably not as effective as when fully covered. On the day of this collision, she was approaching New York, passing the Fire Island Lightship at 1.15 o'clock P. M. The weather was misty and she was regularly sounding fog signals, which were continued up to the time of the collision. About 4.45 P. M. a New York Sandy Hook pilot was taken on board and he took charge of the navigation, though the master, second officer and an able seaman, at the wheel, remained on the bridge. The master stood at the telegraph, which he was operating under the pilot's orders. There was a vigilant lookout duly stationed. After the pilot was taken aboard the regular course of W. N. W. ¼ W. was followed. The Whistling Buoy was passed on the port side, less than a length away, and shortly afterwards the water line of the side of the New York came into view, about two lengths of the Kentucky away, bearing a point on the starboard bow. The engines of the Kentucky were at this time stopped, in consequence of some signal having been heard from the siren of the New York. An order was then given to starboard the wheel a little in order to clear the New York and just afterwards the Exeter City came into view heading E. N. E., at an angle of about 45° with the course of the Kentucky and showing her starboard side. The Kentucky was heading about for her foremast. An order was at once given to put the helm hard-a-starboard and to reverse the engines at full speed. She answered her helm somewhat but took a cant to starboard from the backing. Her starboard bow came into contact with the Exeter City's starboard quarter, penetrating some distance and doing the damage above stated.

The principal fault alleged against the Kentucky is that she was proceeding at an excessive rate of speed in view of the foggy condition of the weather. Up to the time of passing the Whistling Buoy, she was under half speed, which would give her a rate of about 7 knots, her full speed being 10 knots, then she slowed bringing her speed down to the rate of about 5 knots, and then proceeded at half speed again, doubtless for the purpose of preserving the pilot's dead reckoning in reaching Gedney Channel. Her engine's revolutions at full speed were from 70 to 75, half speed 47 or 48 and slow 36 to 38. She probably had not acquired her full half speed velocity just before approaching the steamer New York and Exeter City. It is admitted that she was then going at the rate of 3 or 4 knots but was probably going considerably in excess of 5 knots at the time. In any event, she was clearly violating the rule that steamers navigating in a fog are bound to reduce their speed to such rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such an approaching vessel is herself going at the moderate speed required by law. The Chattahoochee, 173 U. S. 540, 548, 19 Sup. Ct. 491, 43 L. Ed. 801. As the Exeter City here was practically not moving, the latter part of the rule need not be considered and this proves to be a case where the implicated vessel was going at such a rate that she could not bring herself to stop before striking a motionless vessel. The Kentucky was clearly in fault and the only real question in the case is whether the Exeter City was also in fault.

Numerous charges were urged against her, and among them the following, which are the only ones requiring attention, viz.: (1) that she was not equipped with a proper and efficient steam whistle and no proper whistles were sounded as the Kentucky was heard approaching but the Exeter City was relying upon the whistles of the pilot boat, (2) that she was lying inertly across the track of inward bound shipping even after warning by the repeated whistles of the Kentucky, (3) that after the Kentucky was seen, the Exeter City did nothing effective to avoid collision and failed to take any precautions obligatory upon her in thus lying athwart the fairway, either with her helm or screw.

1. The Exeter City had an ordinary steam whistle for a vessel of her character. It was so testified by her officers and the whistle was subsequently taken out of her and examined in New York, where it was shown to be of the proper size and sounding capacity. It was then returned to the vessel. I conclude, therefore, that it was a proper and efficient whistle. On the question of its proper use on this occasion, it appears that she was sounding it at proper intervals as she proceeded through the channel and at 5.23 P. M. having made the pilot boat cutter on the starboard bow, the engines were put slow astern and the pilot discharged. A whistle was then heard on the starboard side, and a long blast given by her in reply. A few moments afterwards, another whistle was heard which was replied to by a similar blast from the Exeter City's whistle. At about the same time the New York sounded a danger signal from her siren. Almost immediately after the second blast from the Exeter City, the Kentucky, from which the approaching signal had come, appeared on the starboard side, heading directly for the Exeter City. The latter's telegraph was then rung full speed ahead and 2 short blasts given by her steam whistle, but the Kentucky came on and the collision happened. It was testified by those on the Kentucky that no whistles were heard from the Exeter City. It is urged by the Kentucky that her failure to hear the whistles of the Exeter City was not due to any inattention but rather to the small size of the Exeter City's whistle, and the circumstance that those on that vessel permitted the small sound of her whistle to be drowned out by the double siren blasts from the New York close alongside. It has been shown that the Exeter City's whistle was not unusually small, and if her blasts were drowned out by the stronger ones of the New York, it was not a fault on the part of the former. It is not true that she was relying upon the New York's signals but was in fact giving her own.

2. It is true that the Exeter City in being to the northward of a prolongation of the axis of the channel, between it and the northernmost side of the approach, was lying across the track of inward bound shipping, but whether she was in fault for doing so has been the most strongly contested point in the case. A great deal of testimony has been taken upon the question from the pilots of the harbor. Many say that it was imprudent for the Exeter City to be there; others say that when a vessel passes the outside buoys she is free to adopt any course she sees fit with respect to proceeding. I think it would have

been more prudent for the vessel not to have partly blocked the approach to the channel, which incoming vessels would naturally take under Art. 25, requiring them to use the starboard side. She necessarily saw that, in connection with the New York, she would be an obstacle to such vessels and it would seem that if she were going to remain in the prolongation of the channel, it would have been better for her to have made a lee for the discharge of the pilot by turning to the starboard or better still to go entirely outside. There was plenty of water on both sides of an extension of the channel so that there was no necessity for being within it on either side and if, in view of the condition of the atmosphere, she had gone entirely outside, danger would have been avoided. As a matter of common prudence, I should say that a course to the south side of, or entirely outside, should have been adopted, but did the neglect to observe either of these precautions contribute to the collision so as to render the Exeter City partly in fault? It seems not. This collision happened upon the open ocean. The obstacle which the Exeter City presented to the Kentucky was small, her length of 286 feet and her diagonal position to the Kentucky made it about 200 feet as compared with 2300 feet, the length of the tow in The Admiral Schley, 131 Fed. 433, 65 C. C. A. 417, and Id. (C. C. A.) 142 Fed. 64, relied upon by the Kentucky here. Moreover, that case appears to have turned largely upon the condemnation which the courts are apt to visit upon the navigating power of tows of great length when they get into collision through such fault. It does not seem to be applicable here.

It is also contended that the Exeter City remained too long in the position she occupied across the channel. It was from 7 to 10 minutes, but several minutes were necessarily consumed in signing the pilot's card for which the captain had to go to his cabin, and then the pilot had to enter and start with his skiff. He was in it, not more than 100 feet from the steamer, when the collision occurred. The time occupied does not seem very great under the circumstances and the length of time does not seem to be a fault.

3. After the Kentucky was seen, there was no time for the Exeter City to do anything to avoid the collision. She tried to move ahead, which was a proper effort on her part, but did not succeed in getting out of the Kentucky's way, owing to the latter's speed..

This collision seems to be entirely attributable to the Kentucky. Her fault of excessive speed in a fog is plain and sufficiently accounts for the disaster. In order to attribute fault to the Exeter City, it would be necessary to resort to an involved state of affairs and consequent uncertainties, which should not be done when a collision can be fully accounted for by a manifest fault on the part of the other vessel.

A question arose in the case concerning the receipt of the Kentucky's log books in evidence. They were used during the examination, de bene esse, of some of her witnesses, and marked for identification. Ordinarily the entries in such books are not receivable in support of the party who makes them (Worrall v. Davis Coal & Coke Co. [D. C.] 113 Fed. 549, 557), but where they are called for and made use of

by the other party for the purpose of cross examining the opposing witnesses and the testimony so adduced is more intelligible by a reference to the books, which is the case here, they should be received. These books will be regarded as in evidence.

There will be a decree for the libellants, with an order of reference.

In re KOPEL.

(District Court, S. D. New York. October 10, 1906.)

1. HABEAS CORPUS—SUCCESSIVE APPLICATIONS FOR WRIT.

The doctrine of res judicata does not apply in matters of habeas corpus, and, there being no federal statute limiting the common-law right of an applicant to petition successively every judge having authority in the premises, a federal court may entertain a petition, notwithstanding the denial of the same petition by a state court also having jurisdiction, although it is within the discretion of any court to prevent an abuse of the writ.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 121.]

2. EXTRADITION—POWERS OF STATE.

A state has no sovereign power to surrender fugitives found within its limits to another jurisdiction, and can grant extradition only under the federal Constitution and statutes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Extradition, § 28.]

3. SAME—RETURN OF FUGITIVE TO PORTO RICO.

Extradition from a state or territory of the United States to Porto Rico is not authorized by the statute relating to extradition to foreign countries (Rev. St. § 5270, as amended in 1900, c. 793, 31 Stat. 656 [U. S. Comp. St. 1901, p. 3591]), nor is Porto Rico a "territory" of the United States, within the meaning of Rev. St. § 5278 [U. S. Comp. St. 1901, p. 3597]; but said section is extended to Porto Rico by section 14 of the organic act of April 12, 1900 (31 Stat. c. 191, p. 80), which provides that "the statutory laws of the United States not locally inapplicable shall have the same force and effect in Porto Rico as in the United States"; and by virtue of such provision, and of that of section 17, giving the Governor of Porto Rico all the powers of Governors of the territories of the United States that are not locally inapplicable, such Governor has the power to issue a requisition for the return of a fugitive criminal by a state as fully as the Governor of a territory would have.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Extradition, § 29.]

On Habeas Corpus.

Alfred R. Page, for relator.

Wm. Travers Jerome, Dist. Atty., and Robert S. Johnstone, opposed.

HOUGH, District Judge. The relator is in the custody of the police of this city by virtue of a warrant issued by the Governor of New York, directing that Kopel be seized and delivered to an officer described in the warrant as being duly authorized to take and convey him to Porto Rico, there to be tried for an offense against the laws of that island. The warrant of the Governor of this state was issued in response to a requisition from the Governor of Porto Rico, and both executives have, in issuing and honoring the requisition in question, acted in assumed compliance with section 5278, Rev. St. [U. S. Comp.

St. 1901, p. 3597]. By his petition herein Kopel alleges that he is held in violation of the Constitution and laws of the United States, in that Porto Rico, not being a "territory," within the meaning of section 5278, the Governor of that island had no lawful right to issue his requisition, and the Governor of New York, therefore, no right to issue the warrant under which the relator is detained.

The learned District Attorney by the return to the writ first urges that a similar application, based upon the same facts, and tendering the same issue of law, has been decided adversely to the relator by a justice of the Supreme Court of this state, from whose decision no appeal seems to have been taken, if such appeal be permissible. While it is, I think, within the discretion of any court to prevent an abuse even of a writ of right and freedom, the doctrine of res adjudicata cannot yet be said to apply in matters of habeas corpus. Undoubtedly, the state court has jurisdiction in this matter as ample and complete as is possessed by the courts of the United States. Robb v. Connolly, 111 U. S. 639, 4 Sup. Ct. 544, 28 L. Ed. 542; Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544. There being, however, no federal statute limiting the common-law right of an applicant for habeas corpus to successively petition every judge having authority in the premises (Ex parte Cuddy [C. C.] 40 Fed. 65), without regard to the fate of his successive applications, and not being made aware of the grounds of the decision of the Supreme Court of New York by any opinion on file, I consider myself bound to dispose of the matter as an original application.

It is, however, further contended that the surrender of Kopel by the state of New York may be lawfully made, even if it be not explicitly warranted by federal statute, inasmuch as there exists in the sovereign state a reserve power to surrender fugitives found within its borders, not taken away by the provision of the federal Constitution (article 4, § 2, subd. 2), which merely obliges a state to do in some cases what it may do in any case. To me it appears obvious that this view of the power of extradition is opposed to public policy, and destructive of national homogeneity, as tending to produce possible, if not probable, agreements, or practices equivalent thereto, between some states to the exclusion of others. Nor is the view contended for consistent with the judgment in People ex rel. Corkran v. Hyatt, 172 N. Y. 182, 64 N. E. 825, 60 L. R. A. 774, 92 Am. St. Rep. 706. In that case Judge Cullen declared that:

"No person can or should be extradited from one state to another unless the case falls within the constitutional provision, and that the power which independent nations have to surrender criminals to other nations as a matter of favor or comity is not possessed by the states."

This decision of the Court of Appeals of New York was affirmed as Hyatt v. Corkran, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657, and in terms that in my opinion make Judge Cullen's remarks the supreme law of the land, and overrule the decisions in Matter of Fetter, 23 N. J. Law, 315, 57 Am. Dec. 382, and State v. Hall, 115 N. C. 818, 20 S. E. 729, 28 L. R. A. 289, 44 Am. St. Rep. 501.

It remains, therefore, to consider whether the terms of section 5278 are sufficiently broad to cover the extradition of a criminal from a

state of the Union to Porto Rico. It may be observed that, if this statute does not apply, none other does. Obviously, no treaty can be applicable; for, whatever may be the political status of Porto Rico, it is not a foreign land, as by the ratification of the treaty of Paris it became "territory of the United States, although not an organized territory in the technical sense of the word." De Lima v. Bidwell, 182 U. S. 196, 21 Sup. Ct. 743, 45 L. Ed. 1041. Nor does the amendment of June 6, 1900 (chapter 793, 31 Stat. 656), to section 5270 [U. S. Comp. St. 1901, p. 3591] apply, for the same reason, viz., that Porto Rico is not "foreign country or territory." Nor does section 1014, Rev. St. [U. S. Comp. St. 1901, p. 716] apply to the case in hand, because the relator is not charged with any "crime or offense against the United States," but with an offense against the statutes of the island of Porto Rico; or, in the language of section 16 of the organic law for Porto Rico (Act April 12, 1900, c. 191, 31 Stat. 77), he is the subject of a criminal prosecution by "the people of Porto Rico." Nor is there any special statute regulating extradition between the states and territories of the Union and Porto Rico, such as exists in the case of the Philippine Islands, where by the act of February 9, 1903 (chapter 529, 32 Stat. 806 [U. S. Comp. St. Supp. 1905, p. 164]), it is declared that the Philippine Islands "shall be deemed a territory," within the meaning of sections 5278 and 5279 of the Revised Statutes. It must, I think, be admitted that Porto Rico is not a "territory" of the United States, and that Congress has with entire consistency, and for obvious political reasons, refused to describe it by that technical term. Territories "have reference exclusively to that system of organized governments long existing within the United States by which certain regions of the country have been erected into civil governments." Their powers (executive, legislative, and judicial) are "conferred upon them by act of Congress, and their legislative acts are subject to the disapproval of the Congress of the United States; they are not in any sense independent governments, * * * yet they exercise nearly all the powers of governments under what are generally called organic acts, passed by Congress, conferring such powers on them." This class of governments has been "long known by the name of territories." In re Lane, 135 U. S. 447, 10 Sup. Ct. 760, 34 L. Ed. 219. More briefly, a "territory" has been defined as an "inchoate state." Ex parte Morgan (D. C.) 20 Fed. 305. Porto Rico has thus far been consistently kept in a condition of vassalage; it is neither a territory in esse nor a state in posse. Yet the various statutes relating to this island have conferred upon its inhabitants a government with all the powers and all the privileges of a technical territorial government; from the privileges of national citizenship only have the inhabitants of the island been debarred. Inasmuch as the federal Constitution does not apply to territorial acquisitions of the United States, except as extended thereto by act of Congress, it is obviously within the power of the nation to organize "territory of the United States" into any sort or kind of "territory" that Congress may desire. In Porto Rico the act of April 12, 1900 (chapter 191, 31 Stat. 77), and its amendments, have provided the substance of a territorial government. The executive, legislative, and judicial governmental departments are

established upon lines familiar to every student of American Constitutions. An elective commissioner, who substantially answers to a territorial delegate, represents the island at Washington. Section 39. It is entitled to a cadet at the Military Academy (Act March 3, 1903, c. 995, 32 Stat. 1011 [U. S. Comp. St. Supp. 1905, p. 202]), a midshipman at the Naval Academy (Act March 3, 1903, c. 1010, 32 Stat. 1198 [U. S. Comp. St. Supp. 1905, p. 220]), and the citizens of Porto Rico are sufficiently near of kin to the citizens of the United States to enlist in the national service (Act March 2, 1903, c. 975, 32 Stat. 934 [U. S. Comp. St. Supp. 1905, p. 174]).

Considering, therefore, what appears to me the obvious congressional intent of erecting in Porto Rico a government territorial in substance, but for political reasons called by a different name, the real inquiry to be made in this litigation is not the political status of the island, but the powers conferred upon the executive thereof with respect to the statutes of the United States now under consideration.

Section 14 of the organic act of April 12, 1900 (chapter 191, 31 Stat. 80), provides:

"That the statutory laws of the United States not locally inapplicable shall have the same force and effect in Porto Rico as in the United States."

Section 17 (31 Stat. 81) thereof requires:

"That the Governor of Porto Rico [who has issued the requisition herein] shall at all times faithfully execute the laws, and he shall in that behalf have all the powers of Governors of the territories of the United States that are not locally inapplicable."

It has not been asserted that section 5278, Rev. St., is locally inapplicable to Porto Rico. To allege that the only existing law under which a Porto Rican fugitive from justice can be returned thereto from the United States is "locally inapplicable" would be making a jest of justice. If the Governor of Porto Rico has under its organic act the power of a territorial Governor under the laws of the United States not locally inapplicable to Porto Rico, then he must have the power to issue a requisition for the return of a fugitive criminal as fully as a territorial Governor would have that power. The only power so to do is found in section 5278, and, that statute not being locally inapplicable to the island, it is my opinion that the requisition in question was lawfully issued, and if it was so lawfully issued, it follows that it was lawfully obeyed. To me the passage of the act of February 9, 1903, supra, regarding the Philippine Islands, is strong confirmation of this view. An examination of the statutes establishing government in the Philippines reveals no such formation of a government territorial in substance as I find in the legislation regarding Porto Rico. It was considered necessary to declare that for the sole purpose of extradition the Philippine Islands should be "deemed a territory." It was not necessary to make a similar declaration in respect of Porto Rico, for the Governor of that island had already been given substantially the powers "of Governors of the territories of the United States," and such powers include the right which has been questioned in this proceeding.

The writ is discharged, and the prisoner remanded.

THE STAMFORD.

(District Court, S. D. New York. October 3, 1906.)

COLLISION—SCHOONER AND TUG AND TOW MEETING—CHANGE OF COURSE BY SCHOONER.

The testimony of disinterested witnesses *held* to sustain the contention of a tug that a collision between her tow and a meeting schooner in Long Island Sound was brought about solely by a change of course on the part of the schooner, after she had passed the tug at a safe distance, and not to the failure of the tug to allow sufficient margin for passing.

In Admiralty. Suit for collision.

Wing, Putnam & Burlingham, for libellants.
James J. Macklin, for the Stamford.

ADAMS, District Judge. On the 14th of April, 1906, between 11 and 12 o'clock A. M., a collision occurred near Execution Light, Long Island Sound, between a loaded stone scow, without a rudder, in tow of the steamtug Stamford, bound for Mamaroneck, New York, from New York City, and the three masted schooner Lizzie Lane bound light from Onset, Massachusetts, to New York. It was a clear day, the tide being half flood, and the wind was light from about south by east. The tug and scow were proceeding against the tide at about the rate of three miles an hour by the land, the scow following straight behind the tug. The schooner was close hauled on the port tack under a full sail, except the outer jib, and making about the same speed. The vessels were seen by each other in ample time to have avoided collision but they did not do so, the starboard corner of the bow of the scow being brought into contact with the starboard bow of the schooner, in consequence of which the schooner suffered to an alleged extent of $1,500.

The burden of avoiding the schooner being on the tug, she seeks exoneration from the consequences of the collision by alleging and endeavoring to establish that after the tug and schooner passed each other, starboard to starboard, the schooner closed in on the tug and tow and brought about the disaster. The schooner, on the other hand, alleges that she kept her course as well as a light and somewhat unsteady wind would permit and the tug was in fault because she did not keep the tow out of the schooner's way, and for endeavoring to pass on the wrong side and in failing to allow for the schooner's necessary leeway.

The tug's claim, more in detail, is that she was well over to the north side of the channel and when she first saw the schooner the latter was 4 points on her own starboard bow; that on the courses of the vessels, about parallel, they should have passed starboard to starboard with plenty of room if each vessel held her course and there was at least 200 feet of clearance when the tug and schooner were abreast, but after they passed, the schooner changed her course several points towards the scow.

The schooner's claim, more at length, is that her master at the helm saw the Stamford from the port side when she was about a half a mile away and almost dead ahead. He expected the tug to

change her course and pass the schooner to the windward but the tug failed to do so and passed very close, not more than 60 feet away, on the starboard side, apparently on a parallel course but he became alarmed when he could not see the scow, which was behind on a long hawser, about 70 fathoms in length, and pinched the schooner up into the wind so that her top sails were shaking or lifting and when the tug was abreast of his vessel's quarter he put the wheel hard down and fastened it so. It is shown that the master then ran forward and ordered the fore sheet let go and slacked up the jib sheets. Two of the men who had been below ran to the fore boom tackle and hauled out the fore boom but this was just in the collision.

The master of the tug noticed that the schooner was sailing close hauled on the port tack and that she was lightly loaded but admits that he made no provision for any leeway the schooner would make. He says he kept his course to pass to the leeward of the schooner, hence it is argued that in having failed to provide for the inevitable leeway, his tug was in fault.

The foregoing and the burden which was upon the tug to keep out of the schooner's way would almost necessarily determine the controversy in the schooner's favor were it not that the tug has produced some disinterested witnesses who testify that there was ample margin for safe passing in the way the tug attempted to go had not the schooner changed her course. These witnesses were from the tug N. B. Starbuck, bound from Bridgeport, Connecticut, to New York, with a light barge in tow on a long hawser. The master who was at the wheel said he was overtaking and passing the schooner and abreast of her at the time of the collision. He judged that when the Stamford passed the schooner she was from 150 to 200 feet off. He testified positively that the schooner fell off towards the scow, possibly 3 points, by a change of course not by leeway, and if she had not changed there would have been no collision and the clearance would have been at least 100 feet. He was subjected to a severe cross examination but his account of the matter was not seriously affected. His testimony was corroborated by a licensed pilot on the same vessel. Taking the testimony of these witnesses into consideration, I feel constrained to hold that the tug left ample margin for safe passing and that the collision was produced by a change of course on the schooner's part.

Libel dismissed.

In re ELIOWICH.

(District Court, S. D. New York. September 28, 1906.)

No. 8,081.

BANKRUPTCY—PROCEEDING BY TRUSTEE TO REQUIRE SURRENDER OF PROPERTY.

Where, after a trustee in bankruptcy had obtained a summary order requiring the bankrupt and his wife to turn over certain goods in their possession as property of the estate, and to account for the value of other goods not found, the seller of the goods to the bankrupt was permitted to rescind the sale for fraud and thus became reinvested with title, the

proceeding by the trustee cannot be continued for his benefit; his only right cognizable in bankruptcy being to liquidate his claim against the estate for the goods not recovered under direction of the court.

In Bankruptcy. On certificate from referee.

Louis H. Levin, for bankrupt.
King & Booth, for Columbian, etc., Co.

HOUGH, District Judge. The trustee herein having proceeded against the bankrupt and his wife for the summary recovery of certain property of the estate, to wit, some enameled ware, procured an order from the referee directing that certain of the goods discovered in their possession or the possession of one of them, should be forthwith delivered to him, and that, as to the goods not found in specie, Eliowich and wife should account, with the evident object of getting against them a summary order for the payment of a sum of money, failure to obey which order would be punishable as a contempt. At this stage of the proceeding the Columbian Company, which had sold to the bankrupt the goods in question a few days before failure, appeared before the referee, set forth that the goods had been obtained by fraud, that the sale had been rescinded by them, and title accordingly revested in the vendor, wherefore an order was asked directing that the trustee turn over to the rescinding vendor (the Columbian Company) the fruits of his attack on Mr. and Mrs. Eliowich, and that the accounting ordered in favor of the trustee be had with the Columbian Company and before the referee. Such order was made, the trustee executed an assignment (so called) to the Columbian Company, and the latter concern has proceeded to hold an accounting and enter an order directing the Eliowichs to pay certain moneys to the Columbian Company, the sole method of enforcing which order is by contempt proceedings. The correctness of that order is now here for review.

For this proceeding no precedent has been cited, and the above statement of facts seems to me to show a startling novelty of procedure. When the Columbian Company rescinded its contract with Eliowich, the title to the goods sold and the proceeds thereof reverted to it. Both goods and proceeds ceased to be property of the bankrupt, and the latter's possession became wrongful, not against the trustee, but against the Columbian Company. The trustee had no cause of action to assign to the Columbian Company, and the only right of that company cognizable in bankruptcy was an unliquidated claim in tort in respect of goods so wrongfully taken by the bankrupt as could not be specifically recovered. Such claim must be liquidated as the court may direct, as against the estate in bankruptcy. This vendor is practically using the bankruptcy court to sue the people who are alleged to have wrongfully taken certain merchandise. It is not pretended that this can be done by an original proceeding, and the case is no better because the trustee began it. He began to get "property of the bankrupt"; his proceeding is being carried on to get "property of the Columbian Company." The "assignment" does not bridge the chasm, for there was nothing to assign.

It is suggested that here is a "substitution of parties" within the act. In the sense in which that expression is used in the statute, it implies some succession in interest. There is none here. The act of the Columbian Company has destroyed what the trustee was after, by changing the nature of the property from that of the bankrupt to that of the defrauded vendor. It seems to me that this procedure, if permitted, is singularly dangerous. If the Columbian Company can do what is here attempted, no reason appears why, under similar circumstances (and they are common enough), the same course cannot be taken as an original proceeding, and thus debts collected through imprisonment, after bankruptcy, in a manner impossible by the ordinary processes of law.

The matter is remitted to the referee, with instructions to vacate the order directing David and Paulina Eliowich to account to the Columbian Company, and further instructions to proceed no further with the claim of the said company against the parties named, otherwise than to permit before him liquidation of the claim against the estate.

A. STEINHARDT & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. December 15, 1903.)

No. 3,170.

CUSTOMS DUTIES—CLASSIFICATION—ORNAMENTED PURSES—JEWELRY.

Chatelaine purses of metal, gilded or plated in imitation of gold and silver, and set with imitation precious stones, which range in value from 34 marks per gross to 30 marks per dozen, are not within the provision in paragraph 434, Schedule N, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], for "articles commonly known as jewelry."

On Application for Review of a Decision of the Board of United States General Appraisers.

This case relates to merchandise imported at the port of New York, which the collector of customs assessed with duty under the provision in paragraph 434, Schedule N, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], for "articles commonly known as jewelry," and which the importers contended was dutiable under the provision in paragraph 193, Schedule C, § 1, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645], for articles composed in part of metal. The goods in controversy, which were invoiced at values ranging from 34 marks per gross to 30 marks per dozen, were described in the opinion of the Board of General Appraisers as consisting "of chatelaine brooches composed of gilded or plated metal in imitation of gold and silver, set with imitation precious stones, and depending from which is a chain purse with a round top, similar in material and design to the chatelaine brooches, and are entirely worn by women, suspended from their girdles." The board found that these articles were commonly known as jewelry, and affirmed the assessment of duty.

Albert Comstock, for Importers.
Charles D. Baker, Asst. U. S. Atty.

PLATT, District Judge. The decision of the Board of General Appraisers is reversed.

GRAINGER et al. v. DOUGLAS PARK JOCKEY CLUB.

(Circuit Court of Appeals, Sixth Circuit. October 27, 1906.)

No. 1,571.

1. STATUTES—DETERMINATION OF VALIDITY.

The constitutionality of a statute must be determined by its provisions, and not by the manner in which it is in fact administered.

2. CONSTITUTIONAL LAW—VALIDITY OF STATUTE—DEPRIVING PERSON OF LIBERTY OR PROPERTY.

A statute or ordinance depriving one of his liberty or property is not in violation of the fourteenth constitutional amendment, merely because of such deprivation; but, to bring it within the amendment, it must have no real or substantial relation to the public welfare, or the deprivation must be brought about without due process of law or amount to a denial of the equal protection of the laws.

3. SAME—EQUAL PROTECTION OF LAWS—CLASSIFICATION IN STATUTE.

A statute or ordinance depriving one of liberty or property does not amount to a denial of the equal protection of the laws, because it does not apply to all persons; the Legislature having the right to make classifications providing they are reasonable and not arbitrary, and the test being that to be valid they must rest upon some reason of public policy and have some real and substantial relation to the object sought to be accomplished.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 678.]

4. SAME.

A statute regulating the right to carry on a particular business is not unconstitutional, as a denial of the equal protection of the laws, because of a classification based on equipment, personal fitness, past history, or other reasonable considerations, and the determination of such matters and the power of selection may be committed to administrative officers.

5. SAME—POWER OF COURTS.

A court has no right to invalidate or overthrow legislation depriving a person of his liberty or property or making a discrimination as to the persons to whom it is applicable, unless it is palpably clear that it has no real and substantial relation to the public welfare; the right to determine what such welfare demands being primarily in the Legislature or local assembly or officer acting under its authority, and every presumption being in favor of its rightful exercise.

[Ed. Note.—For case in point, see Cent. Dig. vol. 10, Constitutional Law. § 46.]

6. SAME.

If legislation depriving one of his liberty or property, or making a discrimination as to the persons to whom it is applicable, does in fact have a real and substantial relation to the public welfare both so far as said deprivation and discrimination are concerned, the motive which prompted its enactment cannot be inquired into by the courts.

7. SAME—VALIDITY OF STATUTE—KENTUCKY ACT REGULATING RACING.

Act Ky. March 23, 1906, creating a state racing commission, and regulating the racing of running horses, which, while excepting from its provisions trotting meetings or races and races conducted by fair associations, prohibits the conducting of any running race in the state except by a corporation or association licensed by the commission, which is empowered to grant and revoke such licenses, to adopt regulations for racing which must be observed by its licensees, and to fix the time in each year during which any association may conduct racing, which must be between the 1st of April and the 1st of December, its action in certain matters being subject to review by the courts, while it may operate to deprive persons

or corporations of their liberty or property, and to create discriminations, cannot be held to have no real and substantial relation to the public welfare, nor to be in violation of the fourteenth amendment of the Constitution, as denying to any person the equal protection of the laws.

8. COURTS—JURISDICTION OF CIRCUIT COURT OF APPEALS—ORDER GRANTING PRELIMINARY INJUNCTION.

That a Circuit Court has jurisdiction of a suit only by reason of the fact that it involves a question arising under the Constitution or laws of the United States, so that an appeal from the final decree therein will lie only to the Supreme Court, does not deprive the Circuit Court of Appeals of jurisdiction to review an order granting a preliminary injunction therein, under Act April 14, 1906, c. 1627, 34 Stat. 116, amending section 7 of Act March 3, 1891, 26 Stat. 828 [U. S. Comp. St. 1901, p. 550], creating said court.

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

D. W. Saunders and Lewis McQuown, for appellants.

H. W. Bond and Helm Bruce, for appellee.

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

COCHRAN, District Judge. This is an appeal from an interlocutory order granting a preliminary injunction. It was made May 24, 1906, in a suit brought May 15, 1906, by the appellee, a Kentucky corporation created and organized December 12, 1905, against the appellants, Charles F. Grainger, Louis des Cognets, J. P. Chinn, Milton Young, and E. F. Clay, all citizens of Kentucky. All of the appellants except Charles F. Grainger reside in the Eastern district of Kentucky, but the appellee has its place of business, and hence resides, in the Western district. Diversity of citizenship not existing, the lower court did not have jurisdiction of the suit on that ground. The sole ground of jurisdiction was that the basis of the relief sought was state action claimed to have been in violation of the tenth section of the first article of the federal Constitution and the fourteenth amendment thereto. This being so, this court will not have jurisdiction of an appeal from the final decree therein. That must go to the Supreme Court. It has jurisdiction of this appeal from said interlocutory order by virtue of the Act of Congress of April 14, 1906 (chapter 1627, 34 Stat. 116), amending the seventh section of the act establishing the Circuit Courts of Appeals (Act March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 550]), so as to give them jurisdiction of an appeal from an interlocutory order or decree granting or continuing an injunction or appointing a receiver "in any cause" instead of in "a cause in which an appeal from a final decree may be taken under the provisions" of said act to the Circuit Court of Appeals as before.

The Douglas Park Jockey Club was empowered by its charter to acquire, equip, and operate in Jefferson county, Ky., within which the city of Louisville is located, a race track for running horses, and prior to the bringing of this suit it had acquired 125 acres of land adjoining said city and equipped it for said purpose at an expense of $225,000. The most, if not all, of this expense was incurred prior to the doing of any of the acts complained of in said suit.

The five individual appellants are the constituent members of the state racing commission appointed April 2, 1906, by the Governor of Kentucky, under an act of the Legislature thereof, approved by him March 23, 1906, and which then became a law by virtue of an emergency clause. Said act is as follows:

"An act to regulate the racing of running horses in the commonwealth of Kentucky and to establish a state racing commission and prescribing its powers and duties.

"Be it enacted by the General Assembly of the commonwealth of Kentucky:

"Section 1. Any corporation formed for the purpose of racing and breeding or improving the breed of horses and conducting races and contests of speed, shall have the power and right, subject to the provisions of this act, to hold one or more running race meetings in each year, and to hold, maintain, and conduct running races at such meetings. At such meetings the corporation or the owners of the horses engaged in such races, or others who are not participants in the racing, may contribute purses, prizes, premiums or stakes to be contested for; but no person or persons other than the owner or owners of a horse or horses contesting in a race shall have any pecuniary interest in the purse, prize, premium or stake contested for in such a race, or be entitled to, or receive any portion thereof after such race shall have been finished; and the whole of such purse, prize, premiums or stake shall be allotted in accordance with the terms and conditions of such race. Such meeting shall not be held except during the period extending from the 1st day of April, to the 1st day of December, inclusive in each year. No running races are authorized or shall be permitted except during the period aforesaid, nor except between sunrise and sunset.

"Sec. 2. A state racing commission is hereby established, to consist of five persons to be appointed by the Governor, three of whom shall be breeders and raisers of thoroughbred stock, and no two of whom shall be members of the same racing association. The members of said commission shall hold their offices for a term of four years, and the first commission shall be appointed within twenty days after this act shall go into effect. Such commission shall appoint a secretary, who shall serve during its pleasure, whose duty it shall be to keep a full and faithful record of its proceedings, and preserve at its general office all books, maps, documents and papers intrusted to its care, and perform such other duties as the commission may prescribe. He shall be paid a salary, to be fixed by the commission at a rate not exceeding $1,200 per annum which shall be paid by the several racing corporations or associations, the amounts to be paid by each to be apportioned by the commission, which shall on or before the 1st day of December in each year assess upon each of said corporations or associations its just proportion of such salary. The commission shall biennially make a full report to the General Assembly of its proceedings for the two year period ending with the 1st day of December preceding the meeting of the General Assembly, and shall embody therein such suggestions and recommendations as it shall deem desirable.

"Sec. 3. Said commission shall have the power to prescribe the rules, regulations and conditions under which running races shall be conducted in this state, and no such races shall be conducted, except by a corporation or association duly licensed by said commission, as herein provided. Any corporation or association desiring to conduct such racing may annually apply to the state racing commission for a license to do so. If in the judgment of the commission a proper case for the issuance of such license is shown, it may grant the same for a term of one year; and every such license shall contain a condition that all races or race meetings conducted thereunder shall be subject to the rules, regulations, and conditions from time to time prescribed by the commission, and shall be revocable by the commission for any violation thereof, or whenever the continuance of such license shall be deemed by the commission not conducive to the interests of legitimate racing.

"But if said license is refused or revoked, said commission shall publicly state its reasons for so doing, and said reasons shall be written in full in the minute book of said commission, which shall at all times be subject to

inspection upon application of any one desiring to do so; said finding of said commission shall be subject to the review of a court of competent jurisdiction; provided, that a refusal of the commission to grant to any racing association a license or to assign any racing association at least forty days in each year if desired for racing at such association, and the decision of such commission revoking any license of any association shall be subject to review of the courts of the state.

"Sec. 4. Every running race meeting at which racing shall be permitted for any stake, purse or reward, except as allowed by this act, is hereby declared to be a public nuisance, and every person acting or aiding therein shall be deemed guilty of a misdemeanor and punished by a fine of not less than $500 nor more than $1,000 for each day of such meeting or racing; and in addition thereto, in a suit brought for the purpose by the state racing commission in the circuit court of the county where it may be proposed to conduct such unauthorized racing, an injunction may be obtained against the same.

"Sec. 5. This act shall not apply to trotting meetings or races, nor shall it apply to racing conducted by any state, county or other fair association, holding not more than one meeting annually, and for a period not exceeding six days for such meeting.

"Sec. 6. Inasmuch as there is no general law regulating racing in this commonwealth, and it is desirable that one should be in operation as soon as possible, an emergency is hereby declared to exist and this act shall be in full force and effect from and after its passage."

Its provisions can be stated and grouped in a way to impress them on one's mind, and we think, though at the risk of tediousness, that this should be done.

This act has no application to trotting races. It applies only to running races. It has no application to such races when conducted by any state, county, or other fair association holding not more than one meeting annually and for a period not exceeding six days for such meeting. It prohibits running races not so conducted, except when conducted by a corporation or association formed for that purpose, and by such corporation or association unless licensed by the commission so to do. It further prohibits a corporation so formed and licensed from running such races except between April 1st and December 1st, inclusive, in each year, and between sunrise and sunset. It provides that no one save the owners of the horses participating in the races shall have any pecuniary interest in the stakes contested for or be entitled to or receive any portion thereof, and that the commission shall have power to prescribe the rules, regulations, and conditions under which races shall be conducted.

As to the granting of licenses, it provides that they shall be granted annually; that they shall be for the term of one year; that they shall be granted if in the judgment of the commission a proper case for issuance of the license is shown; that they shall contain a condition that all races shall be subject to the rules, regulations, and conditions from time to time prescribed by the commission; that they shall be revocable by the commission for any violation thereof or whenever the continuance therof shall be decided not conducive to the interest of legitimate racing; that, if the commission refuses or revokes a license, it shall publicly state the reasons for so doing in full in its minute book, which shall at all times be subject to inspection upon application of any one; and that said finding shall be subject to the review of a "court of competent jurisdiction." It would seem that

the commission has power, not only to grant licenses, but that it has power also to assign and fix the dates at which the races shall be run under the license, which two powers need not be exercised simultaneously, but may be exercised successively, in which case, however, the power to assign and fix dates shall be exercised subsequent to the exercise of the power to grant the license. There is no express provision to this effect. If it has such power it is to be implied from the proviso of section 3, the second of the two court review clauses which the act for some reason contains, whereby it is provided that, not only the refusal of the commission to grant a license or its revoking a license shall be subject to the review of the courts of the state, but also that a refusal to assign any racing association at least 40 days in each year if desired for racing by such association shall be subject to like review. If the act is construed as conferring such power in addition to the power of granting licenses, then, of course, the act prohibits the running of races by an association having a license at any other time than the dates assigned by the commission.

It is provided that at least three of the commissioners shall be breeders and raisers of thoroughbred stock, and that no two of them shall be members of the same association; that they shall hold their offices for the term of four years; that they shall have a secretary to be paid a salary of not exceeding $1,200 per annum by the several racing corporations or associations as apportioned amongst them by the commission; that the commission shall biennially make report to the Legislature of its proceedings, embodying therein such suggestions and recommendations as it shall deem desirable. It is further provided that every running race meeting except as allowed by the act shall be a public nuisance, and every person acting or aiding therein shall be subject to a certain penalty, and that the commission may obtain an injunction against such unauthorized racing in a suit brought for that purpose in the circuit court of the county where it is proposed to conduct it.

The emergency stated for the act's going into effect at once is this:

"There is no general law regulating racing in this commonwealth, and it is desirable that one should be in operation as soon as possible."

The appellant Charles F. Grainger is president of the New Louisville Jockey Club, a racing corporation owning a race track for running horses adjoining Louisville, which it has operated for over 30 years continuously, and a member of the American Turf Association, a national organization of associations engaged in operating race tracks for running horses. None of the other appellants seems to be a member of a racing association. The commission organized April 18, 1906, by the election of Col. J. P. Chinn, who had introduced the act into the Legislature and thus given it its name, to wit, the Chinn Act, as president, and A. B. Rouse, as secretary. On the same date a license was granted to the Kentucky Racing Association of Lexingon, and from April 23, to May 1, 1906, inclusive, was assigned to it as dates for racing. On April 23, 1906, at a subsequent meeting of the commission, certain rules for the government of the commission were adopted; said New Louisville Jockey Club applied orally for a license and the

assignment to it of May 2, to May 23, 1906, inclusive, as racing dates, submitting therewith a list of the racing officials at said meeting, which application was granted; the Latonia Jockey Club, owner and operator of a race track for running horses at Covington, Ky., opposite Cincinnati, Ohio, and a member also of said American Turf Association, applied orally for a license and the assignment to it of May 30, to July 4, 1906, inclusive, submitting therewith a list of the names of the racing officials at said meeting, which application was granted; and the appellee, Douglas Park Jockey Club, which was a member of the Western Jockey Club, a national association in rivalry with said American Turf Association, applied by written communication for the assignment of May 12, to June 15, 1906, inclusive, to it as racing dates, which application was thereupon refused on the ground, as stated in the minutes of the commission, "that the dates asked for by said Douglas Park Jockey Club had previously been assigned."

Either at this meeting or at the previous meeting there was adopted a resolution to the effect that all associations making application for license shall give the names of the officers thereof, and, when making application for racing dates, shall submit the names of the racing officials of the meeting, and also a form of license. The form so adopted provides that the license is to hold race meetings at such times as the commission shall assign and fix, and upon condition that the licensee shall permit all owners and trainers not ruled off or suspended for fraud by a recognized meeting to race over its course subject to the general rules of racing; that no racing official shall act at its meeting except by approval of the racing commission; that all races shall be subject to the rules and regulations and conditions from time to time prescribed by the commission, and shall be revocable by the commission for any violation thereof or whenever the continuance of the license shall be deemed by the commission not conducive to the best interests of legitimate racing.

It is to be noted that the application of the appellee, the Douglas Park Jockey Club, was not for the granting of a license, but for an assignment of certain dates, and it seems never to have made an application for a license; and, further, that with its application it did not give or submit the names of its officers or of the racing officials at its proposed meeting. However, the Lexington Racing Association seems not to have given or submitted the names of either, and the New Louisville Jockey Club and the Latonia Jockey Club seem not to have given the names of the officers of the corporations in connection with their respective applications, and it is uncertain whether the resolution calling for the giving and submission of said names was adopted prior to any of said applications.

After the refusal of the appellants acting as said commission to grant said appellee's said application, the suit in the lower court was brought. The relief sought was an injunction against appellants restraining them from asserting that the appellee did not have the right, and would not be permitted, to have running races for stakes on its race track from June 2, 1906, to July 7, 1906, inclusive, a different period of time from that covered by its said application, from en-

forcing said act against it and instituting actions civil or criminal under said law, and from in any manner interfering with the operation, conduct, or management of its race track. The ground upon which said relief was sought was that said act was unconstitutional. It was claimed to be in violation of both the state and federal Constitutions. No further reference need be made, however, to the claim as to the state Constitution. It was claimed to be in violation of the tenth section of article 1 of the federal Constitution and of the fourteenth amendment thereto. The basis of the claim as to said tenth section was an allegation that prior to the passage of the law appellee had entered into contracts with a large number of persons skilled in the management and conduct of race meetings to conduct, operate, and manage said race meeting, the obligation whereof was impaired thereby. The ground upon which said act was claimed to be in violation of the fourteenth amendment was that it deprived it of its liberty and property without due process of law and denied it the equal protection of the laws, in that it made its right to operate its race track at all and the time when it should operate it to depend on the arbitrary determination of the commission, and had no application at all to corporations or associations organized to operate race tracks for trotting horses and fair associations.

The case was heard in the lower court upon bill, answer, and affidavits. It assumed, without deciding, that the act in question was constitutional, but held that the action of the commission was in violation of the fourteenth amendment. The order of injunction contained two provisions. In one the appellants were enjoined from instituting or instigating any proceedings against appellee under said act with reference to any running race meetings held by it between the date of order and December 1, 1906, and from in any manner interfering or causing others to interfere with its operation, conduct, and management of its track. In the other the appellants were enjoined from refusing to grant the appellee a license in due form to hold one or more race meetings as authorized by said act at any time or times it might elect between the date of the order and December 1, 1906. This latter provision was a mandatory injunction and in effect commanded appellants to grant appellee a license under the act permitting it to run such races as it pleased on its track up until December 1, 1906, without applying to appellee for an assignment of dates. The court seems to have been of the opinion that the sole power conferred on the commission was to grant licenses and prescribe general rules to govern the running of races thereunder, and that it had no power in relation to the assignment of dates.

These two provisions of the order are hardly consistent with each other, and the first one is hardly consistent with the view that the act is constitutional. The first one, which restrains appellants from taking any steps against appellee for operating without a license, presupposes that appellee does not need a license, and hence that the act is unconstitutional. The second one in effect commands the appellants to grant appellee a broad license. It presupposes that appellee does need a license and that the act is constitutional. The relief covered by the first provision is the only specific relief sought in the bill. That

covered by the second is not specifically prayed for, and, to say the least, it is doubtful whether it is in accordance with appellee's theory of its case as presented in the bill. Each provision will be considered separately and in its order.

The first one, as stated, presupposes that said act is unconstitutional, and appellee so contends here. It contends that it is in violation of the fourteenth amedment to the federal Constitution. It makes no point as to the tenth section of the first article thereof. It claims that it is in violation of both of the last two clauses of the first section of the amendment. It deprives it of its liberty and property without due process of law, in that by its provisions it cannot operate its race track without a license and an assignment of dates from the commission. This affects its liberty of action and depreciates the value of its property. It denies it the equal protection of the laws, in that it confers arbitrary power on the commission in the matter of granting licenses and assignment of dates and has no application to owners of race tracks for trotting horses or to state, county, or other fair associations holding not more than one meeting annually and for a period not exceeding six days for such meeting. It cites in support of its contention the following decisions of the Supreme Court, to wit: Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 162, 17 Sup. Ct. 255, 41 L. Ed. 666; Cotting v. Godard, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92; Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679; Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169; Lochner v. New York, 198 U. S. 64, 25 Sup. Ct. 539, 49 L. Ed. 937.

In those cases the following statutes and ordinances were held to be in violation of said clauses of said amendment: In the Yick Wo Case the San Francisco ordinance forbidding any one to carry on the laundry business within the limits of the city without first obtaining the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone; in the Gulf, C. & S. F. R. Co. Case, the Texas statute imposing an attorney's fee not exceeding $10 in addition to costs upon railway corporations omitting to pay certain claims within a certain time after presentation; in the Cotting Case, the Kansas statute limiting the charges to be made by the Kansas City Stock Yards Company for services to be rendered; in the Connolly Case, the Illinois statute prohibiting a recovery of the price of articles sold by any trust or combination formed in violation thereof, exempting agricultural products and live stock in the hands of the producer or raiser; in the Dobbins Case, the Los Angeles ordinance prohibiting the erection and maintenance of gas works except within certain limits; and, in the Lochner Case, the New York statute restricting the hours of employment in bakeries to 60 hours a week and 10 hours a day.

Main reliance is placed on the last clause of the first section or the equality clause of the amendment, and particular stress is laid on the words of Mr. Justice Matthews in the Yick Wo Case, to wit:

"When we consider the nature and theory of our institution of government, the principles upon which they are supposed to rest, and review the history of

their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary action."

Of which words Mr. Justice Brewer, in the Gulf, C. & S. F. R. Co. Case, said:

"No language is more worthy of frequent and thoughtful consideration."

It is to be noted in this connection that the question whether said act confers arbitrary power is not to be determined by the fact that the power conferred may have been exercised arbitrarily as to the appellee. If such is the case, possibly it may have some bearing on the interpretation of the power conferred. In the Yick Wo Case Mr. Justice Matthews seems to intimate that the arbitrary action of the board of supervisors complained of therein did have an interpreting effect on the nature of the power conferred. But we think Judge Sawyer struck a true note, in the case of Ex parte Christensen (C. C.) 43 Fed. 243, 247, when he said:

"The validity of an ordinance must be determined by its terms, by what it authorizes, not by the manner of its execution. It is valid or invalid irrespective of the manner in which it is in fact administered. Its capability of being abused is the test."

And, in the case of Williams v. Mississippi, 170 U. S. 214, 18 Sup. Ct. 583, 42 L. Ed. 1012, it was held that the equal protection of the laws is not denied to colored persons by the Constitution and laws of Mississippi, which make no discrimination against the colored race in terms, but grant a discretion to certain officers which can be used to the abridgment of the rights of colored persons to vote and serve on juries, when it is not shown that their actual administration is evil, but only that evil is possible under them.

But, in order to reach a correct conclusion in this case, it will not do to confine our attention to the said decisions of the Supreme Court relied on by appellee. We should consider in connection therewith other decisions of that court in which certain statutes and ordinances were held not to be in violation of said amendment, as for instance the following, to wit: Slaughter House Cases, 83 U. S. 36, 21 L. Ed. 394; Northwestern Fertilizer Co. v. Hyde Park, 97 U. S. 659, 24 L. Ed. 1036; Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. 992, 32 L. Ed. 253; Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620; N. Y. & N. E. R. Co. v. Bristol, 151 U. S. 567, 14 Sup. Ct. 437, 38 L. Ed. 269; Davis v. Massachusetts, 167 U. S. 43, 17 Sup. Ct. 731, 42 L. Ed. 71; Gundling v. Chicago, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725; L'Hote v. New Orleans, 177 U. S. 595, 20 Sup. Ct. 788, 44 L. Ed. 899; Booth v. Illinois, 184 U. S. 426, 22 Sup. Ct. 425, 46 L. Ed. 623; Otis & Gasman v. Parker, 187 U. S. 606, 23 Sup. Ct. 168, 47 L. Ed. 323; Fischer v. St. Louis, 194 U. S. 361, 24 Sup. Ct. 673, 48 L. Ed. 1018; Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643; Lieberman v. Van De Carr, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305.

The statutes and ordinances upheld in them are as follows, to wit: In the Slaughter House Cases, the Louisiana statute granting to the Crescent City Live Stock, Landing & Slaughter House Company the exclusive privilege of establishing and maintaining landing places, stock yards and slaughter houses in the city of New Orleans, at which all stock intended for sale or slaughter in said city should be landed, inclosed, and slaughtered; in the Northwestern Fertilizer Company Case, the Hyde Park ordinance prohibiting the transportation of offal or other offensive or unwholesome matter through said village and any person from carrying on any offensive or unwholesome business within the village limits or within one mile thereof; in the Barbier and Soon Hing Cases, the San Francisco ordinance prohibiting any one from carrying on the laundry business within certain prescribed limits of the city without first obtaining certain certificates from the health officer and board of fire wardens and not at all between the hours of 10 o'clock at night and 6 o'clock in the morning; in the Mugler Case, the Kansas statute prohibiting the manufacture and sale of intoxicating liquors; in the Powell Case, the Pennsylvania statute prohibiting the manufacture and sale of oleomargarine; in the Christensen Case, the San Francisco ordinance requiring a license for the sale of intoxicating liquors and wines, and providing that no license should be issued without the written consent of the board of police commissioners or in the event of their refusal without the recommendation of 12 citizens of the city owning real estate in the block or square in which the business was to be carried on; in the N. Y. & N. E. R. Co. Case, the order of the Connecticut railroad commisioners requiring the removal of a certain grade crossing on said company's line at its own expense; in the Davis Case, the Boston ordinance prohibiting any person from making any public address on any public grounds without a permit from the mayor; in the Gundling Case, the Chicago ordinance prohibiting the sale of cigarettes without a license and conferring on the mayor power to grant a license and requiring him so to do if the applicant was of good character and reputation and a suitable person to be intrusted with their sale, determinable from certain evidence in regard thereto submitted to the board of health and certified with its opinion to him with the application; in the L'Hote Case, the New Orleans ordinance prohibiting women of lewd character from dwelling outside of certain limits of the city; in the Booth Case, the Illinois statute prohibiting options to buy or sell grain or other commodities at a future time; in the Otis & Gasman Case, the California constitutional provision prohibiting all contracts for sales of shares of corporate stocks on margin; in the Fischer Case, the St. Louis ordinance forbidding the establishment or maintenance of a dairy or cow stable within the city limits without having received permission so to do from the municipal assembly; in the Jacobson Case, the Massachusetts statute providing for compulsory vaccination; and, in the Lieberman Case, the New York sanitary code provision enacted by the board of health, providing that no milk should be received, held, kept, sold, or delivered in said city without a permit in writing from the board of health and subject to the conditions thereof.

The points actually decided in the cases relied on by appellee and those we have referred to are of but little help to us in reaching a conclusion in this case. It is essential that we get behind them and grasp the fundamental principles which led to their decision. Or, to vary the metaphor, those principles having been congealed therein, we must restore them to their original fluid state and then let them carry or push us where they will.

In the first place, it is to be noted that a statute or ordinance depriving one of his liberty or property is not in violation of said amendment merely because of such deprivation. Either of three things is essential to bring the deprivation within the amendment. It must have no real or substantial relation to the public welfare, or the deprivation it provides for must be a deprivation without due process of law, or it must amount to a denial of the equal protection of the laws. If the statute or ordinance has a real and substantial relation to the public welfare, if it provides for a deprivation by due process of law, and if it affords an equal protection of the laws, it is valid, notwithstanding its enforcement will deprive a person subject thereto of his liberty or property. In the Slaughter House Cases, the ordinance upheld required the closing of all existing stock landings, stock yards, and slaughter houses; in the Northwestern Fertilizer Company Case, the ordinance upheld ruined the business of that company and rendered its plant valueless for the purpose for which it was erected; in the Mugler Case, the statute upheld required the abatement of all existing distilleries and breweries as nuisances and was enforced therein as to a brewery owned by one of the parties thereto; in the Powell Case, by reason of the statute upheld therein the owner of a large quantity of oleomargarine was denied the right to sell it within the jurisdiction thereof; and, in the N. Y. & N. E. R. Co. Case, the order of the railroad commissioners upheld required the removal of the dangerous railroad crossing at the expense of the railroad company. In the L'Hote Case, Mr. Justice Brewer said:

"The truth is that the exercise of the police power often works pecuniary injury, but the settled rule of this court is that the mere fact of pecuniary injury does not warrant the overthrow of legislation of a police character."

The Jacobson Case, in which the Massachusetts compulsory vaccination statute was upheld, affords a recent instance of a holding that the effect of a police statute on one's liberty is no reason for overthrowing it. Mr. Justice Harlan said therein:

"In every well-ordered society charged with the duty of conserving the safety of its members, the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraints, to be enforced by reasonable regulations, as the safety of the general public may demand."

It is true that he said further therein as follows:

"It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his health or body would be cruel and inhuman in the last degree. We are not to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended, that the judi-

ciary would not be competent to interfere and protect the health and life of the individual."

But this is no qualification of our position. A statute so intended would in so far have no real or substantial relation to the public welfare. Indeed, each one of the cases which we have referred to, in addition to those cited and relied on by appellee, is an illustration of the proposition we have laid down. In each case the statute or ordinance upheld deprived some person or persons of their liberty or property, and it was upheld because either it did have, or it could not be said that it did not have, a real or substantial relation to the public welfare and also complied with the requirements as to due process of law and equal protection of the laws. The cases emphasized are simply striking cases of such deprivation. The deprivation, then, which the amendment has in view is not any deprivation, but a deprivation that has no real or substantial relation to the public welfare or that is brought about without due process of law or that amounts to a denial of the equal protection of the laws.

Again, a statute or ordinance depriving one of liberty or property does not amount to a denial of the equal protection of the laws because it does not apply to all persons within the jurisdiction of the legislative body enacting it, but is applicable only to certain of such persons. A legislative body has a right to discriminate amongst those persons and to limit the application of its laws to a portion of them only. The act of so discriminating is usually termed classification. There is, however, a limit to its right to discriminate and to classify, and it is important to understand exactly what that limitation is. It is frequently said that the classification must embrace all persons similarly situated. In the Barbier Case, Mr. Justice Field said:

"Though, in many respects necessarily special in their character, they [statutory regulations] do not furnish just ground of complaint if they operate alike on all persons and property under the same circumstances and conditions. Class legislation discriminating against some and favoring others is prohibited, but legislation which in carrying out a public purpose is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

There can be no doubt as to the correctness of this test as to the validity of any particular classification. The danger with it is that it may lead one to use an incorrect test, to wit, that the classification embraces all persons engaged in the same business. In the Powell Case, Mr. Justice Harlan said:

"The objection that the statute is repugnant to the clause of the fourteenth amendment forbidding the denial by the statute to any person within the jurisdiction of the equal protection of the laws is untenable. The statute places under the same restrictions and subjects to like penalties and burdens all who manufacture or sell or offer for sale or keep in possession to sell the articles embraced in its prohibitions, thus recognizing and preserving the principle of equality amongst those engaged in the same business."

Usually all persons engaged in the same business may be said to include all persons similarly situated, but not always; and in such cases that the classification embraces all persons engaged in the same business is not a correct test as to its validity. This happened in the

Gulf, C. & S. F. R. Co. Case. There the statute involved imposed an attorney's fee in certain cases on all railroad corporations, and yet it was held invalid.

Sometimes the test made use of is that the classification must be reasonable, and not arbitrary. In the Otis & Gasman Case, Mr. Justice Holmes said:

"The circumstances disclose a reasonable ground for classification."

In the Gulf, C. & S. F. R. Co. Case, Mr. Justice Brewer said:

"Arbitrary selection can never be justified by calling it classification."

In the same case he quoted from the opinion of Judge Black, in the case of State v. Loomis, 115 Mo. 307, 314, 22 S. W. 350, 21 L. R. A. 789, these words:

"Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that the differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations."

There can be no doubt also as to the correctness of this test. The only thing against it is its generality. One is in danger of losing himself in the terms "reasonable" and "arbitrary."

The Gulf, C. & S. F. R. Co. Case brought to the surface a still other and, as we deem it, the best test for determining the validity of a given classification. It is this: There must be a real and substantial relation between the classification and that for which the statute or ordinance making it was enacted—the object which it was intended to accomplish, to wit, the public welfare. Just as a deprivation of liberty or property to be valid must have a real and substantial relation to the public welfare, so a classification to be valid also must have such a relation thereto. In the Gulf, C. & S. F. R. Co. Case, Mr. Justice Brewer said:

"It is said that it is not within the scope of the fourteenth amendment to withhold from the states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. This as a general proposition is undeniably true. It is equally true that such classification cannot be made arbitrarily. There are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed."

And again:

"The mere classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment. That in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection."

In the case of Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 104, 19 Sup. Ct. 612, 43 L. Ed. 909, Mr. Justice Brewer said:

"On the other hand, it is also true that the equal protection guarantied by the Constitution forbids the Legislature to select a person natural or artificial and impose upon him burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual or one corpora-

tion and enact that whenever he or it is sued the judgment shall be for double damages or subject to an attorney's fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule. Neither can it make a classification of individuals or corporations which is purely arbitrary and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed."

Here the test that the classification must embrace all persons similarly situated, and the test that it must have relation to the object sought to be accomplished, are both referred to. Probably as good a general rule to guide one in passing on the validity of a particular classification as can be found is that contained in these words of Judge Sullivan, in the case of State v. Farmers' Irr. Co., 59 Neb. 4, 80 N. W. 53:

"Classification to be valid must rest upon some reason of public policy, some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified."

Though, as heretofore indicated, a classification which embraces all persons engaged in the same business will not always be valid, yet generally it will. Most always it will embrace all persons similarly situated and will have a real and substantial relation to the object intended to be accomplished, to wit, the public welfare. It follows, therefore, that a classification of persons according to business may be a valid classification. In the Northwestern Fertilizer Co., Mugler, Powell, and Booth Cases the legislation upheld applied only to persons engaged in the same business and embraced all who were or might be engaged therein. They were forbidden to engage therein or to continue to carry them on. Those businesses were the manufacture and sale of offensive materials, of intoxicating liquors and oleomargarine, and the sale of options. The object intended to be accomplished by said legislation was the stoppage of the evils growing out of those businesses. Those particular evils grew out of those businesses, and none other. Hence a classification according to businesses in such cases was held valid. It had a real and substantial relation to the object intended to be accomplished, to wit, freedom from those evils or the public welfare. So a classification of persons according to particular branches of a business, i. e., that turn on such branches may be valid. In the Barbier and Soon Hing Cases, the ordinances upheld, forbidding the carrying on of the laundry business between the hours of 10 at night and 6 in the morning, applied to those engaged in washing and ironing, but not to those engaged in fluting, polishing, bluing, and wringing. Mr. Justice Field said:

"It is not discriminating legislation in any invidious sense that branches of the same business from which danger is apprehended are prohibited during certain hours of the night, whilst other branches involving no such danger are permitted."

In the Otis & Gasman Case, the statute upheld forbade contracts for sale of shares of corporate stock on margin, and not contracts for such sales of other articles. Mr. Justice Holmes said:

"With regard to the objection that this provision strikes at only some, not all, of the objects of possible speculation, it is enough to say that probably in California the evil sought to be stopped was confined in the main to stocks in corporations. California is a mining state, and mines offer the most striking temptation to people in a hurry to get rich. Mines generally are represented by stocks. Stock is convenient for purposes of speculation because of the ease with which it is transferred from hand to hand as well as for other reasons. If stopping the purchase and sale of stocks on margin will stop the gambling which it was desired to prevent, it was proper for the people of California to go no farther in what they forbade. The circumstances disclose a reasonable ground for the classification."

So a classification of persons according to equipment to carry on a particular business as determined by administrative officers to whom the matter is committed may be valid. In the Barbier and Soon Hing Cases, the ordinance upheld forbade any person from carrying on the laundry business without first obtaining a certificate from the health officer that his premises were properly and sufficiently drained, and that all proper arrangements had been made to carry on the business without injury to the sanitary condition of the neighborhood; and also one from the board of fire wardens that his washing and ironing apparatus was in good condition, that their use was not dangerous to the surrounding property from fire, and that all proper precautions were taken to comply with the provisions of the ordinance in relation to fire limits.

So a classification of persons according to their personal fitness to carry on a particular business as so determined may be valid. In the Yick Wo Case, Mr. Justice Matthews said:

"The ordinance therefore also differs from the not unusual case where discretion is lodged by the law in public officers or bodies to grant or withhold licenses to keep taverns or places for the sale of spirituous liquors and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of the fitness is submitted to the judgment of the officer and calls for the exercise of a discretion of a judicial nature."

In the Gundling Case, the ordinance upheld forbade any person from carrying on the business of selling cigarettes without first obtaining a license from the mayor, granted after a determination that he was of good character and reputation and a suitable person to be intrusted with their sale, based upon certain evidence in regard thereto submitted to the board of health and certified with its opinion to the mayor. Mr. Justice Peckham said:

"In the case at bar the license is to be issued if the mayor is satisfied that the person applying is of good character and reputation and a suitable person to be intrusted with the sale of cigarettes, provided such applicant will file a bond as stated in the ordinance. * * * The mayor is bound to grant a license to every person fulfilling these conditions, and thus the fact of fitness is submitted to the judgment of the officer, and it calls for the exercise of a discretion of a judicial nature."

So a classification of persons according to personal fitness and equipment both as so determined may be valid. In the Lieberman Case, the sanitary code provisions upheld forbade all persons from receiving, holding, keeping, selling, or delivering milk in New York City without a permit in writing from the board of health. As to the authority

conferred on the board of health, Mr. Justice Day said that it was "to issue or withhold permits in the honest exercise of a reasonable discretion." It appears from the sanitary code containing the provision so forbidding, more particularly set forth in report of the same case in 175 N. Y. 444, 67 N. E. 913, that the discretion was to be exercised mainly in view of equipment, but no doubt also of personal fitness and past history.

And so also a classification of persons according to certain reasonable considerations as so determined may be valid. In the Fischer Case the ordinance upheld forbade the erection of a dairy or cow stable except by permission of the municipal assembly. Mr. Justice Brown said:

"We do not regard the fact that permission to keep cattle may be granted by the municipal assembly as impairing in any degree the validity of the ordinance or as denying to the disfavored dairy keepers the equal protection of the laws. Such discrimination might well be made where one person desired to keep 2 cows and another 50; where one desired to establish a stable in the heart of the city and another in the suburbs; or where one was known to keep his stable in a filthy condition and another had established a reputation for good order and cleanliness. Such distinctions are constantly made the basis for licensing one person to sell intoxicating liquors and denying it to others. The question in each case is whether the establishment of a dairy and cow stable is likely in the hands of the applicant to be a nuisance or not to the neighborhood and to imperil or conduce to the health of its customers. As the dispensing power must be vested in some one, it is not easy to see why it may not properly be delegated to the municipal assembly which enacted the ordinance. Of course, cases may be imagined where the power to issue permits may be abused and the permission accorded to social or political favorites and denied to others who for reasons totally disconnected with the merits of the case are distasteful to the licensing power. No such complaint, however, is made to the practical application of the law in this case, and we are led to infer that none such exists. We have no criticism to make of the principle of granting a license to one and denying it to another, and are bound to assume that the discrimination is made in the interest of the public and upon conditions applying to the health and comfort of the neighborhood."

In all those cases where the right to carry on a particular business was made dependent on the determination of administrative officers as to equipment, personal fitness, past history, or other reasonable considerations, though such determination is made the basis of the classification, in reality the true basis thereof is the matter of equipment, personal fitness, past history, or other reasonable considerations; the commitment of the determination thereof to such officers being the only practical way of meeting such a situation.

But a classification can be made that approaches nearer to the arbitrary line than any yet considered—cases where the choice of the legislative body or of administrative officers to whom the matter is committed is the sole basis of the classification. Of course, in such cases even it is not to be supposed that the choice is made or to be made arbitrarily but only in view of all relevant considerations, and yet it is a choice that cannot be questioned when made. Such are cases where the power to limit the number of persons who may carry on a certain business or the place where it may be carried on exists. It is conceivable that the public welfare may re-

quire such a limitation, and, of course, if this is so power to make it resides in the legislative body. Where this is so power to choose the persons or place must also exist. If it does not, there can be no power to limit. Either that power must go or with it must exist the power to choose or select. A case of this sort is to be found in the Slaughter House Cases. The statute upheld therein limited the territory within which the stock landing, stock yard, and slaughter house business could be carried on and conferred on the Crescent City Live Stock, Landing & Slaughter House Company the exclusive privilege of carrying on that business. It required that company to permit others desiring to do so, upon payment of certain charges, to land, yard, and slaughter their live stock at its landing, stock yard, and slaughter house, but it excluded every one else from the right to operate a landing yard and slaughter house. The welfare of the community required that this particular business should be restricted to a particular territory, and that but one person should be allowed to carry it on. Hence the Legislature had power to so restrict and allow, and with that power went the power also to select and choose the person who was to carry it on. The one power could not exist without the other. The two powers were inseparably bound together. If there was any error in the decision in that case, it was in holding that the right to carry on such business could be conferred on a single person. There could have been no error in holding that the Legislature had the power to select the person who should carry it on. Mr. Justice Field, in his dissenting opinion, took the position that, if the Legislature had power to select in that instance, it had the power to select the persons who should carry on all the ordinary avocations of life. But this did not follow. In most avocations there is no power to limit, and in the absence of power to limit there can be no power to select.

Another case of this sort is to be found in the L'Hote Case. There the ordinance upheld prohibited women of lewd character from dwelling outside of certain limits of the city of New Orleans. Certain persons living and owning property within those limits claimed that they were deprived of their property thereby, in that it was depreciated in value, and that they were denied the equal protection of the laws. Out of this claim that case arose. Mr. Justice Brewer said:

"Upon what ground shall it be adjudged that such restriction is unjustifiable, that it is an unwarranted exercise of the police power? Is the power to control and regulate limited only as to matter of territory? May that not be one of the wisest and safest methods of dealing with the problem? At any rate, can the power to so regulate be denied? But given the power to limit the location of these persons to certain localities and no one can question the legality of the location. The power to prescribe a limitation carries with it the power to discriminate against one citizen and in favor of another. Some must suffer by the establishment of any territorial boundaries. We do not question what is so earnestly said by counsel for plaintiffs in error in respect to the disagreeable results from the neighborhood of such houses and people, but, if the power to prescribe territorial limits exists, the courts cannot say that the limits shall be other than those the legislative body prescribes. If these limits hurt the present plaintiffs in error, other limits would hurt others. But clearly the inquiry as to the reasonableness or propriety of the limits is a matter for legislative consideration and cannot become the basis of judicial

action. The ordinance is an attempt to protect a part of the citizens from the unpleasant consequences of such neighbors. Because the legislative body is unable to protect all, must it be denied the power to protect any?"

These two cases were instances where the selection was made by the legislative body. Cases exist where the right to make the selection was conferred on administrative officers. In the Christensen Case, the ordinance upheld forbade the sale of intoxicating liquors or wines without a license to be granted upon the written consent of the board of police commissioners, or in the event of their refusal upon the written recommendation of 12 citizens of the city owning real estate in the block or square in which the business was to be carried on. Here the right to carry on this business depended upon the consent of said board or of said real estate owners. It could not otherwise be carried on. The classification which it made was based upon such consent. The requirement of such consent was not a whit less stringent than the requirement of the ordinance involved in the Yick Wo Case that one to carry on the laundry business in a frame building should have the consent of the board of supervisors. Of this requirement Mr. Justice Matthews had this to say:

"They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent not only as to places but as to persons."

And again this:

"The power given them is not confided to their discretion in the legal sense of the word, but is granted to their mere will. It is purely arbitrary and acknowledges neither guidance nor restraint."

Yet the ordinance was upheld, notwithstanding that the ordinances involved in the Yick Wo Case were invalidated. The controversy over the ordinance involved in the Christensen Case arose first in the state courts, and the California Supreme Court upheld the ordinance. Ex parte Christensen, 85 Cal. 208, 24 Pac. 747. The court said:

"The objection is that this makes the license depend upon the arbitrary will and pleasure of the board of police commissioners in the first instance, and of the 12 property owners in the second, and the case of Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, and other cases from the federal courts are cited. But whatever force this objection might have in reference to licenses to carry on the ordinary avocations of life, which are not supposed to have any injurious tendency, it has no force in the present case. It is well settled that the governing power may prohibit the manufacture and traffic in liquor altogether, provided only that it does not interfere with interstate commerce."

From the state courts the controversy was transferred to the federal courts by habeas corpus proceedings. The lower federal court held the ordinance invalid, feeling bound by the decision of the Supreme Court in the Yick Wo Case. Ex parte Christensen (C. C.) 43 Fed. 243. The distinction made by the Supreme Court of California was pressed upon Judge Sawyer, but he did not concur in it. He said:

"It is sought by counsel for the city, as was attempted by the state Supreme Court, to distinguish this case from the laundry ordinance case cited, on the ground that the laundry business is a necessary business, and cannot be wholly suppressed, but only regulated, for the purposes of securing safety from fires,

while selling liquor is supposed to be injurious to society per se, and may be wholly prohibited or permitted upon such conditions as may be prescribed; that the power to absolutely prohibit necessarily includes the power to impose any terms or conditions, however arbitrary, no matter what, less than absolute prohibition, and, consequently, that the power to grant or refuse a license may be delegated to the arbitrary and unregulated will of one or more persons, official or unofficial. I cannot, as at present advised, assent to this proposition. This ordinance does not limit or regulate, or propose to limit or regulate, the sale of liquors. It would seem to be upon its face, like other license ordinances, a mere revenue measure. It does not prohibit the sale of liquors, or limit their sale to any particular portion of the city, or to any number of persons, nor prescribe any qualifications whatever which shall be necessary to entitle a party to a license, or prescribe any conditions or characteristics which shall constitute a disqualification and debar one from obtaining a license. It is not a matter of regulation at all. It simply provides that no license shall issue to any party unless he obtain the written consent of a majority of the police commissioners, or of 12 property holders in the same block, without indicating any conditions whatever upon which the assent may or ought to be given, or withheld. It leaves it to the absolute, arbitrary, unregulated will of the persons named. They can consent to grant a license to every vagabond and disreputable person in the city, and refuse to consent to a license to every respectable person in the city. The ordinance permits and authorizes such action. It puts it in the absolute, arbitrary power of these persons to control the whole retail liquor trade of the city, without regard to qualifications of the parties seeking a license, or to circumstances or conditions, or the interests of society. In my judgment, an ordinance that upon its face permits and authorizes such discrimination and inequality of operation is a violation of the Constitution of the United States. I admit the full power of the state to prohibit, limit, and control the domestic liquor traffic, and to prescribe the qualifications and conditions applicable to all of those who are to be permitted to sell liquors, but this is a very different proposition from that which claims the authority to confer upon any one or more persons the arbitrary power, in accordance with their uncontrolled will, to regulate these matters."

On appeal to the Supreme Court, Judge Sawyer's decision was reversed. Crowley v. Christensen, supra. Mr. Justice Field does not in his opinion controvert the position taken as to the nature of the power conferred and seemingly assumes that it was of the same nature as that conferred by the laundry ordinance involved in the Yick Wo Case. He distinguished these two cases in these words:

"It will thus be seen that that case was essentially different from the one now under consideration; the ordinance there held invalid vesting uncontrolled discretion in the board of supervisors with reference to a business harmless in itself and useful to the community, and the discretion appearing to have been exercised for the express purpose of depriving the petitioner of a privilege that was extended to others. In the present case the business is not one that any person is permitted to carry on without a license, but one that may be entirely prohibited or subjected to such restrictions as the governing authority of the city may prescribe."

Again, he said:

"If there were no property holders in the block, the discretionary authority would be exercised finally by the police commissioners, and their refusal to grant the license is not a matter of review by this court, as it violates no principle of federal law."

In the latter quotation he speaks of the power conferred as "discretionary authority," but, as indicated by what he says in the former quotation, the discretion he has in mind is an "uncontrolled discretion," the same discretion no doubt which Mr. Justice Matthews had in mind

when he used the words, "not a discretion to be exercised upon a consideration of the circumstances of the case." Possibly, in view of the decisions in the Fischer and Lieberman Cases, in the former of which the provision of the ordinance upheld was that no one should erect a dairy or cow stable except by permission of the municipal assembly, and in the latter of which the provision in the sanitary code upheld was that no one should sell milk without a permit in writing from the board of health, that the power conferred was a "reasonable discretion," it would not now be held that by an ordinance similar to the one involved in the Christensen Case the power conferred was an "uncontrolled discretion." But, viewing it as an uncontrolled discretion, the ordinance was upheld because it related to a business which might be entirely prohibited or subjected to such restrictions as the governing authority of the city might prescribe.

Again, in the Davis Case, the ordinance upheld prohibited any person from making any public address on any public grounds without a permit from the mayor, and one was convicted in the state courts of speaking on Boston Common in violation of this ordinance. The Supreme Court of Massachusetts had held according to Mr. Justice White:

"That the Common was absolutely under the control of the Legislature, which in the exercise of its discretion could limit the use to the extent deemed by it advisable and could and did delegate to the municipality the power to assert such authority."

This absolute power over Boston Common in the municipality was held to include the power to prescribe that no one should speak thereon without the mayor's permit. Mr. Justice White said:

"The assertion that, although it be conceded that the power existed in the state or municipality to absolutely control the use of the Common, the particular ordinance in question is nevertheless void because arbitrary and unreasonable, in that it vests in the mayor the power to determine when he will grant a permit, in truth, whilst admitting on the one hand the power to control, on the other denies its existence. The right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power includes the lesser."

In the case of Louisville Water Co. v. Wiemer, 130 Fed. 257, 64 C. C. A. 503, this court held that a regulation of a water company requiring persons engaged in the business of sprinkling streets to obtain a license from the company, and providing that more than one license would not be granted covering the same streets or part of a street, which should be granted to the applicant having the largest list of petitioning owners of abutting property, was reasonable and valid and upheld a selection made by the company under the regulation. Judge Severens said:

"Certainly it cannot be said that there would be any propriety in granting licenses to any and all comers who should demand to do the same thing. In this particular service it is obvious that this would lead to chaos, would embarrass the service to the public, and would be inconvenient and prejudicial to the company. We see nothing, therefore, that could be injurious to any lawful right of others in restricting the grant of the license to one person for a definite locality, so long as that person accomplished the duty of the company to the public in a proper way. The concession of this place to the

one who could bring the largest approval of those of the other party who were most interested seems fair."

It must therefore be conceded that a classification can properly be made on the basis of the choice or selection of the legislative body or of administrative officers to whom the matter is committed. As stated, it is not to be presumed in such cases that the choice or selection is made in the one instance or authorized to be made in the other without regard to such considerations as may be relevant thereto, and yet in fact it may be so made and have no effect upon the classification. This is so as to all businesses where the power to limit exists. Possibly it may not be so in all cases where the power to prohibit exists. Possibly the power to prohibit may not always include the power to limit. We are led to refer to this possibility in view of the Union Sewer Pipe Company Case. It would seem to be certain that the power to prohibit all trusts and combinations exists, and yet in that case a limited prohibition was held invalid. But certainly where the power to limit exists the power to select also exists.

This power to select in such cases may be likened to the power to appoint to office. As but one person can be appointed, the person having appointing power has the power of selection. Or it may be likened to the power to make grants of exclusive franchises. As but one grant can be made, the power to select the person to whom the grant shall be made necessarily exists. Such a classification in such cases has a real and substantial relation to the public welfare. The public welfare requires the limitation, and the limitation necessitates the selection. The touchstone, therefore, of the validity of legislation depriving one of his liberty or property or making a discrimination amongst the persons to whom it is applicable is the public welfare. If the deprivation or classification has a real and substantial relation thereto it is valid, otherwise it is not.

This brings us to another fundamental principle embodied in the decisions cited and referred to. It is this: A court has no right to invalidate or overthrow legislation depriving a person of his liberty or property or making a discrimination as to the persons to whom it is applicable simply because it believes to a certain degree that it has no real or substantial relation to the public welfare. Something more than this is required in order to warrant its interference. That something more is that it must be palpably clear that the legislation in question has no real or substantial relation thereto. The Legislature or local assembly acting under its authority is the governing body of the state or that portion thereof. It is its primary duty to determine what the public welfare demands, and every presumption must be indulged in its favor. It follows, therefore, that unless it is palpably clear that its determination is wrong it must be allowed to stand. Many quotations could be made in support of this position. Two will suffice. In the Gundling Case, Mr. Justice Peckham said:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and, unless

the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizens are unnecessarily and in a manner wholly arbitrary interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for federal interference."

And in the Booth Case, Mr. Justice Harlan said:

"The courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear and unmistakable infringement of rights secured by the fundamental law."

It would seem, therefore, that the New York Court of Appeals, in a holding in a certain case referred to with approval by Mr. Justice Field in his dissenting opinion in the Powell Case, did not put the matter right. That holding as stated by him was as follows:

"When a health law is challenged in the courts as unconstitutional, on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the court must be able to see that it has in fact some relation to the public health, that the public health is the end aimed at, and that it is appropriate and adapted to that end; and, as it could not see that the law in question * * * was designed to promote the public health, it pronounced the law unconstitutional and void."

Rather the court will not so pronounce a law, unless it is able to see that it will not promote the public welfare, and that beyond a reasonable doubt. And it would seem further that Mr. Justice Peckham, in the Lochner Case, did not put the matter exactly right, when he said:

"In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty."

Rather, is not the question that necessarily arises in such cases this: Is or not it palpably clear that the legislation in question is not a fair, reasonable, and appropriate exercise of the police power of the state, but is an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty?

If, then, in a given case the court must admit that it is possible for a reasonable man to conceive that the legislation in question may subserve the public welfare, it must leave it alone. As said by Mr. Justice Holmes, in the Otis & Gasman Case:

"While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a Constitution, instead of embodying only relatively fundamental rules of right as generally understood by all English speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held semper ubique et ab omnibus."

And if, further, in a given case, the court must admit that it is possible for the Legislature to have known some fact not known to

it which would make the legislation in question conducive to the public welfare, it must keep its hands off. In the Powell Case, it was agreed that the oleomargarine which the defendant was charged with having for sale, a portion of which he sold, was in packages so marked as to let purchasers know that it was oleomargarine, and it appeared from the evidence offered and rejected that it was wholesome and nutritious, yet the statute and the conviction under it were upheld because it was conceived that it was possible that most kinds of oleomargarine in the market contained ingredients that were or might become injurious to health, a fact as to which the court could not take judicial knowledge, but might have been known to the Legislature and caused the passage of the law. But just here the caution of Mr. Justice Brewer, in the Gulf, C. & S. F. R. Co. Case, should be borne in mind. It is in these words:

"While good faith and a knowledge of existing conditions on the part of the Legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals and corporations to hostile and discriminating legislation is to make the protecting clause of the fourteenth amendment a mere rope of sand in no manner restraining state action."

A final fundamental principle embodied in said decisions which the proper disposition of this case requires should be taken note of is this: If legislation depriving one of his liberty or property or making a discrimination as to the persons to whom it is applicable does in fact have a real and substantial relation to the public welfare both so far as said deprivation and discrimination are concerned, the motive which prompted its enactment cannot be inquired into. In the Soon Hing Case, Mr. Justice Field said:

"The principal objection, however, of the petitioner to the ordinance in question is founded upon the supposed hostile motives of the supervisors in passing it. The petition alleges that it was adopted owing to a feeling of antipathy and hatred prevailing in the city and county of San Francisco against the subjects of the Emperor of China resident therein, and for the purpose of compelling those engaged in the laundry business to abandon their lawful vocation, and residence there, and not for any sanitary, police, or other legitimate purpose. There is nothing, however, in the language of the ordinance, or in the record of its enactment, which in any respect tends to sustain this allegation. And the rule is general, with reference to the enactments of legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile. And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretense."

In the Dobbins Case, Mr. Justice Day said:

"It is urged that, where the exercise of legislative or municipal power is clearly within constitutional limits, the court will not inquire into the motives which may have actuated the legislative body in passing the law or ordinance in question. Whether when it appears that the facts would authorize the exercise of the power, the courts will restrain its exercise because of alleged wrongful motives inducing the passage of an ordinance is not a question necessary to be determined in this case; but, where the facts as to the situation and conditions are such as to establish the exercise of the police power in such manner as to oppress or discriminate against a class or an individual, the courts may consider and give weight to such purpose in considering the validity of the ordinance."

And, in the Lochner Case, Mr. Justice Peckham said:

"It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power, for the purpose of protecting the public health or welfare, are in reality passed from other motives. We are justified in saying so, when from the character of the law and the subject upon which it legislates it is apparent that the public health or welfare bears but the most remote relation to the law."

There is nothing in these statements of Mr. Justice Day and Mr. Justice Peckham inconsistent with that of Mr. Justice Field in the Soon Hing Case. All that they mean is that the courts have the right to consider the question whether any given legislation has a real or substantial relation to the public welfare, and, if they determine that it has not, they have the right to conclude that it was enacted, not for the public welfare, but for the purpose of depriving the persons affected by it of their liberty and property. In such a case the latter is the real motive behind the enactment, and the claim that it was the public welfare that led thereto is mere pretense. But, where it determines that such legislation does in fact have a real and substantial relation to the public welfare, they do not mean to intimate that the courts have the right to inquire into the real motives that brought about its enactment, and if they conclude that in fact it was not the public welfare, but some sinister motive that was at the bottom of it to overthrow it. Always, as is to be gathered from Mr. Justice Peckham's statement, the inquiry as to motive is limited to the character of the law and the subject upon which it legislates. It cannot go outside of that.

This completes our presentation of the fundamental principles embodied in the decisions of the Supreme Court we have added to those cited and relied on by appellee. There is nothing in the latter decisions qualifying in the slightest those principles. We have just directed attention to Mr. Justice Day's statement, in the Dobbins Case, and Mr. Justice Peckham's statement, in the Lochner Case, on the question of motive and shown their true bearing. In the Yick Wo Case, the ordinance involved made the discrimination it permitted to turn on the choice of the board of supervisors, a discretion not "to be exercised upon the circumstances of each case," but an "uncontrolled discretion." There was no power to prescribe a limit as to how many persons should carry on the laundry business, and hence there could have been no power to select those who should carry it on. In the Gulf, C. & S. F. R. Co. Case, it was held that the classification of the statute involved therein, by which the attorney's fee imposed was

limited to railroad corporations, had no real or substantial relation to the public welfare. It was unreasonable and arbitrary and did not embrace all persons similarly situated. This was true also of the classification of the statute involved in the Cotting Case. It limited the charges alone of the Kansas City Stock Yards Company and omitted other companies engaged in the same business at the same place. The discrimination was attempted to be upheld by the circumstance that the other companies did a smaller business. But it was held that this was not a reasonable basis of classification and was purely arbitrary. Mr. Justice Brewer said:

"If once the door is opened to the affirmance of the proposition that a state may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guaranty of the equal protection of the laws is lost."

And likewise, of the classification of the statute involved in the Union Sewer Pipe Co. Case, it was held that the limitation of the application of its provisions to all sellers of articles outside of agriculturists and live stock dealers had no real or substantial relation to the public welfare. It did not apply to all similarly situated and was unreasonable and arbitrary.

Then, as to the Dobbins Case: The city of Los Angeles, on August 16, 1901, enacted an ordinance prescribing the limits within which gas works might be erected. Under this ordinance and a permit from the fire commissioners, Mrs. Dobbins had begun the erection of gas works and expended considerable money in doing so. Thereupon and whilst the erection of said works was in progress, to wit, on November 25, 1901, a little over three months after the enactment of said ordinance, said city enacted another ordinance narrowing the limits within which gas works might be erected, so as to exclude the place where said works were being erected. Within the original limits there was a large amount of vacant and unoccupied land, and it was devoted almost exclusively to manufacturing enterprises. It was held that the ordinance narrowing the limits had no real or substantial relation to the public welfare, and that the purpose of its enactment was to deprive Mrs. Dobbins of her property so that she might not compete with another gas company supplying the city with gas. In the Lochner Case, on the same ground, the statute limiting hours of labor in bakeries was invalidated. In all these cases it was held, not only that the statute or ordinance involved had no such relation to the public welfare, but that it was palpably clear that such was the case.

With this preliminary consideration of fundamental principles we are prepared to take up the act in question and determine its validity. At the outset, then, it must be conceded that there are two things which do not affect its validity and have no bearing whatever upon the determination thereof. One is the effect of the enforcement of the act on the liberty and property of the appellee. It is true that, when appellee acquired its property and made its investment, there was no restriction upon its right to operate a race track for running horses. It was a lawful business, and appellee had a right to conduct it as it chose, provided it did not infringe the rights of others. And it may be true

that an enforcement of said act may result in a material pecuniary loss to the appellee. Yet notwithstanding this the act is valid, if it is not palpably clear that it has no real or substantial relation to the public welfare.

The other thing is the motive which prompted its enactment. It is urged with some fervor that it was to prevent competition on the part of the Western Jockey Club's association, the appellee, with the American Turf Association's two associations, the New Louisville Jockey Club and the Latonia Jockey Club, during such dates as they desire to have race meetings, and particularly on the part of the appellee with the New Louisville Jockey Club, during its spring race meeting in May, which it has held at that time for over 30 years in succession; and possibly this may have had something to do with its enactment. The matters relied on to establish such motive are such as these: Prior to the enactment of said act, racing in Kentucky with running horses, it is said, had been in vogue for over 100 years without state regulation. It was not until appellee appeared on the scene that any attempt at such regulation was made. Again, in the ordinary course of things the act in question would not have gone into force until some time in June, after the time of said New Louisville Jockey Club's race meeting in May of this year had been held. There would not, therefore, in that contingency, have been anything to prevent appellee holding a race meeting at the same time and thus competing with said club. The ordinary course of things was not pursued, but an emergency clause was inserted in the act which made it take effect immediately upon approval of the Governor, and the only emergency stated was that there was no general law regulating racing in Kentucky, and it was desirable that one should be in operation as soon as possible. Again, the appellant Charles F. Grainger, one of the members of the commission, was at the time of his appointment and has been ever since president of said New Louisville Jockey Club, and said club's application for license and assignment of dates was made by M. J. Winn, president of said American Turf Association. And, finally, since the enactment of said act, nothing has been done practically of any substantial bearing that would not have been done had there been no act, except to prevent appellee from holding a race meeting that would compete with said American Turf Association's two clubs, said New Louisville Jockey Club and said Latonia Jockey Club.

Yet, notwithstanding such may have been the motive that prompted the enactment of said act, the act is valid if it is not palpably clear that the act has no real or substantial relation to the public welfare. The validity, then, of the act hangs upon but a single consideration. There is but one question to be answered in determining its validity. That question is this: Is it or not palpably clear that said act has no real or substantial relation to the public welfare? It is to be noted that the question is not: Does it or not have a real or substantial relation thereto? But: Is it or not palpably clear that it does not? This must be determined both as to the deprivation it authorizes and the classification it makes. In order to answer it correctly we must have in mind just what it provides in the way of deprivation and classification, and this is to be found in the powers it confers on the commission and the

exemptions it makes as to trotting horse and fair races. Apart from the power to prescribe the rules, regulations, and conditions under which running races shall be conducted in Kentucky, it confers on it the power to grant and to revoke licenses and to assign and fix dates at which race meetings under the licenses may be held. It is true that no express power is conferred to assign or fix dates unless it is included in the power to prescribe such rules, regulations, and conditions, as to which we have grave doubt. But we think it is to be implied from the second court review provision contained in the proviso of section 3, which provides that a refusal to assign dates for at least 40 days in each year shall be subject to court review, and the commission from the form of license adopted by it seems to have so construed the act.

The power to grant licenses is to be exercised when "in the judgment of the commission a proper case for issuance of" a license is shown. The power to revoke a license is to be exercised upon "any violation" of the rules, regulations, and conditions prescribed by the commission, or "whenever the continuance" of the license "shall be deemed by the commission not conducive to the interests of legitimate racing." There is nothing said as to the considerations that shall affect the commission in the matter of fixing dates. But, as the act in no other particular contemplates that the commission shall act otherwise than along reasonable lines, it would not seem that it contemplated that it should do so here. So that we must conclude that the power conferred on the commission in all particulars was to act "in the honest exercise of a reasonable discretion." That such is the case is made certain by the provision that the action of the commission in all three particulars was subject to court review. Its action has to stand the test of judicial criticism. It is suggested that the only review provided for in the matter of assignment of dates was of a refusal to assign at least 40 days in each year, and that no review was provided of a refusal to assign particular dates applied for—so that, if the commission assigned at least 40 days in each year, its action was final. This is the letter of the provision, but as it seems that it is the general intent of the act that in no particular should the commission's action be final, it is hardly its spirit. We need not, however, commit ourselves on this point. Even if it was intended that the action of the commission as to the assignment of particular dates applied for should be final, yet there is no reason to doubt that it was further the intent of the act that the action of the commission in regard thereto should be had "in the honest exercise of a reasonable discretion." And it may be conceded that it was still further its intent that in case two associations should apply for the same dates the commission should have power to assign the dates applied for to one and refuse them to the other. The room for the exercise of a reasonable discretion in such a contingency may be small, and it may tax one to indicate in advance possible considerations that might reasonably influence the commission in assigning the dates to one association rather than the other, yet it cannot be said that there are no such considerations, and that the commission would be left to the alternative of doing as it pleased or tossing a copper. Is it or not then palpably clear that the said act in whole or in part has no real or substantial relation to the public welfare? Appellee's real contention is

that said act, in that it exempts the operation of trotting and fair association race tracks from its provisions, and confines their application to the operation of running race tracks, and further in that as to the operation of running race tracks it confers on the commission the power to assign dates at which race meetings may be held, including as it does the power to choose between two associations owning such race tracks in the same or separate communities within the state as to which of them may hold a race meeting at any particular time, is out of such relation to the public welfare. It is therefore not the deprivation but the discriminating or classification feature of the act of which complaint is made. There are, as indicated, two particulars in which it has such feature, and it is claimed that in each particular the act has no real or substantial relation to the public welfare. We will dispose of the claim as to the last particular first, and, in so doing, we will assume that the claim as to the first particular is unsound. To do this correctly it is necessary that we understand how it is that legislation with reference to the operation of running race tracks can have relation at all to the public welfare of the state of Kentucky. It is in this way: The operation of such race tracks is a source of amusement to such of its people as enjoy running races. It may be, as contended by appellants, also the source of great material good in that large sums of money are invested in said state in thoroughbred horses, from which running horses are produced, and the operation thereof is essential to the maintenance of this industry. To what extent the operation of such race tracks contributes to the welfare of that state in these particulars it is not for us to say. Conceding that it does so to a material extent, it must be admitted that in certain particulars it is also detrimental thereto, mainly in one. As it is a matter of common knowledge, this court judicially knows that an invariable accompaniment of the operation of such race tracks is betting on the races there run. This betting is carried on upon the grounds by means of what is called book making, possibly also by pool selling, and otherwise. The betting induced thereby is not confined to the race tracks. It is carried on also in pool rooms away from the tracks; information of the results of the races being transmitted thereto by means of the telegraph. It is not necessary that we descant upon the demoralizing effect of such gambling on the communities where it is carried on, particularly of that carried on in pool rooms. It is known to all. That such pool rooms or betting away from the track exists, or at least has existed, in the state of Kentucky, we know from the decision of the Court of Appeals in the following cases, to wit: Cheek v. Comonwealth, 79 Ky. 359; Commonwealth v. Simond, 79 Ky. 618; Bollinger v. Commonwealth, 98 Ky. 574, 35 S. W. 553; Commonwealth v. Enright, 98 Ky. 635, 33 S. W. 1111.

In the Cheek Case, it was held that one who had sold pools upon horse races in a house under his control within the state had been guilty of the common-law offense of "keeping a disorderly house." In the Simond Case, it was held that one who had operated therein a machine known as "French Pool" or "Paris Mutual," used in betting on horse races, had been guilty of a violation of a statute of the

state prohibiting the operation of a "contrivance used in betting." And, in the Bollinger and Enright Cases, it was held that certain persons who had permitted persons to habitually assemble in houses under their control and there engage in betting on horse races had been guilty of the offense of maintaining a common nuisance. In the Bollinger Case, Judge Lewis said:

"And such gaming house is really more conducive of evil to the public morals than a race track, because those who assemble there are invited only by passion for gambling and cupidity."

In this expression it is recognized that a race track is a source of evil both in the gambling that is permitted there, and in that which is carried on in pool rooms; the evil in the latter particular being greater than that in the former. In its effect on this evil is one way at least then in which legislation with reference to the operation of running race tracks can have relation to the public welfare. And so great is that evil that there can be no doubt that legislation having the effect of prohibiting the operation thereof within the state of Kentucky entirely would be valid, notwithstanding it would put an end thereto as a source of amusement and might destroy entirely its thoroughbred horse industry. Such legislation would find support in the decision of the Supreme Court in the cases of Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079, and Douglas v. Kentucky, 168 U. S. 488, 18 Sup. Ct. 199, 42 L. Ed. 553, in which legislation abolishing lotteries was upheld, and, in the Booth and Otis & Gasman Cases, in which legislation abolishing dealing in options and sales of corporate stock on margins was upheld. Certainly legislation whose effect is not to abolish the operation of such race tracks, but to minimize this evil and other evils arising therefrom, has a real and substantial relation to the public welfare and is valid.

In the cases of State v. Roby, 142 Ind. 168, 41 N. E. 145, 33 L. R. A. 213, 51 Am. St. Rep. 174, State v. Forsythe, 174 Ind. 466, 44 N. E. 593, 33 L. R. A. 221, and Grannan v. West Chester Racing Association, 153 N. Y. 449, 47 N. E. 896, such legislation was upheld and treated as valid. The Indiana statute provided for no commission nor a license to operate a race track. It simply limited the time within which racing might be had. It could only be had between April 15th and November 15th in each year. Race meetings by any association could not be held oftener than three times a year and two times in any period of 60 days, nor longer than 15 days at a time, nor until after the full period of 30 days had elapsed after a meeting had been held. The New York statute provided for a commission and the granting of licenses to operate according to certain rules. The Indiana statute seems to apply to all race tracks, and the New York statute only to running race tracks.

Such is the character of the act in question. It has a tendency to minimize all evils arising from the operation of running race tracks. It limits the time within which they may be operated, to wit, between April 1st and December 1st in each year, between sunrise and sunset and for such length of time as the commission may determine. It requires a license to operate at all and provides for its revocation.

It authorizes the commission to prescribe the rules, regulations, and conditions under which racing may be had. In all these particulars, therefore, the act has real and substantial relation to the public welfare. But these are not the only particulars in which it has the tendency to minimize those evils. The power to assign dates for race meetings involves not only the power to limit their duration but the power to limit the number of associations within the state or in any given community that may operate during the same period of time, and even to limit to one association the right to operate its race track during any given period of time. The power to limit in this particular has a tendency to minimize those evils. The more associations that are operating their race tracks within the state, and particularly within the same community, during the same period of time, the greater the harm to the welfare of the state, and the less the number of associations that are so doing the less the harm. This is self-evident and needs no elaboration. It follows that this right of limitation involved in the power to assign dates has such relation to the public welfare and must be valid. If this is so, then the power to choose and select the associations or association that shall operate during any given period of time, involved also in the power to assign dates, also has such relation to the public welfare and must be valid. The power so to limit cannot exist without the power to choose or select. The fact that the power to limit has a real and substantial relation to the public welfare necessitates that the power to choose or select has such relation thereto.

We are driven then to the conclusion that the power to assign dates with all it involves has such relation to the public welfare and is valid. This is so even if the assignment of the commission of particular dates, and hence the power to choose or select is final and conclusive, and not subject to court review. Direct authority in support of this position is to be found in the decisions of the Supreme Court in the Slaughter House, Christensen, L'Hote, and Davis Cases and of this court in the Wiemer Case. This disposes of this portion of the discriminating or classification feature of the act in question. And in passing it is to be noted that, even if we are wrong here, it does not follow that the whole act is unconstitutional, that appellee is entitled to operate its track without a license, and that the first provision of the order appealed from is correct. It is possible to take the view that this portion of the act is invalid and the rest of it valid.

Then, as to the other portion of the discriminating or classification feature of said act, to wit, its application solely to associations operating running race tracks. Is it or not palpably clear that in so far it has no real and substantial relation to the public welfare; that in making the discrimination or classification in this particular the act does not have regard to the requirements of the public welfare? We think there can be no question that it is not. As stated, gambling is the invariable accompaniment of the running race track. It is allowed on the track and is carried on in pool rooms away therefrom. Those tracks are often operated by gamblers and always by those who encourage such gambling. The gambling so induced is a source of

great revenue to them in the sale of the book making or pool selling privileges and of the news privilege. They are operated, therefore, from a commercial standpoint. Possibly there may be some exception to this statement, but it is certainly correct in the main. Not infrequently said race tracks have been so operated as to create great scandal and to call forth attempts at their suppression. None of this can be said to be true of racing on fair association tracks. They are operated only once a year, usually not longer than a week at a time. Such betting as is allowed at them is not of the refined kind involved in book making or pool selling, and is not the source of demoralization. So far as pool rooms are concerned, they have no connection with such racing, as a rule at least. As to trotting race tracks this court does not know that any of the things said in regard to running race tracks are to any material extent true of trotting race tracks. Probably at times the races run on them are bet upon through book making and pool selling both on the track and in the pool rooms away therefrom, but to what extent this is so we do not know. Nor do we know that they are mainly operated from a commercial standpoint or are attended with any degree of scandal. In the absence of such knowledge, we cannot say that the exemption of them from the provisions of the act in question does not have a real and substantial relation to the public welfare. As in the Otis & Gasman Case the California statute prohibiting the sales of shares of corporate stock on margin and of no other articles was upheld on the ground that probably the evil sought to be stopped was in California confined in the main to such sales, so here we cannot say that it is not possible that the evil that is affected by the act in question is not confined in the main to the running race track. To say the very least, therefore, it is not palpably clear that this classification feature of the act does not have real and substantial relation to the public welfare.

It must be held, therefore, that in neither particular as to which complaint is made is said act in violation of the fourteenth amendment. In our consideration of the question as to whether it is, we have not found it necessary to consider the reason for the commissioner's action in refusing to assign to appellee the date for which it applied. The reason assigned in the minutes of the meeting of the commission is that said dates had been previously assigned to the New Louisville Jockey Club and the Latonia Jockey Club. The reason will hardly stand criticism. The oral applications of said clubs were made at the same meeting at which appellee's written application was filed. The only ground for stating that the dates had been previously assigned was that said oral applications were first acted on and granted before appellee's application was acted on. And the appellants in their answer showed a disposition to get away from the reason they had so assigned in alleging as a reason for their action that appellee's officers had after presenting its application stated that they did not desire an assignment of the dates applied for, and that appellee was not properly equipped for having races at those dates. The evidence presented in the lower court might justify the conclusion that the true reason therefor was to prevent competition, at least, with said New Louisville

Jockey Club; and, further, that the assigning of said dates to said club and excluding of appellee therefrom was due to a preference of it over appellee, and not to any consideration relating to the public welfare, and that in making said assignments said club was given what is termed the cream of the racing season at Louisville. Possibly the preference so shown said club may find some justification in the fact that the public welfare did not figure at all in the commission's had operated its race tracks. But said preference thus shown and the fact that the public welfare did not figure at all in the commission's action in no way affects the validity of the act in question. Said act is not to be construed as authorizing the commission to act otherwise than "in the honest exercise of a reasonable discretion," and the possibility that it may act otherwise and its action may not be reviewable does not for the reasons heretofore stated call for the overthrow of any of its provisions.

The claim set forth in the bill that it is in violation of the tenth section of the first article of the federal Constitution is not insisted on here, and no point seems to have been made of it below. So no further reference need be made to it.

As to the wisdom of the enactment of said legislation or of any of its details it is not for us to say. We are concerned only with the question as to whether it is in violation of the federal Constitution.

Then as to the second provision of the order appealed from: That, as heretofore stated, presupposes that said act is constitutional, and that appellee needs a license in order to operate its race track lawfully. It in effect commands the appellants to grant it a license. Appellee maintains that it was entitled thereto because the right of review conferred by the act is such a right as it had a right to assert, and the action sought to be reviewed was in violation of the federal Constitution. We do not find it necessary to take issue here as to either position taken. Assuming for the sake of the argument that both are correct, still appellee was not entitled to said provision of the order. This is so for several reasons. In the first place, if appellee was entitled to a license at all, it was not entitled to as broad a one as that which the appellants by said provision were so commanded to issue. The only grounds upon which it can be said that it was entitled to such a broad license are that the act did not empower the commission to assign dates or in so far it was unconstitutional. But we have already reached the conclusion that neither ground is maintainable. Then, again, the commission has never refused to issue the appellee a license, and no showing has been made that if applied to therefor it would refuse to grant it. Appellee has never applied for a license, and hence the commissioner has never had an opportunity to refuse to grant it. The only thing that it has applied for is an assignment of particular dates. If that application is to be treated as in effect an application for a license also, the refusal to assign dates applied for was not a refusal to grant a license, and it cannot be so treated.

And, finally, the suit below was against the appellants in their individual, and not in their official, capacity. It was in their official

capacity only that they had power to grant a license or to take any other action under the act.

The fact that this court has no jurisdiction of an appeal from the final decree in said suit is no reason for dealing with this appeal in any manner different from which it would be dealt with if it had jurisdiction thereof; and this case comes within the rule recognized in the case of Louisville Home Tel. Co. v. Cumberland Tel. & Tel. Co., 111 Fed. 663, 49 C. C. A. 524, for reversing an order granting a preliminary injunction.

The order appealed from is therefore reversed, and the case remanded for further proceedings consistent herewith.

BEALMEAR v. HUTCHINS et al.

(Circuit Court of Appeals, Fourth Circuit. November 8, 1906.)

No. 580.

1. PUBLIC LANDS—CHEROKEE LANDS OF NORTH CAROLINA—MANNER OF PRIVATE ENTRY.

Pub. Laws N. C. 1835, p. 7, c. 6, as amended by Pub. Laws 1836–37, p. 29, c. 7, relating to Cherokee Indian lands, and carried into 1 Rev. St. N. C. 1837, c. 42, §§ 1, 36, made all vacant and unsurveyed lands west of the Meigs and Freeman line of 1802, which had been acquired by the state from the Cherokee Indians by the treaties of 1817 and 1819, subject to entry and grant under the general entry and grant laws of the state, and a grant of lands within said territory from the state, issued pursuant to such authority, and regular on its face, is presumptively of lands which were vacant and unsurveyed, and valid, and cannot be collaterally attacked. Such a grant is sufficient, prima facie, to support an action of ejectment.

2. SAME—VALIDITY OF GRANT.

A grant of land from the state, based on a prior entry, and issued on the payment of the purchase price in accordance with said entry, is not affected by a law enacted between the date of the entry and the issuance of the grant.

3. EVIDENCE—RULING ON ADMISSIBILITY OF DEED.

In passing upon the admissibility of state grants or deeds offered as evidence by plaintiff in ejectment as the foundation of his title, the only question is as to the competency of the instruments, and an objection to the same will not be sustained unless the probate is defective.

4. EJECTMENT.

The rulings of the court, in excluding evidence offered by a plaintiff in ejectment to prove title, considered, and *held* erroneous.

5. PUBLIC LANDS—NORTH CAROLINA—CREATION OF NEW COUNTY—COMPLETION OF ORGANIZATION.

Jackson county, N. C., was created by Pub. Laws 1850–51, p. 97, c. 38, from territory of Macon and Haywood counties, but by chapter 39 (page 99), passed on the same day, it was provided that the officers of the old counties should continue to exercise jurisdiction over the territory cut off from their respective counties as before, and there was no provision for the permanent organization of Jackson county until the enactment of chapter 44, p. 97, Laws 1852, under which such organization was made in 1853. *Held*, that until such time Jackson county had no legal existence, and that an entry in 1852 of public land situated in that part of Jackson county taken from Macon county was properly made before the entry taken of Macon county.

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

For opinion below, see 134 Fed. 257.

Geo. H. Smathers (F. A. Sondley, on the brief), for plaintiff in error.

James H. Merrimon, for defendants in error.

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

PRITCHARD, Circuit Judge. This is an action of ejectment brought by the plaintiff in error against the defendant below Thomas Hutchins, in the superior court of Swain county, N. C., on the 16th of October, 1899, to recover of the defendant the possession of two tracts of land of 640 acres each, situate and lying in Swain county. The defendant the Whittier Lumber Company was, by an order of the presiding judge of the superior court of Swain county, permitted to become a party and defend the title to the said two tracts of land as the landlord of the defendant Hutchins. Upon a petition filed by the defendant Whittier Lumber Company on June 14, 1900, the case was removed from the superior court of Swain county to the Circuit Court of the United States at Asheville. The case was tried at the November term, 1904, of the Circuit Court, and the following issues submitted: (1) Is the plaintiff the owner in fee simple, as alleged in his complaint, of the land described therein and entitled to the possession thereof? (2) Is the defendant in the wrongful possession thereof as alleged in the complaint? (3) What damages is the plaintiff entitled to recover?

The plaintiff offered in evidence state grant No. 16 and patented by the state to J. L. Moore on January 5, 1854. Counsel for defendants in error objected to the introduction of this grant for the following reasons: First, that the land embraced in said grant was not subject to entry under the laws of North Carolina, on the date the same purported to have been entered, the 26th day of July, 1852, and that the said grant obtained thereon was for that reason void; second, that said land appeared from said survey to have been entered before the entry taker of Macon county, after the county of Jackson had been created by the General Assembly of North Carolina, and that such entry was not authorized by the laws of North Carolina and had not been cured by any subsequent legislation enacted by the state of North Carolina, and that said grant was for that reason void.

At this stage of the trial, and in connection with the objections made by the attorneys for the defendants to the introduction of said grant in evidence, in order to present the point as to the validity of the said grant, and another grant, being grant No. 18, issued and patented to J. L. Moore by the state of North Carolina, adjoining grant No. 16, entered, surveyed, and granted on the same date, and of the same character, the plaintiff's attorney admitted that the said grants were the sole basis of plaintiff's title to the said two tracts of land, and thereupon in open court, and in the presence of the court and jury, the fol-

lowing agreements and admissions were made by Geo. H. Smathers, attorney for the plaintiff, and Jas. H. Merrimon, of the law firm of Merrimon & Merrimon, attorney for defendants, as to the facts: First, that the two tracts of land described in plaintiff's complaint, and sought to be recovered in this action, lie west of the Meigs and Freeman line, and within the territory acquired from the Cherokee Indians by treaties made and concluded between the United States and the Cherokee Nation or Tribe of Indians, in the year 1817, and 1819, and that said tracts of land are a portion of what are known as "Cherokee Lands"; second, that the said lands are a part of the territory taken from Macon county by the act of the General Assembly of North Carolina, ratified the 29th day of January, 1851 (Pub. Laws N. C. 1850–51, p. 97, c. 38), establishing the new county of Jackson, and are located within the boundaries prescribed by the General Assembly under that act for the said new county; third, that at the dates of the entries of the said two tracts of land, by J. L. Moore on the 26th day of July, 1852, and also at the date of said grants by the state of North Carolina on the 5th day of January, 1854, to J. L. Moore, the said lands were located within the boundaries prescribed by the legislation establishing the new county of Jackson; fourth, that, since the entries and grants of said two tracts of land to J. L. Moore, another new county has been established by the legislation of North Carolina, called Swain county, and the said two tracts of land were at the commencement of this action and are now in Swain county; fifth, that the several treaties between the United States and the Cherokee Indians pertaining to the Cherokee lands in North Carolina should appear in the facts, and also all legislation, general or special, by the state of North Carolina pertaining to the said Cherokee lands, or their entry and grant, and also the act of January 29, 1851, establishing the county of Jackson, together with general or special acts pertaining to the said county, should constitute part of the facts in this case—these to be read from the books and records; sixth, in this connection the plaintiff offered in evidence grant No. 18, issued and patented by the state of North Carolina to J. L. Moore on January 5, 1854, covering the other tract of land described in plaintiff's complaint, which it was admitted by the plaintiff was entered on the same date upon a similar survey, and under the same circumstances as grant No. 16 (Exhibit A) aforesaid, and same objections were made by the counsel for the defendants to the introduction of said grant in evidence as that made to grant No. 16 (Exhibit A) aforesaid. Upon the foregoing admissions and agreed state of facts, and after a full discussion of the matter by the counsel for both plaintiff and defendants, the court sustained the objections of defendants and refused to admit the grants in evidence and declared the same to be void.

The plaintiff next offered to prove that these grants were duly recorded in Jackson county within the time required by law, and offered to introduce in evidence the deeds and a certified copy of a will constituting the plaintiff's (H. Bealmear's) muniment of title to said two tracts of land, grants Nos. 16 and 18 aforesaid, and prove the location of the same, and that said deeds had been recorded in the proper counties, and that said will had been duly proven, probated, and recorded,

etc., in the manner provided by the laws of North Carolina, whereupon the court asked counsel for the plaintiff if the deeds and copy of will aforesaid were offered in evidence with a view of showing any other title than that derived through grants Nos. 16 and 18 aforesaid, or an actual possession of the said two tracts of land under any of said deeds as color of title, to which the counsel for plaintiff replied, "No," but offered to introduce the same with the view of showing the plaintiff's chain of title to the tracts of land in controversy, and admitted that he relied solely on the validity of the grants and chain of title to show title in plaintiff to said tracts of land. Counsel for the defendants, without examining the deeds and certified copy of will, and without even admitting that they passed such title as they purported to convey, objected to the introduction of the same in evidence upon the ground that the grants aforesaid had been declared by the court to be void, and that said evidence was immaterial. This objection was sustained by the court. No evidence whatever was offered by the defendants. The court then directed the jury to answer the issues in favor of the defendants.

The merits of this controversy have been ably presented by counsel representing the respective parties. The General Assembly of North Carolina at its session of 1789 passed an act reserving to the Cherokee Indians a vast territory of country, which is now known as "Western North Carolina" and "Eastern Tennessee." The portion of this territory embraced in Western Carolina was at that date known as "Cherokee lands." By the fifth section of an act passed by the General Assembly of North Carolina in 1783, entitled "An act for opening the land office for the redemption of specie and other certificates," etc., the following reservation was made for the use of the Cherokee Indians, to wit:

"That the Cherokee Indians shall have and enjoy all of that tract of land bounded as follows: Beginning on Tennessee where the southern boundary of this state intersects the same nearest Chickamauga towns, thence up the middle of the Tennessee and Holston to the middle of the French Broad, thence up the middle of the French Broad river (which lands are not to include any island or islands in said river) to the mouth of big Pigeon river, thence up the same to the head thereof, thence along the dividing ridge between the waters of the Pigeon river and the Tuckasejah river to the southern boundary of this state; and the lands contained within the aforesaid bounds shall be and are hereby reserved unto the said Cherokee Indians and their nation forever; and anything herein to the contrary notwithstanding."

Section 6 of said act reads as follows:

"That no person shall enter and survey any lands within the bounds set apart for the said Cherokee Indians, under a penalty of fifty pounds specie for every such entry so made to be recovered in any court of law in this state by and for the use of any person who shall sue for the same and all such entries and grants thereupon, if any should be made shall be utterly void."

The Legislature of North Carolina, at its session of 1789, passed an act ceding or authorizing the cession of the section of country comprising the state of Tennessee to the United States, and the deed of cession was made February 25, 1790. By the adoption of the Constitution of the United States the several states surrendered their power to make treaties with the various Indian tribes. Subsection 3 of sec-

tion 8, and also section 10, of article 1 of the Constitution of the United States. Therefore, after the adoption of the Constitution, all treaties with Indians had to be made with the United States. Nevertheless, when a treaty was made which had for its object the extinguishment of the title of the Indians or their right of occupancy to the land within the original 13 states, the land reverted to and became a part of the public domain of the states.

Among other things, our attention has been called to a number of treaties entered into from time to time by the United States with the Indians who originally occupied the territory known as "Western North Carolina." Without undertaking to enter into details as to when and where these treaties were made, or as to the amount of territory affected by the respective treaties, we will content ourselves by saying that the Indians from time to time disposed of their lands by treaty and were finally divested of the remaining portion east of the ceded territory (that is to say, the boundary line between North Carolina and Tennessee) by the New Echota Treaty entered into by the Indians with the United States at New Echota, Ga., on the 29th of December, 1835. By the adoption of this treaty the state of North Carolina became reinvested with title to all the lands in said territory. This treaty contained a reservation to the effect that a certain class of individual Indians might have the right to remain east on the terms and conditions named, and that they should be entitled to a "pre-emption right to 160 acres of land at the minimum Congress price to include their improvements." This was the last treaty made between the United States and the Cherokee Indians before they moved west. These Indians were commonly known as "Eastern Cherokees," and those who had emigrated to the west prior to that time were known as "Western Cherokees."

The Legislature, at its session of 1819, passed an act in regard to the disposition of the Indian lands that had been acquired by treaty, the first, second, third, fourth, fifth, sixth, seventh, eighth, and tenth sections of which are as follows:

"1. That as soon as may be convenient after the passage of this act, the Governor shall appoint two commissioners whose duty it shall be to superintend and direct the manner in which the said lands shall be surveyed and laid off into sections containing from fifty to three hundred acres of land; that they shall further cause the principal surveyor to note down in each of said sections the quality of the land contained therein, stating that it is of the first, second or third quality; and in all cases where it can be done with convenience, or the situation of the land will admit of it, such portion of the adjoining mountainous lands shall be included in each section as may be deemed sufficient for buildings, fences, fuel and other necessary improvements.

"2. That one principal surveyor of skill and integrity, shall also be appointed by the Governor, with full power and authority to appoint as many deputy surveyors, chain carriers and markers, and to employ as many pack horses as may be thought necessary to complete the said survey in the most speedy and effectual manner; for whose conduct the said principal surveyor shall give bond and security in the sum of ten thousand dollars payable to the Governor for the time being, for the faithful discharge of the several duties imposed by this act. It shall further be the duty of the said principal surveyor, under the directions of the commissioners aforesaid, to cause each section by him surveyed to be measured and marked, the corners to be clearly designated on trees, or otherwise, with the number of each section.

"3. That each surveyor shall note in his field book the true situation of all mines, springs, mill seats and water courses, over which the lines he

runs shall pass, and those contiguous thereto; that the said field book shall be returned to the commissioners, who shall cause their principal surveyor therefrom to make a description of the whole lands surveyed, in three connected plats, one of which, when completed, shall be transmitted to his excellency, the Governor, one to the secretary's office, and the other lodged and recorded in the clerk's office of the county of Haywood.

"4. That it shall be further the duty of the said commissioners to ascertain and fix upon some central and eligible spot for the erection of the necessary public buildings, whenever that section of the state may be erected into a separate county, and that four hundred acres surrounding said site shall be reserved for the future disposition of the legislature.

"5. That no portion of said lands shall be surveyed and laid off into sections, except so much thereof as in the estimation of said commissioners will sell for fifty cents per acre; and that the residue of said lands shall be reserved for the future disposition of the legislature, and that no part or portion thereof shall be liable to be entered in the entry-taker's books for the county of Haywood, or elsewhere, until provision be made by law for the disposal thereof; and entries heretofore made, or grants obtained or which may hereafter be made, otherwise than as provided by this act, be and the same are hereby declared to be utterly void and of none effect.

"6. That the Governor, on receipt of the plats and drafts heretofore provided for in this act, shall give notice by proclamation in all the newspapers published in the city of Raleigh and in such other papers in the adjoining states of South Carolina, Georgia, Virginia and Tennessee, of the time and place of sale, as he may deem advisable which in no case shall be less than two months from the date of the notice, that the said lands shall be exposed at public sale to the highest bidder at Waynesville, in the county of Haywood, under the superintendance of the said commissioners; and the sale shall be kept open for the space of two weeks and no longer.

"7. That the said commissioners shall require of each and every purchaser to pay down, at the time of sale, one eighth part of the purchase money, and shall take bond and security for the payment of the balance in the following installments, viz.: the balance of one fourth at the expiration of twelve months, one fourth at the expiration of two years, one fourth at the end of three years and the remaining fourth at the end of four years; in no instance shall a grant or grants issue to the purchaser, until the whole of the purchase money be paid in full; and in case of failure to pay the whole when due, and the money cannot be obtained by a judgment on their bond, then and in that case, the land shall revert to the state, and be liable again to be sold for the use and benefit of the state.

"8. That if during the time of said sale, any section of land noted to be of the first quality, shall not command in the market the sum of four dollars per acre, the said commissioners shall postpone the sale of such section until further directed by the legislature; and in like manner lands of the second quality not commanding three dollars, and lands of the third quality not commanding two dollars shall be postponed as aforesaid, and report thereof made to the Governor."

"10. That the said commissioners shall give to each purchaser a certificate describing the land by him purchased, with a plat of the lot and number of the section conformable to the plan returned to the secretary's office; upon the production of which proof of the payment of the purchase money made to the secretary by the treasurer's receipt, it shall be the duty of the said secretary to issue a grant to the purchaser for the said lot of land in the usual and common form."

The other sections of the act are not material to this controversy. There were from time to time supplemental acts passed bearing upon this subject, but such acts related principally to the price and terms upon which the lands should be sold, but did not change any of the material provisions of the act of 1819. It is well to bear in mind the provisions of this act, inasmuch as the same have been the cause of much litigation, and the courts have at times been perplexed in consequence

thereof when called upon to construe the different statutes relating to entries and grants pertaining to lands lying within the territory in question.

The lands referred to in the foregoing act which had been acquired by the treaty of 1819 and authorized to be surveyed and sold by the commissioners in accordance with the provisions of the act of the Legislature of 1819, and the several acts supplemental thereto, were surveyed and sold from time to time until the year 1835, at which time it must have been apparent to the Legislature that all of the lands that would sell for a price greater than the other vacant lands of the state then subject to entry and grant had been surveyed, and accordingly it was provided that the vacant and unsurveyed lands acquired in 1817–19 by treaty from the Cherokee Indians should be subject to entry and grant in accordance with the general entry and grant law of the state. The act in question is as follows (chapter 6, p. 7, Pub. Laws 1835):

"That from and after the first day of May next, it shall and may be lawful for any person or persons to enter any vacant and unsurveyed lands that have been acquired by treaty from the Cherokee Indians in the year of one thousand eight hundred and seventeen and one thousand eight hundred and nineteen under the same rules, regulations, and restrictions, that are already provided by law for entering vacant lands in this state, and all laws and clauses of laws coming within the meaning and purview of this act, be and the same are hereby repealed."

This act was amended by chapter 7, p. 29, Pub. Laws 1836–37, entitled "Cherokee Lands," and reads as follows:

"That nothing in the aforesaid act contained shall be so construed as to authorize or allow the entry of any portion of the said lands, which were reserved or allotted to any Indian or Indians under said treaties, which the state has since acquired by purchase; and that the secretary of state be, and he is hereby directed to issue no grant for any portion of the lands of the latter description, until the General Assembly shall otherwise order and direct."

The lands referred to in the last-mentioned act are those that were reserved to the individual Indians by the second and third sections or articles of the treaties of 1819 and purchased by the state from said Indians as shown by the act of the General Assembly in the years 1823–24.

The acts of 1835 and those amendatory thereof (chapter 7, p. 29, Laws 1836–37), were brought forward and re-enacted in the first volume of the Revised Statutes of North Carolina, chapter 42, entitled "Entries and Grants"; the former act being re-enacted in section 1, and the latter in section 36 of said chapter. The first section of this chapter is as follows:

"That all vacant and unappropriated lands belonging to this state shall be subject to entry in the manner herein provided, except in the cases hereinafter mentioned. It shall not be lawful for any entry-taker to receive an entry for any lands lying to the westward of the line run by Meigs and Freeman in the year one thousand eight hundred and two, as the then boundary line between this state and the Cherokee Nation, except the vacant and unsurveyed lands that have been acquired by treaty in the years one thousand eight hundred and seventeen and one thousand eight hundred and nineteen; or any lands covered by the waters of any of the lakes of the state, or any lands now covered by the waters of a lake that shall be gained therefrom by the

recession, draining or diminution of such waters; and every entry made and grant issued contrary to the intent and meaning of this enactment shall be void."

The record in this case is somewhat complicated, owing to the fact that, after the jury had been impaneled and the issues submitted, and the grants upon which the plaintiff relies had been rejected by the court as incompetent evidence, it appears that an agreement was entered into between counsel for the plaintiff in error and the defendants in error, which was treated as an agreed statement of facts, upon which the court below held: First, that grants Nos. 16 and 18 were void because under the laws of North Carolina the lands embraced therein were not subject to entry and grant at the time they were issued; second, that these grants were void because the same were entered in the county of Macon July 26, 1852, after the county of Jackson had been created.

The first question that we are called upon to decide is whether any of the vacant and unsurveyed lands west of the Meigs and Freeman line were subject to entry and grant under the general entry and grant laws of the state at the date of the entries upon which these grants were based. As we have already said, the act of 1835, as amended by the act of 1837, was brought forward and incorporated in the Revised Statutes of 1837, and was in full force and effect on the 26th day of July, 1852, at the time the entries were made in pursuance of which the grants in question were issued. This act contains general authority for the entry and grant of all vacant and unsurveyed lands west of the Meigs and Freeman line which had been acquired by treaty in 1817–19. It clearly indicates that it was the purpose of the Legislature of 1835 that all vacant and unsurveyed lands which had not been surveyed in accordance with the act of 1819 and acts supplemental thereto should be subject to entry and grant. The reference contained therein to the "vacant" and "unsurveyed" lands is not susceptible of any other interpretation. The act of 1835, being general in its terms, must be construed as authority for the entry and grant of any and all vacant and unsurveyed lands within any of the counties to which it refers.

It was evidently the purpose of the Legislature to exempt from the operation of the general law which it enacted at that time all lands that had been surveyed as Indian lands; the statute authorizing which, as we have heretofore said, provided specific and particular means for the entry and grant of certain grades of lands known as "Cherokee Indian" lands of that territory. In framing the act of 1835, it would have been an easy matter to have provided that none of the lands west of the Meigs and Freeman line should be subject to entry and grant, and this is precisely what would have been done had it been the purpose of the framers of the act to exempt all of the lands west of this line from the operation of the general entry and grant law at that time. The fact that the act of 1835 expressly refers to the vacant and unsurveyed lands west of the Meigs and Freeman line shows most conclusively that there were vacant and unsurveyed lands west of this line at that time, and that it was the purpose of the Legislature to provide for the entry and grant of all such lands in that territory which

had not been surveyed prior to that date in accordance with the provisions of the act of 1819, and subsequent acts relating thereto. Prior to that date the state had disposed of the lands west of the Meigs and Freeman line in accordance with the provisions of the act of 1819, under the operations of which the more valuable class of lands that had been acquired by the various treaties from the Indians were entered and granted to individuals residing in that territory.

It should be borne in mind that the act of 1835 expressly authorized the entry and grant of all vacant and unsurveyed lands that had been acquired by the treaties of 1817 and 1819. It contained no exception whatever, and the fact that the Legislature at its session of 1836 and 1837 amended the act of 1835, so as to prohibit the entry of "any portion of the said lands which were reserved or allotted to any Indian or Indians under said treaties, which the state had since acquired by purchase," clearly indicates that the Legislature of that session construed the act of 1835 to mean that all the vacant and unsurveyed lands that had been acquired by the treaties of 1817 and 1819 west of the Meigs and Freeman line were subject to the general entry and grant laws of the state. It is obvious that the Legislature of 1835 carefully considered all questions relating to the lands that lay west of the Meigs and Freeman line and reached the conclusion that the vacant and unsurveyed lands west of that line that had been acquired by the treaties of 1817 and 1819 should be placed on the same footing as the other vacant lands in the state. Therefore, when the act of 1835 was passed, the vacant and unsurveyed lands within that territory were made subject to entry and grant and were treated in the same manner as other vacant lands in the state that were subject to entry and grant. Suppose the grants in question had been issued for lands outside of the territory embracing the Indian lands, would it be seriously contended that the same could be attacked collaterally in an action of ejectment, upon the ground that such grants did not indicate that the lands granted belonged to the vacant and unappropriated class? Such a proposition would hardly be advanced in any court, and it is equally as unreasonable to insist that grants for vacant and unsurveyed lands west of the Meigs and Freeman line should show that such lands were vacant and unsurveyed in order to render the same valid. The state authorized the entry and grant of vacant and unsurveyed lands west of the Meigs and Freeman line, and in pursuance thereof the entries were made, the lands surveyed, the state received the price agreed upon in payment therefor and issued grants for the same. The natural and reasonable presumption which arises is that the grants were issued in pursuance and in accordance with the provisions of the general entry and grant law authorizing the same.

Under these circumstances, did the court err in undertaking to pass upon the legal sufficiency of the grants in question? These grants are regular and in the usual form and purport to convey title to certain lands within the state and to have been issued by the state, and being thus issued under a general authority and containing the terms usually employed, cannot be attacked collaterally. The only method by which the validity of the grants could be attacked would be in an action in-

stituted for the purpose of having the same vacated. Such is not the case at bar. "A grant for land lying in a county to which the entry laws apply cannot be attacked collaterally for fraud or mistake in procuring such grant." Holly v. Smith, 130 N. C. 85, 40 S. E. 847.

The defendants in error rely on the case of Stanmire v. Powell, 35 N. C. 313, as authority to show that the two tracts in controversy are not subject to entry and grant under section 1, c. 42, of the Revised Statutes, or under the general entry and grant law of the state. In that case the plaintiff claimed the two tracts of land in controversy under a resolution of the General Assembly of North Carolina, passed on the 16th day of January, 1849, donating to Ailsey Medling 640 acres of land in one body or quarter section, in consideration of services rendered by her father, James Schoolfield, in the Revolutionary War. The resolution under which plaintiff claimed title was to the effect that the provisions of the same were to operate upon any of the lands of the state then subject to entry, and that the warrant or warrants to be issued therefor should be laid so as to include lands belonging to the state for which the state was not bound for title. The defendant claimed title to the land in controversy under the land sales of 1838, made in pursuance of chapter 9, p. 30, Pub. Laws 1836–37, entitled "An act prescribing the mode of surveying the lands of this state lately acquired by treaty with the Cherokee Indians," and produced a certificate from the commissioners, Samuel F. Patterson and Chas. L. Hinton, showing that he had purchased the lands at the sale of the Cherokee lands on the 2d day of November, 1838. The fourth section of this act (chapter 9, p. 32, Laws 1836–37) prohibited the entry and grant of all lands conveyed by the provisions of that act. This chapter applied to all the lands acquired from the Indians by the treaty of 1835 and included all the lands in Cherokee county. It provided the only manner by which any one could acquire title to lands in that county. At that time there was no entry taker in the county of Cherokee, and the entry upon which the grant was based was made before the clerk of the county court of Cherokee, under the resolution to which we have heretofore referred. The court held that the grant in that case was void: First, on the ground that there was no land in the county of Cherokee which was subject to entry and grant; second, that the state was bound for title to the land in controversy to the defendant under the purchase which he had made at the land sale of 1838.

In the case of Harshaw v. Taylor, 48 N. C. 513, the plaintiff claimed title to the lands under a grant issued by the state on February 18, 1852. At that time the land in Cherokee county was not subject to entry and grant; the act authorizing the same being ratified December 27, 1852. The defendant's claim in that instance was based upon a certificate of purchase issued to him by the land commissioners at the sale of 1838. The court held that the statute under which the plaintiff's grant was issued only authorized the entry and grant of unsold land, and that the land in controversy had been surveyed and sold in pursuance of the statute pertaining to the lands lying in Cherokee county, and the grant was issued before the act under which the plaintiff claims went into operation.

It will be observed that in both of these cases there was not only a statute (the terms of which were unqualified) containing a provision that none of the lands in the territory in which the lands in controversy were located should be subject to entry and grant under the general entry and grant laws of the state, but it also appears that the defendants' claim in each instance was based upon certificates of purchase issued to them by the land commissioners in pursuance of the act of 1819. In the cases mentioned there was indisputable evidence of the fact that the lands had been conveyed to the defendants under the provisions of the Indian land laws, but in the case at bar there is nothing to indicate what the defense will be in this respect, nor are the defendants under obligations to disclose what the nature of their defense will be until the plaintiff first presents to the court sufficient evidence to constitute a prima facie case. But in this connection we call attention to the fact that in each of these cases it was shown that the defendant acquired title by a certificate of purchase issued by the land commissioners at the land sales of 1838. We think that the evidence offered and proposed to be offered by the plaintiff in this case was sufficient to cast the burden upon the defendants to show any matters which they had to offer in the nature of a defense to the action, and it would be competent, among other things, if they could do so, to show that the lands described in the grants had been surveyed and sold to them or to those under whom they claim in accordance with the provisions of the laws relating to the disposition of what are known as the "Indian Lands." In this connection, it should be remembered that the act of 1835 was not passed upon in the consideration of the cases cited, nor has it ever been construed by the Supreme Court of North Carolina. Therefore this court will construe the same in accordance with the general rule of interpretation applicable in such cases.

It is insisted that the Cherokee lands were pledged in 1848 for the purpose of building the Western Turnpike Road. This is true, but the pledge was nothing more or less than a declaration on the part of the Legislature that the proceeds arising from the sale of these lands should be applied to the construction of the Western Turnpike. There is nothing in the act of 1848, which in any manner changes the method of disposing of what is known as the Cherokee lands, and the act can have no bearing upon the question involved in this controversy.

It is contended by the defendant that section 4, c. 9, p. 32, Laws 1836–37, which provides that "the residue of said lands shall remain subject to the disposition of a future Legislature and shall not be subject to be entered in the entry-taker's office of the county of Macon," repeals by implication the act of 1835, in so far as it related to the vacant and unsurveyed lands in the county of Macon. This act clearly does not apply to the lands that were acquired by the treaties of 1817–19, but relates solely to the lands that were acquired by the treaty of 1835 and were subsequently incorporated into what is known as "Cherokee County." The title of the act reads as follows: "An Act providing the mode of surveying and selling the lands of this state lately acquired by treaty from the Cherokee Indians." The language of the title makes two things clear, first, that the lands had lately been acquired by a

treaty, and not by treaties. If it had been intended that the provisions of the act should apply to all the vacant lands in Macon county, such lands would have been referred to as having been acquired by treaties, and not by treaty, as in this instance.

Also, section 16, c. 9, p. 37, of the act of 1836–37 provides as follows:

"That until the said section of country is laid off into a separate and distinct county it shall be and remain subject to the jurisdiction of the county of Macon and form a part thereof."

It is manifest that this provision means that the country referred to in this act had not been under the jurisdiction and control of Macon county prior to that date. It must be construed as referring to that section of country which had been recently acquired from the Cherokee Indians by the treaty of 1835. Under the circumstances the act of 1836–37 did not repeal by implication the act of 1835, inasmuch as there is nothing in the one which interferes with the provisions of the other. The county of Cherokee was created by the act of the Legislature of 1838–39, and the lands referred to by the act of 1836 were included within the territory comprising the new county and as such were not subject to entry and grant under the general entry and grant law of the state until 1852, at which time an act was passed authorizing the entry and grant of all vacant and unsold lands in Cherokee, Macon, and Haywood counties in accordance with the method therein provided, and this act continued in force until repealed by sections 2478, 2479, of the second volume of the Code, at which time all the Cherokee lands were subject to entry and grant under the general entry and grant law of the state.

It is also insisted by the defendants in error that the law on which the entries were based was changed subsequently to the dates of the entries and before the grants were issued. While this may be true, an act passed since the date of the entry could not affect the rights of the enterer as of the date when the entry was made.

The acts of 1854–55 (section 31, c. 18, p. 44, Pub. Laws) authorized the entry and grant of vacant and unappropriated lands belonging to the state subject to certain exceptions. Section 31 of this act is as follows:

"Nothing contained in this chapter shall apply to the lands commonly known as and called Cherokee lands but the said lands are to be disposed of and regulated according to the laws in relation thereto."

This provision of the law passed after the entry had been made upon which the grants in question were based cannot affect in the slightest degree any rights that may have been acquired by the enterer upon the payment to the state of the sum agreed upon as the purchase price of the land for which grants were issued. When Moore made the entry in 1852, he acquired an equity which was completed by the payment of the sum named therein and the issuance of the grants. The right which he acquired at the date of the entry to have the grants issued upon his compliance with the terms of the entry was not disturbed by any act of the Legislature passed after the date of the entry and prior to the issuance of the grant.

In the case of Bryson v. Dobson, 38 N. C. 140, the court held:

"The law allowed her until the 31st of December, 1844, to pay the purchase money, and, upon her doing so, it assured her she should have a grant upon application in due time. The entry, if not a contract with the state, strictly speaking, at least creates an inchoate valuable interest, sustained by statute and a guaranty of the public faith. That interest, if the enterer performs the condition imposed by law, no authority can justly take away or deny. * * *"

In Featherston v. Mills, 15 N. C. 596–598, it is declared that an entry "is in equity, which, upon payment of the purchase money, entitles the enterer to a grant, if applied for in due season; and also entitles him to call for a conveyance from one who has already obtained a grant for the same land, with notice of the previous entry. That such is the idea of the right by entry is clear from many circumstances."

In Plemmons v. Fore, 37 N. C. 312, it was held:

"An entry of land creates an equity, which, upon the payment of the purchase money to the state in due season, entitles the party to the grant, and consequently to a conveyance from another person who obtained a prior grant under a junior entry with knowledge of the first entry."

In Stanly v. Biddle, 57 N. C. 383, 384, it was held, in speaking of an entry:

"It is prior in time, and by subsequent payment of the purchase money in due time it gave the plaintiff a complete equity, against the state, and also against those claiming under her by subsequent entry."

The court was without power to pass upon the validity of the grants after they had been rejected as evidence. When the plaintiff below offered the grants in question, he was entitled to have the same considered as evidence in his behalf, unless the court was of opinion that for some reason they were not competent to be used as such. As we have already stated, the court declared that the grants in question were void, notwithstanding the fact that the same had already been held to be incompetent as evidence in the case. It appears from the record that the court ruled the grants out on objection as to their effect, and not as to their competency. We do not understand this to be the rule governing the introduction of evidence of this character. Ordinarily, when a grant or deed is offered in evidence, the only question which can be raised is whether the instrument offered has been duly registered. The record shows that the plaintiff in error proposed to show that the grants had been registered, but even this evidence, like the grants, was rejected by the court upon the ground that the same was incompetent. We confess that we are at a loss to know what valid objection could have been reasonably offered to the admission of this evidence.

In the case of Wilhelm v. Burleyson, 106 N. C. 386, 11 S. E. 592, in discussing this rule, the court, among other things, said:

"An objection to the introduction of a deed offered as evidence will not be sustained, as a rule, unless the probate is defective and the reading of it is resisted on that ground. Vickers v. Leigh, 104 N. C. 248–260, 10 S. E. 308; Cox v. Ward, 107 N. C. 507, 12 S. E. 379."

The court below, in passing upon the validity of these grants, used the following language:

"Again, the authority of the entry taker, in respect to the Cherokee lands, was special, and was confined to the vacant and unsurveyed lands, and his authority must be shown by the party asserting it. Harshaw v. Taylor, 48 N. C. 513. In Ross v. Duval, 13 Pet. (U. S.) near the bottom of page 61, 10 L. Ed. 51, it is said: 'The rule is well settled that, to avoid the statute, a party must show himself to be within its exception.'"

We do not understand that the rule to which the court referred applies in this case because the statute of 1835 as embodied in the Revised Statutes is general in its terms and apples to all vacant and unsurveyed lands, and the first exception contained therein is that it shall not apply to any of the lands lying westward of the line run by Meigs and Freeman in 1802 as the then boundary line between this state and the Cherokee Nation, except the vacant and unsurveyed lands which had been acquired by treaty in the years 1817 and 1819. The reference to the Cherokee lands is an exception to the general law, and, in order to leave no doubt as to the fact that the Legislature intended to subject the vacant and unsurveyed lands to entry and grant, it was expressly provided as a second exception that the vacant and unsurveyed lands west of the Meigs and Freeman line should be subject to entry and grant. Therefore, if this provision be an exception to the general entry and grant law, at most it can only be considered as an exception to an exception. Hence the rule announced by the court below does not apply. The effect of the exception contained in the Revised Statutes was to preserve the status of the Indian lands west of the Meigs and Freeman line not affected by the act of 1835; as well as that portion which had been acquired by the New Echota treaty. The vacant and unsurveyed lands west of the Meigs and Freeman line acquired by the treaties of 1817–19 having been made subject to entry and grant under the provisions of the general law by the act of 1835, it was evidently the purpose of those intrusted with the duty of compiling the Revised Statutes to preserve the act of 1835 in so far as it related to those lands, and, in order that there might be no doubt as to the effect of the exception in the Revised Statutes which related to the Indian lands west of the Meigs and Freeman line, a proviso or saving clause was coupled with the exception to the effect that the vacant and unsurveyed lands acquired by the treaties of 1817–19 were not to be included as a part of the exception, but were to remain subject to the general entry and grant law of the state, thus leaving the act of 1835, in so far as it related to the vacant and unsurveyed lands west of the Meigs and Freeman line acquired by the treaties of 1817–19 unimpaired. But let us assume that the plaintiff's rights depended upon an exception to the general statute in this case. If such were the case, he would certainly be entitled to show by competent evidence that the grants upon which he relies are for lands that are vacant and unsurveyed at the date of his entry. This the court below refused to permit him to do.

Beginning at the last paragraph on page 23 and continuing on page 24 of the record is found the following statement:

"Plaintiff next offered to prove that said two grants were duly recorded in Jackson county within the time required by law, and offered to introduce in evidence a certified copy of a will constituting the plaintiff Bealmear's

muniments of title to said two tracts of lands, grants Nos. 16 and 18 aforesaid, and to prove the location of the same, and that said deeds had been recorded in the proper county, and that said will had been duly proven, probated, and recorded," etc.

To this evidence the defendants in error objected upon the ground that the same was immaterial. The defendants' objection was sustained by the court below. If the ruling of the court to the effect that the plaintiff's rights are based upon an exception to the general statute had been proper, it would have been error to have refused to permit the grants and deeds to be introduced in evidence and thus deny the plaintiff the right to show the location of the lands in controversy.

We will now consider the third ground upon which the court decided that the grants in question were void, to wit: "That they were void because they were entered in the county of Macon, July 26, 1852, after the county of Jackson had been created." Jackson county was established by the act of the General Assembly of North Carolina, passed in 1850–51 (page 97, c. 38). This county was erected from portions of Haywood and Macon counties. At the same session of the Legislature and on the same day an act was passed (page 99, chapter 39) entitled "An act for the administration of public justice for the county of Jackson." This act provided, among other things:

"That the superior courts of law and equity, of common pleas and quarter sessions for the counties of Haywood and Macon respectively shall have the same jurisdiction in all matters pertaining to the administration of public justice within the county of Jackson as said courts heretofore had and exercised therein."

It was further provided that the justices of the peace, constables, and other public officers theretofore appointed in Macon county, but living in the territory of Jackson county, should have and exercise the same powers and privileges and be subject to the same penalties as prior to that date. It was also provided that the sheriffs of Haywood and Macon counties should have power to execute process directed to them in the territory of Jackson county under the same rules and regulations, etc., as before the passage of the act establishing the county of Jackson. There was no provision for the permanent organization of the new county of Jackson until the session of the Legislature of 1852, at which time, on the 27th of December, 1852, an act was passed entitled "An act to provide for the holding of the county and superior courts of the Seventh judicial district." Laws 1852, p. 97, c. 44. Under this act the time was fixed, and also the place, for holding the county and superior courts of Jackson county. We quote so much of the first and second sections of this act as relate to the time of holding courts and all of the third section relating to the courts in Jackson county:

"Section 1. Be it enacted * * * that the county courts of the county of Jackson shall be held in March, June, September, and December of each and every year."

"Sec. 2. Be it further enacted that the superior courts of law and equity for the county of Jackson shall be held on the third Monday of March and September of every year. * * *

"Sec. 3. Be it further enacted that the first county court of the county of Jackson shall be held at the dwelling house of Daniel Bryson, Sr., and there-

after, until the courthouse is built, at such places as the county court (a majority of the justices being present) shall direct and after the courthouse is built the courts shall be held in such courthouse and the superior courts shall be held at the same place as the county courts."

It will be seen that the county of Jackson had no legal existence for any practical purposes until after its organization, which was not consummated until the March term, of 1853, of the county court or the court of common pleas and quarter sessions of that county. A careful reading of the laws of the General Assembly shows that the Legislature, at its session of 1852, did not consider that Jackson county had any legal existence, inasmuch as the legislation which was enacted at that session provided for the organization of the new county. While, on the other hand, all the laws enacted for Macon and Haywood counties were intended and did inure for the benefit of Jackson county, treating the territory taken from Macon and Haywood counties as being under the control and jurisdiction of the officials of Macon and Haywood counties. The third section of this act provided that the officers of Haywood and Macon counties should continue to exercise jurisdiction over the territory cut off from their respective counties, and it is fair to assume that they did continue to act until there was such an organization of the county as entitled it to be treated as a legal entity.

In Ryan v. Evans, 49 Tex. 364, the court held:

"That the fact that it was declared that 'a new county' within certain boundaries 'was established' did not have the effect to create a county, because in the same declaration it was contemplated and provided that certain things should be done in organizing it, which were necessary to be done in order to separate its territory from the jurisdiction of the two counties from which it was taken, and give it a distinct identity as a county, a body corporate constituting one of the civil and political divisions of the state."

In the case of Lumpkin v. Muncey, 66 Tex. 311, 17 S. W. 732, it was held:

"Until a new county is actually organized or attached to some other county, transfers of land located in it should be registered in the old county."

Under the head "When Organization is Perfected," 7 Am. & Eng. Ency. of Law (2d Ed.), the author says:

"A county completely organized has been held to signify a county having within itself the necessary means of performing its functions independent of any other county, with its lawful officers and machinery for carrying out the powers and performing the duties belonging to that class of corporate bodies."

Then again, on page 929, under the head, "On County Government," the author says:

"When a new county is created from the part of a territory of an old county, and provision is made for its organization at a future time, it remains attached to and under the government and control of the old county until its organization. But upon the organization of the new county the authority of the officers of the old county over the territory of the new ceases, and the administration of the affairs of the new county should be conducted only by its own officers."

Thus it will be seen that, where it is sought to create a new county, the territory thus taken from the old county will be treated for all purposes as being under the jurisdiction and control of the authorities of the old county, until there is a complete organization of the new county in compliance with the act authorizing the creation of the same. There are a number of cases in North Carolina wherein the question involved in this controversy has been passed upon.

In the case of Wyman v. Taylor, 124 N. C. 432, 32 S. E. 742, Chief Justice Furchees, in discussing this phase of the question, said:

"These lands were all in Macon county until the erection of the county of Swain. This was done by the General Assembly in February, 1871, but it was provided that the county government of Macon county should extend over the territory of the new county until it should elect its county officers, and they should be qualified and inducted into office in June, 1871. The entries, surveys, and plats for the Love land were all made before the time fixed for the organization of Swain county. Therefore the entries were made in Macon county, and the surveys and plats made by the surveyor of Macon county. This seems to have been proper, and the only place the entries could have been made, and the surveyor of Macon county was the proper officer to make the surveys and plats. The grant was not issued until the 2d day of May, 1872, but it was issued upon the entries, surveys, and plats in Macon county. This grant was registered in Macon county in 1873, but was not registered in the new county of Swain until 1879. It was not void, but good."

In the case of McMillan v. Gambill, 106 N. C. 359, 11 S. E. 273, the court held:

"The formation of the county of Ashe, in the year 1800, did not destroy the validity of an entry covering land within the boundaries of said county, but made in the entry taker's office of Wilkes county in 1798 and surveyed by virtue of a warrant issuing from said office in 1799; nor is a grant that issued for said land upon said survey and entry in January, 1801, void. The grant was admissible, and was sufficient, if located so as to include within its boundaries the disputed land (as to which there was no controversy), to show title out of the state."

This case is cited with approval by Judge Furchees, in the case of Wyman v. Taylor, 124 N. C., 32 S. E.

It is insisted that, in the case of Harris v. Norman, 96 N. C. 59, 2 S. E. 72, the contention of the defendant is sustained. There is no analogy between that case and the one at bar. In that case the entry and survey were made in Wautauga county, and in pursuance thereof a grant was issued for the lands described as being in that county, but the evidence shows, as well as the admissions of the plaintiff, that the entire tract of land was located in Mitchell county. In that case the court properly held that the entry taker in Wautauga county was without authority to receive an entry for lands located in an adjacent county that were not subject to the laws and jurisdiction of Wautauga county. For the same reason the surveyor of Wautauga county was powerless to act in his official capacity in regard to land that lay in Mitchell county. In the case at bar the facts are entirely different. At the time the lands were entered the territory in which the same were embraced was subject to the jurisdiction and control of the officials of Macon county. Such being the case, the entry taker of that county is presumed to have acted within the scope of his authority. Under

these circumstances, we think that the court below erred in declaring the grants void for the reasons hereinbefore stated.

It being provided that the officers of Macon county residing in the territory which had recently belonged to Macon county should have power and authority to act as public officials in that territory, and nothing else appearing, it is presumed that the entry taker resided in the territory formerly embracing a part of Macon county, and that he acted under the power and authority vested in him by the statute in question, and at most the action of the surveyor of Jackson county in surveying the lands in controversy in pursuance of the order of the entry taker of Macon county can only be said to be irregular, and, when we consider this phase of the question, section 2761 of the Code of North Carolina of 1883 is directly in point, and has been construed by the Supreme Court of that state.

Chief Justice Furchees, in the case of Wyman v. Taylor, 124 N. C. 424, 32 S. E. 741, says:

"And the state has accepted his survey made upon these several entries, taken its pay, and granted him the lands. It must therefore be supposed that the state considered his entries and his survey and plat a substantial compliance with the statute, or it must have considered this provision of the statute as only directory, and the entries, survey, and plat a substantial compliance with the statute. However this may be, they seem to us to be but irregularities that do not vitiate and avoid the grant. Such irregularities seem to be expressly provided for in section 2761 of the Code, and the grantee's title validated, if it were defective as contended by the defendants."

For the reasons hereinbefore stated, we are of opinion that the court erred, first, in refusing to admit the grants and will in evidence, together with the evidence as to the location of the land; second, in declaring the grants void upon the ground that none of the territory west of the Meigs and Freeman line was subject to entry and grant at the date of the entry upon which the grants in question were based; third, in declaring the grants void upon the ground that the land in question was entered in Macon county after the passage of the act authorizing the establishment of Jackson county.

The judgment of the Circuit Court is therefore reversed, and a new trial granted, with directions to proceed in accordance with the views herein expressed.

Reversed.

GOERZ v. BARSTOW et al.

(Circuit Court of Appeals, Fifth Circuit. October 1, 1906.)

No. 1,493.

1. MORTGAGES—IMPEACHMENT OF FORECLOSURE SALE—SANITY OF MORTGAGOR—EVIDENCE.

Evidence considered, and *held* not to establish the insanity or mental incapacity of a landowner at the time of making a mortgage on the land or at the time of its foreclosure and the sale of the land thereunder so as to afford ground for setting aside such sale.

2. SAME—FORECLOSURE—SALE IN PARCELS—IRREGULARITY IN SALE—TITLE OF PURCHASER.

On a sale of property under a judgment foreclosing a security deed, given under the law of Georgia, a sale in bulk, instead of in lots, following the description in the deed, is a matter within the control of the court, and at most an irregularity, which cannot be availed of in an outside attack on the title of the purchaser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1559.]

3. VENDOR AND PURCHASER—IMPEACHMENT OF PURCHASER'S TITLE FOR FRAUD —BONA FIDE PURCHASER.

Where a woman who purchased real estate employed an attorney to pass upon the title and draw the deeds, she was not by reason of such fact chargeable with notice of any previous fraud on his part which might affect the title, so as to affect her standing as a bona fide purchaser, where she had in fact no knowledge that he ever had any connection with the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 491, 492; vol. 40, Cent. Dig. Principal and Agent, § 690.]

4. SAME.

The fact that a woman had dealt in a small way in real estate in the suburbs of a city does not render her chargeable with notice of fraud affecting the title of the grantors of similar property purchased by her because of the inadequacy of the price paid, where such price was four-fifths of the value of the land at the time, as alleged in the bill filed against her to recover the property on the ground of the fraud, nor is she chargeable with such notice because of a covenant by the grantor in her deed to protect her against lawsuits of which she had no actual knowledge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 477, 481.]

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

For opinion below, see 122 Fed. 140.

The bill in this case was brought by and in behalf of the heirs at law of Elias B. Barstow, who died intestate in Chatham county, Ga., in September, 1898. The scope of the bill is to recover three several tracts of land in and about the city of Savannah and an accounting for rents and profits, on the theory that Elias B. Barstow, the owner of these lands, was non compos before and from July 12, 1895, up to his death, and that the defendants, through fraudulent and illegal proceedings, had procured possession and titles to the same. The appeal in this case is by part of the defendants, and relates to only one of the tracts of land, and therefore a full description of all the pleadings and evidence is unnecessary.

In regard to the tract involved in this appeal, the bill charges:

"Second. Your orators further show that E. B. Barstow died on the ——— day of September, 1898, in Chatham county, Ga., intestate, and that on November 3, 1898, W. W. Gordon, Jr., was duly appointed and qualified as administrator to the estate of the said Elias B. Barstow as temporary administrator, and permanent letters of administration on said estate were issued to him by the ordinary of Chatham county, Ga., on December 19, 1898, and your orators show that W. W. Gordon, Jr., administrator, consents to the filing of this bill by your orators and the heirs at law of said E. B. Barstow, deceased, for the purpose of recovering certain real estate hereinafter more particularly described. Your orators show that the said estate is entirely solvent, and that it is not necessary for the administrator to take possession of the real estate sought to be recovered in this bill for the payment of any debts of the intestate or for any other purpose, and your orators show further that under the laws of Georgia real estate descends direct to the heirs at law.

"Third. Your orators further show that said E. B. Barstow inherited in fee simple a large amount of valuable property, including a tract of about 1,176 acres on Wilmington Island, Chatham county, and several tracts in the immediate vicinity and suburbs of the city of Savannah, Chatham county, Ga.; three of these tracts being the subject of this bill, and more particularly described as follows: 5, 8, 9, 13, 16, 17, 20, on Tebeau's map, dated February 28, 1894, each containing 5 acres, except lot 20, which contained 5.26; said 50.26 acres bounded as follows: 50.26 acres, consisting of and known as lots 1, 4; south by a 50-foot street as laid down in said map; east by Waters' road; north by a 30-foot street; on the west by land of ——— Smith, as marked in said plat—said map being of record in the office of the clerk of the superior court of Chatham county. The second tract, containing 67½ acres, more or less, lying near the city of Savannah, in Chatham county, Ga., and known and designated as lots 23, 26, 29, 32, 35, on the plan of the Norton tract, made March 12, 1869, recorded as '4H, folio 18.' The third tract being 20 acres, more or less, near the city of Savannah, in Chatham county, state of Georgia, known and designated as lots 14, 15, 18, 19, on a plan of the Norton tract, made by the county surveyor; said tract of four lots being bounded north by a right of way designated in said plan, east by lot 11 of said plan, south by lands of McClesky, and on the west by lands of Hull.

"Fourth. Your orators show that about the 12th of June, 1895, said E. B. Barstow contracted with Isaac Beckett, agent for Harriet H. Burch, for a loan of $1,500, $1,000 of which was to be paid at once, and the remaining $500 a short time after, and that to secure said debts said E. B. Barstow executed a deed to Harriet H. Burch to the 50.26-acre tract hereinafter described; that on the execution of said security deed $1,000 in cash was paid to said Barstow according to said agreement.

"Fifth. Your orators show that said Barstow at and before the time of entering into this contract was deranged in his mental faculties, and did not have at that time sufficient amount of reason to be capable of knowing his real situation or condition, or of knowing or understanding clearly what he was doing or perceiving the effects of his acts. Your orators show that said E. B. Barstow was an old man, upwards of 60 years of age; that at and before the time of said contract, and afterwards, continuing to his death, his mind was greatly impaired and weakened, due in a large measure to the long-continued and excessive use of spirituous liquors; although possessed of large and valuable property, he was morally and physically incapable of managing his own affairs or in taking any care of himself personally; that, while owning these various tracts of land in and near the city of Savannah, he lived the life of a recluse on Wilmington Island, avoiding contact with his fellow men, without servants, and finally died alone and unattended at his home on said island on the ——— of September, 1898, intestate. Said Barstow had many insane delusions and personal traits, among them the delusion that his property was immensely valuable. He refused about the time of said contract with Burch a reasonable and bona fide offer of $20,000 for the property, the subject of this bill. He actually paid taxes on his property far above the taxable value of said property.

"Sixth. Your orators show that said Isaac Beckett is a lawyer and money lender in the city of Savannah. During the transaction resulting in the same contract with Barstow, said Beckett became acquainted with said Barstow's physical condition and physical weakness and imbecility and conceived the scheme of wresting from said Barstow his valuable property for a nominal consideration, and as the scheme developed other defendants besides Harriet H. Burch and Isaac Beckett became connected with the illegal and inequitable transaction by the purchase of the respective tracts as herein set out; and all of said defendants purchased with notice of the rights and equities of said E. B. Barstow in these premises, and were speculating with their eyes open to the vices and imperfections of the title acquired by him to the said several tracts of land. This unlawful and fraudulent scheme to acquire Barstow's property for a nominal consideration was so far successful that within a year's time, from April 6, 1897, property reasonably and fairly worth $14,000 was sacrificed for less than $2,000. The

particular manner in which the gross frauds were carried out will appear by a recital of the facts of the various transactions.

"Seventh. Your orators further show unto your honors that said Isaac Beckett purposely delayed for an unreasonable time to pay the balance of the said $500 agreed to be loaned by said Burch, and in consequence of said delay said Barstow was unable to pay his taxes, and his property was levied on for the year of 189–; that the said levy on his property for taxes greatly inconvenienced and embarrassed said Barstow, and with the said levy against the property it was rendered more difficult to secure money with which to meet his taxes, and said Barstow finally failed to pay the principal or interest due on the Burch loan on the 12th day of June, 1896, whereupon the said Isaac Beckett filed suit in the city court of Savannah against said Barstow returnable to the July term of court, although the return day of said court was less than 14 days distant from the day when said suit was filed. Said suit went by default, and judgment was taken at the November term in favor of Harriet H. Burch for the principal sum of $1,500, $109.33 interest, $160.93 as attorney's fees, said attorney's fees being included in the judgment contrary to law, and no defense was filed in said suit; Isaac Beckett thus taking unconscionable advantage of said E. B. Barstow. Your orators further show that the said Isaac Beckett, in his anxiety to sell the property of said Barstow, advertised the same in the Press, a newspaper published in the city of Savannah, Chatham county, Ga., an insufficient length of time, and was about to sell the property under the Burch judgment, whereupon Joseph H. Cronk, attorney for Barstow, stopped the sale on the ground of insufficient advertisement. Still another levy under said judgment was made, which was set aside for the lack of a reconveyance deed. Finally, Thomas Sheftall, sheriff of the city court of Savannah, levied under the Burch execution, and sold on the 5th day of April, 1897, lots 1, 4, 5, 8, 9, 12, 13, 16, 17, 20, according to Tebeau's map, dated February 28, 1894, each containing five acres, except 20, which contained 5.26 acres and being 50.26 acres in all, situated and being in Chatham county, Ga., to Isaac Beckett, agent, for the sum of $500. Your orators show that said levy and sale were illegal, fraudulent, and void. The said Isaac Beckett could not lawfully bid at said sale in any capacity; he having been the attorney for the plaintiff in execution, said H. H. Burch. Said sale was further illegal, fraudulent, and void because it was an excessive levy and sale, and for inadequacy of consideration. The tract was easily capable of being subdivided, and could have been sold lot by lot, instead of which the tract of 50.26 was sold as a block for $500, when the same was easily and reasonably worth $5,000.

"Eight. Your orators further show that while said land was bid off for the nominal and grossly inadequate sum of $500 by Isaac Beckett, agent, and the whole amount in excess of the court costs should have been appropriated to the payment of the state and county taxes then due on said property, yet said Beckett unlawfully and fraudulently applied $160.93 of said $500 on account of his attorney's fees improperly entered up under the Burch mortgage; $76.75 of the same was applied to costs, and the balance, $262.32, should have been applied to part payment of taxes. Your orators further show that on April 13, 1897, the sheriff made a deed conveying the property to James V. Kennickell for $500. While it is usual and customary among the business men of Savannah to record deeds at once, said deed was not recorded until June 15, 1897. April 19, 1897, said Kennickell sold and conveyed ⅘ interest in said 56.26 acres to C. H. Dorsett, George H. Stone, W. W. Starr, and T. F. Gleason, Jr., for $1,400, which deed was not recorded until May 10, 1897. On the same date, April 19, 1897, Isaac Beckett furnished part of the funds for the transaction, and as executor of the estate of ——— Byrns, and loaned to said parties, Dorsett, Stone, Starr, Gleason, and Kennickell, $1,000. On March 21, 1898, said Kennickell sold and conveyed his remaining ⅕ interest in said tract to George Beckett, an attorney at law, and son of Isaac Beckett, for $350, being an equal proportionate amount with that paid by the other grantees for their respective interests; George Beckett at the same time assuming Kennickell's liability upon the Byrn's note and mortgage. This was recorded April 6, 1898. On April 14, 1898, Dorsett, Stone, Starr, Gleason, and George Beckett sold and conveyed ⅗ interest in said

tract of land to Adele M. Goerz for $2,500. On April 2, 1898, the same party sold and conveyed to said Adele M. Goerz the remaining ⅓ interest in said tract for $1,500; said deed containing a covenant to save her harmless against suits, taxes, etc., and said Adele M. Goerz is now in possession of said tract. Your orators show that said Kennickell, Dorsett, Stone, Starr, Gleason, and George Beckett were aware of Barstow's mental and physical condition, knew of these several schemes, and they had notice of Barstow's equitable interest in the said land. Dorsett was a real estate agent and acted as agent for Mrs. Burch, and well knew the real value of this land, and the greatly inadequate price for which it had been sold under the Burch judgment. George H. Stone was a physician, and was one of Barstow's nearest neighbors on Wilmington Island; and, with a full knowledge of Barstow's insanity, imbecility, and intemperance, he became a purchaser as above set out, with full knowledge of Barstow's rights and equities in the premises. These grantees knew that Isaac Beckett and George Beckett, his son, were engineering, aiding, and forwarding these sales and transactions, and Isaac Beckett and George Beckett were acting as agent and attorney at law for those various parties in these sales and transactions, and they were charged with notice of all Isaac Beckett's illegal acts, and knowledge that he had acquired in the transactions connected with this loan, and they entered into these transactions with their eyes fully open and willing to share in the fraudulent profits. Your orators further show that said Adele M. Goerz bought with notice, and that she was fully cognizant of the character of these transactions and sought to protect herself against the loss by the covenant in her deed against lawsuits and taxes. Your orators further show that the covenant in her deed alone was sufficient to put her upon inquiry.

* * * * * * * * * *

"Eleventh. Your orators show that during these sales and transactions by which said Barstow's property, worth upwards of $14,000, was sacrificed for less than $2,000, his estate was entirely solvent, owning property far in excess of all debts and liabilities against it, and any one of said tracts was readily worth more than the debts for which all these tracts were sold; but such was his mental incapacity that he was utterly defenseless against these repeated raids upon his property. He had quarreled with his attorney, Joseph H. Cronk, though said Cronk had rendered him efficient service. He was without immediate family to protect his interests, and his nearest relatives were residents of distant states, and there was no one to interpose in these transactions in his behalf.

"Twelfth. Your orators show that the circumstances of these transactions, the rapidity with which they were brought to sale by Burch and Beckett, and bid off in behalf of Burch and Beckett were calculated to, and did chill and suppress bidding on the part of the general public."

The original prayer of the bill covered, not only a recovery of the lands, but an accounting to the complainants for the rents and profits. Certain demurrers attacking the equity of the bill and the jurisdiction of the court were overruled upon a direction that all prayers looking to the recovery of money judgments should be stricken from the bill and the case be confined to the recovery of the property.

After the evidence was taken and a hearing and a reference to the special master, complainants were allowed to amend their bill by adding at the end of paragraph 8 the following: "(1) Your orators further show that in the said deeds to Adele M. Goerz, one of the defendants, made by her grantors above named and who are defendants herein, there are to her general covenants of warranty of title, and that, if title failed to her as to said lands or any part thereof, she, in law is entitled to have recourse against her said warrantors to the extent of the purchase money and interest thereon from the dates of said deeds; and, further, that, if in and by the terms of the decree in this case your orators be compelled to reimburse or make good the said Adele M. Goerz for such purchase money or any part thereof due to her by her said warrantors on failure of title, then and in any such event your orators are equitably entitled to be subrogated, to such extent, to all of her said rights against her said warrantors, jointly and severally, and to make them who would be ultimately liable immediately liable herein to your orators.

who shall have paid any such amounts to said Adele M. Goerz compulsorily. Your orators do not attach hereto copies of said deeds containing the said warranties for the reason that the originals are in evidence already in this cause, and to which the usual leave of reference is prayed as often as may be necessary"—and by enlarging the prayer by adding the following: "That your orators, if, in and by the decree in this cause, they shall be compelled to pay to said Adele M. Goerz any sum of money whatever in the way of reimbursement to her for any money which she may have paid out to her said grantors as purchase money for said lands, may be subrogated in the place of said Adele M. Goerz and against her said grantors, jointly and severally, who are defendants herein, under their covenants of warranty, and have decree against said defendants for all such sums, with interest, so to be paid by your said orators under said decree, to the end that, all parties being before the court in this equity cause, all rights may be adjudicated herein, and that all parties ultimately liable may be made immediately liable." Following this amendment, which substantially restored some of the accounting features stricken out at the time the demurrers were passed upon, there was a reference to the master for an accounting, and on his report exceptions were filed by most of the present appellants, which were overruled, and a final decree rendered, which, after decreeing that, "before and at the times of the several sales of said properties therein set out at and by which the title of the said Elias B. Barstow was sought to be divested, the mind of the said Elias B. Barstow had degenerated to the extent that he was wholly incompetent to protect his landed interests in the premises," proceeded further to decree as to these appellants:

"As to the remaining tract of land, to wit:

"All that certain lot, tract, or parcel of land situate, lying, and being in the city of Savannah county of Chatham, and state of Georgia, containing 50.26 acres, more or less, being known and designated on Tebeau's map, dated February 28, 1894, as lots Nos. 1, 4, 5, 8, 9, 12, 13, 16, 17, and 20; each said lot containing 5 acres, except lot No. 20, which contains 5.26 acres; said 10 lots as one body being bounded as follows: North by a 30-foot street; east by Waters' road; south by a 50-foot street, as laid down in said map, and west by lands of ——— Smith, as shown in said plan. It is decreed that the sale thereof, made by the sheriff of the city court of Savanah on April 6, 1897, to Isaac Beckett, agent, at and for the sum of $500, as well, also, the conveyance of said tract made on April 13, 1897, by said sheriff to J. V. Kinnickell, who was then and there acting for Isaac Beckett, he being the real purchaser and taking the title in the name of the said Kennickell, was and is null and void. And it is further decreed that the several sales and conveyances made thereafter by the said J. V. Kennickel, acting for and on behalf of the said Isaac Beckett, to Charles H. Dorsett, George H. Stone, W. W. Starr, Thomas F. Gleason, Jr., and George W. Beckett, defendants herein, the said George W. Beckett then and there representing, holding for, and taking title in his name for his father, Isaac Beckett, were and are null and void. And, further, that the sales made by Charles H. Dorsett, George H. Stone, W. W. Starr, Thomas F. Gleason, Jr., and George W. Beckett to Adele M. Goerz of, respectively, an undivided ⅔ and ⅓ interest in said 50.26-acre tract on April 4 and October 22, 1898, are hereby decreed to have been and to be null and void.

"It is further decreed that said complainants are entitled to redeem the said 50.26 acres of land and to become possessed of the same as owners in fee simple, freed and cleared of all claims of defendants in and upon the same, and that the said Adele M. Goerz is entitled to be paid by the said complainants the sums of money paid out by her, with interest thereon, from dates of purchases in the purchase of said land, at the rate of 7 per cent. per annum, as well, also, such sums of money as she may have paid out for taxes upon said property, less what she may have received as income therefrom, she at the same time accounting for and being debited with such sums of money as he may have received from sales of portions of said lands; that is to say, the net amount, as the result of such account, to be paid to said Adele M. Goerz by said complainants is decreed to be the sum of $4,182.14, with interest thereon from March 24, 1904, at the rate of 7 per cent. per annum. And it is further decreed: That, upon the payment of said sum of

money, said tract of land consisting of 50.26 acres, more or less, shall stand redeemed of and from the claim of title of said Adele M. Goerz in the same and shall be owned and possessed by complainants in fee simple, and that the said complainants are entitled to redeem the said tract of land, and to said end it is decreed that said complainants do pay on or before the 20th day of June, 1905, unto the solicitors of record of the said defendant, Adele M. Goerz, the sum of $4,182.14, with interest thereon from March 24, 1904. at the rate of 7 per cent. per annum, to date of payment, and the deeds held by the said Adele M. Goerz to said tract of land, as well as the deeds from the sheriff of the city court of Savannah to James V. Kennickell and the deeds from James V. Kinnickell to Charles H. Dorsett, George H. Stone, W. W. Starr, Thomas F. Gleason, Jr., and George W. Beckett, shall stand annulled; and, at the same time that the aforementioned payment shall be made to the said Adele M. Goerz, she, the said Adele M. Goerz, shall, and is hereby ordered to, execute and deliver unto complainants a quitclaim deed conveying to said complainants all the right, title, interest, estate, claim, and demand of said Adele M. Goerz as claimed by her in and to said land. The said quitclaim deed shall be prepared and presented to said defendant, through her solicitors of record herein, by complainants' solicitors. That the said respective conveyances made by the said Dorsett, Stone, Starr, Gleason, Jr., and Beckett on April 4 and October 22, 1898, to Adele M. Goerz, by which said tract of 50.26 acres was conveyed to her, contained covenants of general warranty of title, thereby making said grantors therein jointly and severally liable to said Adele M. Goerz for the purchase money, with interest, for dates of said conveyances; and, title in said Adele M. Goerz being decreed herein to have failed, the said grantors above named, who would have been ultimately liable jointly and severally under said covenants of warranty, are hereby decreed to be immediately liable to said complainants when they shall have paid, under the compulsion of this decree, the said purchase money and interest to said Adele M. Goerz.

And it is therefore adjudged and decreed that, in and by way of subrogation, the said complainants, upon compliance with this decree in making the said Adele M. Goerz whole in the premises, by paying her the amount of money hereinbefore directed to be paid unto her, do recover and have judgment against the following named defendants, agreeably with the opinion of the court handed down and filed March 17, 1905, sustaining the report of the standing master, except as modified in said opinion; that is to say: (a) Complainants are hereby awarded judgment against the following named defendants, jointly and severally, to wit: Charles H. Dorsett, W. W. Starr, Thomas F. Gleason, Jr., and Charles W. Saussy, administrator of the estate of George H. Stone, deceased, to be levied as to the latter, of the goods, chattels, lands, and tenements which were of said Stone deceased, now in said administrator's hands, or that may hereafter come into his hands to be administered, in the sum of $1,800, principal, being the profit made by them in their joint enterprise with interest on said principal sum to date of this decree, $844.72, and future interest on said principal sum of $1,800 at the rate of 7 per cent. per annum until paid. (b) As to George W. Beckett, who purchased for $350 an undivided one-fifth interest in and to the said lands which were sold to Mrs. Goerz, and who was acting for his father, Isaac Beckett, and is therefore not out anything, he should account to the complainants for this alleged consideration of $350, together with his profits, $450, and interest on both, and therefore judgment is hereby awarded against said George W. Beckett in the sum of $800, principal, $382.68, interest to date of this decree, and future interest on said $800 at 7 per centum per annum. (c) As to Isaac Beckett, complainants are entitled to secure from him the profit made by him in the sale of the Goerz land, namely $1,250, principal, besides interest thereon at 7 per cent. per annum, less, however, the interest on the sum of $500 paid by Kinnickell for him at sheriff's sale, aggregating $1,603. Therefore the complainants are hereby awarded judgment against said Isaac Beckett in the sum of $1,603. (d) It is further decreed that said complainants shall have execution against said defendants, respectively, for the sums of money herein before awarded."

This appeal is prosecuted by Adele M. Goerz and by her grantors, Charles H. Dorsett, W. W. Starr, Thomas F. Gleason, Jr., and George W. Beckett, against whom a decree for money was rendered. The assignment of errors, 26 in number, cover the overruling of the demurrer, exceptions to the amendment to the bill, the overruling of exceptions to the judgment of the special master, the findings against Mrs. Goerz, the findings against her grantors, and numerous holdings and findings in the written opinion of the court filed in the case.

Saml. B. Adams, for appellant.

Hugh V. Washington, Wm. Garrard, and P. W. Meldrim, for appellees.

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

PARDEE, Circuit Judge (after stating the facts). Our view of the case on this limited appeal renders it unnecessary to pass upon all the matters covered by the assignments of error and argued so fully in the briefs, for we think the decision of the question whether Mrs. Goerz was or is an innocent purchaser of the tract of land claimed by her, and therefore entitled to the rights of an innocent purchaser, will settle this appeal.

The bill charges that at the time Barstow gave the security deed to Mrs. Burch on June 12, 1895, Barstow was deranged and incapable of managing his affairs. The evidence does not show such to be the case. The evidence does show that for some indefinite period before his decease Barstow was non compos mentis, but he was never interdicted, and there is no reliable evidence in the record to show at what time his full incapacity to manage his affairs commenced or to show that at the time he gave the security deed to Mrs. Burch he was non compos. In fact, the undisputed evidence shows the contrary. Nor is there reliable evidence in the record to show that at the time of the judicial sale of April 5, 1897, under foreclosure of the Burch security deed was he at all times or at that time non compos. The most that can be considered as proved as to his condition of mind about that time is that, when under the influence of liquor and for times succeeding, he behaved in such besotted and fantastic ways as to justify the conclusion that he was then insane; but the evidence clearly shows that about the time of the sheriff's sale on Mrs. Burch's judgment he had long lucid intervals, in which he attended to business and was capable of attending to and managing his own affairs. We do not find any evidence or circumstances in the case to throw doubt upon or otherwise discredit the evidence of Mr. Cronk, a respectable member of the bar, and who up to and after the sale in question was Barstow's attorney apparently representing Barstow's interests with ability and fidelity. Mr. Cronk testifies:

"I was admitted to the bar in December, 1878, and have since practiced law in Savannah.

"Q. Do you recollect this paper shown to you? and, if you do, please state all you know about it.

"A. Mr. Barstow was a client of the firm of Norwood & Cronk in 1894, and was a client of mine in 1895, 1896, and a part of 1897. I think it was the

latter part of May, 1895, he called at my office and stated he was badly in need of money, and had made efforts to secure a loan from numbers of money lenders in Savannah. I asked him if he had made application to Mr. Isaac Beckett, who I knew was then lending money for some clients of his. He answered 'No.' I told him, if he did not wish to call Mr. Beckett, I would, as an act of friendship for him, do so. He assented. I immediately called on Mr. Isaac Beckett, and Mr. Beckett stated to me that before he made the loan he would ascertain from Mr. Charles H. Dorsett whether the particular land included in this deed to secure debt was ample security for a loan of $1,500, which was the amount that Mr. Barstow wanted. Later Mr. Beckett informed me that Mr. Dorsett considered the land ample security, and he would make the loan. A few days before this paper was executed Mr. Beckett was in my office, and stated that he did not have as much as $1,500 then in hand, but thought he would have the full amount one or two months later, and that, if I wished the paper to be drawn as this paper is drawn, he would draft it and be ready to have it executed on the 12th of June, the date of this paper. I stated to Mr. Beckett that I could give him no instructions as to how to draw the paper or for the amount, because I was not acting as attorney in the matter for Mr. Barstow, but simply as a friend; that he might draw the paper, if he saw fit, this way and leave it exclusively to Mr. Barstow to say whether he would accept this amount and execute the paper. When Mr. Beckett informed me of the date he was ready to pay this amount if Mr. Barstow wanted it, I wrote a letter to Mr. Barstow, and he came to my office on the day this paper was executed. He and I called at Mr. Beckett's office together. Mr. Beckett then handed to me to read this paper for the first time. I read it over first, and then read it aloud to Mr. Barstow. Mr. Beckett showed me a bank book, and also Mr. Barstow, that he did not have the full $1,500 then in bank to the credit of Mrs. Burch, and I then stated to Mr. Barstow it was left entirely for him to say whether he was willing to accept the $1,000 cash, and the other small sums later on, as specified in this paper. Mr. Beckett was asked how much longer Mr. Barstow would have to wait for the additional money, and I understood Mr. Beckett to say positively in a month or two he would have the additional $500. Mr. Barstow thereupon stated that he would execute the paper, and the paper was executed in Mr. Beckett's office, and I witnessed it, and the $1,000 was then handed to Mr. Barstow. So far as the additional sums are concerned, I do not know when they were paid, and, in fact, do not know personally that they were paid at all.

"Q. You never heard from Barstow when they were paid?

"A. He never reported to me at the times he received the additional money, but he subsequently informed me that he had received $1,500.

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"Q. Mr. Cronk, will you state what was the mental condition of Mr. Barstow at this time and what your means of information are?

"A. As to his mental capacity?

"Q. His mental condition.

"A. Aside from meeting Mr. Barstow during the years 1894, 1895, 1896, and part of 1897 in the capacity of client, he often made calls otherwise to my office during these years. In that way I became pretty well acquainted with him. I never did regard him as an imbecile when not under the influence of liquor; and it was on very rare occasions I ever did see him under the influence of liquor. He was a clear-headed man, and a man of will. When under the influence of liquor, he was inclined to be erratic and quarrelsome. But I never regarded this eccentricity as insanity. He personally attended to all of his business with me. The southern tier of lots of this tract of land, south of Savannah, called the 'Norton tract,' was not covered by any mortgage or deed to secure debt. He arranged to sell off these lots, advertised the property, and made periodical visits to this place with a view of being on hand to meet prospective purchasers. He sold numbers of these lots personally. He got me to draw one or two deeds, and then finally concluded that he would get blank deeds and simply use one of the form deeds written by me and make all further deeds to future purchasers himself, and have them executed before two witnesses, one of them a notary public or justice of the

peace; thus showing, as I always believed, that he was fully capable of attending to his own business. If I had ever thought that Mr. Barstow was an insane man, nothing could ever have induced me to have filed a suit against him for attorney's fees.

"Q. After the interest became due did you ever have any conversation with him about paying this Burch debt? I say, after he gave this security deed, did you ever have any conversation with him about paying Mrs. Burch?

"A. You mean paying this debt?

"Q. Yes, sir.

"A. I do not remember that he did before he was sued for the debt. He called at my office in the summer of 1896, with a copy of a petition which had been filed by Mr. Beckett against him for the foreclosure of this deed to secure debt. Either the time of filing or the time of service on him was not within the time required by law. I advised him to file no defense to the paper, as Mr. Beckett could take no valid judgment against him at the July term of the city court, and in that way I think the petition went over to the November term. I then suggested to Mr. Barstow, as judgment could not be taken against him before November at least, that that would give him five or six months in which to endeavor to secure another loan to take up this one of Mrs. Burch. He stated that he had made efforts in Savannah heretofore to secure a loan, but that no one would loan him money, and he expected, if possible, to get a loan from a company either in Macon or in Atlanta, and with that in view he had gotten Mr. James K. Hines, of Atlanta, to examine the title to the property. Subsequently, and especially not long before the November term of the city court, Mr. Barstow frequently called at my office to consult with me about the suit brought by Mr. Beckett. He finally decided not to file any defense. It was during these visits that he informed me he could not secure a loan from the loan companies in Macon or Atlanta or from any individual. After his property was advertised for sale under the judgment procured by Mr. Isaac Beckett in favor of Mrs. Burch, Mr. Barstow called at my office quite often and was anxious to have the sale stayed. In the examination I made for Mr. Barstow, I found that the levy on the property preceded the actual record of the deed made back to him by Mrs. Burch. I therefore informed Mr. Barstow that a sale under the then existing levy and advertisement would be void, and that he could either let the sale go on on or stop it by an affidavit of illegality on this as well as other grounds. He said he preferred not to get into expensive litigation with any third person about the property. It was therefore decided to stop the sale by an affidavit of illegality, which was done. Afterwards a second levy was made and the property advertised for sale, I think, in March, 1897. As the affidavit of illegality was pending and the execution had been withdrawn to make the second levy without an order of court, I also stopped this second sale. The only ground of the affidavit of illegality which was then left for a decision of the court was on the question of attorney's fees, which the court decided in favor of Mr. Beckett. Having no authority from Mr. Barstow, I did not carry this question to the Supreme Court. The property was then readvertised the third time, and subsequently sold by the sheriff of the city court.

"Q. Was anything said to you about his paying the interest and the debt being allowed to run on? Was anything said to you by Mr. Beckett about the interest being paid and the debt running on?

"A. He never said anything to me about having paid any interest.

"Q. Did you ever tell Mr. Barstow that, if he would pay up the interest, he would be indulged as to the principal?

"A. All that I know is that Mr. Beckett informed me that if Barstow would pay the interest that the principal could run on, but Mr. Beckett did not state definitely how long the principal could run on. That I communicated to Mr. Barstow.

"Q. How did you come to sue him, and what for?

"A. My suit?

"Q. Yes.

"A. That suit was for fees; the first item being for professional services prior to, I think, the first part of July, 1896, and for additional services running on to date on March, 1897. After this latter service was near-

ly completed Mr. Barstow asked me to let him take from my possession certain papers which Mr. Rad Saussy, as attorney for the county commissioners, had left with me to get him to nominate a commissioner, a blank being left in the paper for the commissioner's name to be filled in, and which paper was the original for condemnation of some land of Mr. Barstow under a second proceeding for that purpose. I told Mr. Barstow that I could not allow him to take the paper from my office. He asked why. I told him simply because it was an office paper that had been intrusted to me by Mr. Saussy for one purpose only, and, if he would name his commissioner, I would fill the name in and return the paper immediately to Mr. Saussy. He stated 'No'; that he wanted to carry the paper off for a short while and would bring it back. I declined to let him have that paper. Then he got mad with me and left my office, and I could get no answer from him about paying me up these back fees. I wrote him numbers of letters and tried to conciliate him, but he never after that had anything to say to me, nor did he answer any letters of mine, nor did he ever come to my office again."

As there is no evidence to show that at the time of the sale Barstow was under the influence of a drunken spree or suffering from the effects thereof, or suffering any other mental derangement incapacitating him, we consider that, in the light of Cronk's evidence, there was nothing in Barstow's mental condition to in anywise affect the validity and conclusiveness of the security deed of June 12, 1895, the judgment rendered thereon in the city court of Savannah, or of the judicial sale of April 5, 1895, based on the said judgment. If that sale is impeachable, it must be for fraud or for matters apparent on the record. The incipient conspiracy and fraud charged in the bill in relation to the security deed and the proceedings to foreclose the same are not established by evidence sufficient to warrant a decree against Beckett and the purchaser at the sale of this tract. It is only in the sales and dealings with other Barstow lands and in subsequent transactions that these parties may have become involved so as to make them responsible in equity.

As to the proceedings in execution apparent of record, it is sufficient to say that the levy was co-extensive with the security deed (see Reeves v. Bolles, 95 Ga. 404, 22 S. E. 626), and, if the property was not sold in lots following the description in the security deed, it was a matter within the control of the court whose judgment was being executed (Rorer on Sales, § 714, p. 290); and at the worst was an irregularity not available in any outside attack on the title transferred by the sale. As Barstow was not insane at the time he executed the security deed, nor shown to be insane at the time of the judicial sale—on the contrary, then having long lucid intervals if ever before insane—the judicial sale of the 50.26 tract was not void, at worst voidable, and is only impeachable, if it is impeachable at all (as to which we do not decide), for fraud, we think it clear that the appellant, Mrs. Goerz, has the right to invoke section 3540 of the Code of 1895 of Georgia, reading:

"A title obtained by fraud, though voidable in the vendee will be protected in a bona fide purchaser without notice."

The bill charges:

"Your orators further show that said Adele M. Goerz bought with notice, and that she was fully cognizant of the character of these transactions and sought to protect herself against the loss by the covenant in her deed against

lawsuits and taxes. Your orators further show that the covenant in her deed alone was sufficient to put her upon inquiry."

There is no evidence in the record to support this charge, except that her deed contained a covenant of protection against loss from lawsuits and taxes, and as to this covenant it is admitted that it was a part of the printed form of deed used, and the evidence shows that printed forms of deed with such covenant were in use by not only Mr. Beckett, who drafted the deed for Mrs. Goerz, but by other members of the Savannah bar. To an unprofessional person like Mrs. Goerz such a provision would have no significance. Mrs. Goerz's uncontradicted evidence is that, in 1866 being left a widow with a small capital of $1,800, she soon invested in lots in the southwest section of the city, holding them for a while and then selling with a profit, and has followed that business ever since, dealing with Dorsett and other real estate agents. As to how she bought and paid for the tract in question, she testifies:

"Q. Now, Mrs. Goerz, will you please explain how you came to buy this property?

"A. Well, as I stated before that I have dealt in and sold real estate, and I had some cash money on hand which I thought I might invest, I not only went to Mr. Dorsett's office, but to different other brokers to find what real estate they had on their books and what they just had at that time of houses, etc. I could not see anything I wanted, and I went to Mr. Dorsett and asked him if he had lots or anything on hand, and he mentioned several, which I cannot just now state all what it was, and also a tract of land. As I never purchased anything without looking at it, he agreed to take me out, and came to my house with a hack, and we went out for me to see the land, and I looked at it and came back to the city and thought there might be something, a little, in it, and that is how I came to purchase it.

"Q. Did you look at it with Mr. Dorsett?

"A. Yes; with Mr. Dorsett out in the hack, just like he would any other—

"Q. Did you agree with Mr. Dorsett on what you were to pay for it?

"A. Not right then. We did not agree on a price. I went back in a day or two because the price was more money than I had on hand, and I wanted to see just how I would get my money together.

"Q. Just explain—go on in your own way, Mrs. Goerz. Did you or not understand that Mr. Dorsett was one of the owners of the property?

"A. I asked him then who I was buying from, and he says, 'Well, from a syndicate,' and I said, 'Who are they?' and he said 'I am one,' but that was on the way going out, and he probably would have said the others but there was a buggy coming towards the city and the party in there bowed, and that interfered with the conversation, and we never renewed it, because generally I am not in the habit of asking who the party is that I buy from, since I have a lawyer afterwards to see my titles.

"Q. You understood Mr. Dorsett was one?

"A. I understood he was one of the parties.

"Q. You been dealing with Mr. Dorsett a good many years?

"A. Yes; and when he said he was one that was sufficient for me, because I always found in all my dealings Mr. Dorsett perfectly reliable and all, and I did not inquire any further.

"Q. You had entire confidence?

"A. Entire confidence.

"Q. When did you first see these deeds, Mrs. Goerz?

"A. Well, I cannot really state the date, but I can explain how it is. I keep no regular bank account—never have. I have a book at the People's Saving & Loan Company, and people pay to me pay in there, and it is credited on the book, and, like all my transactions previously, the deeds when they were made out my lawyer sent them there. He sent them to the courthouse, and

from there they were sent to Mr. Dorsett's office. They paid for the recording of them and then kept them until I called for them, in the safe. So the deeds were there quite a while before I ever saw them—before I called for them. In fact, I never called for the deeds until I was served with paper in this suit.

"Q. Did you see the deeds yourself before you got notice of this suit brought by the Barstows against you and others?

"A. To the best of my knowledge I did not. Of course, time has gone off some, and it is hard just to state the exact point.

"Q. Are you positive that quite a long time elapsed before you saw the papers?

"A. Quite a long time; yes, sir.

"Q. You spoke about keeping money with the People's Saving & Loan Company and having your money transactions through that company. Is Mr. Dorsett president of the company—of the People's Saving & Loan Company?

"A. I think he is.

"Q. You understand that he is?

"A. I know he is one of the officers of the company.

"Q. Does that company have its place of business in the same place of business where Mr. Dorsett is?

"A. In the same place; that is the same place.

"Q. Now, you say the property is paid for?

"A. I paid $2,500 in money cash, and then had a note of $1,600 besides taken up, finishing paying the amount due for the property, for I paid $4,000 for it, and, of course, to explain that note of $1,600 the $100 additional I wanted for expenses, because it took all my ready money to pay for that property, to pay Mr. Beckett for papers made out, and such as that.

"Q. And other little incidental expenses?

"A. Yes, sir.

"Q. Did you then borrow $1,600?

"A. $1,600.

"Q. In order to enable you to pay for this property and some incidental expenses?

"A. Yes, sir.

"Q. Do you know from whom you borrowed?

"A. I borrowed from the People's Saving & Loan Company.

"Q. So that your money transactions were made through the company and through Mr. Dorsett?

"A. Yes, sir."

She testifies, further, that up to the time of hearing of this suit she did not know and had never heard that the property had ever belonged to Barstow, and had never heard or knew anything of Barstow.

As to Mr. Beckett's connection with her purchase, she testifies that he was the lawyer who drew the deeds for her; that she paid him for the service; that he had previously drawn titles for her; that she did not know that Beckett had ever had the property sold or had bought it in. She herself bought from a syndicate of which she only knew Dorsett. Throughout a lengthy and rigid cross-examination she answered fairly and fully, and we are impressed with the fact that in purchasing the property she was acting solely in her own interest, in honesty and good faith. It is true that in a small way she was a successful real estate dealer, and she had availed herself of the legal services of Isaac Beckett, who is charged in the bill with conceiving a conspiracy to defraud Barstow of his lands.

We are aware of no invidious legal presumptions affecting Mrs. Goerz's honesty and good faith to be invoked because she was a real estate dealer. Neither under the averments of the bill nor under the evidence can it be presumed that because Isaac Beckett was employed by

Mrs. Goerz to pass upon the title and draw the deeds she was charged with notice of the frauds theretofore attempted and perhaps committed by Beckett or within his previous knowledge. On principle and authority no such presumption can be indulged in. Pursley v. Stahley, 122 Ga. 362, 50 S. E. 139; American Surety Co. v. Pauly, 170 U. S. 165, 18 Sup. Ct. 552, 42 L. Ed. 977; Western Mortgage Co. v. Ganzer, 63 Fed. 650, 651, 11 C. C. A. 371. If Beckett's knowledge had been acquired after his employment by Mrs. Goerz, there might be a little more reason in charging her with the knowledge of her agent, but still a presumption that a man volunteers against his own interest a confession of his own rascality is not to be readily indulged in. The price Mrs. Goerz paid was not so inadequate as to put her on notice of any defect in the title. She paid $4,000, four-fifths of the value asserted in complainants' bill, and there is highly respectable authority for holding that complainants are estopped from denying the truth of their averments. See 1 Daniel, Chancery, 838, 832n. There is evidence in the record showing that in the opinion of certain real estate men the property was worth in 1897 about $10,000, but considering the history of cities like Savannah, and after the panic of 1893 and 1894 the unexampled prosperity of the country, getting well started in 1896 and 1897, and in view of the continued rise in suburban property near prosperous cities, the opinions of witnesses given now as to the values of vacant suburban property in 1897 are not as reliable in fixing values as would be evidence of actual transactions at the time.

In Eyre v. Potter, 15 How. 42–59, 14 L. Ed. 592, it is said:

"Again, it is ruled that inadequacy of consideration is not of itself a distinct principle of equity. The common law knows no such principle. The consideration, be it more or less, supports the contract. Common sense knows no such principle. The value of a thing is what it will produce, and it admits of no precise standard. One man in the disposal of his property may sell it for less than another would. If courts of equity were to unravel all these transactions, they would throw everything into confusion, and set afloat the contracts of mankind. Such a consequence would of itself be sufficient to show the injustice and impracticability of adopting the doctrine that mere inadequacy of consideration should form a distinct ground for relief. Still there may be such an unconscionableness or inadequacy in a bargain as to demonstrate some gross imposition or some undue influence; and in such cases courts of equity ought to interfere upon satisfactory ground of fraud; but, then, such unconscionableness or such inadequacy should be made out as would, to use an expressive phrase, shock the conscience, and amount in itself to conclusive and decisive evidence of fraud."

All elements of fraud eliminated, and, so far as Mrs. Goerz is concerned, she cannot under the evidence in this case be charged with any, certainly there is nothing in the price she paid for vacant suburban property, taxable, but producing no revenue, to "shock the conscience."

We have been referred to many adjudged cases to the effect that contracts with an insane person, though not interdicted or judicially declared incapable, are void, and to other cases to the effect that such contracts are voidable only. If absolutely void, the innocent purchaser cannot as such be protected, if voidable, the innocent purchaser may have a standing in equity. If the evidence in this case

established that Barstow was insane at the time the security deed was granted, or perhaps even at the time of the judicial sale of the 50.26 tract, our conclusion on this appeal might have been on other lines.

The appellant, Mrs. Goerz, is entitled to a reversal of the decree by the court below, and a remand of the case, with instructions to dismiss the bill so far as she is concerned. This conclusion renders necessary a reversal of the decree, and the dismissal of the bill against the other appellants, so far as they are charged with liability or decreed to pay moneys as the grantors of Mrs. Adele Goerz.

Decree accordingly.

ISRAEL v. ISRAEL.

(Circuit Court of Appeals, Third Circuit. October 17, 1906.)

No. 37.

JUDGMENTS—ACTION ON JUDGMENT OF ANOTHER STATE—JUDGMENTS WHICH WILL SUPPORT ACTION.

Under article 4, § 1, of the federal Constitution, requiring that full faith and credit shall be given to the judicial proceedings of another state, in order that a judgment or decree shall be conclusive in an action brought thereon in another state, it must not only be conclusive in the jurisdiction where rendered, but also final in character, and establish a fixed and certain liability; and a decree for alimony and costs will support an action in another state in so far as it is for a sum due at the time of its rendition, and which is absolutely awarded, but not with respect to future payments, for which it provides, but as to which it remains subject to modification at any time, in the discretion of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1496, 1497.]

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

For opinion below, see 136 Fed. 1023.

David Wallerstein, for plaintiff in error.

D. Stuart Robinson, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. This is a writ of error taken by Abraham Israel to reverse a judgment for $2,640.71 and costs recovered against him in the court below by Tillie B. Israel, defendant in error, in an action of assumpsit, founded on a certain judgment or decree for the payment of alimony, maintenance and costs, rendered by the Supreme Court of New York, in a suit for divorce brought by him against her. The plaintiff in the court below introduced in evidence an exemplified copy of the record of the proceedings in the New York suit and rested. The defendant offered no evidence and a verdict for the plaintiff was taken subject to the question reserved "whether there was any evidence to go to the jury in support of plaintiff's claim." This point was determined adversely to the plaintiff in error and judg-

ment was entered on the verdict. The assignments of error broadly raise the question whether the judgment or decree for the payment of alimony, maintenance and costs in the New York suit could support the action of assumpsit in the court below. It appears from the record that the New York suit was brought by the plaintiff in error to secure an absolute divorce from the defendant in error, and that, the latter in her answer to the complaint having denied the charges made against her and set up a counterclaim and prayed for a dismissal of the complaint and, by way of affirmative relief, for a separation from bed and board and suitable support and maintenance, it was, July 21, 1902, adjudged and decreed by the court, among other things, as follows:

"Fourth. That the plaintiff pay the defendant weekly on Monday of each and every week commencing on the 30th day of June, 1902, and until the further order or judgment of this court, the sum of thirty dollars for the support and maintenance of defendant and the said children, such payment, however, not to be in lieu of dower or right of dower of the defendant in the plaintiff's real estate or any interest in his personal estate in case of his death intestate.

"Fifth. That the defendant recover from the plaintiff the costs of this action to be adjusted by the clerk of this court."

It appears from the record that the costs of the New York suit were adjusted by the clerk at the sum of $223.85, and were, September 15, 1902, adjudged and decreed to be paid by the plaintiff to the defendant.

The defendant in error contends that by virtue of the Constitution and laws of the United States full faith and credit are to be given in Pennsylvania to the judgment or decree of the Supreme Court of New York, and therefore that the action in the court below was sustainable. The plaintiff in error denies that the Constitution or legislation of the United States so applies to the New York judgment or decree as to support that action. Article 4, section 1, of the Constitution declares that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," and that "the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." By the act of May 26, 1790, c. 11, 1 Stat. 122, as amended and incorporated in section 905 of the Revised Statutes [U. S. Comp. St. 1901, p. 677] it is provided that the records and judicial proceedings of the courts of any state, when duly authenticated, "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken." It appears from the record that the judgment on the verdict in the court below includes $2,130 representing alimony and maintenance for seventy one weeks, at the rate of $30 per week, as adjudged and decreed in the New York suit, and, further, that of the above sum of $2,130 only $120, or four weeks' alimony and maintenance was payable on the rendition of the New York judgment or decree. The balance, amounting to $2,010, represented alimony and maintenance which was not then payable, but only to accrue thereafter. It appears that under the statutes of New York the judgment or decree, so far as it directed the payment of alimony and maintenance not then accrued or payable could at any time thereafter be annulled, varied or modified by the court rendering it. It, therefore, was not a con-

clusive and final judgment or decree with respect to the sum of $2,010, representing alimony and maintenance for sixty seven weeks accruing after its rendition. It did not constitute a fixed, unconditional and absolute liability for its payment. Any rule which would allow suit to be maintained in another state on such a judgment or decree for future alimony and maintenance, would directly tend to the creation of confusion, embarrassment and conflict between courts. The Supreme Court of Illinois in Barclay v. Barclay, 184 Ill. 375, well said with respect to the liability to pay alimony which had become due under a decree providing for future alimony:

"The decree for alimony may be changed from time to time by the chancellor, and there may be such circumstances as would authorize the chancellor to even change the amount to be paid by the husband, where he is in arrears in payments required under the decree. * * * The peculiar character of the obligation is such that it is always subject to modification by the court in which the decree was entered, according to the varying circumstances of the parties, and no other court could undertake to administer the relief to which the parties are entitled except that having jurisdiction in the original suit. An attempt to do so by such other court would bring about a conflict of authority and a condition of chaos with reference to questions of this character, because no other court would have before it the facts with reference to such change in conditions and as to such original right of the parties."

In Pennington v. Gibson, 16 How. 65, 14 L. Ed. 847, the court laid it down "as the general rule, that in every instance in which an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for an ascertained and specific amount," but, in referring to Hugh v. Higgs, 8 Wheat. 697, 5 L. Ed. 719, where it was held that no action at law was sustainable "on the decretal order of the Court of Chancery," said:

"It might very well be error to allow the action of debt upon a decretal order of the chancery, and yet perfectly regular to sustain such an action upon the final decree. The former is subject to revision and modification, the latter is conclusive upon the rights of the parties."

We are well satisfied that, aside from the operation of the constitutional and legislative provisions touching the faith and credit to be given to the records and judicial proceedings of the courts of other states, when duly authenticated, no action was sustainable in Pennsylvania on the New York judgment or decree so far as it embraced alimony and maintenance not then accrued. And we are equally well satisfied that such constitutional and legislative provisions do not lend any support to an action in Pennsylvania for the recovery of such alimony and maintenance. On this point Lynde v. Lynde, 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810, is conclusive. In that case the Supreme Court affirmed the decision of the Court of Appeals of New York. Lynde v. Lynde, 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679, 76 Am. St. Rep. 332. The case came before the Court of Appeals on appeal from a judgment of the Appellate Division of the Supreme Court of New York modifying and affirming as modified a judgment of the court at Special Term in an action founded on a decree of the Court of Chancery of New Jersey by which it was adjudged that the plaintiff was entitled to recover of the de-

fendant $7,840 for alimony until the date of the decree, and a counsel fee of $1,000; that the defendant should pay to the plaintiff alimony at the rate of $80 per week from and after the date of the decree and give security for the payment of the several sums of money directed to be paid; and that upon his failure to comply with the decree application might be made for sequestration proceedings and a receiver and an injunction. The trial court at Special Term decided that the decree of the Court of Chancery of New Jersey should be enforced against the defendant not only with respect to the counsel fee of $1,000 and alimony until the date of the decree, but also as to alimony accruing from and after the date of the decree, and the giving of security; and further provided that upon failure by the defendant to comply with the provisions of the decision a receiver might be appointed ancillary to the receiver appointed by the Court of Chancery of New Jersey. The defendant appealed and the Appellate Division modified the judgment, so as to allow the plaintiff to recover $8,840, the aggregate of the counsel fee and alimony until decree, and affirmed the judgment as so modified. The Court of Appeals through Gray, J., among other things, said:

"With respect to how far the Supreme Court of this state will enforce the final decree of the New Jersey court, I think the determination of the Appellate Division to be quite correct. The action was to recover upon a final decree of the court of another state, which, being rendered with jurisdiction over the person of the defendant is to be deemed conclusive, in so far as it adjudged the defendant to be indebted to the plaintiff at the date of its rendition. The proceeding in chancery had terminated in an unconditional decree that the defendant must pay a definite sum of money, established as a debt against him, and, therefore, it had extra-territorial value and force. (Wharton Confl. Laws, § 804.) As a debt of record against the defendant the courts of this state should give it full credit and effect; but as to its other provisions for future alimony and for equitable remedies to enforce compliance, I do not think we should say that it falls within the rule of the Federal Constitution. I do not think that the courts of this state should give effect to the decree by enforcing any of the collateral remedies, which the prevailing party may be entitled to in New Jersey and which the subsequent order gave to her. So far as it made provision for the payment of alimony in the future, it remained subject to the discretion of the chancellor and lacked conclusiveness of character. The chancellor's action was not final on the subject. As he observed in Lynde v. Lynde (supra), referring to the law of New Jersey: 'The statute exhibits an intention that the subject shall be continuously dealt with according to the varying condition and circumstances of the party.' The provision of the Federal Constitution, which requires that full faith and credit shall be given to the judicial proceedings of another state, in my opinion, should be deemed to relate to judgments, or decrees, which not only are conclusive in the jurisdiction where rendered, but which are final in their nature. If they, once and for all, establish a debt, or other obligation, against a party, the record is available in other jurisdictions as a foundation for a judgment there."

The Supreme Court of the United States in its affirming opinion said, through Mr. Justice Gray:

"By the Constitution and the act of Congress, requiring the faith and credit to be given to a judgment of the court of another State, that it has in the State where it was rendered, it was long ago declared by this court: 'The judgment is made a debt of record, not examinable upon its merits; but it does not carry with it, into another state, the efficacy of a judgment upon property or persons to be enforced by execution. To give it the force of a judgment in

another State, it must be made a judgment there; and can only be executed in the latter as its laws may permit.' * * * The decree of the Court of Chancery of New Jersey, on which this suit is brought, provides, first, for the payment of $7,840 for alimony already due, and $1,000 counsel fee; second, for the payment of alimony since the date of the decree at the rate of $80 per week; and third, for the giving of a bond to secure the payment of these sums, and, on default of payment or of giving bond, for leave to apply for a writ of sequestration or a receiver and injunction. The decree for the payment of $8,840 was for a fixed sum already due, and the judgment of the court below was properly restricted to that. The provision for the payment of alimony in the future was subject to the discretion of the Court of Chancery of New Jersey, which might at any time alter it, and was not a final judgment for a fixed sum. The provisions for bond, sequestration, receiver and injunction, being in the nature of execution, and not of judgment, could have no extra-territorial operation."

The defendant in error relies on Barber v. Barber, 21 How. 582, 16 L. Ed. 226. That case, however, was reviewed at considerable length by the Court of Appeals of New York in its opinion in Lynde v. Lynde, supra; and it cannot reasonably be assumed that, when the latter case was under consideration by the Supreme Court of the United States on writ of error, Barber v. Barber was overlooked by that tribunal. On the contrary, it fairly may be assumed that the Supreme Court took the same view as the Court of Appeals did of the decision in Barber v. Barber. In so far as that decision is inconsistent with Lynde v. Lynde on the point now under discussion, if there be any inconsistency, it must be considered as overruled, or at least modified, by the later case. We regard Harding v. Harding, 198 U. S. 317, 25 Sup. Ct. 679, 49 L. Ed. 1066, cited on behalf of the defendant in error as wholly inapplicable to the matter in hand. We think that neither principle nor authority warranted the bringing of any action in Pennsylvania on the New York judgment or decree so far as it provided for the payment of alimony and maintenance to accrue thereafter, and that there was error on the part of the court below in rendering the judgment complained of on the question reserved. But the New York judgment or decree, with respect to the alimony and maintenance due and payable on its rendition and the costs, represents a fixed, unconditional and absolute liability for which suit might be maintained elsewhere than in New York in any court of competent jurisdiction. The defendant in error sued in the court below for the recovery not only of the amount of such fixed liability, but also of the alimony and maintenance to accrue only after the rendition of the New York judgment or decree, together with interest on the several sums. We have no reason to believe or even suspect that in thus suing she attempted or meditated any fraud upon the jurisdiction of the court below, founded upon the amount of the matter in dispute. It is but reasonable to assume that her claim as set forth in her declaration or complaint fairly represented the amount really and bona fide in controversy so far as she is concerned, and, therefore to conclude that the court below had jurisdiction. Schunk v. Moline, Milburn & Stoddart Co., 147 U. S. 500, 13 Sup. Ct. 416, 37 L. Ed. 255. The judgment below included not only $2,010 representing alimony and maintenance accruing after the rendition of the New York judgment or decree but also legal interest thereon to the date of taking the ver-

dict on which the judgment below was entered; that sum with such interest amounting to $2,258.90. The plaintiff below had no right to recover any portion of the future alimony and maintenance or interest thereon, represented by the sum last above mentioned, and the excess of the amount of the judgment over that sum being "less than the sum or value of five hundred dollars exclusive of interest," she was not entitled to recover costs in the action below. Rev. St. § 968 [U. S. Comp. St. 1901, p. 702].

In view of the foregoing considerations we are of opinion that, unless the plaintiff below or her proper representative shall within thirty days next after the date of filing this opinion enter upon the record of the judgment below a remittitur as to the sum of $2,258.90, parcel of the amount thereof, together with legal interest on that sum, and as to all costs in the action below, and shall within the same period of thirty days file in this court a certified copy of the remittitur so entered upon the record below, the judgment below should, at the expiration of that period, be reversed with costs both in this court and in the court below; but that upon the entry upon the record of the judgment below by the plaintiff or her proper representative within the above mentioned period of thirty days of such remittitur and the filing within that period of a certified copy thereof in this court, as above mentioned, the judgment below should stand and be affirmed as to the residue of the amount thereof, the plaintiff below, defendant in error, however, to pay costs in this court. And it is now so ordered and adjudged, and that the mandate of this court issue upon the expiration of the above mentioned period of thirty days, and, further, that the clerk of this court do forthwith transmit to the parties or their counsel of record certified copies of this opinion and order.

UNITED STATES v. DONALDSON-SHULTZ CO.

(Circuit Court of Appeals, Fourth Circuit. November 8, 1906.)

No. 659.

JUDGMENT—RES JUDICATA—ACQUITTAL IN CRIMINAL PROSECUTION AS BAR TO TO CIVIL SUIT.

The acquittal of a defendant indicted under section 12 of Act March 3, 1899, 30 Stat. 1151 [U. S. Comp. St. 1901, pp. 3541, 3542], for creating an obstruction in a navigable stream, in violation of section 10 of said act, is not a bar to a subsequent suit in equity brought by the United States under the same section against the same defendant to compel the removal of such obstruction; the issues and measure of proof required in the two proceedings not being the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1078.]

Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Richmond.

For opinion below, see 142 Fed. 300.

L. L. Lewis, U. S. Atty.

H. I. Lewis and Isaac Diggs, for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge. An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors and for other purposes. Approved March 3, 1899. 30 Stat. 1121.

Sections 10 and 12 of the said act (30 Stat. 1151 [U. S. Comp. St. 1901, pp. 3541, 3542]) are as follows:

"Sec. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the chief of engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the chief of engineers and authorized by the Secretary of War prior to beginning the same."

"Sec. 12. That every person and every corporation that shall violate any of the provisions of sections nine, ten and eleven of this act, or any rule or regulation made by the Secretary of War in pursuance of the provisions of the said section fourteen, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any circuit court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney-General of the United States."

In January, 1905, the Donaldson-Shultz Company, the appellee in this case, was indicted in the District Court of the United States for the Eastern District of Virginia for violation of section 10 of this act; the charge in the indictment being, substantially, that the said company, being a corporation under the laws of the state of Virginia, had, on the 1st day of October, 1902, unlawfully built in Urbanna creek, a navigable water of the United States, at a point in the said creek where no harbor lines had been established, to wit, at Urbanna, in the said district, a certain wharf, a wooden structure, 175 feet long and 20 feet wide, and that the same was built by the Donaldson-Shultz Company on plans not recommended by the chief engineer of the United States army or authorized by the Secretary of War, etc. And, further, that the said company, on the said day, did unlawfully create an obstruction to the navigable capacity of said Urbanna creek, a navigable water of the United States, at Urbanna, in the said district, by building a large wooden structure, etc., extending from the left-hand shore out into the channel limits of the said creek a distance of 10 feet, thereby causing an obstruction to the navigation of said creek, such obstruction being created by the said company without any authority so to do by

the Congress of the United States, etc. On the 16th of January, 1905, the said company was tried upon this indictment in the District Court of the United States for the Eastern District of Virginia, at Richmond, upon the plea of not guilty, and the jury, which was sworn and impaneled in the case, rendered a verdict of not guilty. Whereupon, the said company was discharged. Thereafter, on the 31st of March, 1905, the United States Attorney for the Eastern District of Virginia, by direction of the Attorney General of the United States, brought a bill of complaint in the Circuit Court of the United States for the said district against the Donaldson-Shultz Company, setting forth the same facts, in substance, as those constituting the averments in the indictment upon which the company had been tried and acquitted. The bill further alleged that the said defendant corporation, although often requested so to do, had not removed the said wharf from the waters aforesaid, and particularly had not removed the same from the channel limits of the said creek, and that the existence of the said wharf was a serious and permanent obstruction to the navigation of the said Urbanna creek at the point aforesaid. The prayer of the complainant was for writ of mandatory injunction, requiring and compelling the Donaldson-Shultz Company, its officers, agents, and employés to remove the said wharf and obstruction from the said Urbanna creek, or at least to the extent that the same constitutes an obstruction to the navigation in the said creek. The company appeared in response to the service of the writ of subpœna, and on June 3, 1905, filed to the bill of complaint a plea of res judicata, as follows:

"In the Circuit Court of the United States for the Eastern District of Virginia.

"The United States of America v. The Donaldson-Schultz Company, a Corporation. In Equity.

"And the said defendant comes and says that the said plaintiff heretofore, to wit, on the 5th day of January, 1904, in the District Court of the United States, for the Eastern District of Virginia, held at Alexandria, Virginia, impleaded the said defendant and indicted it, in a certain criminal indictment containing three counts for violating the very same statute and not performing and doing the very same things, and each and every of them in the plaintiff's bill in equity here mentioned, and filed in this Honorable Court, which said indictment is in the words and figures following, to wit."

Then follows in full the indictment upon which the defendant company was tried, which it is not necessary to reproduce here. The Circuit Court held this plea sufficient and that the acquittal of the defendant upon the criminal indictment was a bar to the present civil action, and thereupon the bill of complaint was dismissed, and the United States, by its attorney, having duly excepted to this ruling of the court, brings the case here by appeal.

There are many instances in which a navigable stream or a public way may be obstructed, and yet there might be such an uncertainty about the testimony which was adduced in the trial of the criminal indictment that the person charged with the obstruction would be acquitted, and still, as a fact, the obstruction might exist. The case of Coffey v. United States, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684, is cited and relied upon largely to sustain the decision of the Circuit

Court, but in our opinion that is not an analogous case at all. Coffey was indicted under section 3257 of the Revised Statutes [U. S. Comp. St. 1901, p. 2112], which provides that:

"Whenever a person engaged in carrying on the business of a distiller defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, he shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits found in the distillery and on the distillery premises, and shall be fined not less than five hundred dollars nor more than five thousand dollars and shall be imprisoned not less than six months nor more than three years."

Upon this indictment he was tried and acquitted. An information was also filed on behalf of the United States against the distillery and the distilling apparatus used by Coffey, and also against all the distilled spirits found in his distillery and on the distillery premises. The information was tried after Coffey had been acquitted in the trial upon the criminal indictment, and the Supreme Court very properly held that:

"Where an issue raised as to the existence of the act, or fact denounced, has been tried in a criminal proceeding instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit in rem by the United States, where as against him the existence of the same act or fact is the matter in issue as a cause for the forfeiture of the property prosecuted in such suit in rem."

The reason and soundness of this principle are readily seen, because in the issue between the United States and the person charged with the commission of the acts which are the basis of the forfeiture it is determined that the acts were not committed and the facts did not exist. Consequently there was no forfeiture, because the acts must have been committed and the facts must have existed at the time, in order to vest the title of the offending thing in the government as forfeited property. The forfeiture of Coffey's distillery and other property was a part of the punishment prescribed by the law for the criminal act which he was alleged to have committed. The jury having found that the criminal act alleged had not been committed, then, of course, it follows that the punishment could not be inflicted. And this line of reasoning is followed out substantially in Boyd, Claimant, v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746. This was a proceeding in rem against certain merchandise claimed to be forfeited to the United States because fraud had been committed against the government in its importation. The statute under which the proceeding was instituted provided, also, that the person offending should be punished by fine and imprisonment, in addition to the forfeiture of his goods. In that case Mr. Justice Bradley, in delivering the opinion of the court, says:

"These are the penalties affixed to the criminal acts; the forfeiture sought by this statute being one of them. If the indictment had been presented against the claimant, upon conviction the forfeiture of the goods could have been included in the judgment."

The facts in this case are the converse of the Coffey Case; for here it is held that a conviction of the criminal act carries with it the forfeiture of the goods, whilst in that case it is held that an acquittal of the person charged with the criminal act upon which the forfeiture is claim-

ed is a bar to the forfeiture; but there is no such question involved in the case before us. There is no claim for the forfeiture of the property of this company, for we do not find anywhere in the statute making it a misdemeanor to obstruct a navigable water that the material used in the construction of the obstruction is forfeited to the United States. This is not made a part of the punishment as in the statutes passed upon in the Coffey Case and in the Boyd Case. The purpose of the statute we are considering is not to take property from the owner, but to keep navigable waters free from impediments which would obstruct their free and convenient use for navigation. If the mandatory injunction sought by this proceeding was issued, the result would simply be to require the appellee to remove the obstruction—to take his property away. It is argued by the appellee that because the United States proceeded first by indictment, and upon the trial there was verdict of acquittal, that conditions must remain in statu quo, and that the government has no further right to proceed in a civil action to remove an obstruction to a navigable stream which it is alleged still exists. If this be the law, then the right of the government to maintain the navigable waters in a condition suitable for navigation and free from obstruction would, in many cases, be absolutely destroyed by the vicissitudes, the uncertainties, and the local environments attending criminal trials. An obstruction might exist and yet the evidence adduced in a criminal trial might not be sufficient in the minds of the jury to convince them beyond what the law calls a reasonable doubt, which is necessary in such trials in order to authorize a verdict of guilty. The element of an intent might be wanting if such were held by the trial court to be necessary. The person indicted may have placed the obstruction under a bona fide belief that he had a right to do it and this might result in his acquittal, and yet shall it be contended that, although this acquital has taken place and in fact the obstruction is there, the government is deprived of its civil remedy to have it removed? We think not.

It is our conclusion that there was error in the ruling of the Circuit Court, and the case is remanded, in order that proceedings may be had in accordance with this opinion.

Reversed.

TRADE DOLLAR CONSOL. MINING CO. v. FRASER et al.

(Circuit Court of Appeals, Ninth Circuit. October 8, 1906.)

No. 1,305.

1. WATERS AND WATER COURSES—RIGHTS OF APPROPRIATOR—PROTECTION BY INJUNCTION.

A complainant corporation, which has made an appropriation of water from a stream in accordance with the laws of a state to be used in the generation of power for manufacturing and electrical purposes, and which has constructed a dam at large expense sufficient in height to enable it to use beneficially the quantity of water appropriated, is entitled to protection by injunction against a later appropriator, who for the purpose of obtaining the benefit of the dam is undertaking to take out ditches or canals a short distance above it, to be carried below around the ends of the dam, also for the purpose of generating power, where the effect would

be, not only by lowering the water to lessen the power and efficiency of complainant's plant, but also to endanger its dam by the proximity of the proposed ditches.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 331, 332.]

2. INJUNCTION—PROTECTION OF WATER RIGHTS—PROOF OF THREATENED INJURY.

Where defendants had filed an application for a permit to divert water from a stream which had been granted by the state authorities on their furnishing a plan of their proposed works, which plan if carried out would work irreparable injury to the plant of complainant, which was a prior appropriator, and defendants insisted upon their right and affirmed their intention to proceed in accordance with such plans, such facts sufficiently show a purpose and intention to interfere with complainant's water rights to warrant the granting of an injunction to restrain the threatened injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 9–13.]

3. SAME—ADEQUATE REMEDY AT LAW.

The fact that defendants, who claim the right to take water from a stream in accordance with plans approved by the state authorities, in carrying out such plans would be compelled to condemn right of way over the lands of complainant, who is a prior appropriator, will not debar complainant from the right to an injunction to restrain the building of such proposed works, where their construction would work irreparable injury to the plant of complainant and destroy the value of its prior water right, since its equitable rights could not be adequately protected in the condemnation proceeding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 15–17.]

Appeal from the Circuit Court of the United States for the Central Division of the District of Idaho.

Johnson & Johnson and N. M. Ruick, for appellant.

Alfred A. Fraser, for appellees.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

ROSS, Circuit Judge. The case shows that one Joseph H. Hutchinson, the predecessor in interest of the appellant, by notice posted and recorded in January, 1900, claimed the right to the use of 10,000 cubic feet per second of the waters of Snake river, to be diverted therefrom at a point about 10 miles up the river from the town of Guffey, Owyhee county, Idaho, particularly identified by a large lava rock island near the center of the river, and which point is called Swan Falls. The purpose for which the appropriation was made was stated in the notice to be "power for motive, manufacturing, mechanical, electric light, electric power, and other useful and beneficial purposes, and for irrigation by means of pumping and otherwise." The notice further stated that the water was to be diverted by means of a dam, or else two canals or conduits, said dam to be constructed across the river at Swan Falls, particularly describing the dam site, and further stating that the water flowing at that point was "to be used for power for motive, manufacturing, mechanical, electric light, electric power and for pumping water for irrigation purposes in the counties of Ada, Canyon, Owyhee, Elmore, Lincoln, Cassia and other places in Idaho"; that plans and speci-

fications of the dam site would be filed with the state engineer of Idaho as required by law, and claiming five years in which to complete the dam or canals. In May following Hutchinson posted and caused to be recorded in the office of the recorder of the county another similar notice of the appropriation of the same waters for the same purposes, to be diverted at the same place, and that such diversion was to be by means of a dam, plans and specifications of which would be filed with the state engineer of Idaho, and designating the places of intended use, and further expressly stating that nothing therein was intended as a waiver of any rights claimed in his previous notice of January.

The appellant, a corporation organized and existing under and pursuant to the laws of the state of Kentucky, having acquired Hutchinson's rights, commenced and completed the construction of a dam across the river at the point indicated in the notice, plans for which were approved by the state engineer as required by a statute of the state, thereby creating a head of 19 feet of water, and installing a costly power plant not only of great present capacity but one intended to be, and susceptible of being, largely increased. While at the time of the commencement of this suit, and at the time of its trial in the court below, the appellant was only making use of 2,150 cubic feet per second of the waters of the river in the operation of its plant and the running of the four water wheels it had then installed, the undisputed evidence shows that in the construction of the dam provision was made for the installation of 12 more wheels of like capacity, the operation of which would require practically all of the water claimed. The evidence also shows that the cost of the works already completed exceeds $350,000, and that in the making of that large expenditure the appellant not only had in view additions to the equipment from time to time as the demand for power and the other purposes stated should arise, in the development of the region in which the plant is located, but had been actively engaged in the pursuit of its intention to enlarge the plant and apply all of the water claimed to a beneficial use.

A statute of the state of Idaho, where the property in question is situated, approved March 11, 1903 (Sess. Laws 1903, pp. 250–252), makes provision for just such a case. Sections 38 and 41 of that statute are as follows:

"Sec. 38. In allotting the waters of any stream by the district court according to the rights and priorities of those using such waters, such allotment shall be made to the use to which such water is beneficially applied, and when such water is used for irrigation the right confirmed by such decree or allotment shall be appurtenant to and shall become a part of the land which is irrigated by such water. Such right shall pass with the conveyance of such land and such decree shall prescribe the land to which such water shall become so appurtenant; and the amount of water so allotted shall never be in excess of the amount used for beneficial purposes for which such right is claimed; provided, that in the case of works capable of diverting more water than is applied to a beneficial purpose at the time the rights of the person or persons owning or using such works are adjudicated by the court, the right only to the water beneficially applied at the time of making such allotment shall be confirmed by the court, and the court shall ascertain the amount of water which can be diverted through such works in excess of such quantity beneficially applied, and shall set a time when such an amount shall be applied to the beneficial purposes for which it is intended, which time shall not exceed

four years from the date of the decree issued by such court under such adjudication, and any person using any of such water which was not beneficially applied at the time of such adjudication shall, before the expiration of the time set for such beneficial application, make proof of such beneficial use in the manner provided in section seven (7) of this act, and such right, when confirmed in the manner provided in this act, shall relate to the priority established by such court, and if such application of any of such water shall be made subsequent to such date then the priority of the right to the use thereof shall be determined in the manner provided in section eight (8) of this act."

"Sec. 41. All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this act; and after the passage of this act all of the waters of this state shall be controlled and administered in the manner herein provided, and all acts or parts of which may be in conflict with this act are hereby repealed."

The case further shows that at the low-water stage of the river, which extends from August to November of each year, the volume of water flowing in the river at Swan Falls is only about 6,500 cubic feet per second. On the west side of the river is Owyhee county, and on the east side is Ada county, of the state of Idaho. After the building of appellant's dam and the consequent raising and backing of its waters until a head of 19 feet was thereby obtained, the defendants and one F. B. Whitin filed in the office of the engineer of the state, pursuant to the provisions of a statute of the state, two applications for permission to appropriate certain waters of the river for power purposes—one for a permit to appropriate 2,000 cubic feet per second to be diverted from the river at a point on the west bank thereof in Owyhee county, about 500 feet above the west end of the appellant's dam, and to be conducted to the point of intended use on the same bank of the river about 500 feet below the west end of the dam, by means of a ditch or canal 65 feet in width at the bottom, 81 feet in width at the water line, and with a depth of water of 8 feet; the other for a permit to appropriate 2,000 cubic feet per second to be diverted from the river on the other bank thereof in Ada county, about 400 feet above the east end of the appellant's dam, and to be conducted to the point of intended use on the same bank of the river about 500 feet below the east end of the dam, by means of a ditch or canal of like dimensions, and with like depth of water. Whitin having conveyed all of his interest in the applications and permits to the defendant Fraser, and the state engineer having returned both applications to the defendants for the purpose of correction, and having required a more definite and certain place of diversion and use of the waters and a survey of the proposed ditches or canals to be used in connection therewith, the defendants, on the 29th of November, 1904, returned to the state engineer their corrected applications, each accompanied by a plan and map of the proposed works for the diversion of the waters, on which day the state engineer approved each application and granted them a permit to appropriate the waters applied for, and to construct the proposed works, subject to the limitations and conditions that one-fifth of the work therein specified should be completed on or before May 29, 1907, that the whole of such work be completed on or before November 29, 1909, and that the time for the proof of the beneficial use of such waters extend to November 29, 1913. Those permits, with the maps and plans accompanying the same, were record-

ed in the records in the office of the state engineer. We assume that that officer was authorized to grant the permits to the defendants if they did not interfere with any vested right of the appellant. If they did so interfere, then, manifestly, to the extent of such interference they were and are invalid and of no effect.

Since the applications of the defendants and accompanying plans and maps show that the point of diversion of the waters applied for are but a few hundred feet above the appellant's dam, and the place of their intended use but a few hundred feet below it, and as the defendants' declared purpose of use is that of power, nothing can be plainer than that their sole object in so fixing the points of intended diversion was and is to avail themselves of the power created by the appellant's dam. If such use of the waters of the river would be without injury or damage to the appellant, perhaps it could not justly complain, but the record before us leaves no room to doubt that such diversion by the defendants would certainly work serious damage to the appellant and very likely destroy its dam. There is no conflict in the testimony upon the subject; indeed, it is all one way. We extract from the testimony of the witness Wiley, under whose directions appellant's works were constructed. Being asked to state what effect the defendants' diversion of the waters covered by their permits would have upon the appellant's dam and power plant, the witness answered:

"A. The construction of a canal around the south end of the dam would, in my opinion, result eventually in its destruction.

"Q. State your reasons for that conclusion.

"A. At this end of the dam the bed rock does not rise above the level of the old bed of the river, and is overlaid by a mixture of boulders and fine earth to which the dam is joined as securely as possible under such conditions; and the defendants' plans show a very large canal in this unstable material, carrying a flow of 5,000 cubic feet of water per second around the abutment of the dam, so close as to be practically in contact with it. Such a canal would be extremely hard to maintain, and a break in it would result in rapid erosion and the establishment of a new channel for the river around the south end of the dam, lowering the water to somewhere nearer its original level. Such a canal would also act as an effective barrier to any repairs that it might be necessary to make to the dam, and in this way also would be a constant menace. The dam in the south channel is of the rock-filled crib type and is filled and backed by material taken from the side hill adjacent to the south abutment, which is the only place where suitable material is available. It is necessary to have free access to this material in order to maintain the dam, and a quarry filled with cars and derrick is maintained here for this purpose, and has been used every year since the completion of the dam. The construction of the proposed canal would prevent the use of this quarry and will isolate the dam from all material needed in its maintenance. The proposed canal around the north end of the dam would be a menace to the safety of the dam, though not such a serious one as that around the south end; the material in the north shore being of a firmer nature, though even here we were not able to make a complete junction with the bed rock. The chief objection to the canal at this end is the obstacle it would present to the operation of the present plant and its prohibition of future extensions. The property of the company is located in a narrow canyon 700 feet below the general level of the country. There is barely room on the north side of the river for the location of the dwellings necessary for the employés of the company in the operation of its plant, and a canal with the proposed capacity of 5,000 cubic feet per second, as shown by defendants' map, would take away practically all the available ground in the vicinity of the complainant's property. Furthermore, the construction of both canals, as

proposed by the defendants, would leave the property of the complainant isolated from the mainland by canals which are virtually rivers themselves, and would be a most serious obstacle in the maintenance and operation of the plant.

"Q. What other effect would the diversion of the amount of water claimed by the defendants, through canals at each end of the complainant's dam, have upon the present power dam of the complainant?

"A. The diversion around the south end of the dam would only result in reducing the head acting upon the water wheels by the lowering of the water above the dam; but the diversion around the north end, on account of the condition of the river below, would result in not only reducing the elevation of the water above the dam, but would raise the elevation of the tail-water. The combined effect would reduce the velocity of the water wheels to such an extent as to render the entire equipment of water wheels, gearing, and electric generators inadequate for the work required, and it would be necessary to install a new equipment to meet the new conditions. Furthermore, the reduced head would require more expensive machinery to produce the same results, and would also require the use of a much larger volume of water.

"Q. What, in your opinion, has been the effect of the defendants' application for a permit to divert the water around the complainant's dam, upon the value of complainant's property?

"By Mr. Fraser: I object to that as immaterial, irrelevant, and incompetent. The witness has not shown himself competent to testify as to that question, and it is calling for a conclusion of the witness.

"A. It has, in my judgment, materially decreased the value of complainant's property by suggesting a flaw in complainant's title and making it difficult, if not impossible, to perfect plans for the extension of the plant, while there exists a possibility of defendants' right to divert any part of the water around complainant's dam."

The witness Irwin, who it appears is the general manager of the complainant company, after specifying the various mines and companies and towns and parties to which the complainant furnishes power and light, and the various steps that have been taken by the complainant to enlarge its plant and extend its operations, being asked to state what effect the construction of defendants' proposed works would have on the dam and power plant of the complainant, answered:

"A. I think the construction of a canal on the Owyhee county side would menace the property so seriously in my opinion that it would practically destroy it.

"Q. Give your reasons.

"A. My reasons for this are that the lava reef on which this dam rests does not run at right angles to the original course of the stream, and consequently the waters coming over the spillway are forced against the Owyhee county bank, and this causes a very strong eddy to be formed on that side of the river. This eddy has a tendancy to erode the bank back of the abutment and has already done so. In June, 1903, I received a telephone message from the superintendent in charge of the power plant that the fill back of this abutment was washing, and that it was necessary to take some immediate steps to protect the dam. I took a shift from the tunnel, and by special conveyance hurried them to the dam, and there found that this water or eddy had washed the riprap and fill back of the abutment on the Owyhee county side a distance of about four feet, and was still washing it at that time. We tried to fill this hole which the eddy had cut, and found that up to a distance of about 16 feet from the pier we could fill it, but from there on nothing would stay. We had this crew of men put in one rock that was practically five feet square, but it dropped into that hole and was lost to sight and apparently had no effect whatever. The erosive action of the water was finally stopped at that point by putting in rails and holding the water that way.

"By Mr. Nugent: Q. Steel rails?

"A. Well, track rails. This, of course, was merely a temporary expedient. It was adopted to keep the water from washing around this abutment. As soon as low water came in the fall, we proceeded to put in timber cribs below this abutment and had them filled with rock, and we thought we had the situation well under control. But in 1904, at the high-water stage, a telephone message from the power plant again summoned us to the river, as this time the riprap work above the pier was being cut out and one of the bulkheads in the crib, which was put in the preceding summer, had been practically cut out and the rock settled through it. We took a crew of men and had them working probably for two weeks repairing the damage that the high water was doing at that time. Up above the dam on the Owyhee county side there is one place where you can see a sink hole probably five feet in diameter, through which the water at the medium stage of the river runs. Where it runs to we don't know, but we were afraid of it, and this year we are having that excavated and a crib filled with rock and dirt built above the dam to afford additional protection at this point. The fact that the concrete masonry is not joined to rock on the Owyhee county side, but is simply tied to the boulders and loose ground there, makes it a very difficult point to hold; and, from the force of the water that I have witnessed and had a little experience with in handling, these two sets of difficulties that we have had during the high-water period have convinced me that, no matter whether all the men you could get and all the money that you could have back of you was available, nothing would prevent the destruction of that dam, if the water at high-water season cut around the south pier.

"Q. What would be the effect of the construction of such a canal as is contemplated by the defendants?

"By Mr. Fraser: I object to that for the reason that the defendant has not shown himself competent to answer the question.

"A. It would cut us off from the quarry that we use in getting the fill to make these repairs that we use in the high-water season, and would, in my opinion, be very apt to cause erosion there that would practically give the river a new channel around that south pier. It would practically destroy the dam.

"Q. From your knowledge of the circumstances there and the condition of the soil, could such canal be safely constructed?

"A. I don't think it could. On the north side of the dam the principal damage would be the lowering of the head and cutting our power house off from the mainland. In addition to this the tail-water at this side would necessarily raise on account of the islands which lie directly below on the Ada county or north side of the river, which would have a tendency to back the water up and raise the tail-water as well as decreasing the efficiency of the machines."

There is no contradiction of this testimony in the record, but, on the contrary, other evidence therein in confirmation of it. In the opinion of the court below it is caid:

"There is one proposition involved in this case which seems clear. The complainant has erected a dam across that river, by which it creates a waterfall of 19 feet where practically none before existed, and thereby it has created a power for its plant. This 19-foot fall exists only while the dam is filled to the top, and, of course, any decrease in the height of the water lessens the power and efficiency of the plant accordingly. The complainant is entitled to such protection of this dam that the water in it shall not be lowered below the 19 feet by the erection of any other works by any other parties."

But the court below held that, inasmuch as, in its opinion, there was not a sufficient showing of an intention on the part of the defendants to divert the water claimed by them, the complainant was not entitled to any injunction.

We agree with the court below that the appellant is entitled to maintain the head of water created by the dam, for the reason that it was,

as against the defendants, the prior appropriator, and because the undisputed evidence shows that any decrease in the height of the water must necessarily lessen the power and efficiency of the appellant's plant. But there is another reason, equally potent, why the defendants are not entitled to make the diversion of the waters claimed by them in pursuance of the permits granted to them. The uncontradicted evidence clearly shows that the diversion of the waters claimed by the defendants by means of the contemplated canals and ditches, in such close proximity to the appellant's dam, would not only seriously endanger its security, but very likely work its destruction. That fact of itself would necessarily work irreparable injury to the appellant, for the uncertainty in respect to the stability of the appellant's works and the continuing danger of their destruction would not only necessarily depreciate the value of them, but practically put an end to the appellant's contemplated enlargement and extension of its plant. We therefore entertain no doubt that the appellant is entitled to an injunction protecting it against the diversion of the waters claimed by the defendants in pursuance of the permits granted to them by the state of Idaho, if the case sufficiently shows the purpose of the defendants to commit the wrongs complained of. The court below was of the opinion that it did not, relying in its opinion upon what is said in section 198 of Kerr on Injunctions, and upon this quotation from the opinion of the court in the case of Church v. Maschop, 10 N. J. Eq. 57:

"The court cannot grant an injunction to allay the fears and apprehensions of individuals. They must show the court that the acts against which they ask for protection are not only threatened, but will in all probability be committed to their injury."

The section from Kerr on Injunctions is as follows:

"The mere prospect or apprehension of injury, or the mere belief that the act complained of may or will be done, is not sufficient; but, if an intention to do the act complained of can be shown to exist, or if a man insists on his right to do, or begins to do, or threatens to do, or gives notice of his intention to do, an act which must, in the opinion of the court, if completed, give a ground of action, there is a foundation for the exercise of the jurisdiction. The mere denial of a man of his intention to do an act or to infringe a right will not prevent the court from interfering; but, if a man asserts positively that it is not his intenion to do a certain act or infringe a certain right, and there is no evidence to show any intention on his part to do the act or infringe the right, the court will not interfere."

We find no fault with the law as thus declared, but are of the opinion that the record in the present case not only shows the intention on the part of the defendants to commit the acts complained of, but that even in their answer they do not make any unqualified denial of such intention. The bill charges that the defendants, against the complainant's will and in violation of its rights, threaten and intend to commence the construction of the canals of the dimensions indicated in the permits issued to them, and in accordance with the plans annexed thereto, for the purpose of diverting 2,000 cubic feet of the waters of the river around each end of the complainant's dam. In their answer the defendants do not make any unqualified denial of such intention and purpose on their part, but aver:

"That they and their predecessors in interest, in securing the permits referred to in the complainant's bill, and which are relied upon by these defendants for their rights and privileges in the premises, acted in good faith and with the sole object and purpose of acquiring the right to use the unappropriated waters of Snake river at said point to the extent of 4,000 cubic feet and of maturing plans for power plant and financing said proposition so as to conduct said power to Boise City and other places for sale for mechanical, lighting, and other purposes. These defendants aver that so far these defendants have proceeded no farther than to comply with the laws of the state of Idaho with reference to securing said permits from the state engineer, which permits have been duly and regularly granted; that said defendants do not purpose or intend to go upon said ground of the complainant or attempt to construct said canals or in any manner interfere with said premises until they have filed their suit in condemnation for a right of way for its said canal and the right to use said property, which will not be done for some four or five months, as defendants are now engaged in matters connected with the said business solely, aside from the work upon the ground such as financing said proposition, which matters are now well advanced; that in all matters relative to defendants' rights they intend to proceed by legal methods and in an orderly way, and will not in any event attempt work upon said ground or attempt to divert said water, or to initiate the construction of said canals until permitted so to do by a court having jurisdiction of matters relative to proceedings in condemnation, and will proceed alone in accordance with the laws and statutes of this state relative to acquiring rights by condemnation. Defendants allege that they do not intend to trespass upon said premises or in any way interfere with the complainant's free and uninterrupted use of said waters until their rights have been determined."

Inasmuch as the condemnation proceedings here referred to are for the rights of way for the canals indicated on the plans annexed to the permits, it appears from the defendants' own answer that they intend to commit the acts complained of, and insist upon their right to do so. These threatened acts of the defendants would, according to the evidence, necessarily lessen the efficiency of the complainant's plant, be continuing in their nature, and be very likely to absolutely destroy its dam, and as a consequence its entire plant. An injunction lies to restrain threatened permanent interference with water rights (Angel on Water Courses, § 444 et seq.), and, whenever there is a threat and intent to wrongfully enter upon another's real property and to take permanent possession thereof and effect a permanent lodgment there, the threatened injury is "irreparable in itself, and the insolvency of the intruder or the actual damage which may ensue is immaterial." More v. Massini, 32 Cal. 595; Richards v. Dower, 64 Cal. 62, 28 Pac. 113; Crescent City Wharf & Lighter Co. v. A. M. Simpson, 77 Cal. 290, 19 Pac. 426. Although it appears that the appellant is the owner of the lands through which the defendants propose to build their canals, and therefore would necessarily be the party defendant to such condemnation proceedings, it is manifest that its equitable rights could not be there fully protected, if protected at all. Where such is the case, it is well settled that a remedy afforded by an action at law is no bar to the maintenance of a suit in equity. Kilbourne v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005; Boyce v. Grundy, 3 Pet. 210, 7 L. Ed. 655; Southern Pacific Railroad Co. v. U. S., 133 Fed. 651, 66 C. C. A. 581, and cases there cited.

Our conclusion is that the appellant is entitled to an injunction restraining the defendants from making the diversions of the waters

covered by the permits issued to them at the points or through the ditches or canals indicated on the plans accompanying them, and from any diversion of the waters of the river that will interfere with the head of water created by the appellant's dam, or in any way injure or destroy its works.

We are further of the opinion that the court below should, in accordance with the provisions of the statute of Idaho above quoted, have by its decree fixed, within the limits of the appellant's appropriation, the amount of water which can be diverted by its works, and should have fixed a time not exceeding four years from the date of the decree within which the remainder of the water covered by the appellant's appropriation, not already applied to beneficial use, should be so applied. That such, in the opinion of the court below, was the appellant's right under the statute of Idaho appears from this clause of its opinion:

"Beyond question, under our laws, a party may be protected in the use of all the water he actually appropriates and uses, even if it be every drop that flows in as great a river as the Snake. Not only that, but when he has used but a part of what he claims, he will be allowed a reasonable time to make use of the balance, provided he shows by his work and improvements good faith in reducing all he claims to his actual use."

In the opinion of the court below there is no indication of any lack of good faith on the part of the appellant, nor do we discover any in the evidence. Yet the court below refused to award appellant the relief contemplated by the provisions of the statute above quoted, and confined the relief given to the quieting of the appellant's title, as against the claims of the defendants, to the 2,150 cubic feet per second of the waters of the river already applied by it to a beneficial use.

For the reasons stated, the judgment is reversed, and the cause remanded to the court below for further proceedings in accordance with views above expressed.

SAMUEL H. COTTRELL & SON v. SMOKELESS FUEL CO.

(Circuit Court of Appeals, Fourth Circuit. November 8, 1906.)

No. 611.

SALES—CONTRACT FOR SALE AND DELIVERY OF COAL—EXCUSE FOR FAILURE TO MAKE DELIVERIES.

Under a provision of a contract for the sale and delivery of coal from a certain mine at stated prices, that deliveries should be subject to strikes "which might delay or prevent shipment," the seller was not excused from performance because of a strike at the mine which did not prevent or delay shipments of coal, but merely increased the cost of production and the cost to the seller, and its refusal to make deliveries for that reason was a breach of the contract.

In Error to the Circuit Court of the United States for the Eastern District of Virginia, at Richmond.

For opinion below, see 129 Fed. 174.

H. R. Pollard, for plaintiffs in error.

Conway R. Sands and Alexander H. Sands, for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge. The plaintiffs are residents and citizens of the city of Richmond, in the Eastern district of the state of Virginia, and the defendant, the Smokeless Fuel Company, a West Virginia corporation doing business in the said city of Richmond. On the 17th of April, 1902, a written contract was entered into between the plaintiffs, Samuel H. Cottrell & Son, and the defendant, the Smokeless Fuel Company, as follows:

"This agreement, entered into this 17th day of April, 1902, by and between the Smokeless Fuel Company, party of the first part, and S. H. Cottrell & Son, party of the second part, both of the city of Richmond, witnesseth: That the said party of the first part agrees and binds itself to furnish and deliver, to the party of the second part, on board cars at Richmond, all the New River R. O. M. steam coal from Collins Colliery Company they may need from April 17, 1902, to April 17, 1903, approximating 3,000 tons more or less, and to ship the same in such quantities and at such times as the said party of the second part may from time to time direct, during the continuance of this contract, and at the following prices: All coal going to Elba Station, $2.57 f. o. b. C. & O. tracks; all deliveries to other parts of Richmond, where no switching charge is made on coal, at $2.60 per net ton of 2,000 lbs. delivered. Said party of the first part further agrees that should the general market value of coal decline during the lifetime of this contract, based on the wage scale at the mines or reduction in freight rates, that the said party of the second part is to have advantage of whatever reduction is made on all coal shipped after the said reduced rates are put into effect.

"In consideration of the above, the party of the second part agrees to buy from the party of the first part all the New River R. O. M. steam coal it may need, as hereinbefore specified, and to pay therefor to the party of the first part at the prices set forth above on or before the 20th of each calendar month for all shipments made during the previous month. All settlements to be made on railway scale weights as ascertained at the usual points of weighing for these mines, and as shown on bills to be rendered by party of the first part in accordance with the usages of the coal trade. Party of the second part is to pay all freights and deduct same from the bills rendered by the seller. Deliveries of coal under this contract are subject to strikes, accident, interruptions to transportation and other causes beyond the control of the party of the first part which may delay or prevent shipment.

"In witness whereof the said parties hereto set their hands this 17th day of April, 1902.

"[Seal of Smokeless Fuel Company.]

Smokeless Fuel Company,
C. J. Milton, Pres.
"S. H. Cottrell & Son.
"Sam'l H. Cottrell & Son."

The defendant company, between the date of the contract and June 10th of the same year, delivered to the plaintiffs about 563 tons of coal, but after that date failed and refused to make further deliveries of coal to the plaintiffs under the contract. Thereupon, in May, 1903, the plaintiffs brought suit against the defendant in the circuit court of Richmond, Virginia, and filed a declaration complaining of the defendant of a plea of trespass on the case in assumpsit, founded upon a breach of the contract and alleged damages by reason thereof in the sum of $5,000. Upon the petition of the defendant company the case was removed to the Circuit Court of the United States for the Eastern District of Virginia. A demurrer was filed by the defendant to the

declaration of plaintiffs, which was overruled, and thereupon the defendant filed its plea of general denial and non assumpsit. A jury trial was had upon the issues thus raised by the pleadings, and at the close of the testimony the court instructed the jury to return a verdict for the defendant, which was done, to which instruction the plaintiffs duly excepted. The case is brought here by writ of error sued out by the plaintiffs to have this action of the Circuit Court reviewed.

It is shown in the evidence that, after the defendant company had partially complied with the contract, as above stated, a strike was inaugurated at the mines of the Collins Colliery Company, from which, under the contract, the coal was to be furnished; that the strike necessitated the employment of guards and otherwise increased the expenses of mining and shipping coal from the said mines. The mines, however, did not cease to operate, and coal was continued to be shipped therefrom to the defendant at Richmond, and the defendant continued to furnish other parties with the same character of coal described in the contract, but at a higher rate than that named in the contract. The defendant also proposed to the plaintiffs to furnish them any quantity of the coal such as described in the contract, but at a higher price than that named therein. The Circuit Court held that the existence of a strike at the Collins mine had the effect to abrogate the contract from the day that the strike commenced and to relieve the defendant from further obligation thereunder. The paragraph of the contract upon which the Circuit Court based its ruling is the last clause, and reads as follows:

"Deliveries of coal under this contract are subject to strikes, accident, interruptions of transportation and other causes beyond the control of the party of the first part which might delay or prevent shipment."

Let us analyze this paragraph, and, taking it in connection with the preceding agreements, determine, if possible, its meaning. The defendant agreed to deliver to the plaintiffs, within a specified period, the quantity of coal named at a certain price per ton, and the defendant was bound to carry out this contract, unless the conditions or some one of them provided for in the paragraph quoted arose and were such as to prevent performance. The sole ground upon which the defense is based is that a strike took place at the mine; for there is no allegation that accidents, interruptions of transportation, or other causes interfered, nor does it appear that the strike delayed or prevented the shipment of coal. On the other hand, the undisputed testimony is that the strike was kept under control. The mines continued in operation, and shipments of coal of the character contracted for were continued to the city of Richmond, Va. Shipments of this coal were made to the defendant, and the defendant was offering it on the market at an advanced price, even proposing to sell it to the plaintiffs in such quantities as they might require. Therefore the paragraph of the contract, eliminating that part not necessary to consider here, would read as follows:

"Deliveries of coal under this contract are subject to strikes * * * beyond the control of the party of the first part which might delay or prevent shipment."

What is meant by the phrase "beyond the control of the party of the first part?" The contract was for the delivery of coal from a certain mine, and evidently the strikes contemplated at the time of making the contract were strikes at that mine. So far as appears, the defendant had nothing to do with the actual operation of the mine. It was simply dealing in the product. Necessarily, therefore, the conclusion to be drawn is that a strike, in order to affect the contract, must be such as to be beyond the control of the operators of the mine and thus delay or prevent shipments. It does appear from the record that the strike at the mine necessitated the employment of guards and other means, which increased the cost of production, and the decision of the Circuit Court seems to be based upon the view that this condition authorized the defendant to annul its contract. In this, we think there was error. It was a question of fact which might properly have been submitted to the jury, as to how far the defendant's ability to perform the contract was affected by the conditions existing at the mine on account of the strike, and the extent to which plaintiffs were entitled to recover for defendant's failure would depend upon how this fact was determined. But, under the circumstances of this case, the mere fact that a strike was inaugurated did not, in our opinion, warrant the defendant in refusing the further performance of the contract.

"It is a well-settled rule of law that, if the party, by his contract, charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforseen difficulties, however great, will not excuse him." Dermott v. Jones, 69 U. S. 1, 17 L. Ed. 762. "The law regards the sanctity of contracts and requires the parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. If the parties made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit it to be interpolated by the parties themselves who made it." Id. "The courts will not make an agreement for the parties, but will ascertain what they have agreed by what they have said and by the meaning of the words used to express their intention. Where the intention clearly appears from the words used, there is no need to go further, for in such cases the words must govern; or, as is sometimes said, where there is no doubt, there is no room for construction." Clark on Contracts, p. 591. "Where parties have entered into written engagements, with express stipulations, it is manifestly not desirable to extend them by implication. The presumption is that, having expressed the same, they have expressed all the intentions by which the intent could be bound under that instrument." Broom's Legal Maxims (8th Am. Ed.) p. 652; Bishop on Contracts (1887 Ed.) §§ 380, 381; Parsons on Contracts (9th Ed.) p. 915.

By the contract in question, the defendant was bound to sell and deliver to the plaintiff all the coal that should be required by the latter, between the dates mentioned; the quantity named being 3,000 tons, more or less, and at the prices per ton named in the contract. Nothing

else appearing, this was an absolute promise on the part of the defendant, based upon a sufficient consideration to furnish the coal, and nothing would excuse the performace of this promise except the act of God, the law, or the conduct of the plaintiff. There was, however, one, and only one, limitation upon this otherwise absolute undertaking, and that limitation is found in the clause of the contract which exempted the defendant from liability for nonperformance, if by strikes or other uncontrollable causes it should become unable to comply with its contract; that is, if strikes or any of the other causes mentioned occurred in such manner as to be beyond the control of the defendant or the operators of the mine from which the coal was to be brought, so as to delay or prevent shipment. The defendant was relieved from the obligation to the extent that such conditions rendered it unable to perform the contract fully, and to this extent only.

We see no merit in the position of counsel for the defendant in error that the testimony in the case is not sufficiently identified. The trial judge, in allowing the two bills of exceptions, directs in each that the evidence offered by the plaintiffs and by the defendant, "all of which as reported and filed by the official stenographer in this case, is to be incorporated and copied by the clerk herein and made a part of this bill of exceptions." Immediately following the exceptions is the testimony in full certified by the stenographer who took it on the trial, and whose report was, as appears, accepted by the court and the counsel. There is no suggestion that the testimony set out in the record, as a part of the bills of exceptions, is not that given by the witnesses and shown by the exhibits on the trial. The trial judge adopted the testimony as taken and certified by the stenographer and incorporated it in the bills of exceptions. This, in our opinion, is sufficient.

The judgment of the Circuit Court is reversed, and the case remanded, to the end that further proceedings may be in harmony with the views herein expressed.

Reversed.

HUSSEY v. RICHARDSON-ROBERTS DRY GOODS CO.

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

No. 2,365.

1. APPEAL AND ERROR—REVIEW—FINDINGS OF FACT.

When the trial court has considered conflicting evidence and made its finding and decree thereon, it will be taken as presumptively correct, and will not be reversed on appeal unless an obvious error has occurred in the application of the law, or a serious and important mistake has been made in consideration of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3955–3969.]

2. BANKRUPTCY—VOIDABLE PREFERENCE—KNOWLEDGE OF CREDITOR.

A mercantile creditor had sold a bankrupt goods for only a few months prior to his bankruptcy. He was slow in making payments, and, learning that he had placed a mortgage on his stock, the creditor sent an attorney to look after the claim. The bankrupt stated to him that he did

not have sufficient capital to meet his bills promptly, but was doing a profitable business and was entirely solvent; that he had an offer for his stock in cash and land amounting in value to a sum largely in excess of his indebtedness, which he could accept at once. The attorney advised its acceptance and meantime took a chattel mortgage on the stock for the amount of his claim. The debtor was, in fact, insolvent, and became bankrupt within four months thereafter. *Held*, that such facts supported a finding of the District Court that the creditor did not have reasonable cause to believe, when the mortgage was taken, that a preference was intended, and that it was not voidable under Bankr. Act 1898, § 60b, 30 St. 562 [U. S. Comp. St. 1901, p. 3445].

3. SAME.

The fact that a debtor was adjudged a bankrupt on the ground that the giving of a chattel mortgage was a preference and an act of bankruptcy is not conclusive that such mortgage is voidable under Bankr. Act 1898, § 60b, 30 St. 562 [U. S. Comp. St. 1901, p. 3445].

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

Joseph V. C. Karnes, Alexander New, Edwin A. Krauthoff, and W. S. McClintock, for appellant.

R. E. Culver, for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. The only question in this case is whether a just demand held by Richardson-Roberts Dry Goods Company against the bankrupt, Sowers, and secured by chattel mortgage, should be allowed as a secured or general debt against the estate. That depends upon whether the mortgage constituted a voidable preference under the provisions of the bankruptcy act of 1898 as amended. Section 60 (a) of that act (act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]) defines a preference as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has within four months before the filing of the petition * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debts than any other of such creditors of the same class."

Section 60 (b) of the act defines a voidable preference as follows:

"If the bankrupt shall have given a preference, and the person receiving it * * * shall have had reasonable cause to believe that it was intended thereby to give a preference it shall be avoidable by the trustee."

Undoubtedly the conveyance by the bankrupt of his stock of goods by the mortgage in question constituted a preference within the meaning of the act. The mortgage was executed within four months before the filing of the petition. The bankrupt, as it now appears, was then insolvent, and the effect of the enforcement of the mortgage was necessarily to enable the mortgagee to obtain a greater percentage of its debt than other creditors of its class. But these facts do not render the mortgage voidable. To make it so the creditor must have had reasonable cause to believe that it was intended thereby to give a preference.

The mortgage having been executed within the prescribed four months, and necessarily operating, if the bankrupt was then insolvent,

to enable the mortgagee to get a greater percentage of its debt than other like creditors, the question of fact is much simplified, and, as conceded by counsel for both sides, is simply this: Did the mortgagee at the time it took the mortgage have reasonable cause to believe the bankrupt was then insolvent? The referee found in substance that neither the mortgagee nor its attorney knew that the bankrupt was insolvent, but that they had reason to believe that he could not then pay all his creditors in money, and "that some of them would be compelled to depend upon land" which, it was understood, the bankrupt was then negotiating to take in exchange for his stock of goods. On such a finding the referee concluded that the creditor had reason to believe the bankrupt was insolvent. The district judge, on a proper certification to him of the question, after first considering the facts found and testimony taken by the referee, and again considering that and other proof taken upon a motion for a rehearing, found the issue in question in favor of the mortgagee.

The referee obviously adopted an erroneous criterion in determining that issue. A person within the meaning of the bankruptcy act is not insolvent merely because he is unable to pay his debts in money as they become due in the ordinary course of business. Such was the test of insolvency under the bankruptcy act of 1867 (Toof v. Martin, 13 Wall. 40, 20 L. Ed. 481; Dutcher v. Wright, 94 U. S. 553, 24 L. Ed. 130), but by the provisions of section 1, cl. 15, of the act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]), as amended, insolvency exists only when the aggregate of a person's property exclusive of certain items therein mentioned "shall not, at a fair valuation, be sufficient to pay his debts." Recognizing the test to be as just quoted, the learned district judge twice heard the issue involved in this case, and after a careful and critical consideration of the evidence as disclosed by his memorandum of opinion before us, twice reached the conclusion that the mortgagee did not have reasonable cause to believe its creditor insolvent when it took the chattel mortgage.

The main facts from which that conclusion was deduced are substantially as follows: The mortgagee had but recently commenced doing business with the bankrupt. In the spring of 1904, before it began selling him goods, it made the inquiries usual among jobbers to determine whether he was entitled to credit, and between that time and September, when he became bankrupt, had sold him about $2,000 worth of dry goods. He was slow in making payments as they matured, but with knowledge of that fact the mortgagee kept on selling him goods. The mortgagee about September 1st learned that he had mortgaged his stock for $1,000 to a man by the name of Barrett, and an attorney was sent to Quenemo, Kan., where the bankrupt did business. He learned that the bankrupt had borrowed $1,000 from Barrett for the purpose of paying a debt that was then due, and was informed that the mortgage had been executed with the consent and approval of the wholesale grocery house which was one of his two remaining merchandise creditors. An investigation then followed into the financial condition of the bankrupt. His stock was examined, and, although

represented by the bankrupt to be worth $8,000, was considered by the attorney of the mortgagee to be conservatively estimated at $5,000. He also had about $100 in open accounts, and the fixtures and equipment of a bakery which cost him between $300 and $400. The indebtedness of the bankrupt was represented by him to be not over $3,700, including the mortgagee's debt. The bankrupt advised the attorney, who remained there parts of two days, that he had an opportunity to sell his entire stock for $6,000, if he would take one-half of that sum in cash and the balance in a farm of the value of $3,000. He represented that such an offer had been made to him and that he could close the deal at any time. He asked the attorney to stay over till the next day, when the owner of the farm was expected to be there to close up the deal. He assured the attorney that he was perfectly solvent, that his business was good and his assets more than sufficient to pay all his debts, but that he did not have capital enough to pay them promptly. The attorney favored his making the sale, and believed from the representations of the bankrupt that it would be speedily culminated. He considered whether he would stay until the transaction for the sale of the stock was made, but concluded that it was not necessary to do so, and, with the prudent view of putting his claim in a condition where he would surely get the money as a necessary prerequisite to passing title to the stock, he took the chattel mortgage to secure the debt. He then advised the bankrupt that, if for any reason the sale should not be made, his client would give him more time on the claim if he could get some more capital in his business. Such are the principal facts of the case. They are told in different ways and with some variation by the different witnesses, and different interpretations are placed upon their testimony by counsel. The result depended upon the credibility due to witnesses, the true import and meaning of lengthy correspondence between the bankrupt and the mortgagee, mercantile agency reports, and other like matters. We have carefully and critically examined all this evidence, and from it we conclude that the mortgage in question was executed at a time and under circumstances justifying the mortgagee in believing, and that it did believe, that the bankrupt was then solvent. It took a mortgage on property which it believed was about to be sold for $2,000 more than enough to pay all the bankrupt's debts. This seems to have been done merely as an expedient to insure speedy collection.

There are, however, some phases of the evidence and some fair inferences to be drawn from it which strongly tend to the opposite conclusion, and an unprejudiced mind bent on arriving at the truth might, with reason, reach a different conclusion. The taking of a chattel mortgage by a creditor to secure the payment of an overdue debt shortly before the institution of proceedings in bankruptcy by or against him is usually suggestive of insolvency, and should always be carefully scrutinized by the trier of the fact. But peculiar facts, such as are disclosed by the record in this case, may attend the taking of such a mortgage. They should always be carefully considered, with a view of ascertaining what actually inspired it. The conclusion reached by us in this case is the same as that reached by the learned trial judge.

He had some of the witnesses before him, probably knew their character as well as the character of the parties, carefully examined the voluminous correspondence, and adhered on a motion for a rehearing to his first announced decision. His conclusion under such circumstances is entitled to the greatest consideration, and affords us much assurance of the correctness of our own.

This court, in a uniform series of decisions, has declared that, when the trial court has considered conflicting evidence and made its finding and decree thereon, it will be taken as presumptively correct, and will be followed unless an obvious error has occurred in the application of the law or a serious and important mistake has been made in consideration of the evidence. Fitchett v. Blows, 20 C. C. A. 286, 74 Fed. 47; Cheney v. Bilby, 20 C. C. A. 291, 74 Fed. 52; McKinley v. Williams, 20 C. C. A. 312, 74 Fed. 94; Snider v. Dobson, 21 C. C. A. 76, 74 Fed. 757; Denver & R. G. R. Co. v. Ristine, 23 C. C. A. 13, 77 Fed. 58; Moffatt v. Blake (C. C. A.) 145 Fed. 40. See, also, Evans v. State Bank, 141 U. S. 107, 11 Sup. Ct. 885, 35 L. Ed. 654.

The petition filed by creditors to secure an adjudication of bankruptcy against Sowers alleged as the act of bankruptcy the following:

"That Alva L. Sowers is insolvent and that within four months next preceding the date of this petition the said Sowers committed an act of bankruptcy in that he did heretofore in the month of September, 1904, transfer his property to Richardson-Roberts Dry Goods Company with the intent to prefer Richardson-Roberts Dry Goods Company over such other creditors and at the time of such transfer said Sowers was insolvent."

It is contended that the adjudication which followed on that petition is res adjudicata of the present claim of the dry goods company. There is no merit in that contention. Conceding that under the authority of In re American Brewing Co., 50 C. C. A. 517, 112 Fed. 752, and Ayres v. Cone, 138 Fed. 778, 71 C. C. A. 144, the dry goods company would be estopped from again litigating the issues raised by the creditors' petition, namely, whether Sowers was in fact insolvent, or whether he made the alleged transfer with intent to prefer the dry goods company, there is yet left the issue involved in the present case, whether at the time the transfer was made the dry goods company had reasonable cause to believe it was intended by Sowers as a preference, or, as simplified in this case, whether it then had reasonable cause to believe Sowers was insolvent. The giving of a preference by an insolvent as defined by section 60 (a) affords sufficient ground for an adjudication of bankruptcy against him, but is not sufficient to avoid the transfer constituting a preference as against the person receiving it. To accomplish the latter, it must be shown, additionally, that the one receiving it had reasonable cause to believe it was a preference. An issue of that kind was not and could not properly have been presented or tried in the petition for adjudication. In re Rome Planing Mill (D. C.) 96 Fed. 812. The general rule is that the estoppel of a judgment extends only to those material matters in issue or to those without proof of which it could not properly have been rendered.

The order and decree of the District Court allowing the debt of the dry goods company as a secured demand was right, and is accordingly affirmed.

OREGON & C. R. CO. v. UNITED STATES (three cases).

(Circuit Court of Appeals, Ninth Circuit. November 2, 1906.)

Nos. 1,223, 1,224, 1,225.

PUBLIC LANDS—RAILROAD GRANT—LANDS EXCEPTED.

A grant of public lands to aid in the construction of a railroad, which excepts therefrom such lands within the place limits as shall be found to have been "granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of," did not attach to lands which were within the primary limits of the grant as fixed by the definite location of the line of road, but upon which, at the time the map of definite location became effective, there were homestead and pre-emption claims filed in the proper land office, and remaining of record and uncanceled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 244–246.]

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

For opinion below, see 133 Fed. 953.

See 144 Fed. 832, 143 Fed. 765.

These cases were argued and submitted together. The suits were brought to procure the cancellation of certain patents alleged to have been erroneously issued by the government to the Oregon & California Railroad Company under the act of Congress of July 25, 1866 (chapter 241, 14 Stat. 239). All of the lands involved in the suits are within the primary limits of that grant, and are all opposite and coterminous with sections of the railroad definitely located by a map thereof filed with the Secretary of the Interior on the 29th of October, 1869, and approved by the Secretary January 29, 1870. These lands consisted of 17 separate tracts, 9 of which were claimed under homestead filings, and 8 under pre-emption filings, made before the date of the approval of the map of definite location of the railroad by the Secretary of the Interior, and all but 3 of them being made before the filing of that map. Patents for these lands were issued to appellant during the years 1871, 1872, 1877, and 1894, as parts of the lands granted by the act of Congress mentioned. The appellant afterwards sold the land, with the exception of one 80-acre tract, to bona fide purchasers, who were without notice of the homestead and pre-emption filings thereon, except the presumptive notice given by the law. In the agreed statement of facts made by the respective counsel it appears that, including the lands here in suit, the appellant has not received the full quantity of land granted to it by the act of July 25, 1866, and that the patents to the lands in controversy were duly and properly issued unless such lands were excepted from the grant to the appellant by reason of the homestead and pre-emption filings mentioned. The court below was of the opinion that the lands in question were excepted from that grant by such filings, and that the patents were, therefore, erroneously issued by the government, and a decree was entered in each case in accordance with that opinion, canceling appellant's patent to the 80-acre tract, still unsold, giving judgment against the appellant for $1.25 an acre for each tract sold by it for such amount or more, and for $56 received by it from the sale of one of the tracts for that amount, being less than $1.25 an acre. The present appeals are from those decrees.

William D. Tenton and William Singer, Jr., for appellant.

John H. Hall and Francis J. Heney, U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

Several of the points made on behalf of the appellant in the present cases were decided against its contention in the case of United States v. Southern Pacific Railroad Co. et al. (C. C.) 117 Fed. 544, which case was affirmed by this court in (C. C. A.) 133 Fed. Rep. 651, and by the Supreme Court in Southern Pac. R. Co. v. United States, 200 U. S. 341, 26 Sup. Ct. 296, 50 L. Ed. 507. Is it true, as further contended on behalf of the appellant, that the lands in suit were embraced by the grant of July 25, 1866, and, as consequence, that the patents issued therefor were valid? The granting clause in that act is as follows:

"And be it further enacted that there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers, as aforesaid, nearest to and not more than ten miles beyond the limits of said first named alternate sections; and as soon as the said companies or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified. The lands herein granted shall be applied to the building of said road within the states, respectively, wherein they are situated. And the sections and parts of sections of land which shall remain in the United States within the limits of the aforesaid grant, shall not be sold for less than double the minimum price of public lands when sold: Provided, that bona fide and actual settlers under the improvement, and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement and occupation: And provided also, that settlers under the provisions of the homestead act, who comply with the terms and requirements of said act, shall be entitled within the limits of said grant, to patents for an amount not exceeding eighty acres of the land so reserved by the United States, anything in this act to the contrary notwithstanding."

What Congress granted by that act, and all that the appellant could acquire thereby, were certain sections of the "public land."

In considering a similar grant—that of July 2, 1864 (chapter 216, 13 Stat. 365), made to the Northern Pacific Railway—this court said in the case of Amacker v. Northern Pacific Railroad Co., 58 Fed. 850–851, 7 C. C. A. 518, 541:

"The character of the grant to the company is well defined. It is one in præsenti, but, as was said in the St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company, 139 U. S. 1, 5, 11 Sup. Ct. 389, 390, 35 L. Ed. 77, 'the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but, when once identified, the title attached to them as of the date of the grant, except as to such sections as were specifically reserved.' In considering, therefore, what lands ultimately passed by the grant, there are two periods principally to be regarded—one the date of the granting act, the other the filing of the map of definite location of the road. Lands to which claims had attached at either period do not pass, though they were free from the claim at the other period. In Bardon v. Northern Pacific Railroad Company, 145 U. S. 535, 12 Sup.

Ct. 856, 36 L. Ed. 806, a pre-emption claim existed at the date of the granting act, which, however, had been abandoned before the map of definite location was filed. It was held that it was not included in the grant. See, also, Hastings & Dakota Railroad Company v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363. In Kansas Pacific Railway Company v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122, a homestead entry was made after the date of the grant, but before the filing of the map of definite location, and it was held that the land was excepted from the grant."

The agreed statement of facts in the present cases shows that all of the lands in controversy were parts of odd-numbered sections of unoffered land, and that the homestead and pre-emption claims thereto were filed in the proper land office, and were of record and uncanceled at the time the map of the definite location of the appellant's road became effective.

The land in controversy in the case of Northern Pacific Railroad Company v. De Lacey, 174 U. S. 622, 19 Sup. Ct. 791, 43 L. Ed. 1111, was within the primary limits of both the grant made by Congress to the Northern Pacific Railroad Company July 2, 1864 (chapter 217, 13 Stat. 365), and the grant made by the joint resolution of May 31, 1870 (16 Stat. 378). The grant in the act of July 2, 1864, was of—

"Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and the plat thereof filed in the office of the Commissioner of the General Land Office," etc.

In that case it was contended that the land there in question was excepted from both of those grants, because one John Flett had on the 9th day of April, 1869, filed in the local land office a statement declaring his intention to purchase the land under the laws of the United States authorizing the pre-emption of unoffered land, which claim remained uncanceled at the time of the definite location of the company's line of road. The Supreme Court held that inasmuch as that claim of Flett, filed on the 9th day of April, 1869, in the local land office, was alive at the time of the adoption of the resolution of May 31, 1870, the land was excepted from the operation of the grant contained in that resolution, and that inasmuch as the right of Flett, under whom De Lacey claimed, was a right of pre-emption only, which ceased at the expiration of 30 months from the filing of his statement on the 9th of April, 1869, in the local land office, because of the failure to make proof and payment within the time required by statute, there was no existing claim to the land at the time of the definite location of the company's line of road, which was March 26, 1884, and therefore the land passed to the company under the grant of July 2, 1864; but the court said:

"If there had been a pre-emption claim at the time of the passage of the act of 1864, the land would not have passed under that grant."

It is conceded by counsel for the appellant that, in the construction of the various land grant acts, the courts, as well as the Land Department, have held that a homestead filing is a "homestead claim,"

and that a pre-emption filing is a "pre-emption claim," and, further, that at the time the appellant's grant of July 25, 1866, was made, and its road was finally located, and at the time the homestead filings in the present cases were made, homestead claims were initiated by the filing thereof. In respect to the pre-emption filings in question, they appear to have been made upon "unoffered lands," in respect to which, as shown by the Supreme Court in the De Lacey Case (174 U. S. 628–632, 19 Sup. Ct. 791, 43 L. Ed. 1111), pre-emption claimants had at the time the appellant's definite location of its road became effective an uncertain and indefinite time within which to prove or complete their proof and payment. It results that, as the homestead and pre-emption claims in question were existing claims of record and uncanceled at the time the definite location of the appellant's road became effective, the lands in controversy were not "public lands," and therefore, under the well-established law upon the subject, its grant did not attach to them. Northern Pacific Railway Co. v. De Lacey, 174 U. S. 634, 19 Sup. Ct. 791, 43 L. Ed. 1111; Northern Pacific Railroad Company v. Sanders, 166 U. S. 620, 17 Sup. Ct. 671, 41 L. Ed. 1139; Whitney v. Taylor, 155 U. S. 85, 15 Sup. Ct. 796, 39 L. Ed. 906; Kansas Pacific Railroad Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122; Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. Ed. 844; Monroe Cattle Co. v. Becker, 147 U. S. 57, 13 Sup. Ct. 217, 37 L. Ed. 72; Leavenworth, etc., R. R. v. United States, 92 U. S. 733, 23 L. Ed. 634; Bardon v. Northern Pacific Railroad, 145 U. S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806; United States v. Southern Pacific Railroad Co., 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091.

In each case the judgment appealed from is affirmed.

MORROW, J., took no part in this decision.

ATCHISON, T. & S. F. RY. CO. v. OSBORN.

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

No. 2,336.

1. RECEIVERS—ORDER APPOINTING—EFFECT OF PROVISIONS.
   An interlocutory order appointing receivers for a railroad confers no vested rights on any outside creditor and makes no provisions which cannot be modified or changed later or in the final decree.
   [Ed Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, §§ 91, 114; vol. 41, Railroads, § 678.]

2. SAME—FORECLOSURE PROCEEDINGS—UNSECURED CLAIMS.
   The income of a railroad, while in the hands of receivers, is subject to equitable charges of a different character from those to which the fund realized from a sale of the corpus of the property is subject.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, §§ 272–311; vol. 41, Railroads, §§ 692, 693.]

3. SAME—RIGHT TO PRIORITY OVER MORTGAGES.
   Holders of unsecured claims for damages, arising from negligence of a mortgagor railroad company prior to the appointment of receivers, have no equity which entitles them to priority of payment over the mortgage creditors.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, §§ 293–311; vol. 41, Railroads, § 693.]

4. RAILROADS—FORECLOSURE OF MORTGAGE—CONSTRUCTION OF DECREE—RECEIVERSHIP.

An interlocutory decree appointing receivers for a railroad in a foreclosure suit directed them to pay from the earnings of the road all just and legal liabilities of the company incurred in the transportation of freight and passengers within the preceding 12 months, including damages for injuries to employés or other persons and to property. The final decree, order of sale, and order of confirmation required the purchasers or their assigns to pay, in addition to the price bid, any indebtedness and liabilities contracted or incurred by the mortgagor company in the operation of its railroad prior to the appointment of the receivers, "which are prior in lien to said general mortgage," upon the court adjudging the same to be prior in lien to said mortgage, and reserved jurisdiction of the cause for the purpose of adjusting such claims, giving the purchasers or their assigns the right to appear and defend against the same and the right of appeal from the decision thereon. *Held*, that a claimant of an indebtedness or liability of the old company, who had not secured payment thereof out of the earnings of the road while in the hands of the receivers, as provided by the interlocutory decree, could compel payment by the purchasers or their assigns only by establishing on principles of equity that his demand was prior in lien to the mortgage, on a hearing in conformity to the provisions of the final decree.

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

On December 23, 1893, the Union Trust Company of New York, as trustee under the general mortgage before then made by the Atchison, Topeka & Santa Fé Railroad Company filed its bill in the Circuit Court of the United States for the District of Kansas against the railroad company to foreclose the mortgage. On that day an order was made in the cause appointing receivers to take possession of, hold, and manage the railroad pending the litigation. That order was first made upon a condition that all liabilities of the railroad company, including, among others, damages for injuries to employés or other persons and to property which had accrued within 12 months before that date, should constitute a lien upon the railroad property paramount to the lien of the mortgage, and requiring such liabilities, if not paid by the receivers out of the earnings, to be paid out of the proceeds of the sale of the road.

Subsequently, and on January 10, 1894, the order was modified so as to read as follows: "And it appearing to the court that the defendant company owes debts and has incurred liabilities which the holders thereof could, without any interference with the legal or equitable rights of the complainant under the mortgage set out in the bill, collect by proceedings at law from said defendant by seizing its rents, income, and earnings, and in other lawful modes, if not restrained from so doing by this court, and that it would be inequitable and unjust for the court to deprive said creditors of their legal right to collect their several debts, by appointing receivers to take and receive the earnings of said road during the pendency of this suit, as prayed by the complainant, without making suitable provision for the payment of such debts and liabilities, the receivers herein are therefore further directed to pay all just and legal debts, demands and liabilities due or owing by the defendant company which accrued or were incurred for work, labor, materials, machinery, fixtures and supplies of every kind and character, done, performed or furnished in the improvement, equipment or operation of said road and its branches, and all just and legal liabilities incurred by the said company in the transportation of freight and passengers, including damages for injuries to employés or other persons and to property which have accrued, or upon which suit has been brought or was pending, or judgment rendered within twelve months last past, and all liability of said company to persons or corporations who may have become sureties for said company on stay, supersedeas or cost bonds, or bonds in garnishment proceedings, or other bonds of like character, without regard to the date of such bonds; and also all liabilities to persons or corporations who may have

become liable by indorsement, guaranty or otherwise, for the debts of said company on account of money borrowed by said company to pay operating expenses; and also all just and legal debts and liabilities which the said receivers may incur in operating said road, including claims for injury to persons and property. The receivers are authorized and directed to pay all such debts and liabilities, as the same shall accrue, out of the earnings of the road."

Afterwards, on August 27, 1895, after that suit had been consolidated with two others, a final decree of foreclosure and sale was entered. That decree contained, among other things, the following provisions: "The purchaser or purchasers, his or their successors and assigns, shall as part consideration and purchase price of the property purchased, and in addition to the sum bid, take the same and receive the deed therefor upon the express condition that he or they, or his or their successor or assigns, shall pay, satisfy and discharge any unpaid compensation which shall be allowed by the court to the receivers, and all indebtedness and obligations or liabilities which shall have been legally contracted or incurred by the receivers before delivery of possession of the property sold, and also any indebtedness and liabilities contracted or incurred by said defendant railroad company in the operation of its railroads prior to the appointment of the receivers, which are prior in lien to said general mortgage, and payment whereof was provided for by the order of this court dated January 10, 1894, and filed January 16, 1894, and which shall not be paid or satisfied out of the income of the property in the hands of the receivers, upon the court adjudging the same to be prior in lien to said mortgage and directing payment thereof, provided that suit be brought for the enforcement of such indebtedness, obligation or liability within the period allowed by the statute of limitations of the state of Kansas for the commencement of such suit thereon after such indebtedness, obligation or liability was contracted or arose. In the event that said purchaser or purchasers shall refuse, after demand made, to pay any such indebtedness, obligation or liability, the person holding the claim therefor, whether established in a state court or any other court of competent jurisdiction, may, upon fifteen days' notice to said purchaser or purchasers, their successors or assigns, file his petition in this court to have such claim enforced against the property aforesaid in accordance with the usual practice in relation to claims of a similar character; and such purchaser or purchasers, and his and their successors or assigns, shall have the right to appear and make defense to any claim, debt or demand so sought to be enforced, but either party shall have the right to appeal from any judgment, decree or order made thereon. And jurisdiction of this cause is retained by this court for the purpose of enforcing the foregoing provisions of this decree, and the court reserves the right to retake and resell said property in case the purchaser or purchasers, his or their successors or assigns, shall fail to comply with any order of the court in respect to the payment of such prior indebtedness, obligations or liabilities within thirty days after service of a copy of such order. Any such purchaser or purchasers, and his or their successors and assigns, shall have the right to enter his or their appearance in this court, or any other court, and he or they, or any of the parties of this suit, shall have the right to contest any claim, demand and allowance existing at the time of the sale and then undetermined, and any claim or demand which may arise or be presented thereafter, which would be payable by such purchaser or purchasers, his or their successors, or assigns, or which would be chargeable against the property purchased, in addition to the amount bid by such purchaser or purchasers at the sale, and may appeal from any decision relating to any such claim, demand or allowance."

Afterwards, on December 10, 1895, the property described and included in the mortgages foreclosed was sold by the special master appointed for that purpose to Edward King, Victor Morawetz, and Charles C. Beaman, and on that day the sale was confirmed by an order, which, among other things, contained the following: "And it appearing by such special master's report that he has fully complied with the directions of said [final] decree as to the sale of said property, and that such purchasers were the highest and best bidders for such railroad, property and franchises sold as a single parcel,

and that the same was struck off to them for the sum of sixty million dollars, subject, however, to the payment of the receivers' compensation, receivers' debts and other preferential liens and claims, as provided for in said decree, and to all and singular the terms and conditions in said decree set forth, * * * the court now orders and decrees that the said report of the said special master be in all things approved, and that the sale made by him * * * be and the same is in all things ratified, approved, confirmed and made absolute, subject, however, to the payment of the receivers' compensation, receivers' debts and preferential claims and to all equities reserved and to all and singular the conditions of purchase, as recited in such decree; and this court expressly reserves and retains jurisdiction of this cause and power to enforce all the provisions of said decree. * * *"

After reciting that the purchasers had deposited bonds and paid the money as required by the decree, the court proceeds in the order of confirmation and directs the special master to execute a deed conveying the railroad and its franchises to the purchasers, "subject, however, to the payment, satisfaction or discharge by such purchaser or purchasers, or their successors or assigns, of * * * all indebtedness and liabilities contracted or incurred by the said Atchison, Topeka & Santa Fé Railroad Company in the operation of its railroads prior to the appointment of the receivers, which are prior in lien to said general mortgage, and payment whereof was provided for by the order of this court dated January 10, 1894, and filed January 16, 1894, and which shall not be paid or satisfied out of the income of the property in the hands of the receivers, upon the court adjudging the same to be prior in lien to said mortgage and directing payment thereof."

Later, on December 12, 1895, the special master, acting under authority of the foregoing decree and order, executed a deed conveying to the purchasers the railroad and its franchises in which the sale was declared to be subject to the payment by the purchasers of the indebtedness and liabilities contracted or incurred by the old company in the operation of its railroads prior to the appointment of the said receivers, in exactly the same language as that found in the final decree and order of confirmation already quoted. Later the purchasers transferred the property by them acquired at the special master's sale to the appellant herein, the Atchison, Topeka & Santa Fé Railway Company, a new corporation created and organized for the purpose; made the transfer to it subject to the same conditions concerning the payment of debts and liabilities as were contained in the final decree, order confirming the sale, and master's deed.

Milo H. Osborn, the appellee, in 1892, prior to the institution of the foreclosure suit, instituted his action in the district court of Harper county, Kan., against the mortgagor, the Atchison, Topeka & Santa Fé Railroad Company, to recover damages for alleged negligent conduct of its agents and servants, resulting in the burning and destruction of his wheat crop stacked on his premises. This action, after protracted litigation in that and the Supreme Court of Kansas, resulted, in April, 1902, in a final judgment in the district court in his favor against the old company for $1,968.40. Afterwards, on March 10, 1903, Osborn filed in the Circuit Court of the United States for the District of Kansas, in which the original foreclosure proceeding was instituted and was then pending, his intervening petition praying that his judgment be ordered paid by the new railroad company without any inquiry as to whether it evidenced a debt prior in lien to the general mortgage, on the theory that the interlocutory and final decrees in the foreclosure suit imposed its payment upon the purchasers and their assigns as a part of the purchase price. In answer to the intervening petition, the appellant railway company admitted that Osborn had secured a judgment in the district court of Harper county, Kan., as alleged by him, but averred that it (the appellant) was not liable to pay the same under the decrees entered in the foreclosure suit. Upon the foregoing facts the Circuit Court ordered the appellant railway company to pay the Osborn judgment with interest, without any hearing or inquiry into the equity of the claim or whether it was in fact prior in lien to the original mortgage debt; the theory of the learned trial judge being that this demand was required to be paid by the original order of apointment of the receivers as a preferential demand.

and that nothing occurred later in the final decree and confirmation of the sale to affect that obligation. The railway company appeals.

Robert Dunlap (Wm. R. Smith and Gardiner Lathrop, on the brief), for appellant.

I. P. Campbell (S. S. Sisson and H. C. Sluss, on the brief), for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

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

The deed from the original purchasers of the railroad to the appellant, the Atchison, Topeka & Santa Fé Railway Company, obligates it to pay all the debts and liabilities which the original purchasers were required to pay. Accordingly, our inquiry is limited to a consideration of the obligations imposed upon the original purchasers; and, as this depends upon the construction to be placed upon the interlocutory and final decrees entered in the foreclosure suit, it becomes necessary to carefully consider them with the purpose of ascertaining their true meaning. In order to do so it is well first to advert to the state of law on the subject in question at the time the decrees were entered. It should be presumed that the chancellor passed all the orders and decrees in the light of, and conformably to, existing law. By that, their meaning may well be elucidated.

The order appointing the receivers was interlocutory only. Its function was to lay down a scheme for holding and operating the railroad pending the foreclosure suit. No claimant acquired any right to the property or its income by virtue of that order which might not be modified by later orders or by provisions of the final decree. In other words, no vested rights accrued to any such claimant by the provisions of that order. Kneeland v. American Loan Co., 136 U. S. 89, 97, 10 Sup. Ct. 950, 34 L. Ed. 379; Louisville, Evansville & St. Louis Railway Co. v. Wilson, 138 U. S. 501, 506, 11 Sup. Ct. 405, 34 L. Ed. 1023; Gregg v. Mercantile Trust Co., 48 C. C. A. 318, 109 Fed. 220, 226; Mather Humane Stock Transp. Co. v. Anderson, 22 C. C. A. 109, 76 Fed. 164. The income of a railroad while in the hands of a receiver is subject to equitable charges of a different character and for different reasons from those to which the corpus of the fund realized by a sale is subject. Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339; Union Trust Co. v. Souther, 107 U. S. 591, 2 Sup. Ct. 295, 27 L. Ed. 488; St. Louis, etc., Railroad Co. v. Cleveland, etc., Railway, 125 U. S. 658, 8 Sup. Ct. 1011, 31 L. Ed. 832; Gregg v. Metropolitan Trust Co., 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717; Blair v. St. Louis, etc., Railroad (C. C.) 22 Fed. 471. The lien created by the mortgage in favor of the bondholders was a vested right subject only to the payment of a few unsecured matured claims for operating expenses, equipment, and the like, necessary to equitably restore to unsecured creditors that which by the nonpayment of their claims when due amounted to a diversion of the fund in favor of the mortgage creditors; or, in the language of Mr. Justice Brewer in the Kneeland Case, subject only to the payment "of a few unsecured claims which by the rulings of this court have been

declared to have an equitable priority." Fosdick v. Schall, supra; Kneeland v. American Trust Co., supra; Gregg v. Metropolitan Trust Co., supra; Southern Railway v. Carnegie Steel Co., 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458. Unsecured claims for damages arising from negligence of the mortgagor company before the appointment of receivers had not, before the decrees were made in this case, or since then, been recognized as conferring upon the holders an equity for their payment over the mortgage creditors. On the contrary, such claims had been declared by this court, when the learned chancellor who passed the decrees in this case was one of its honored members, not to be entitled to any such preferential right. St. Louis Trust Co. v. Riley, 16 C. C. A. 610, 70 Fed. 32, 30 L. R. A. 456. See, also, Atlantic Trust Co. v. Dana, 62 C. C. A. 657, 128 Fed. 209.

In the light of the foregoing well-settled propositions, the decrees now in question were entered. On their true interpretation depends the conclusion to be reached in this case. If the purchasers at the master's sale purchased the railroad and received deeds or conveyances thereof subject to the condition that they should pay all liabilities for damages incurred by the negligent operation of the road before the receivers were appointed, then the decree ordering the appellant railway company, which holds under and through them and subject to all their assumed liabilities, to pay the same, is right and should be affirmed.

It may readily be conceded that, by the interlocutory order appointing the receivers, the chancellor intended to subject the earnings or income resulting from the operation of the railroad to the payment, among other things, of claims like that of Osborn. In fact, by the first order made on December 23, 1893, before its modification on January 10, 1894, the chancellor in express words declared that the order appointing the receivers was made on condition that all demands and liabilities due or owing by the railroad, including damages for injuries to employés or other persons and to property, should be paid either out of the earnings of the road while in the hands of the receivers or out of other funds in the hands of the receivers, or, "if not sooner discharged, then the same shall be paid out of the proceeds of the sale of the road." But, as already seen, this order confers no vested rights upon any claimant and was quickly supplanted by another one. On January 10, 1894, doubtless out of deference to the then recently expressed opinion of Mr. Justice Brewer in Kneeland v. American Loan Company, supra, wherein he announced that courts had no right to make the appointment of a receiver conditional upon the payment of unsecured indebtedness, the modified order found in the statement of the case was made, eliminating the condition found in the order of December 23d, and also striking out that part of the order requiring the unsecured liabilities, if not sooner discharged, to be paid out of the proceeds of the sale of the road. It may reasonably be concluded that the chancellor, by the modification and correction of the interlocutory order, in the way just indicated, intended that such debts should not be paid out of the proceeds of the sale, or in fact in any way other than out of the earnings. We thus observe that, at the initiation of the proceedings, the chancellor discriminated in a marked manner between

payment out of income and out of proceeds of sale, and clearly, in the new order, limited the fund out of which payments should be made to the earnings of the road.

The claim in question not having been paid out of the earnings, it became subject to the provisions of the final decree. The chancellor, still bearing in mind the equitable rule he had recognized by the amendment of January 10, 1894, namely, that he could not lawfully arbitrarily impose upon the purchasers the condition of paying unsecured demands, or, in other words, require their payment out of the proceeds of the sale before the mortgage debt was satisfied, apparently adjusted the final decree to the requirement of that rule. The interlocutory order was now to be entirely superseded, and the rights of the parties were to be finally determined and a final decree entered fixing the same. What was done? The chancellor certainly does not order and decree that the purchasers shall pay as part consideration for and as a condition to securing title to the railroad, over and above the sum bid, "all indebtedness and liabilities contracted and incurred by the railroad in the operation of its road prior to the appointment of the receivers." If he had so intended, the words just quoted would have accurately expressed that intention. Nothing more would have been necessary. But he immediately qualified the general words used, by providing that the debts and liabilities to be paid by the purchasers should have a certain quality additional to that of having been incurred before the appointment of the receivers, namely, they should be such as "are prior in lien to said general mortgage"; and then, out of further and abundant precaution, and apparently for the purpose of providing for an adjudication of the question whether the required quality determinative of the right of priority in lien existed, he provided that they should be paid "upon the court adjudging the same to be prior in lien to said mortgage and directing a payment thereof."

Still further evincing a purpose to subject the purchasers to payment of only such debts as were in fact prior in lien to the general mortgage, the chancellor provided that, if such debts and liabilities are not paid on demand, the claimant may "file his petition in this court to have such claim enforced against the property"; but "such purchaser or purchasers and his or their successors or assigns shall have the right to make defense to any claim, debt or demand so sought to be enforced, and either party shall have the right to appeal from any judgment, decree or order made thereon." This clause cannot, in our opinion, mean what is contended for by appellee's counsel, that a claimant may present his petition to the Circuit Court merely for the purpose of having that court ascertain and find that it was a claim within the class mentioned in the interlocutory order of January 10, 1894, which was to be paid out of the earnings of the road. It obviously has a broader meaning. The petition was to be presented to secure an order for the enforcement of the claim, not against the earnings as only contemplated by the interlocutory order, but against the property itself in the hands of the purchasers or their assigns. In order to secure such an order, the claim must be shown to be prior in lien to the general mortgage. To meet an issue of that kind, the provision was made for bringing in the

purchasers or their assigns and conferring upon them the right to defend against the enforcement of the claim upon their property and to appeal from any adverse decision. This elaborate machinery for the institution of a proceeding and bringing the parties interested was not devised merely to ascertain that the claim belonged to a class which its very existence as a claim demonstrated.

The order confirming the master's sale and the deed executed by him each contain the identical language found in the final decree already referred to. It sems to us that the learned chancellor endeavored in those three documents most industriously to accurately discriminate in the kind of liabilities incurred before the appointment of the receivers which the purchasers were required to pay in addition to the sum bid by them for the property. The provisions seem to us to admit of no doubt as to their meaning. They carry the obvious implication that some debts or liabilities contracted or incurred by the old railroad prior to the appointment of the receivers were not of equitable cognizance and constituted no lien prior to the mortgage lien. Such was the settled law, and such the learned chancellor had himself declared in the Riley Case. The obvious purpose of the provisions above referred to, requiring only those debts to be paid which were "prior in lien to the general mortgage," and that, too, only "upon the court adjudging the same to be prior in lien thereto," was to distinguish between such as were not of that character, and therefore, under decisions well known to the chancellor, not entitled to take precedence over the mortgage creditors and those "few unsecured claims which by the rulings of the Supreme Court" were entitled to equitable priority.

Learned counsel for the appellee call attention to the following provisions of the interlocutory order appointing receivers:—

"And it appearing to the court that the defendant company owes debts and has incurred liabilities which the holders thereof could, without any interference with the legal or equitable rights of the complainant under the mortgage set out in the bill, collect by proceedings at law from said defendant by seizing its rents, income, and earnings, and in other lawful modes, if not restrained from so doing by this court, and that it would be inequitable and unjust for the court to deprive said creditors of their legal right to collect their several debts, by appointing receivers to take and receive the earnings of said road during the pendency of this suit, as prayed by the complainant, without making suitable provision for the payment of such debts and liabilities."

—and earnestly urge that that preamble settles the law of the case, was unappealed from, and is now binding upon the railway company. We cannot give our assent to any such view. The authorities already referred to clearly establish the doctrine that the interlocutory decree appointing receivers confers no vested rights upon any outside creditor and makes no provisions which cannot be modified or changed later or in the final decree. The recital referred to orders nothing or adjudges nothing, and, if it did, was not an appealable order prior to the rendition of the final decree.

It is next urged that the true interpretation of the final decree, wherein it refers to the obligation upon the purchasers to pay any indebtedness and liabilities contracted or incurred by the railroad company prior to the appointment of the receivers, *"which are prior in lien to said gen-*

eral mortgage," is that the last italicized words constitute a statement that all such indebtedness and liabilities so incurred prior to the appointment of the receivers are in fact prior in lien to the general mortgage. In other words, the contention, as we understand it, is that the reference in the final decree to "the indebtedness and liabilities contracted or incurred by the railroad prior to the appointment of the receivers" is to such claims, as a class, created by the order appointing the receivers of date June 10, 1894, and that all such claims were by the language of the final decree declared to be prior in lien to the general mortgage. We are unable to adopt that view of the decree. It is, in our opinion, not warranted by the language actually employed or the necessary implications already referred to. Moreover, it overlooks or fails to give significance to several important provisions of the decree already referred to, and in that respect violates a well-known rule of construction of contracts and other written documents. A decree as so interpreted would be so out of harmony with and so contrary to existing law and practice in equity that we would not assume it to have been made unless the language employed imperatively demanded it. We cannot, therefore, in view of what has been said, agree to the contention of learned counsel for the appellee that the claim of Osborn was ever adjudicated either by the interlocutory decree or final decree to be prior in lien to the general mortgage. It has never been so adjudicated, and until it has been no order should be made directing the appellant railway company to pay it.

But it is contended that, since the decrees were entered in the foreclosure suit, there has been a harmonious interpretation of them by state and federal courts and a cotemporaneous construction of them by the railway company, to the effect that all liabilities of whatsoever character incurred by the old company were by those decrees imposed as obligations upon the new company. Our attention is first called, in support of that contention, to the case of Goodwin v. Atchison, Topeka & Santa Fé Railway Company, 55 C. C. A. 337, 118 Fed. 403, decided by this court. Judge Thayer, in delivering the opinion, disposed of the case solely on the ground that, by the voluntary appearance of Mrs. Goodwin and submission of her cause upon its merits to the special master appointed in certain supplemental proceedings therein described, to subject unmortgaged assets of the old company to the payment pro rata of unsecured demands against that company, she was concluded by the final judgment of the Circuit Court, confirming the master's report and disallowing her claim, from again contesting the same matter in an intervening petition based on the decrees rendered in the foreclosure suit. After so disposing of the appeal, Judge Thayer took occasion to say:

"Neither the order appointing receivers for the Atchison, Topeka & Santa Fé Railroad Company, nor the decree of foreclosure, determined that the claim in controversy was preferential and must be paid in any event. The order appointing receivers placed the claim in the class of preferential demands provided the intervener succeeded in showing that she had a valid demand against the railroad company. The question of the validity of the claim was left open for adjudication by the order appointing receivers, and, as the intervener failed to show that the claim presented was a legal and lawful demand, her application for relief is not strengthened by anything con-

tained in the order appointing receivers, or in the decree of foreclosure and sale, or in the order approving the sale."

This utterance is claimed by learned counsel for appellees to constitute a construction of the decrees in the foreclosure suit in harmony with their construction. We are unable to so regard it. It is at best a construction of the order appointing the receivers. It holds, as we hold, that such order placed appellee's claim in a class of preferential demands, which, if determined to be valid, was entitled, according to the terms of that order, to payment "out of the earnings of the road;" but it does not hold or intimate, as we understand it, that, notwithstanding the provisions of the final decree superseding the interlocutory order, a valid claim in that class against the old company constituted an obligation against the new one, without a hearing and adjudication that it was prior in lien to the general mortgage.

It is next urged that the case of Atchison, Topeka & Santa Fé Railway Co. v. Cross, 63 Kan. 564, 66 Pac. 620, affords another instance of construction in harmony with the theory of appellee's counsel. That was a case in which Cross, having obtained a judgment against the old company in the state court for $4,000 with interest for the negligent killing of his son, had presented that judgment to the special master appointed in the supplemental proceedings and secured an allowance and confirmation thereof by the court of $4,000 without interest. Cross afterwards brought an action in the state court for the interest which had accrued on that judgment, amounting to about $800. The Supreme Court of Kansas held that the order of allowance by the special master, when confirmed by the circuit court, was conclusive as to the extent of the railway's liabilities, and that Cross could not relitigate the question of interest in another action. Having thus effectually disposed of the case, the court made use of the following language in its opinion:

"It is unnecessary to discuss whether, under the terms of the decree confirming the sale of the railroad property, the purchasers became liable for the payment of the judgment held by defendants in error against the old company without an order of court 'adjudging the same to be prior in lien to the general mortgage and directing payment thereof.' The quoted language has received much attention from counsel, and its meaning, when read in connection with other parts of the decree, is the subject of totally divergent views. The decision of another question in the case is, in our judgment, conclusive against recovery by the defendants in error."

For the reasons just stated there was no discussion or determination of the construction of the final decree or order confirming the sale in the foreclosure suit.

In the last-mentioned case it appears by way of evidence that the Circuit Court, in which jurisdiction of the foreclosure suit and the parties thereto was reserved by the court, at one time declared a judgment rendered against the old railroad company in the state court, in favor of one Elder for damages occasioned by negligence, to be a lien upon the property of the new company and ordered its payment by the latter company, and that it was paid as ordered. It also appears that, notwithstanding the Circuit Court had ordered that the Cross judgment be allowed against the unmortgaged assets in the hands of the receiver

in the supplemental proceedings, and to be paid pro rata with other claims against such assets, the railway company voluntarily paid the sum of $4,000 out of its own funds. These are the only two instances of conduct of the railway company looking towards a construction of the obligation imposed upon it by the decrees in the foreclosure suit brought to our attention. They are not sufficient to constitute proof of any cotemporaneous construction of the decrees. Why the railway company paid Cross $4,000 when his claim was adjudged to be entitled to participate in the unmortgaged assets only, or why it submitted to a decree, without appeal, obligating it to pay the Elder judgment, is only a matter of conjecture. There being no obligation to pay the first, and the second having been paid, without appeal, would naturally suggest that the railway company did so as a matter of policy. If it saw fit for any reasons to make a voluntary donation of $4,000 to Cross, that fact certainly should not be made use of to establish a legal liability to pay all such claims that might thereafter be presented; and, if it saw fit, for any reasons satisfactory to itself, to pay the judgment awarded in favor of Elder without an appeal to this court, that fact, in our opinion, affords no legal ground for holding that it might not thereafter contest any similar demand. Facts of which we have no knowledge may have appeared in those cases justifying or requiring the payments as made. Whatever may have been the reasons that induced the railway company to pay them are not brought to our attention. In these circumstances there is nothing before us to establish such a cotemporaneous construction as concludes the railway company from now insisting upon its rights as fixed by the decrees properly interpreted.

It results from the foregoing that any claimant of an indebtedness or liability against the old railroad company, who had not secured payment thereof out of the earnings of the road while in the hands of receivers, as provided by the interlocutory decree of January 10, 1894, was by the final decree given the opportunity to establish on principles of equity that his demand was prior in lien to the general mortgage and to secure an order from the court to that effect. This was to be established on a hearing at which purchasers or their assigns might be present and heard in defense and enjoy the usual right of appeal to a higher court, if defeated. This construction is a rational one in harmony with established principles of law and practice in equity. The other construction claimed by appellees is, in our opinion, forced and unnatural, and deprives the purchasers and assigns of their property without a day in court or an opportunity to be heard in defense of their rights.

The decree must be reversed, and the cause remanded, with instructions to proceed in accordance with the principles laid down in this opinion.

PREISS v. ZITT.

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

No. 2,341.

PLEADING—VARIANCE—DEFECTS CURED BY VERDICT.

Objection to a variance between averment and proof must be taken when the evidence is offered, and, if not so taken, and the evidence is sufficient to support the verdict, mere defects of averment are cured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1438.]

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

J. D. Sullivan, for plaintiff in error.

Geo. H. Reynolds, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. The question in this case is one of pleading and practice. Zitt sued Preiss for a broker's commission earned by procuring purchasers for shares of stock in a brewing company owned by the latter upon terms previously agreed upon. The verdict and judgment were for the plaintiff. The defendant, who prosecutes this proceeding in error, contends that there was a variance between the averments and the proofs, and that recovery was allowed upon a cause of action not set forth in the pleadings. The petition averred the employment of the plaintiff, the price defendant was to receive for the stock, and the agreed percentage of plaintiff's commission. There was no controversy over these matters. It was further averred that plaintiff procured parties who were ready, able, and willing to make the purchase at the price named and upon the terms and conditions agreeable to defendant in accordance with the agreement between them; also that the plaintiff had fully performed everything to be done by him. In his answer the defendant claimed that the parties produced by plaintiff required as a condition to their purchase that he enter into a written contract not to engage in the brewing business in his city or vicinity for 10 years, that he never authorized plaintiff to make such terms, and that he never agreed to sell his stock with that restriction imposed upon him. The plaintiff replied by a general denial excepting as to admissions contained in the answer.

At the trial there was evidence on behalf of plaintiff that during the negotiations the defendant agreed to the condition mentioned, and thereafter, when he brought his purchasers to defendant's city to close the transaction, defendant again assented, but on the following day repudiated his agreement and refused to make the sale unless he was left at liberty to enter into a competitive business, and upon this the parties split. The defendant interposed no objection to the evidence when it was offered and received. On the contrary, he assisted the plaintiff in eliciting it. He waited until after plaintiff's case was made, and then moved for a directed verdict upon the ground that the cause of action pleaded was not the one that was proved. His motion being

overruled, he proceeded with evidence in defense. It is claimed that by the denial in the reply the plaintiff traversed the averment in the answer that the parties he produced required as a condition to their purchase that defendant contract to abstain from a competing business, and that plaintiff, having tendered such an issue, should not be permitted to recover upon proof that the condition mentioned was one of the terms agreed upon. The contention of defendant is devoid of merit. It is well settled that objection to a variance between averment and proof must be taken when the evidence is offered, otherwise it will be deemed to have been waived. If the evidence is sufficient to support the verdict, and it was in this case, mere defects of averment in the pleadings are cured. Nashua Savings Bank v. Anglo-American Co., 189 U. S. 221, 231, 23 Sup. Ct. 517, 47 L. Ed. 782; Roberts v. Graham, 6 Wall. (U. S.) 578, 18 L. Ed. 791. But, more than this, the plaintiff's petition was so framed as to fully cover the cause of action proved at the trial, and a reasonable construction of his reply, viewed in its connection with the preceding pleadings, is that it tendered an issue, not as defendant asserts, but upon the averment in his answer that he never authorized plaintiff to sell his stock with a restriction upon his future business, and that he never agreed to such a restriction. This was the issue fairly made, and it was the one that was tried. The evidence fully warranted the verdict for the plaintiff, and the judgment was for the right party.

The judgment is affirmed.

KUZEK v. MAGAHA et al.

(Circuit Court of Appeals, Ninth Circuit. November 2, 1906.)

No. 1,220.

1. ACTION—LEGAL OR EQUITABLE.

A suit to recover a stated per cent. of the proceeds of gold taken from a mining claim leased by plaintiff to defendant in accordance with the terms of the lease, to obtain an injunction restraining defendant from making any further extraction of gold from the premises, to obtain an accounting of the gold taken under the lease, and the appointment of a receiver to hold the property pending the litigation is essentially one in equity, and an equitable defense thereto may be interposed.

2. APPEAL—MATTERS REVIEWABLE—RULINGS ON EVIDENCE.

In a suit in equity, the appellate court will not consider assignments of error based on rulings on the admissibility of evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3367, 4185.]

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

A. J. Bruner, Elwood Bruner, Chas. Page, Edward J. McCutcheon, and Samuel Knight, for appellant.

Ira D. Orton, J. C. Campbell, W. H. Metson, and F. C. Drew, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. It is insisted on behalf of the appellant that this action was one at law, and that the court below committed such palpable error in entertaining and sustaining the equitable defense thereto that this court should consider such error in the absence of an assignment of error in that regard. If counsel be correct in that contention, the necessary result would be a dismissal of the appeal; for it is the well-settled rule that errors committed in an action at law are reviewable here only by means of a writ of error. But it is clear from the complaint itself that the suit is of an equitable nature, and was so treated by the respective parties in the trial court. It was brought by the appellant to recover 75 per cent. of the gross proceeds of gold taken from a certain mining claim leased by him to the appellee, in accordance with the terms of a certain written lease set out in the complaint, to obtain an injunction restraining the defendant in the suit from making any further extraction of gold from the premises, to obtain an accounting of the gold already extracted by him, and the appointment of a receiver to take and hold the property pending the litigation. Nothing more need be said to show that the suit was essentially one in equity. Therefore the defendant thereto was plainly entitled to set up in defense, as he did, that the 75 per cent. of the gross proceeds provided by the lease set up in the complaint to be paid to the lessor was intended by the parties thereto to be 25 per cent. only, and that the figures 75 were inserted, instead of the figures 25, by the mutual mistake of the parties, and that accordingly the lease should be reformed, and the rights of the respective parties fixed in accordance with such reformation.

In the giving of the evidence upon that controverted question, exceptions were reserved by the appellant to various rulings of the trial court, which are here assigned as error, and upon which, in accordance with the practice prevailing in equity cases, we do not rule upon. It is sufficient to say that we find in the record ample evidence to sustain the findings of the court to the effect that the mistake claimed by the appellee was made, and that the real agreement of the parties provided for the payment to the lessor by the lessee of 25 per cent. only of the gross proceeds of the leased ground.

The judgment is affirmed.

MORROW, Circuit Judge, took no part in this decision.

SOUTHEASTERN CONST. CO. v. FARNHAM CO.

(Circuit Court of Appeals, Third Circuit. November 12, 1906.)

No. 11.

EVIDENCE—PAROL EVIDENCE AFFECTING WRITING.

In an action at law on a written contract, an affidavit of defense setting out a contemporaneous verbal agreement adding a term to the contract by creating an additional obligation on the part of plaintiff, and alleging a breach of such agreement, does not state a defense, under the settled rule

that, when a contract has been reduced to writing, such writing cannot be contradicted, altered, added to, or varied by oral evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2030–2047.]

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

For opinion below, see 144 Fed. 989.

Charles L. McKeehan, for plaintiff in error.

Thomas Raeburn White, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. The decision of the circuit court is sufficiently supported by the opinion of the learned District Judge. 144 Fed. 989. The suggestion now made, that the only extrinsic proof requisite to sustain the defense which he held to be insufficient in law, would be of "a consideration additional to the consideration named in the writing," cannot be accepted. What really was proposed by the affidavit of defense was not merely to show by oral evidence that, as a fact, a consideration other than that mentioned in the written contract was given, but to vary the terms of the contract itself, by adding to it an obligation-creating provision which it did not contain; and this could not be done without violation of the long-settled rule, that when a contract has been reduced to the form of a document or series of documents, the contents of any such document or documents may not be contradicted, altered, added to, or varied by oral evidence.

The judgment is affirmed.

UNITED STATES PLAYING CARD CO. v. A. G. SPALDING & BROS.

(Circuit Court of Appeals, Second Circuit. April 24, 1899.)

No. 141.

PATENTS—INFRINGEMENT—DUPLICATE WHIST TRAYS.

The Bisler patent, No. 525,941, for a duplicate whist tray, is not for a primary invention, but covers improvements only on existing trays, and its claims must be strictly limited to the improvements described. As so construed, *held* not infringed.

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

The United States Playing Card Company brought a bill in equity, based upon the alleged infringement of letters patent No. 525,941, dated September 11, 1894, and issued to Gustav A. Bisler for an improved tray for playing duplicate whist. Two trays, respectively known as "Paine's Whist Tray" and "Kalamazoo Ideal Whist Tray," were sold by the defendants, and each was claimed to be an infringement. The decree of the Circuit Court found that claims 1 and 2 of the Bisler patent were valid, that the Paine tray infringed claim 1, and that the Kalamazoo tray infringed both claims. From this decree the defendants appealed to this court.

Frederick L. Chappell, for appellants.
Arthur von Briesen, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The important predecessors of the Bisler patent were the Paine & Sebring patent, No. 462,448, dated November 3, 1891, which was for a tray made of cloth board or fancy paper, having upon its face four rubber bands or holders for holding the various hands of cards, and the Woodbury patent, No. 434,469, dated December 1, 1891, which described a case, made of flexible material, having four flexible wings, which folded upon each other, each wing having a pocket or inwardly opening envelope for containing the cards.

The Bisler tray had an upper and lower firm plate, with interposed blocks at the corners of the lower plate and another interposed block in its center, thus forming card-receiving pockets which are open in front and have their sides and rear produced by the various blocks, owing to the central position of the center block, whose corners are adjacent to the inner corners of the several corner blocks. The plates are of the same size and a semicircular notch is cut away in each plate to form finger spaces which enable the users to grasp the cards inserted in the pockets. Springs are secured within the pockets, so that the cards bear against the springs and are retained in position. Claims 1 and 2 are as follows:

"(1) An apparatus for playing duplicate whist, consisting of a tray composed of plates with intervening corner and central blocks, forming pockets closed on their sides and inner ends, and open at the outer edge of the tray, substantially as described.

"(2) A tray, for the purpose set forth, consisting of the plates, B, B, having the recesses, G, in their sides, the intervening blocks, C and D, forming the pockets, E, closed at their sides and inner ends, and the springs, F, in said pockets; said parts being combined substantially as described."

Before the date of this suit, no tray had ever appeared upon the market which was made in accordance with the specification of the Bisler patent. The Kalamazoo tray has two plates; the top plate being of smaller size than the bottom plate, so that a margin of about three-fourths of an inch is left around each side of the upper plate. It has intervening blocks, one at each corner and one at the center; there being a space of about 1⅛ inches between the central block and the inner corners of the corner blocks. The pockets thus formed for the cards are not entirely closed at their sides and inner ends, but the corners of the inner block are adjacent to the several inner corners of the corner blocks. The lower board has a semicircular notch at the edge of each side for finger spaces, so that the cards can be easily introduced into and withdrawn from the pockets, and opposite each one of these spaces there is in the lower board a raised spot, or "hump," which aids in forcing the cards against the upper plate. The upper plate of the Paine tray is of the same size as the lower plate, and is separated from it by thin strips around the four outer edges of the board. Between the plates a slender frame of cross strips of thick pasteboard is interposed, which makes with the side boards four pockets for the cards. At the outer end of each pocket a notch is cut from

the side strip, and from the lower board for finger spaces, and four rectangular pieces are cut or punched away in the upper board, so that, when it is placed over the notches in the lower board, open spaces are formed through which the cards are placed in the pockets. The pockets are without a spring.

The broad claim for plates and interposed blocks forming pockets for which Bisler first applied was limited, so that in claim 1 corner and central blocks form pockets closed on their sides and inner ends and open at the outer edge of the tray, and claim 2 requires recesses in the sides of the plates. The invention of the patent is an improvement upon that of Paine & Sebring, inasmuch as it has pockets between two plates, instead of a tray upon which the cards are held by rubber bands, and is an improvement upon the invention of Woodbury because its pockets are between the plates of a nonflexible tray, instead of being flexible pockets in flexible wings of a tray. It is not a primary invention, and the scope of the patent must be strictly limited in accordance with the limitation of the claims. The corners of the central blocks of the Kalamazoo tray are adjacent to the inner corners of the several corner blocks, and the pockets are sufficiently closed on their sides and inner ends to answer the requirements of the specification and of claim 1; but the Bisler tray consisted of two plates of the same size, and, if the pockets were open towards the player, they must be open at the outer edge of the tray. As the upper plate of the Kalamazoo tray is smaller than the lower plate, the pockets are not open at the outer edge of the tray; but a part of the lower board is between the pocket and the tray's outer edge, which is of manifest convenience for the easy insertion of the cards in the pockets. Claim 2 demands recesses in the sides of each plate; that is, finger spaces in each plate at each pocket, which are necessary to withdraw the cards when the plates are of the same size. In the Kalamazoo tray but one plate is recessed. For these reasons it does not infringe either claim. The Paine tray does not infringe claim 1 because its interposed frame and the sides of the upper plate are not the corner and central blocks of the Bisler patent. In claim 1, the patent was limited to a particular method of forming the pockets, so that pockets formed in a substantially different way are not within the claim. As the Paine tray has no springs, it is not claimed that it infringes claim 2.

The decree of the Circuit Court is reversed, with costs, and the case is remanded to that court, with instructions to dismiss this bill, with costs.

COLUMBUS CHAIN CO. v. STANDARD CHAIN CO.

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

No. 1,532.

1. PATENTS—ANTICIPATION BY FOREIGN PATENT—BURDEN OF PROOF.

A patent will not be invalidated for anticipation by a foreign patent of prior date, if the invention is shown to have been made by the American patentee before such date; but, where anticipation is otherwise clear,

the burden rests upon him to establish such priority beyond a reasonable doubt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 64.]

2. SAME—MACHINE FOR DIMENSIONING CHAIN-LINKS.

The Carroll patent, No. 620,826, for a swaging device for regulating the dimensions of chain-links, is void for anticipation by the Swiss patent to Goerke, No. 9,592, which covers a device substantially the same in all its parts and intended to accomplish the same result, but also, in addition, for use in welding the links.

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

See 145 Fed. 186.

C. C. Shepherd, for appellant.

Melville Church, for appellee.

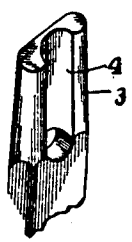
Before LURTON and SEVERENS, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge. This is an appeal from a decree dismissing a bill filed to enjoin the infringement of letters patent No. 620,826, granted to Daniel Carroll, March 14, 1899, and assigned to appellant, complainant below, April 19, 1900. The answer put in issue both the validity of the patent and its infringement.

The patent is for a device for imparting uniform dimensions to chain-links, i. e., internally. Many chains, such, for instance, as pulley and crane chains which run over toothed wheels or have to fit into pockets or depressions on the face of wheels, require that the links thereof be internally of exactly equal lengths. It is to secure this result that the device covered by the patent is intended. It is a punch with two distinguishing features. One is a slightly tapering head, adapted to enter and fill the ends of a chain-link; the other, a channel in one of its faces to permit free movement therein of one arm of the adjoining link. It is thus set forth in claim 1 of the patent, which is the claim thereof alleged to have been infringed:

"In a device for regulating the dimensions of chain-links, a punch having a slightly tapering head, adapted to enter and fill the ends of a chain-link, said punch head having a channel in one of its faces to permit the free movement therein of one arm of an adjoining link substantially as and for the purpose specified."

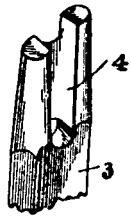
FIG. 5



A detailed view or perspective of the upper portion of the punch is shown by figure 5 of the drawings, which is as follows:

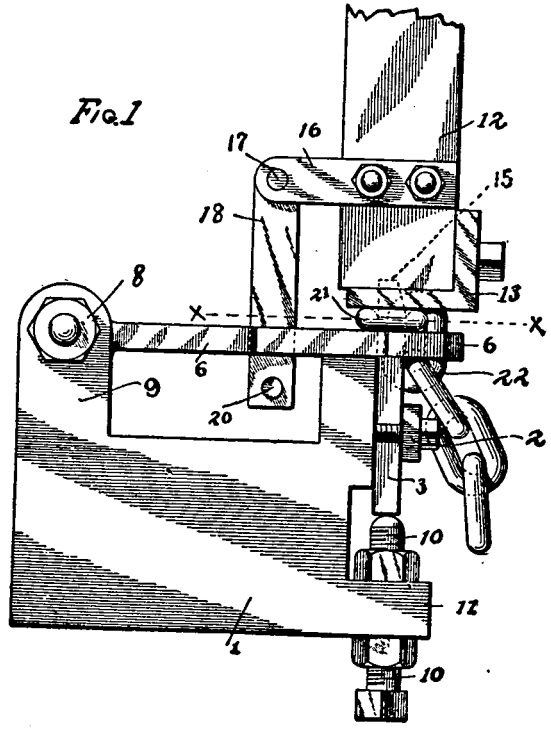
A similar view of a slightly modified form of the punch, the modification consisting in a substantially bifurcated end portion thereof, is shown by figure 6 of the drawings, which is as follows:

Fig. 6



The operation of the device consists in forcing the chain-links previously formed down over the punch, and then removing them therefrom, or it may consist in the reverse of this, i. e., in forcing the punch into the chain-links and then removing it therefrom. The result of the operation of the device in either way is that the internal dimensions of all the links in a chain are made identical and uniform. To secure this operation, the drawings and specification of the patent contemplate that the device shall be used in connection with an ordinary foot, hand, or power press. They set forth an arrangement of the press so as to secure the operation of the device in the first of the two ways stated. Figure 1 of the drawings is a side elevation of the parts of the press, which come in contact with the device; the device in place and the chain being formed. It is as follows:

Fig. 1



3 is the punch; 1 the base block to which it is attached; 12 the slide arm of the press which forces the previously formed chain-link down over the punch; and 6 the stripper plate, the elevation of which removes the chain-link from the punch. In practice it seems that the device is operated in this way rather than in the reverse way. It accomplishes the intended result successfully. The evidence discloses several ways of accomplishing such result prior to its use, but they were crude, and, as

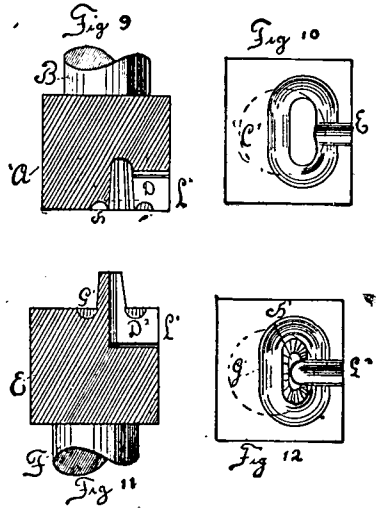
compared with them, it saves much labor. It is therefore a useful and valuable device.

The defense of noninfringement was based upon the fact that appellee's punch, instead of having a channel in one of its faces to permit free movement therein of the adjoining link, is separated into two parts, with a central space between them, in which one arm of the adjoining link can have such movement. It is urged that the patentee, Carroll, limited his device to a punch having a channel in one of its faces, and, as appellee's punch does not have such channel, there has been no infringement. The following authorities are cited in support of this position: Merrill v. Yeomans, 94 U. S. 568, 24 L. Ed. 235; Burns v. Meyer, 100 U. S. 671, 25 L. Ed. 738; Railway Co. v. Mellon, 104 U. S. 112, 26 L. Ed. 639; Sutter v. Robinson, 119 U. S. 530, 7 Sup. Ct. 376, 30 L. Ed. 492; McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; Cimiotti Co. v. American Fur Refining Co., 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100; Harriss v. Allen (C. C.) 15 Fed. 106; Western & Wells Co. v. Rosenstock (C. C.) 30 Fed. 67; Kinzel v. Luttrall Brick Co. et al., 67 Fed. 926, 15 C. C. A. 82; Seabury v. Johnson (C. C.) 76 Fed. 456; Schrieber & Conchar Mfg. Co. v. Adams, 117 Fed. 830, 54 C. C. A. 128; Hale v. World Mfg. Co., 127 Fed. 964, 62 C. C. A. 596.

On the other hand, it is urged that the space in appellee's punch is nothing more than a continuation of the channel in appellant's punch, and differs from its modified form, as shown in figure 6, in degree only. And see the decision of this court in the case of Standard Caster Wheel Co. v. Caster Locket Co., 113 Fed. 162, 168, 169, 51 C. C. A. 109. We do not find it necessary to dispose of the question thus raised, inasmuch as we think that the defense of invalidity of the patent has been made out, and it was on this ground that the lower court dismissed the bill.

The patent is invalid because it was anticipated. To establish anticipation a number of prior United States patents were introduced in evidence by appellee, and its expert, after a consideration thereof, gave it as his opinion that the subject-matter defined by claim 1 of the patent in suit was disclosed in its entirety therein. To the same end a Swiss patent, No. 9,592, issued to Heinrich Goerke, December 27, 1894, was so introduced. It is this patent which the lower court held invalidated the patent in suit. With this conclusion we agree, and in view of this we have given no consideration to the United States patents relied on. The device covered by that patent contains a punch, and the punch which it contains has the two distinguishing features of appellant's punch, to wit, a slightly tapering head adapted to enter and fill the ends of a chain-link, and a channel in one of its faces to permit the free movement therein of one arm of an adjoining link. It is operated in the same way, and it is intended to and does accomplish the same result. It is operated in connection with two dies—an upper or hammer die, and a lower or anvil die. The upper surface of the lower or anvil die is provided with a half round groove, corresponding accurately with a chain-link, and from the middle thereof the punch described as cone-shaped, and in the alternative as a wedge, arises, corresponding exactly on its outside, save in front, with the inner curvature of the

chain-link, and having a groove or channel in front to partly receive the next to the last chain-link. The under surface of the upper die is provided with a groove corresponding to the groove in the lower die, and the part lying within it is hollowed out into a wedge-shaped or conical recess, corresponding to the punch of the lower die. For the reception of the next to the last link between the two dies, recesses are provided. Figures 9 and 10 of the drawings of the patent are respectively a vertical section and an inverted plan view of the upper die. They are as follows:



Figures 11 and 12 thereof are similar views of the lower die. They are as follows:

The result intended to be accomplished by the device covered by the Goerke patent is broader, however, than that intended to be accomplished by the device of the Carroll patent. That intended to be accomplished by the latter, as we have seen, is the bringing of all the links of a chain to a predetermined, fixed, or standard internal dimension. That intended to be accomplished by the former is not only this, but at the same time to weld the links. Appellant's expert testified that it related primarily to the art of welding chain-links. This is hardly correct, but, whether so or not, it had distinctly in view the securing of uniformity in the internal dimensions of chain-links. The device covered by the patent is referred to in the title as a "swaging machine for the production of calibrated chains." The specification opens with a description of devices of the prior art, and refers to them as tools theretofore "known for calibrating and correcting chains which require accurate spacing, i. e., links of exactly equal lengths," and, after stating that these devices were not satisfactory, goes on to say:

"I have therefore invented the chain-dimensioning swaging machine, which is represented in two embodiments in the accompanying drawings."

The description given above of the device is in the second of those two embodiments, and is referred to as a modification of the first one. For our purpose it is not necessary to set forth the first embodiment. But the description of the device in that embodiment shows that, as thus used, it was intended to dimension internally the chain-links. As, for instance, it is said:

"The chain-link which is to be welded, and at the same time dimensioned, is placed upon the punch H of the lower die in a ready to weld and still hot condition; and the upper die is then brought down upon the lower die and the chain-link lying thereon until the two dies lie close on one another. * * *

The link to be welded thereupon not only takes the exact recessed form of the two dies, but also has its length accurately determined."

In the description given of the device in the second embodiment, no mention is made of the result intended to be accomplished by its use therein, but there can be no doubt that it was to dimension internally as well as weld the chain-links.

The fact that the device of the Goerke patent was intended to, and will, accomplish more than the device of the patent in suit, does not prevent its being an anticipation of the latter. It is sufficient that in part it was intended to, and will, accomplish the same result, and that in the same way. Had the Goerke patent been later, it would certainly infringe the patent in suit. Therefore, according to the well-settled rule, it anticipates. It is urged that the welding of the links in the Goerke patent interferes with the dimensioning thereof. The unwelded link must necessarily be placed over the punch at a welding heat, and, by the time the welding and dimensioning is complete, the link will have cooled to such an extent as to contract and grip the punch so that it cannot be removed therefrom without twisting or bending. The patent contains no suggestion as to the method of removing the link after it has been welded and dimensioned. It is claimed that the links thus formed, when removed, will be so irregular in their shrinkage that they will not be of uniform length. This is not so with the device of the patent in suit. The link, before it is placed on the punch, is welded and partially cooled and is readily removed by the stripper plate. But there is no necessity of welding the links at the same time they are dimensioned in using the device of the Goerke patent. It can be used to dimension them alone. The appellee had dies made according to the Goerke patent, and they operated successfully when limited to dimensioning previously welded links. The device of the patent in suit is therefore the device of the Goerke patent, minus any provision for welding the links.

This case therefore comes within the rule, as to anticipation by a foreign patent, laid down by Mr. Justice Clifford, in the case of Seymour v. Osborne, 11 Wall. 555, 20 L. Ed. 33, in these words:

"Patented inventions cannot be superseded by the mere introduction of a foreign publication of the kind, though of prior date, unless the description and drawings contain and exhibit a substantial representation of the patented improvement, in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct, and practice the invention to the same practical extent as they would be enabled to do if the information was derived from a prior patent. Mere vague and general representations will not support such a defense, as the knowledge supposed to be derived from the publication must be sufficient to enable those skilled in the art or science to understand the nature and operation of the invention, and to carry it into practical use. Whatever may be the particular circumstances under which the publication takes place, the account published, to be of any effect to support such a defense, must be an account of a complete and operative invention capable of being put into practical operation."

But, in order that the Goerke patent may invalidate the patent in suit, it is not sufficient that it antedates that patent. If, notwithstanding such antedating, the patentee, Carroll, invented his device prior to the date of the Goerke patent, then his patent is not invalidated thereby.

The appellant claims that such was the case, and this seems to be its main reliance in upholding the Carroll patent. Some point is made as to the date of the issuance of the Goerke patent. In its title are these words:

"Patent No. 9,592, Class 72, December 27, 1894, 6:45 p. m., Heinrich Goerke, of Gruene, near Isenlohr (Westphalia, Germany.)"

It is contended that the date thus given is the date of the application for the patent, and not the date of its issuance. There is, however, nothing in the record to show that such is not the date of the issuance of the patent—the fair inference is that it is the date of the issuance and not of the application—and the printed and uncertified copy of the patent was introduced in evidence as a patent issued on that date, pursuant to a stipulation that it might be so introduced. The date given must therefore be accepted as the date of the issuance of the patent.

The evidence relied on to make out that the patentee, Carroll, invented his device prior to December 27, 1894, the date of the issuance of the Goerke patent, consists of the testimony of the patentee, Daniel Carroll, his brother, Edward Carroll, James Crooks, and George N. Mettle. The patentee testified that he conceived his device in the fall of 1893; about the month of November; that he made a sketch of it; that not later than November, 1893, he had his brother, Edward, a chain maker, forge him a punch to his sketch; that, his brother not being able to forge the channel as sharp or deep as he wanted, he had James Crooks, a pattern maker, to make him a wooden punch with the channel the proper depth, during the winter of 1893 and 1894; and that in the summer or fall of 1894 he had George N. Mettle, a machinist, to plane a channel in a steel punch which his brother, Edward, had forged for him. It does not appear whether this punch is the same as the one before referred to, but it probably was. The patentee testified that he tried this punch, and it worked successfully. He does not state, however, when he did this. The patentee's brother, Edward Carroll, testified that he made a punch for the patentee, under his direction, probably about September, 1893—not later than September—and that it was rough forged and rather crude. James Crooks testified that he made a wooden model of the appellant's punch; that, at the time, he had no knowledge of the purpose for which it was to be used; and that he was not certain as to the time when he did this, but that it was on or about 1894 or 1895. George N. Mettle testified that in the fall or winter of 1894 he planed or smoothed out the groove in a tool very similar to appellant's punch, which the patentee, Carroll, brought to him, forged to shape, and needing only the groove.

This is the entire evidence bearing on the question as to Carroll having conceived his device prior to the issuance of the Goerke patent. It is to be noted that the witness Crooks locates the making of the model on or about 1894 or 1895, and the witness Mettle locates the making of the groove in the steel punch in the fall or winter of 1894. Neither of these two witnesses, therefore, may be said to give testimony that tends to show that Carroll conceived his device prior to December 27, 1894. The sole evidence, therefore, of conception, prior to that date, is the testimony of the patentee and his brother, and it does not clearly

and certainly appear from their testimony that a successful device was made and operated prior thereto. On the other hand, as weakening, if not overcoming, that testimony, are two circumstances. One is that neither the sketch, wooden model, or steel punch referred to was introduced in evidence. The patentee testified that he could not state positively where the steel punch was at the time he gave his testimony. As to the wooden model, he testified that it was retained in his possession until within the last year, when in moving his household effects it was mislaid, and diligent search had so far failed to find it. The other circumstance is the delay of the patentee in making an application for a patent. He did not make an application therefor until December 10, 1897, over three years after the time when he claims to have invented the device. This delay is unaccounted for. The patentee gives reasons for his not putting his device into practical operation before 1898, but none for his not applying for a patent at an earlier date. In view of the usefulness and value of the device, the delay in applying for a patent seems unreasonable.

The burden was on appellant to establish that he invented his device prior to December 27, 1894, and that beyond a reasonable doubt. It is well settled that, if a defendant seeks to invalidate the patent in suit by showing, by oral testimony, prior invention, the proof must be clear, satisfactory, and beyond a reasonable doubt. The rule is thus stated by Mr. Justice Brown, in the case of Washburn & Moen Mfg. Co. v. Beat 'Em All Barbed Wire Co., 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154:

"We have now to deal with certain unpatented devices, claimed to be complete anticipations of this patent, the existence and use of which are proven only by oral testimony. In view of the unsatisfactory character of such testimony arising from the forgetfulness of witnesses, their liability to mistakes, their proneness to recollect things as the party calling them would have them recollect them, aside from the temptation to actual perjury, courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof shall be clear, satisfactory, and beyond a reasonable doubt. Witnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves are not usually to be depended upon for accurate information. The very fact, which courts as well as the public have not failed to recognize, that almost every important patent, from the cotton gin of Whitney, to the one under consideration, has been attacked by the testimony of witnesses who imagined they had made similar discoveries long before the patentee had claimed to have invented his device, has tended to throw a certain amount of discredit upon all that class of evidence, and to demand that it be subjected to the closest scrutiny. Indeed, the frequency with which testimony is tortured or fabricated outright, to build up the defense of a prior use of the thing patented, goes far to justify the popular impression that the inventor may be treated as the lawful prey of the infringer."

This court, in the case of American Roll-Paper Co. v. Weston, 59 Fed. 147, 8 C. C. A. 56, held that the oral testimony as to prior invention was sufficiently cogent to establish it beyond a reasonable doubt, and because of it invalidated the patent in suit.

It is also the law that, if a plaintiff seeks to maintain the patent in suit by showing by oral testimony invention prior to a patent which anticipates it and would otherwise invalidate it, the proof must be of the

same character. In the case of Thayer v. Hart, Jr. (C. C.) 20 Fed. 693, Judge Coxe said:

"The complainant's patent antedating the defendants', it was incumbent upon them to prove beyond a reasonable doubt that theirs was the prior invention. This they have done by proof so positive that the complainant's counsel conceded, on the argument, that the date of their invention was January 15, 1877, eleven months prior to the filing of complainant's application. This date being fixed, the burden was transferred to the complainant to satisfy the court by proof as convincing as that required of the defendant that his invention preceded theirs. The rule in such cases is very strict. It is so easy to fabricate or color evidence of prior inventions, and so difficult to contradict it, that proof has been required which does not admit of reasonable doubt. Where interests so vital are at stake, where intervening years have made perfect accuracy well-nigh impossible, where an event not deemed important at the time has been crowded from the memory and obscured by the ever-varying incidents of an active life, it is not difficult to imagine that even an honest man may be led erroneously to persuade himself that the facts accord with his inclination concerning it. The evidence of prior invention is usually entirely within the control of the party asserting it, and so wide is the opportunity for deception, artifice, or mistake that the authorities are almost unanimous in holding that it must be established by proof, clear, positive, and unequivocal. Nothing must be left to speculation or conjecture."

The appellant's oral testimony comes far short of establishing beyond a reasonable doubt that, prior to December 27, 1894, he conceived, constructed, and actually used his device. It relies on the case of Bliss v. Merrill (C. C.) 33 Fed. 40, as supporting its contention that it has made out prior invention to the degree required. In that case Judge Coxe said:

"The invention of the second claim is not anticipated by any of the prior patents or exhibits. The English patent to Reynolds describes substantially the same combination, but, though prior to the complainants' patent, it was not prior to their invention. This patent was sealed July 27, 1875. It was therefore on that day that the invention was made patent to the public. Smith v. Goodyear, 93 U. S. 486, 498, 11 L. Ed. 35. The complainants, if they are to be credited, conceived their invention prior to May 6th of that year. Their testimony in this regard is to some extent corroborated by other witnesses, and by presumptions drawn from collateral facts and circumstances. It is true that this portion of the proof is hardly susceptible of denial. It lies almost wholly within the knowledge of the complainants. A direct attack upon a position founded upon such evidence is, except in rare instances, out of the question. But the difficulties which surround the defendants do not exonerate them from presenting some satisfactory proof, either direct or circumstantial, to traverse the positive assertion of the complainants. Instead of this, there is nothing but the intangible presumption arising from the somewhat peculiar coincidence that the same idea, alike even in minute details, should have occurred to two persons on different continents without one having seen the other's device. But it is entirely clear that the court would not be warranted in rejecting the positive testimony of two respectable and unimpeached witnesses upon a mere suspicion of this character."

It is to be noted that here the testimony of the complainant was "to some extent corroborated by other witnesses, and by presumptions drawn from collateral facts and circumstances." Here there is no such corroboration. Crooks' testimony amounts to no more than that he made the wooden model in 1895, and Mettle's to no more than that he made the groove in the steel punch in the winter of 1894. The date in each instance is too late. His brother Edward's testimony did not

show he made a punch which could be used before December 27, 1894. And, instead of there being corroborating facts and circumstances, the absence of the sketch, wooden model, and steel punch, and the delay in applying for the patent, are circumstances against the claim of prior invention. Besides, it does not clearly and certainly appear from the testimony of the patentee that any device was put to practical and successful use prior to the date of the Goerke patent.

The decree appealed from is therefore affirmed.

PARDY et al. v. J. D. HOOKER CO.

(Circuit Court of Appeals, Ninth Circuit. October 29, 1906.)

No. 1,322.

PATENTS—SUIT FOR INFRINGEMENT—USE BY EMPLOYER OF INVENTOR.

A suit for infringement of a patent cannot be maintained against a defendant who employed and paid the patentee to build the machines embodying the invention, for which the patent was afterward applied for and obtained, under an agreement that defendant was to pay all costs and expenses, and was to own any patent that should be issued, and where the machines so built were used by defendant, not only without objection on the part of the patentee, but under his direction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 364.

Right to inventions as between employer and employé, see note to Pressed Steel Car Co. v. Hansen, 71 C. C. A. 221.]

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

The bill in this case alleges that, prior to August 20, 1889, one George Pardy was the inventor of certain new and useful improvements in riveting machines, and that after making the invention died testate at the city and county of San Francisco, Cal., of which place he was a resident; that, after the death of said Pardy, such proceedings were had in the superior court of that city and county; that a decree was duly entered admitting to probate the last will of the said George Pardy, and directing letters testamentary to be issued to the appellant William Pardy, as executor of the estate, which was done; that by the will George Pardy devised a one-half interest in the invention to William Pardy, one-eighth to John Pardy, and three-eighths to Albertine Hasler; that, while the letters testamentary were in effect, and after the executor, William Pardy, had duly qualified thereunder, he did, on the 16th day of December, 1889, as such executor, duly file in the Patent Office of the United States an application for the issuance of letters patent covering the invention of the deceased Pardy, in pursuance of which application letters patent were on the 19th day of August, 1890, regularly issued to William Pardy, as executor of the estate of George Pardy, deceased, for the benefit and use of the devisees under the will; that on February 26, 1890, a decree was duly entered in the superior court of the city and county of San Francisco distributing "to William Pardy an undivided one-half interest in the aforesaid invention and the letters patent to be obtained therefor, and to John Pardy a one-eighth interest, and to Albertine Hasler a three-eighths interest"; that on the 2d day of May, 1903, John Pardy sold and assigned to William Pardy all his right, title, and interest in the letters patent, together with all rights of action which had accrued to him by reason of the infringement thereof; that the defendant, since February 13, 1895, without the license or consent of the complainants, within the jurisdiction of the court "has unlawfully and wrongfully used one or more pipe-riveting machines each containing and embracing the said invention described and patented in and by the said letters patent sued on herein, and has infringed upon the exclusive rights secured to your orators by said letters patent, and has made and realized large profits and

advantages therefrom, but to what amount your orators are ignorant and cannot set forth." The prayer is for an injunction and for an accounting and for general relief.

The answer of the defendant to the bill denies, among other things, that George Pardy was the inventor of the machines in question, and alleges that, prior to his death, to wit, about the year 1888, he was employed as a mechanic by J. D. Hooker, at the city of Los Angeles, to construct experimental machines embodying certain improvements in riveting machines invented by said J. D. Hooker, and then and there divulged and described to Pardy by him; that it was then and there agreed between Hooker and Pardy that Hooker should pay for all materials necessary for the construction of the machines, and should pay Pardy for his services "in embodying said invention in said machines, and that, in consideration thereof, the said J. D. Hooker should become and be entitled to all the benefits of said services of said Pardy, and become and be exclusive owner of the said experimental machines; that, thereafter and in pursuance of said agreement, the said George Pardy did construct experimental machines embodying said invention of said J. D. Hooker; that upon the completion thereof the said J. D. Hooker suggested certain material additions thereto, and changes therein, some of which were made by said George Pardy and some by others; that such experimental machines were made by or under the direction of said Pardy, all embodying the said invention, additions, and changes made by said J. D. Hooker; that said J. D. Hooker paid for the materials necessary for the construction of said experimental machines and for the said additions thereto, and paid the said George Pardy in full for all his said services in connection with the making and altering of said experimental machines, and said J. D. Hooker thereupon became and was and now is entitled to all the benefits derived from said services, and became and was and now is the sole owner of said experimental machines; that said William Pardy, acting as executor of said George Pardy, deceased, seeking surreptitiously to appropriate said invention, or so much thereof as is embraced in the claims of the patent sued on, unjustly and unlawfully filed in the Patent Office of the United States an application for said patent, wherein he falsely alleged the said George Pardy to be the inventor thereof, and thereafter he surreptitiously and unjustly obtained the patent sued on for that which was in fact invented by said J. D. Hooker, who was using reasonable diligence in adapting and perfecting said invention."

The defendant further alleged that, subsequent to the making of the machines above mentioned, J. D. Hooker, with the full knowledge of George Pardy, had several other machines similar to the first machines constructed, and also one or more machines embodying some of their features, and continuously used all of the machines with the full knowledge of, and without any objection by, George Pardy; and that, after the incorporation of the defendant, J. D. Hooker gave express permission to the defendant to use the machines, which defendant has done.

Hazard & Harpham, for appellants.

J. W. McKinley and Alexander H. Van Cott, for appellee.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

ROSS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The court below, upon a consideration of all of the evidence in the case, adjudged that George Pardy was not the inventor of the invention patented, that the patent is void, and dismissed the bill at the complainants' cost. It appears from the evidence that in the year 1887 J. D. Hooker was engaged in manufacturing pipe at Los Angeles, and conceived the idea of making a machine to rivet such pipe, instead of doing the work by hand. George Pardy was at the time a mechanic

and patent solicitor. Hooker employed him to get up such a machine for him, and, according to the evidence, undoubtedly gave Pardy his own ideas as to how the desired object could be accomplished. It also clearly appears, both from the oral testimony and from the letters in evidence, that the distinct agreement between Hooker and George Pardy was that Hooker was to pay all the cost of the work and pay Pardy for his services, and was to own and control any patent that should be issued covering the machine. In accordance with that agreement, the first and only machines built by George Pardy were installed by Hooker in his establishment at Los Angeles, and used by him not only without objection by George Pardy during his lifetime, but under his supervision. It appears, further, that a third machine was installed by Hooker after George Pardy's death, which has been continuously used ever since by Hooker and his successor in interest, the defendant in error, J. D. Hooker Company, and that, as early as November, 1893, the appellant William Pardy knew of such use. The testimony of Hooker is to the effect that he paid all the cost of the machines and paid George Pardy in full for his services rendered under their agreement. Whether or not that be true, the present is not a suit to recover for such services or for such expenses, but only for an infringement of the patent issued to the appellant William Pardy, as the executor of the estate of George Pardy, and for an accounting of profits.

We are of the opinion that such suit cannot be sustained, in view of the distinct agreement between Hooker and the deceased Pardy, above alluded to, to say nothing of the appellants' laches. We are of the opinion, however, that the court below was, in view of the evidence, in error in adjudging that George Pardy was not the inventor of the machine patented. Hooker knew, or must be held to have known, that such patent could not have been issued except upon oath that George Pardy was the inventor. Hooker did not himself apply for such patent, and there is nothing to indicate that he ever contemplated doing so. It is true, as has been said, that he gave Pardy his own ideas and employed him to get up such a machine as he (Hooker) desired, but the accomplishment of the desired end was evidently left to Pardy. This is conclusively shown by this extract from the letter of Hooker to Pardy of December 23, 1887:

"It has always seemed to me that the motion to crush the rivets should be like the movement of the die machine at the Mint; you know how nicely that has to work, but you doubtless have investigated that movement."

The principle of the invention in question is not at all "like the movement of the die machine at the Mint," but, on the contrary, effects the riveting process by a roller movement.

We are of the opinion that the decree dismissing the bill at the complainants' cost is right, but that the court should not have adjudged the patent to be void, or that George Pardy was not the inventor of the machine patented.

The cause is therefore remanded to the court below, with directions to modify the judgment in accordance with the views above expressed, and as so modified it will stand affirmed.

HOLMES v. DOWIE et al.

(Circuit Court, N. D. Illinois, E. D. July 27, 1906.)

No. 28,354.

1. PRINCIPAL AND AGENT—POWERS OF ATTORNEY—UNAUTHORIZED DEED BY ATTORNEY—RIGHTS OF GRANTEE.

A deed to property made by one holding a power of attorney from the legal owner in plain violation of the spirit and intent of the power, which was well known to both the grantor and grantee is ineffective to convey any interest.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 556–563.]

2. TRUSTS—ENFORCEMENT IN EQUITY—PROPERTY COLLECTED FOR CHURCH PURPOSES.

Money or property contributed by his followers to the founder of a church, who is professedly engaged in extending and building up such church, cannot be claimed by him as his individual property, but is impressed with a trust which binds him as trustee to use it for such purpose, and such trust may be enforced in equity.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 43–46, 53.]

3. SAME.

Defendant Dowie founded a church known as the "Christian Catholic Apostolic Church." Using funds contributed by his followers and sympathizers, he purchased land in his own name, and laid out a city, which was settled chiefly by members of his church who built upon lots leased by him for the purpose. He built a tabernacle and established a bank and various industrial enterprises conducted by unincorporated companies, stock in which was purchased by his followers at his instance. With the consent of the members, he constituted himself the general overseer of the church, and assumed entire charge of all of its affairs. On many occasions he declared both to his congregation and publicly that all such enterprises were for the ultimate benefit of the church, and that the property was to be so held by himself and his successors. Large indebtedness having been contracted and dissensions having arisen in the church, suits were instituted for the appointment of a receiver, and to determine the right to the office of overseer, and also proceedings in bankruptcy by creditors against Dowie, which were by consent consolidated and heard together. *Held*, that Dowie was not the owner of the property individually, but held the same as trustee and so conducted the business, and was not therefore subject to bankruptcy proceedings on account of the indebtedness; that a receiver, not connected with the church, would be appointed to take charge of all of the property and business, and to operate the same for the benefit of the creditors and the church; and, there being a controversy as to the office of general overseer of the church, that an election by the members would be ordered, to be conducted under supervision of the court, there being no regulation of the church providing for his selection.

In Equity.

Stephen S. Gregory, for complainant.

P. C. Haley, E. C. Wetten and C. H. Pegler, for defendant Dowie.

Jacob Newman, C. E. Cleveland, Chas. Whitney, V. V. Barnes, and Chas. E. Lander, for Voliva, Granger and others.

LANDIS, District Judge. The bill of the complainant, Holmes, a citizen of Kentucky, seeks a decree declaring a trust of certain prop-

erty (situated principally in Zion City, Ill.,) standing on the 31st day of March, 1906, in the name of John Alexander Dowie. It is alleged that Holmes is and for several years has been the owner of some $3,000 worth of stock in several unincorporated associations engaged in commercial pursuits at Zion City; that down to the fall of the year 1905 these enterprises were under the domination and control of Dowie, as trustee for the Christian Catholic Apostolic Church, by virtue of investments in said associations of funds which had come into his hands as the head of the church; that in September of last year, Dowie, having suffered a stroke of paralysis, executed a power of attorney authorizing three inhabitants of Zion City (officers of the church), to manage the several business institutions referred to and to control all other property standing in Dowie's name; that in February, 1906, Dowie terminated this authority, and executed a power of attorney giving the defendant Voliva full power over the property; that on March 31, 1906, Voliva conveyed by deed and bill of sale all the property to the defendant Granger; that thereupon Voliva, Granger, and the other defendants, being officers of the church, assumed to suspend Dowie from his position as general overseer of the church, and to appoint Voliva in his place under the title of acting general overseer; that shortly thereafter, Dowie who, owing to ill health, had for several months been absent in Jamaica and Mexico, returned to Illinois, and filed a bill in the state circuit court of Lake county against Voliva, Granger, and others, alleging, among other things, that the property covered by Dowie's power of attorney to Voliva belonged to Dowie personally; that the conveyances by Voliva to Granger were in violation of Voliva's duties under the power, and a fraud upon Dowie's rights, and praying for a decree of conveyance by Granger to Dowie; that to this bill the defendants Voliva, Granger, and others filed an answer and exhibited a cross-bill, averring that the property represented the accumulations of years of contributions to Dowie as overseer of the church by persons who sympathized with his religious doctrines, and that such contributions were trust funds for the extension of the work of the church, and praying for a decree that the whole of said property is a trust estate for the use of the Christian Catholic Church; that at about this time certain persons claiming to be creditors of Dowie filed a petition in the United States District Court, alleging that Dowie was insolvent, had committed acts of bankruptcy by preferring other creditors, and praying that he be adjudged bankrupt; that to this petition Dowie answered by setting up his version of the development of the Zion City enterprises, including the establishment of the various business institutions, the execution of the several powers and conveyances above mentioned, and praying judgment of the court on the question of ownership; that thereupon the complainant and defendant in the state court proceedings joined in a stipulation transferring that cause to the United States District Court to be heard, and the rights of all parties determined in the bankruptcy matter.

The question of the District Court's jurisdiction under the stipulation having challenged the attention of the court, the Holmes bill was filed in the Circuit Court, and all parties have entered into an agreement

that the evidence heard in the District Court may be considered in determining the issues raised by Holmes' complaint in the Circuit Court, to which last-mentioned bill Dowie on the one hand, and Voliva, Granger, and their associates on the other, have answered in harmony with their respective contentions in the state court and District Court proceedings above referred to.

It appears that John Alexander Dowie, a native of Scotland, where he had been educated along theological lines, came from Australia to the Pacific Coast in 1888, and remained there a number of years engaged in church work. From there he came to Illinois, and after considerable time devoted to the same work in Chicago undertook the Zion City enterprise in 1899, in execution of a scheme conceived by him many years before; that in furtherance thereof he purchased a tract of land aggregating some 6,000 acres, a part of which was subdivided and laid out in park and residence property, provision being likewise made for manufacturing sites and for other commercial enterprises; that conveyances of lots were made to various persons by instruments in form of lease for 1,100 years, upon which lots dwelling houses have been erected by the grantees, accommodating a population of 6,000 or 7,000 people; that Dowie has constructed several schoolhouses at a cost of $25,000 each, buildings for higher educational purposes at an outlay of approximately $200,000, and a tabernacle for church services, seating 6,000 or 7,000 people; that a lace factory, soap works, candy factory, and other industrial enterprises have been established by Dowie, and furnish employment to the inhabitants, who are practically all members of the Christian Catholic Apostolic Church.

The financing of this scheme was accomplished in part by moneys received from purchasers under the 1,100 year leases. What these funds amounted to does not appear, but that a very substantial part of the capital used in the development of the plan was made up of money contributed to Dowie by persons outside of Zion City and living in various parts of the world, plainly appears from the evidence of Dowie, whose testimony on that subject is substantially as follows:

"I acquired this property by the generosity of good people throughout the world, very largely unconnected with the church, as well as connected with the church. I have looked upon the property as the result largely of my own good sense under God. I paid for the land only $250 per acre, an exceedingly low price, and have maintained a minimum selling price of approximately $3,000 per acre. I have carried on my land work through a land department, my law work through a law department, my general stores through a general stores department, my lace industries through a lace industries department, etc. The money came in the form of offerings and contributions from the same common source—the people all over the world, mostly outside of Zion City. I believe the property to be completely mine to do with as I please, and that no human being other than myself has any right, claim, or interest in it. I consider, however, that the way in which I got this property and the way in which I have it absolutely binds me, when I have ceased to control it, to put it in trust in perpetuity for the Christian Catholic Apostolic Church, so that it shall go down to generations to do good in that line, with the exception of 2½ per cent. which I think is fair for me and my family. I did think 5 per cent., but I have reduced it to 2½, and am somewhat inclined to reduce it more."

In response to an inquiry from the court as to the relation Dowie sustained to this property his senior counsel replied as follows:

"My understanding is that Dowie had the absolute legal title to the property, and that he always regarded himself as holding it in trust for the extension of the Kingdom of God, not that he believed Zion City owned that property or had any interest in it."

It may be observed here that a solution of this problem is not embarrassed in any respect whatever by Voliva's alleged conveyances to Granger, for the obvious reason that those conveyances were in plain violation of the spirit and intent of Dowie's power to Voliva, which both Voliva and Granger well knew. Moreover, they knew from a cablegram received shortly before the execution of the documents that Dowie had forbidden such conveyance. Therefore, as between Dowie, Voliva, and Granger, those instruments were mere waste paper. It is also to be borne in mind that there is a vast aggregate of pecuniary liabilities outstanding, a substantial portion of which is now past due. Included in these liabilities are purchase money notes secured by mortgages covering lands upon which the city stands, obligations to pay annuities to persons who have turned over to Dowie moneys and property, merchandise and other creditors, including labor claims of employés of the several Zion enterprises, as well as the demands of depositors of funds in the bank. Those conditions which had existed for many months before Voliva came to Zion City in February, 1906, resulted, as was to have been expected, in a curtailment, if not suspension, of commercial credit. Material had to be paid for in cash; the sale of the products of the several factories was restricted, and workmen were thrown out of employment. In short, there was commercial and industrial depression at Zion City. However, in my view of this case a detailed examination into the management of the business enterprises or a minute consideration of the vast aggregate of singularly acrimonious disputes with which the controversy has been burdened, would be wholly superfluous. During Dowie's sojourn in Australasia and on the Pacific Coast he received and devoted to the purposes of church and charity, according to his judgment, a large amount of money. Apparently he did not seek to amass a private fortune. When he reached Chicago, in 1893, he possessed in addition to a library, wearing apparel etc., only about $2,000. After he came here and down to the occurrence of the events which brought the parties before me he had a very large revenue made up of offerings and contributions from people all over the world, running in some years to as much as $250,000. This money was used by him for church and charity purposes as he saw the necessity or wisdom of such expenditures, and for the material development of Zion City. And he states that he engaged in secular occupations only as an incident to, or in aid of, the accomplishment of his main object, namely, the propagation of his religious doctrine. As Dowie himself expresses it, he earned money from secular pursuits "for God and humanity." Thus came about the laying out of Zion City and the establishment there of various industries and commercial enterprises for the temporal welfare of his followers, the ultimate pur-

pose of the whole plan being, however, the extension of the Kingdom of God in accordance with the Dowie theory.

It is a well-recognized principle of equity that where a person accepts money or property to be used by him for the benefit of some other person or persons, or for the advancement of some lawful enterprise, such money or property constitutes a trust estate. It is the function of a chancery court to ascertain whether or not a conveyance falls within this category. If it be determined that it does, it then becomes the duty of the court to prevent a diversion of the fund and to safeguard it for the object of the gift. This may be accomplished by the exercise over both persons and property of those broad powers which so characteristically inhere in a court of equity. The inquiry then is: Did these offerings come to Dowie for his private purse, or did the contributors intend that the fund should be directed to charitable or religious uses? If for any other purpose than the purely personal benefit of Dowie the estate is a trust. It is the duty of the court to get at the substance of the thing, and in ascertaining the purpose of the gift the court is not limited to an inspection of written documents or other specific declarations of the parties made at the time. If their relation is one of confidence, or if he who receives the gift is in a position of influence over him who makes the gift, as for instance, if the person receiving the money is the advocate of a religious faith, and by word and attitude and environment induces a conviction in the minds of large numbers of people that as an instrumentality of divine authority, he can and does relieve physical ills, and is clothed with power to exert an influence on the spiritual welfare of men and women, who thereupon give him of their lands and goods—surely, the motive of such gift ought not long to remain a matter of doubt in the minds of rational men. The fact that such contributions, amounting at times to as much as $250,000 in a single year, came to him in the form of checks and currency through the mail and by express, the contributor omitting to require the execution of a formal declaration of the trust, does not tend to divest the transactions of their real character. It is just as if a contributor sitting in a church pew had placed the funds on the collection plate passed to him by a deacon. Surely in such case the court would not decree that the parson might put the money in his pocket on the alleged score of no agreement to the contrary, merely because the contributor had failed to rise in his place and exact a pledge of trusteeship from the pulpit.

The Christian Catholic Apostolic Church is unincorporated. If it had been incorporated and John Alexander Dowie had thereupon been duly chosen as general overseer, and the contributions that went to the building up of this estate had come to such general overseer, clearly he could not have a decree of individual proprietorship. Can it be that the mere omission to incorporate changes his relation to the property, and that the general overseer of the unincorporated society is therefore to be adjudged the individual proprietor merely because of such omission? It would be difficult to conceive of anything more inherently inconsistent than Dowie's claim of private ownership and his admission of trust obligation for the spiritual

welfare of generations unborn. He says it is his own property, and yet he considers that because of the way he got it he is absolutely bound to turn it over to his successor in perpetuity for the church. Now, if he is to have a successor that necessarily implies his own representative capacity, for the individual man can have no successor; and if he must pass it to his successor how can he be at liberty to dispose of it otherwise in his own lifetime? If during his lifetime he were to divide it up among his followers, or devote it to some other secular purpose, as he may if it is his private fortune, his admitted obligation to future generations would be, by his own act, thus made impossible of fulfillment. Obviously, the theory advanced in his behalf is not sound.

Let us now examine what has been Dowie's own understanding of his relation to this estate as evidenced by his declarations before the events which caused this litigation. In his contracts with intending lessees of land at Zion City and with subscribers to the stock of the Zion Building & Manufacturing Association, unincorporated, he covenanted for himself and his successors. At a meeting in February, 1899, he inquired from the pulpit if any member of the congregation objected to his sole trusteeship, and no objection being voiced he thanked the congregation for their confidence in him. This was prior to the purchase of the land, and on an occasion when the Zion City venture was under consideration. In September, 1903, in a signed letter, published in Leaves of Healing, he asserted:

"Zion's business is God's business. Two million dollars of new capital required for the extension and development of the financial, commercial, and industrial undertakings of Zion City."

And he called upon his followers to realize by immediate sale the cash proceeds of all their property and come with all their house to Zion City and invest in Zion securities or Zion lands. At a church meeting held in November, 1903, he declared that "Zion, as a whole, has 95 per cent. of the money interest," and that he, Dowie, has 5 per cent. Again, in Leaves of Healing, November, 1904, he declared:

"This is my word to you: Zion is not my personal property. Get in, and get in with all you have."

Leaves of Healing was the official organ of the church, edited by Dowie, and used by him as his channel of communication with his followers and sympathizers all over the world. While a witness he declared that it would be difficult to exaggerate the power and importance of Leaves of Healing. The declarations quoted above, so communicated to his people, were made for some purpose. Manifestly, that purpose was to influence the minds of men and women possessed of property. That Dowie recognized that such persons were, in fact, so influenced by his importunities and declarations is evidenced by a codicil to his will executed in August, 1905, as follows:

"The remaining nineteen-twentieths of said estate in my name which I hold and have held in trust for said (Christian Catholic Apostolic) Church, I do

hereby give, devise and bequeath to my successor in office, to him and his successors in office, to be administered for said church and the extension of Zion and the Kingdom of God, in conformity with the rules of said church and pursuant to the teachings of the Lord Jesus Christ as expressed in the Holy Scriptures as understood and administered by such church."

There is no escape from the plain meaning of these words. The declaration is an unqualified and complete recognition of an existing trust obligation. No specious construction or refinement of reasoning could make anything else out of it, and for this court to enter a decree of private ownership would be to perpetrate a fraud. Counsel have offered in evidence a will executed by Dowie within the last few months, purporting to dispose of this property in a different way from that provided in the document from which the August codicil is quoted above, and it is argued that the subsequent will supersedes the former one. Of course, it is elementary that so long as a man lives he may change his will or revoke it altogether, and it is therefore entirely competent for Dowie to dispose of whatever individual property he may have in such way as will give effect to the last purpose his faculties enable him to conceive. But this is not the point involved here. While he may alter the disposition of his own property, the words of the 1905 codicil, solemnly declaratory of his trust relation to this property, once committed to paper and his signature attached, are beyond recall.

This estate is and must be held to be a trust for the Christian Catholic Apostolic Church. The appointment of a receiver to take possession and administer the property pending the entry of a final decree, and the designation of a permanent trustee, therefore, becomes necessary. Considering the ecclesiastical dispute which has cast a shadow across Zion City and its inhabitants, and bearing in mind the large variety of conflicting interests, this task is one of extreme delicacy. The position in which the people of Zion City find themselves at this time in respect of the question of employment is to my mind the most pressing consideration before the court. It is strongly insisted by counsel for the complainant Holmes and for the Voliva faction that the defendant Alexander Granger be continued in charge. This appointment it is asserted is an absolute necessity. I do not concur in this proposition. Waiving all questions of Granger's fitness or unfitness from the standpoint of business ability for this undertaking, some time ago he took a vow from which I quote the following:

"I vow in the name of God my Father and of Jesus Christ, His Son and my Saviour, and of the Holy Ghost who proceeds from the Father and the Son, that I will be a faithful member of Zion's Restoration Host, and I declare that I recognize John Alexander Dowie, General Overseer of the Christian Catholic Church in Zion in his three-fold prophetic office as a messenger of the Covenant, the Prophet foretold by Moses, and Elijah the Restorer. I promise to the full extent of all my power to obey all rightful orders issued by him, and that all family ties and obligations, and all relations to all human government shall be held subordinate to this vow. This I make in the presence of Almighty God."

It is not my duty to express my contempt for the man that could exact or take this oath, but I am not obliged to repose confidence in

a man so constituted that, living in this republic, he could serenely vow his readiness at all times to abandon his family and betray his country. I will not appoint Alexander Granger. In this connection it is due to the present membership of the church residing in Zion City to call attention to the fact that at a public meeting of the church held in Zion Tabernacle April 21, 1906, this so-called restoration vow was repudiated and abandoned. The receiver to be appointed must be a man of recognized business ability and absolute integrity, whose selection will at once inspire the confidence of the thousands of inhabitants of Zion City dependent for employment upon a rehabilitation of industrial enterprises at Zion City, and at the same time be notice to the financial world that, in future, the affairs of these concerns will be conducted in accordance with those sound business principles that must underlie all stable commercial development. He will also be under no obligation to anybody or any influence except this court for his appointment. And he will understand that the only way to discharge that obligation is by absolute fidelity to his trust. Thus he will be hampered in no possible way in the performance of his duties. No officer or employé in any capacity will be disturbed or retained because he is an adherent or official of the church. The man that does his work will be continued in his employment.

The question of the overseership of the church has to be considered. That officer will represent the religious organization for whose use the receiver will administer the trust estate. Wilbur Glenn Voliva is at present acting overseer. He was brought from Australia, where he occupied a subordinate position, and placed in charge at Zion City by Dowie, whose grave physical malady required him to sojourn in a southern clime. Without going into the merits or demerits of the several ecclesiastical contentions of the different factions, it is a fact that Voliva and his adherents assumed to suspend Dowie from the general overseership, in Dowie's absence, and without giving him a hearing. Charges gravely affecting Dowie's private character were made. An incident of the controversy was the suspension of Wilhite, Peters, and others from fellowship in the church, by a communication in the following language:

"Mr. Fielding H. Wilhite—Dear Brother in Christ: Inasmuch as you are aiding and abetting an officer of this church who has been suspended from his office and from fellowship, it becomes my duty to remove you from office and suspend you from fellowship in the Christian Catholic Apostolic Church in Zion for cause. Unless you turn from the error of your way it will be necessary to remove you from Fellowship. Praying to God to lead you to repentance, I am,

"Faithfully yours, in the Master's service,

"J. G. Excell, Ecclesiastical Secretary."

The punishment thus inflicted upon Dowie's followers as a penalty for their refusal to desert their leader so taints their proceedings with unfairness that common decency seems to require that some sort of orderly method, free from all possible coercion and duress, be employed to select a general overseer by a process which will leave his title free from cloud. It is the general rule that a court

will recognize the action of a religious society in this respect, and this court does not assume to usurp the power of selection in the pending cause. It is for the organization itself to select its leader. Inasmuch, however, as it has no regulation providing how this shall be done, and in view of the fact that the church is domiciled in the United States, it seems fair to me that the majority rule should prevail. It is therefore ordered that on the third Tuesday of September next an election of a general overseer of the Christian Catholic Apostolic Church be held in the City of Zion, at which election all male and female members of that church over 21 years of age, who have continuously resided in Zion City since January 1, 1906, shall each be entitled to one vote. For the purposes of this election persons suspended for adhering to the Dowie faction will be considered members of the church. The election will be held in accordance with the laws of the state of Illinois, under what is known as the "Australian System." The court will designate officers of election to serve on the occasion named. The names of persons to be voted for will be certified to this court within 10 days from this day. If no more than one candidate be so certified this court, in dealing with the trust estate, will recognize such person as the legally chosen general overseer of the church. If more than one name is certified, such persons will have the use of the tabernacle at Zion City alternately during the period preceding the election. During such period the publication known as "Leaves of Healing" will be suspended by the printing office of this trust, save only that an edition will be gotten out at once containing in full the opinion of the court in the pending controversy, and the court directs that a copy of such publication be sent by those in charge of Zion Printing House to all subscribers and members of the church to whom Leaves of Healing have been forwarded or delivered since March 31, 1906. In due time the court will make suitable provision for the compensation of John Alexander Dowie on account of his services rendered in the development of this estate. This is not only in accord with the general understanding of all parties concerned in the fund, but is consonant with equitable principles, especially in view of the fact that the present value of the estate appears to exceed the contributions received.

An order will be entered in the bankruptcy matter of John Alexander Dowie in the District Court vacating the order adjudicating him a bankrupt, and dismissing the petition.

FORD v. CHARLES E. BLANEY AMUSEMENT CO. et al.

(Circuit Court, S. D. New York. November 5, 1906.)

1. COPYRIGHT—CONSTRUCTION OF STATUTE.

The copyright act should be liberally construed, with a view to protect the just rights of authors and to encourage literature and art.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Copyrights, § 1.]

2. SAME—REQUISITES—MAGAZINE ARTICLE.
The proprietor of a magazine, who is also the owner of an article published in it, secures a valid copyright of such article by duly copyrighting the number of the magazine in which it is printed.
3. SAME—RIGHT OF DRAMATIZATION.
Under Rev. St. § 4952 [U. S. Comp. St. 1901, p. 3406], providing that "authors or their assigns shall have exclusive right to dramatize or translate any of their works for which copyright shall have been obtained under the laws of the United States," it is not necessary that an author should himself have taken out a copyright of his book in order to preserve the right of dramatizing it, but it is sufficient if a copyright has been secured by any one having the right to obtain it, and the author may reserve the right of dramatization while selling the right to publish the book to another, who, as proprietor, may copyright it in his own name.
4. SAME—ACTION FOR INFRINGEMENT—PLEADING.
In an action for infringement of a copyright, it is not sufficient to allege generally in the bill or complaint that all conditions and requisites required by the laws of the United States to obtain a copyright have been complied with, but the specific acts done and necessary to constitute such compliance with the law must be affirmatively alleged, and the complaint must also show that the person in whose name the copyright was obtained was the person who owned the right and was entitled to it.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Copyrights, § 72.]

At Law. On demurrer to complaint.

Elder & Roehr (Robert H. Elder and Ralph Royall, of counsel), for plaintiff.

Mayer C. Goldman, for defendants.

HOLT, District Judge. This is a demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action. The action is brought to recover damages for an alleged violation by the defendants of the complainant's right of dramatization of a novelette. The complaint alleges, in substance, that the complainant is the author of a novelette called "Cherub Divine"; that the complainant sold to the Ainslee Magazine Company of New York the sole right of printing and publishing the said novelette, reserving to the complainant all rights of dramatization of it; that the Ainslee Magazine Company, as agent, for and in behalf of and for the purpose of protecting the rights of the complainant in the said novelette, deposited in the office of the Librarian of Congress on January 16, 1905, the title of their monthly publication, as follows: "Ainslee's Volume 15, No. 1, February, 1905," which said publication contained the said novelette; that said Ainslee Magazine Company thereafter duly took the various proceedings necessary to obtain a copyright of said Ainslee's volume 15, No. 1, February, 1905; that the defendants, in violation of the complainant's right of dramatization of the said novelette, had composed and prepared for stage production a dramatization of the said novelette in a play called the "Millionaire Detective"; that said play has been performed in various cities; and that the defendants are about to produce said play in other cities, and a judgment for damages is demanded in the sum of $15,000.

There are two important questions raised by this demurrer. One is whether the proprietor of a magazine, who becomes the proprietor of an

article published in it, copyrights the article by filing in the office of the Librarian of Congress the title page of the magazine and by otherwise complying with the provisions of the copyright act. There is not much authority upon that question. It has been suggested that, in order to secure a copyright of an article published with other articles in a periodical, it is not enough to deliver at the office of the Librarian of Congress a printed copy of the title of the periodical, and to publish the copyright notice required by the statute on the title page or the next page of the periodical; but it is claimed that a copy of the title of each article, in respect to which copyright is claimed, must be filed, and a copyright notice inserted at the head of each article. But I think such a construction too strict. The copyright act, in my opinion, should be liberally construed, with a view to protect the just rights of authors, and to encourage literature and art. I think that the filing of the title of a magazine is sufficient to secure a copyright of the articles in it, if they are written or owned by the proprietor of the magazine. Bennett v. Boston Traveller Co., 101 Fed. 445, 41 C. C. A. 445. I cannot see how there can be any question of the validity of such a proceeding if the proprietor of the magazine is the author or the proprietor of all the articles published in it; and if he is the author or proprietor of some of the articles, and not of others, I do not see why a copyright so registered is not valid as to the articles which he either wrote or owns. I think, therefore, that a valid copyright was obtained of the novelette Cherub Divine by filing in the office of the Librarian at Washington the title page of the issue of Ainslee's Magazine in which it was published, provided, of course, all other legal requirements were complied with.

The other serious question raised by this demurrer is whether the right of dramatizing a novel can be reserved by its author when the sole right to print it has been sold to a publisher who, as proprietor, has taken out the copyright. The language of section 4952 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 3406], as amended, is:

"Authors or their assigns shall have exclusive right to dramatize or translate any of their works, for which copyright shall have been obtained under the laws of the United States."

I think, under this provision, it is not necessary that the author himself should have taken out the copyright of a book, in order to preserve the right of dramatizing it, but that the author can sell the copyright of the book to a person who, as proprietor, can take out the copyright, while the author, at the same time, retains the right of dramatization. If a copyright of a book has been obtained by anybody entitled by the law to obtain it, I think that the author of the book or his assigns, a term which, as used in section 4952, means, in my opinion, an assignee of the right of dramatization, has the exclusive right to dramatize the work, if he reserved the right to dramatize upon the sale of the book, which is alleged in the complaint in this case. The object of the statute seems to have been to provide that the author's right of dramatization of a book shall not be protected unless the book be copyrighted; but I do not see anything in the statute which requires that the author

should take out the copyright of the book. The act does not say that authors or their assigns shall have the exclusive right to dramatize a book for which they have obtained a copyright. It says that they shall have such exclusive right if copyright "shall have been obtained." The copyright of a book and the right of dramatization are inherently and essentially different. They are, in most cases, exercised or purchased by different persons, and I can see no reason why the copyright of a book, which, by the statute, is a prerequisite to the maintenance of the exclusive right of its dramatization, should necessarily be obtained by the person who holds the right of dramatization. If it is obtained by anybody entitled to it, in my opinion the requirement of the statute is complied with.

There are, however, certain other grounds of demurrer to the complaint in this case, which I assume can probably be easily cured by amendments, but which I think I am compelled to hold to be well taken. The complaint in an action of this kind must allege affirmatively that the title of the book has been filed in the office of the Librarian of Congress at Washington, that two copies of the book have been filed in such office before its publication, and that notice of the copyright, as required by the act, has been printed upon each copy issued. The bill in this case does not contain these specific allegations, although it does contain an allegation that all conditions and requisites to obtain a copyright, as required by the laws of the United States, were complied with. I think, under the authorities, that the specific allegations to which I have referred should be contained affirmatively in the bill. Trow City Directory Co. v. Curtin (C. C.) 36 Fed. 829; Chicago Music Co. v. Butler Co. (C. C.) 19 Fed. 758. There is also in this bill strictly no allegation of the transfer of the copyright to the Ainslee Magazine Company. The allegation is that the complainant sold to that company the sole right of printing and publishing the said novelette, reserving to the complainant all rights of dramatization of the said novelette. This probably may be held to imply a sale of the copyright, although a mere contract authorizing the publication of a story in a magazine does not (Mifflin v. R. H. White Co., 190 U. S. 260, 23 Sup. Ct. 769, 47 L. Ed. 1040); but I think that there should be a specific allegation in the complaint that the copyright was sold or transferred as well as the right to print.

I think, therefore, that this demurrer should be sustained, with leave to the complainant to amend the complaint within 20 days, upon the payment of costs.

UNITED STATES v. CHICAGO & A. RY. CO. et al.

(District Court, N. D. Illinois, N. D. July 6, 1906.)

1. CARRIERS—INTERSTATE COMMERCE—PAYMENT OF REBATES.
The published tariff schedules of defendant, an interstate carrier by rail, gave its rate on packing-house products from Kansas City, Kan., including the rate charged by a belt line company for carriage between Kansas City, Kan., and Kansas City, Mo., to a connection with defendant's road. Defendant charged and received such rate from a packing company, paid the charge of the belt line company, and afterward paid back to the packing company the sum of $1 upon each car so shipped. *Held*, that such repayment constituted the granting of a rebate, in violation of Interstate Commerce Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599], and could not be justified as lawful on the ground that it was an allowance to the packing company for the use of its own private track in moving the cars from its shipping building to a connection with the belt line tracks.

2. SAME.
The word "rate," as used in Interstate Commerce Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599], means the net amount the carrier receives from the shipper and retains, and any device by which such amount is reduced below the rate given in the published schedule is one for the giving of a rebate.

On Motion by Defendant for Direction of a Verdict.

Charles B. Morrison, U. S. Dist. Atty.
John Barton Payne and Ralph M. Shaw, for defendants.

LANDIS, District Judge. In this proceeding the Chicago & Alton Railway Company and its vice president and general freight agent are charged with violating the interstate commerce law by granting rebates. The government having closed its case, the defendants move for an order directing the jury to return a verdict of not guilty.

The material facts are as follows: The Chicago & Alton Company is an interstate carrier, operating a railroad from Kansas City, Mo., to points east; the Belt Railway Company is an interstate carrier operating the belt line connecting Kansas City, Kan., and Kansas City, Mo.; the Schwarzschild & Sulzberger Company is a corporation engaged in the beef-packing business at Kansas City, Kan.; the track of the Alton Company connects with the Belt track at Kansas City, Mo.; and the Belt track connects with the private track of Schwarszchild & Sulzberger, laid and maintained by that corporation on its own property at Kansas City, Kan., occupied also by its packing plant. As required by the interstate commerce law the Alton Company and the Belt Company published and filed tariff schedules announcing to the shipping public what their charges would be for the transportation of packing-house products. The Belt tariff was $3 per car from the packing company's track to the Alton connection. The Alton schedule stated that its rate included the Belt Company's charge, so that, in substance, it was as if the Alton road itself connected with the packing company's track. The Alton Company collected from the

Schwarzschild & Sulzberger Company the amount of its freight charge as per the published schedules, remitted to the Belt its $3 switching charge, and thereafter paid to Schwarzschild & Sulzberger $1 on each car of the Schwarzschild & Sulzberger product so handled. This practice has obtained since 1901. Prior to that time the Alton Company's tariff likewise included the Belt charge, which was then $4 per car. On collecting the full tariff from the Schwarzschild & Sulzberger Company, the Alton road paid to the Belt its charge of $4 per car, whereupon the Belt gave to the packing company $1 on each loaded car handled. It was at the request of Schwarzschild & Sulzberger (for some reason which does not appear) that for this arrangement was substituted the plan evidenced in the pending cause, whereby the railway company made payment direct to the shipper (some five months after the freight went forward), instead of indirectly through the medium of the Belt line.

The indictment charges that the payment to the packing company was a rebate. The defendants contend that the payment was made by the railway company for its use of the packing company's private track, connecting its shipping dock with the Belt rails; and it is urged in behalf of defendants that, if any provision of the law has been violated, it is only that section requiring the carrier to publish any terminal charge or regulation which alters or determines the aggregate rate for the transportation of property. I am unable to see the force of this contention. The real question here is simply this:

"Has the payment back to the shipper of $1 per car out of the money paid by the shipper to the railway company in the first instance resulted in the shipper getting its property transported at a less cost to it than that specified in the published schedules?"

It would seem that to state this question is to answer it. The word "rate," as used in the interstate commerce law, means the net cost to the shipper of the transportation of his property; that is to say, the net amount the carrier receives from the shipper and retains. In determining this net amount in a given case, all money transactions of every kind or character having a bearing on, or relation to, that particular instance of transportation whereby the cost to the shipper is directly or indirectly enhanced or reduced must be taken into consideration. Applying this test to the case before me, the net cost to the Schwarzschild & Sulzberger Company has been made $1 per car less than the published schedules represented that net cost would be. Viewing the transaction from the standpoint most favorable to the defendants, it amounts to the railway company assuming the cost of getting the shipper's property to the carrier's rails for transportation—a substantial consideration not mentioned in, or contemplated by, the published schedules. With equal propriety (its schedules being silent on the subject) a carrier might, for the purpose of inducing the routing of traffic via its line, pay the consignor's and consignee's bills for the cartage of property between their warehouses and the railway depots.

The object of the statutes relating to interstate commerce is to secure the transportation of persons and property by common carriers for reasonable compensation. No rate can possibly be reasonable that is higher than anybody else has to pay. Recognizing this obvious truth, the law requires the carrier to adhere to the published rate as an absolute standard of uniformity. The requirement of publication is imposed in order that the man having freight to ship may ascertain by an inspection of the schedules exactly what will be the cost to him of the transportation of his property; and not only so, but the law gives him another and a very valuable right, namely, the right to know, by an inspection of the same schedule, exactly what will be the cost to his competitor of the transportation of his competitor's property.

It being my opinion that, when the Alton Company published a specific rate covering packing-house products, collected that rate from the Schwarzschild & Sulzberger Packing Company, and subsequently gave back part of that rate to Schwarzschild & Sulzberger, a device was employed by means of which the packing company's property was transported at a less rate than that named in the published schedules. the defendants' motion will be overruled.

THRESHER v. WESTERN UNION TELEGRAPH CO. et al.

(Circuit Court, D. Montana. October 22, 1906.)

No. 330.

REMOVAL OF CAUSES—MOTION TO REMAND—JOINDER OF DEFENDANTS IN TORT.

Where the complaint in an action in a state court states a joint cause of action in tort against two defendants, one a citizen of the state and the other of another state, allegations in a petition for removal filed by the nonresident defendant, which are in substance merely denials of allegations of fact made in the complaint, are not sufficient to justify a conclusion of a fraudulent joinder, and cannot be considered on the merits by the federal court as to the issues so tendered on a motion to remand after removal, but the allegations of the complaint must be taken as true for the purposes of such motion.

On Motion to Remand to State Court.

Maury & Hogevoll, for plaintiff
E. B. Howell, for defendants.

HUNT, District Judge. This is an action at law brought by B. S. Thresher against the Western Union Telegraph Company and Levi S. Wild, defendants. It was instituted in the district court of the Second judicial district of the state of Montana. Plaintiff prior to February 5, 1906, was an attorney practicing in the courts of the state and of the United States within Montana. Plaintiff alleges that prior to January 20, 1906, defendant Western Union Telegraph Company was doing business at Butte, Mont., and that defendant Wild was the manager of such business at Butte, and for the telegraph company had charge of the receiving and delivering of messages at Butte, that certain disbarment proceedings against plaintiff were pending in the Supreme Court of the state of Montana, and that prior to said last-mentioned date he had requested the Attorney General of the state of Montana to ask the Supreme Court to fix a time for him, plaintiff, to file answer to such charges. He alleges that on said date the Supreme Court, upon the application of said Attorney General, fixed Monday, January 22, 1906, at 10 o'clock, as the time for plaintiff to file answer to the charges in the said disbarment proceedings, and that between 12 and 1 o'clock of the same day the said Attorney General deposited with the defendant telegraph company, for transmission, a telegram addressed to plaintiff at Butte, advising him that the Supreme Court had granted plaintiff until Monday to file answer. Plaintiff alleges that the message was transmitted by the telegraph company at Helena, and reached Butte about the hour of 1:45 p. m. of the 20th of January; that it was the duty of the defendants to use great care and diligence in the transmission and delivery of the said message, but that the said defendants, in gross violation of their duty, failed and neglected to deliver the message to plaintiff, or to give him notice of the receipt of the same until 2 o'clock p. m. on the 22d of January, although defendants well knew of plaintiff's residence and place of business in Butte. He alleges that he had no notice of the order of the Supreme Court until the telegram was received, and that no answer was filed by him

because of his ignorance, and that because no answer was filed the Supreme Court disbarred him as an attorney at law. He alleges that, if the telegram had been received in time, he would have filed an answer, and that because of the gross negligence and carelessness of the defendants in transmitting and delivering the telegram he has been damaged. Summons was duly served upon defendant Wild as manager, and upon him personally. Defendants, through Mr. E. B. Howell, their attorney, filed a joint demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action. Upon the same day the defendant telegraph company petitioned the state court for a removal of the cause to the Circuit Court of the United States.

The petition alleges, among other things, that the defendant telegraph company is a citizen of the state of New York, and that Levi S. Wild is its manager, and, though a citizen of the state of Montana, yet he is not a necessary or proper party defendant; that the defendant company's office at Butte is a large and important one, employing several operators and a number of messengers and clerks, whose duty it was to receive messages from the operators and deliver the same to persons to whom the messages were addressed; that defendant Wild did not have charge of receiving or delivering messages at the office of the company in Butte in any other sense than that he had general oversight and charge of the office and of the employés, and that he did not receive or deliver the message described in plaintiff's complaint, but that it was actually received by one of the operators, and was by him passed over to one of the clerks, and by a clerk to a messenger for delivery, and that, if there was any negligence in the delivery, it was the actual negligence of one of the clerks or one of the messengers, for which Wild was in no way responsible. The petitioner alleges that plaintiff has not joined Wild as a defendant in good faith, but merely for the purpose of preventing the telegraph company from removing the cause to the Circuit Court of the United States and defrauding the federal court of its jurisdiction.

The affidavit of defendant Wild sets forth that he was, and is, the manager of the defendant telegraph company's office at Butte, and that it was impossible for him to receive and deliver personally the messages that were received at the office; that there are 5 clerks and 15 messengers employed, and that it was their duty to receive and deliver messages, and that the message referred to in plaintiff's complaint was actually received by one of the operators, and was delivered through the efforts of the clerks and messengers, and not by affiant, and that, if there was any negligence, it was that of the clerks or messengers; that there is no cause of action against affiant; and that he is joined as a defendant for the sole purpose of preventing the defendant telegraph company from removing the cause to the Circuit Court of the United States.

The usual order of removal was made. Plaintiff has moved in this court for an order remanding the cause to the district court of the Second judicial district of the state of Montana, which motion is resisted by defendants.

An examination of plaintiff's complaint discloses a joint cause of action stated against defendants. It may be defectively stated, but it is sufficient and cannot be disregarded because traversed by the petition of the defendant company and affidavit of defendant Wild, both of which contain matter appropriate doubtless in an answer to the complaint. The doctrine of the case of Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, is that plaintiff may select his own manner of bringing his action. If he has improperly joined causes of action, he may fail in his suit, the question may be raised by answer, and the rights of the defendant adjudicated. But the question of removability must ordinarily be determined by the complaint which contains plaintiff's case. True, the court is not always precluded from considering the contents of the petition for removal. In cases where diversity of citizenship is the ground involved, the court may and does often consider the face of the record, including the petition for removal. Helena Power Transmission Company v. Augustus N. Spratt et al. (C. C.) 146 Fed. 310. But where the action is one in tort against joint tort-feasors, and this appears to be such a suit, a petition for removal based upon denials of the allegations of the facts stated in the complaint does not justify the federal court in trying the merits of the petition, upon which rests the solution of the question of alleged fraudulent joinder. To try the merits of the petition now would certainly be to pass upon the essential facts of the controversy itself, and thus the federal court would, in effect, be determining a case which a jury may pass upon. This should not be done on petition to remand. There is not enough in the petition of the company and in the affidavit of defendant Wild, when considered with the complaint, to warrant the federal court in holding upon this motion that the defendants have been fraudulently or wrongfully joined for the purpose of preventing a removal to the federal court.

The case of Iowa Lillooet Gold M. Co. v. Bliss (C. C.) 144 Fed. 446, cited by defendants, is easily distinguishable, as the court there held that, on the face of the complaint, defendant's liability was several and distinct—that of one resting upon contract, that of another upon tort. Here all are apparently properly sued in tort. So, too, is Cella v. Brown (C. C. A.) 144 Fed. 742, to be distinguished, for the court expressly held that the question of separability was to be determined from the face of the complaint, and under that rule decided that no facts were stated which presented issuable matter, or upon which any relief could be administered. As already indicated, the complaint in this action is good.

It follows that, for the purpose of passing upon the question of removal, the present action must be deemed by this court to be joint; hence the motion to remand must prevail.

UNITED STATES v. ALEXANDROFF et al.

(District Court, E. D. Pennsylvania. November 19, 1906.)

No. 2.

BAIL—FORFEITURE OF RECOGNIZANCE—DISPOSITION OF PROCEEDS.

The proceeds of a forfeited bail bond given to the United States to secure the appearance of a person discharged from custody by a District Court on a writ of habeas corpus, pursuant to an order made by such court on the allowance of an appeal, belong to the United States; and, in the absence of any statute authorizing it, the court has no power to apply the same to the payment of the costs awarded to the adverse parties to the proceeding by the appellate court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Bail, § 424.]

J. Whitaker Thompson and Walter C. Douglas, Jr., for the United States.

John F. Lewis, for Russian vice consul.

HOLLAND, District Judge. This is a petition of the vice consul of Russia at Philadelphia to the court for an order to pay the amount of a forfeited recognizance to him on account of a bill of costs incurred on an appeal on a writ of habeas corpus.

It appears that in the spring of 1900 Leo Alexandroff, a Russian, under contract to serve on a ship then being built at Cramp's Shipyard, in the city of Philadelphia, deserted. He was arrested at the instance of the Russian vice consul and committed to the county prison. He sued out a writ of habeas corpus against Robert C. Motherwell, Jr., keeper of the Philadelphia county prison, and Capt. Vladimir Behr, master of the Russian cruiser upon which Alexandroff was to serve his government. The case was heard by the district judge here, and Alexandroff was discharged. Counsel for the respondents to this writ of habeas corpus asked leave to appeal to the United States Circuit Court of Appeals, and this request was granted by the district judge, who at the same time required Leo Alexandroff to give bail in the sum of $200 for his appearance in the District Court, as stated in the bond, "within five days after the determination of the appeal, to answer and obey whatever final order or judgment shall be made in the premises, and not depart said court without leave." The Circuit Court of Appeals of the Third Circuit affirmed the order of the District Court, whereupon a certiorari to the Supreme Court of the United States was taken, and on January 13, 1902, the Supreme Court reversed the judgments of both courts below and remanded the case to the District Court for further proceeding. The mandate of the Supreme Court was filed here February 17, 1902, which mandate provides, inter alia, as follows:

"On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the United States Court of Appeals and the judgment of the District Court of the United States for the Eastern District of Pennsylvania, in this cause, be, and the same are, hereby reversed, with costs, and that the said William R. Tucker, vice consul, etc., recover against the said Leo Alexandroff $169.55 for his costs herein expended, and have execution therefor."

The cause was remanded to the District Court for further proceedings consistent with the opinion of the court. The Supreme Court required that he should be returned to the Russian authorities. Alexandroff, however, failed to appear as he had agreed to do, and his bail bond was forfeited, and on July 15, 1903, the money, amounting to $200, was paid into court, where it still remains.

The respondents in this appeal incurred costs to the amount of $288.-75. They claim the proceeds of the forfeited bail bond of Alexandroff on account of these costs, and ask the court to make an order on the clerk to pay this money over to them. The proceeds which the vice consul asks to be paid to him were realized on a bail for appearance in court at a certain time. The bond was given by Leo Alexandroff and his sureties to the United States. They both acknowledged themselves indebted to the United States, conditioned for the appearance of Alexandroff at a certain time. It was not a bond to the respondents, making Alexandroff or his sureties in any way responsible to them to do any act on his part or pay any obligation, by way of costs, that they might incur. They had no interest in the bond. It was required of him by the district judge to guaranty his appearance to answer the judgment of the court as to surrendering himself to the Russian government. The United States could forfeit the bond and collect the money, or, through the President, could remit the forfeiture. Had Alexandroff appeared, nothing could have been collected by respondents on account of costs. The bond was not given for any purpose other than to secure his appearance, and, unless there is a constitutional or statutory enactment to the contrary, the proceeds of a forfeited bail bond, given for appearance in court at a time certain, belong to the government, to which the bond is given. U. S. v. Fanjil, Fed. Cas. No. 15,069; 5 Cyc. 155; Commonwealth v. Shick, 61 Pa. 495; McCool v. Smohe, 2 Pears. 18; Commonwealth et al. v. Winpenny, 2 Pears. 107; Sadler's Criminal Procedure, § 201.

The petition, praying that the proceeds of this forfeited recognizance be paid to the petitioner on account of his claim for costs, is dismissed.

ABRAM DE RONDE & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. December 15, 1903.)

No. 3,331.

CUSTOMS DUTIES—CLASSIFICATION—BLEACHERS' BLUE—COAL TAR PREPARATION.

So-called bleachers' blue, which is not used as a color or dye, but solely as a bleaching mixture, *held* not to be within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 15, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626] for coal tar colors or dyes, but within the further provision in the same paragraph for coal tar products or preparations that are not colors or dyes.

On Application for Review of a Decision of the Board of United States General Appraisers.

This case relates to merchandise imported at the port of New York consisting of so-called bleachers' blue. It was classified under the

provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 15, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626] for coal tar colors or dyes, and was claimed by the importers to be dutiable under the further provision in the same paragraph for coal tar products or preparations that are not colors or dyes. Following is an extract from the opinion of the Board of General Appraisers:

FISCHER, General Appraiser. The testimony offered by the importers is to the effect that the article is not used as a color or dye, but that it is solely used as a mixture with starch to bleach fabrics subjected to sizing. The importers are unable to state any facts other than these, and file with the Board an affidavit of the manufacturer thereof, sworn to before the United States consul at Manchester, England, wherein he states that the article is not made from coal tar, and is only a bleaching material, and not a dye. The manufacturer does not show the material or substance from which this blue is made, and only states that it is not from coal tar. At the request of the counsel for the importers, the sample in this case was submitted to the government chemist in charge of the laboratory at the port of New York for analysis, and said chemist reports as follows: "Sample is chiefly a coal tar dye, not made from alizarin or anthracin." The chemist returns to this Board a skein of worsted which he subjected to an immersion in this blue, and said worsted shows a completely dyed article of bluish color.

From the evidence and facts before us, we find that the merchandise in question is a coal tar dye, and accordingly overrule the protests, and affirm the decisions of the collector.

Howard T. Walden, for importers.
Charles D. Baker, Asst. U. S. Atty.

PLATT, District Judge. The decision of the Board of General Appraisers is reversed.

In re LEVI & PICARD.

(District Court, S. D. New York. November 10, 1906.)

BANKRUPTCY—SALE OF GOODS TO BANKRUPT—RIGHT OF SELLER TO RESCIND.

To entitle a seller of goods to rescind the sale for fraud, there must have been an undisclosed knowledge of insolvency and an intention not to pay for them on the part of the purchaser when the goods were bought, and the seller cannot rescind and reclaim the goods from the trustee in bankruptcy of the purchaser solely because the latter knew himself to be insolvent and unable to pay when the goods were delivered and received.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 219.]

In Bankruptcy. On petition for reclamation.

Ernst, Lowenstein & Cane, for petitioners.
James, Schell & Elkus, for receiver in bankruptcy.

HOUGH, District Judge. The petition submitted is in the usual form, and would entitle the petitioners to an order of reference if desired. The court, however, is asked to consider certain affidavits and proceedings already on file as an agreed statement of facts, and base its decision thereon. On August 31, 1906, the bankrupt firm bought from the petitioners, on four months' credit, certain pieces

of cloth, which are the subject of this reclamation. Investigation since bankruptcy has shown that the firm was insolvent at the date of purchase, but the partners did not (in my opinion) know that fact. The partnership, however, was not a happy family, and one partner had for a long time been anxious to withdraw from the firm, provided he could take with him in cash his contribution to the firm capital. On August 28, 1906, this partner secretly took from the firm's mail a letter containing a firm remittance of upwards of $11,000, and secreted the money, in order to coerce the other partners into permitting him to retain what he had demanded as the price of his retirement. On September 4th the fact of this appropriation became known. It was immediately evident that, unless this money could be recovered, the firm must fail. The defrauded partners communicated their condition to certain creditors, and as a result a petition in involuntary bankruptcy was filed against the firm on September 6, 1906. Adjudication followed. The investigation first alluded to shows that, even had the $11,000 not been taken, the firm was probably insolvent before August 28th. On September 4th and 5th the goods bought as aforesaid on August 31st were delivered at the bankrupt's place of business, and received by the clerks in charge, who had no knowledge of the firm's troubles.

The right of the petitioners to reclaim the goods so delivered is based upon the proposition that if, at the time of the receipt or delivery thereof, the vendees had reasonable cause to believe that they were unable to pay for them, and did not then intend to pay for them, the sale may be rescinded and the goods recovered, even though no such cause to believe or intent not to pay can be proven or inferred as of the date of the sale. This refinement upon the well-established rule regarding rescission is not in my opinion sustained by authority or reason. Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993, is binding authority in this court. It was there held to be established that what entitles a vendor to disaffirm a contract of sale and recover his goods consists in the vendee's inducing the vendor "to sell him goods on credit" when he was (a) insolvent, (b) concealed his insolvency, and (c) did not intend to pay for what he bought. Here the contract of sale was complete when the minds of the parties met on August 31st; and at that time, although the bankrupt firm was insolvent, there is no evidence that the partners knew that fact, and there is a plain inference that they then intended to pay for what they bought. The rule of the case last cited has frequently been enunciated in New York, and is, I think, the law of this state. Nichols v. Pinner, 18 N. Y. 295; Hotchkin v. Third National Bank, 127 N. Y. 329, 27 N. E. 1050. Doubt, however, has been produced by Whitten v. Fitzwater, 129 N. Y. 627, 29 N. E. 298. This is an ill reported memorandum decision, and in my opinion means no more than that evidence tending to show an intent not to pay when the goods were received (only six days after the purchase) might have been used by the jury as a basis for finding that the same intent existed six days before. Thus understood, I think the decision right, but under the circumstances of this case find myself unable to find evidence or draw an inference favorable to the existence of the necessary

intent on August 31st. Whitten v. Fitzwater, however, has been understood by others than the petitioners as sustaining their doctrine.

The exact point here under discussion was considered in Starr v. Stevenson, 91 Iowa, 684, 60 N. W. 217, where the court held that:

"The intent never to pay for the goods has sometimes been treated as a false representation and sometimes as a fraudulent concealment; but in either event it must precede the sale. * * * A contrary doctrine to that here declared seems to be announced in Whitten v. Fitzwater. * * * We do not think that case announces a correct rule, and must decline to follow it."

Burrill v. Stevens, 73 Me. 395, 40 Am. Rep. 366 (cited in the Iowa decision), refers fully to the cases, both English and American, sustaining the doctrine above set forth, which in my judgment has only been doubted in New York through bad reporting.

In practice, the petitioners' demand is especially vicious in bankruptcy. It is notorious that mercantile contracts for future deliveries, often many months distant, or extending over a long period of time, are the rule rather than the exception.

That a contract for "spring delivery" made in perfect honesty in October may be avoided because an expert investigation after bankruptcy in May renders it probable or certain that, when goods were delivered in April, the vendee was insolvent, and therefore should have imputed to him an intent not to pay, cotemporaneous with delivery, is intolerable. Such proceedings would render every mercantile failure a mockery to creditors who had given no credit or sold on short time. Yet to this extent would the doctrine contended for lead the court.

The petition is denied.

RICHMOND STANDARD STEEL SPIKE & IRON CO. v. ALLEN et al.

(Circuit Court of Appeals, Fourth Circuit. November 8, 1906.)

No. 650.

1. BANKRUPTCY—CORPORATIONS—ACTS OF BANKRUPTCY.

An insolvent corporation occupying leased premises does not commit an act of bankruptcy by permitting its property on such premises, which is subject to a mortgage given to secure its bonds, to be sold under a distress warrant lawfully issued for past due rent, which by the state statute is made a lien on such property. The only persons concerned in such transaction are the landlord and the mortgage bondholders, each having a lien, and the sale does not affect general conditions nor operate to give any creditor a "preference through legal proceedings," within Bankr. Act July 1, 1898, c. 541, § 3a(3), 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 82.]

2. SAME.

There is no legal obligation on an insolvent debtor to file a voluntary petition in bankruptcy.

3. SAME—TRANSFER OF PROPERTY.

The sale of property by an insolvent corporation, and the use of the proceeds in paying the current salary of its president, is not a transfer with intent to prefer a creditor which constitutes an act of bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 3a(2), 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]; such salary being a legitimate current expense so long as the corporation is a going concern.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 75, 78.]

Appeal from the District Court of the United States for the Eastern District of Virginia, in Bankruptcy.

Wm. L. Royall, for appellant.

B. Rand Wellford (Thos. N. Carter, on the brief), for appellees.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge. This is a proceeding in involuntary bankruptcy, and the appeal here is upon exception duly taken by the appellant to the order of adjudication.

The petitioners are holders of certain bonds of the Richmond Standard Steel Spike & Iron Company, which said bonds are secured by deed in trust upon the property of said company. The following agreed facts are set out in the record: That the Richmond Standard Steel Spike & Iron Company is a corporation having for a period greater than six (6) months preceding the filing of the petition in this cause its principal place of business in the city of Richmond, Va., and that it has a plant for the manufacture of spikes in the city of Manchester, Va., and that the said company owes debts in excess of $1,000. It is further admitted that the said company is indebted to the petitioners as set out in the petition filed in this case, and that the security held by them is not sufficient to pay the debts due them so that there will be due them, over and above what will be paid them under their lien, an amount largely in excess of $500. It is further admitted that the said company is insolvent, and that within four (4) months next preceding

the filing of the said petition Wm. Northrop and H. T. Wickham, receivers of the Virginia Passenger & Power Company, from which the said company rents the water power by which its mill is operated and the site on which the mill is situated, levied a distress warrant upon the property of the said spike company upon the leased premises, of which a true copy is made part of defendant's answer to the original petition, and that the same was sold under the said distress warrant October 18, 1905. That the property so levied on consisted mainly of machinery and fixtures which were embraced in the articles conveyed by the deed of trust securing the petitioners and other bondholders of the said spike company. It is further admitted that no step was taken by said company five days prior to the date fixed for the sale of the property levied on to prevent the said sale or to have it ascertained by legal tribunal whether the property was liable to distress and did not within five (5) days vacate and discharge the said levy. It is further admitted that Corbin Warwick is the president of the said spike company and has been for a number of years, and that he has within four (4) months next preceding the filing of the petition in this cause sold the property covered by the said deed of trust, being part of said Manchester plant, and applied the proceeds of sale to pay salary due him as president of said company. It is further agreed that the rent levied for by said receivers was one year's overdue rent.

The question presented for our consideration is whether the appellant committed an act of bankruptcy. It is insisted by the appellees that there were two acts of bankruptcy, either one of which was sufficient to warrant the order of adjudication. The one was that within four months next preceding the filing of the petition a warrant of distraint for rent was levied on the property of the appellant; that under this warrant, which was issued at the instance of the landlord, certain of the property, consisting mainly of machinery and fixtures at the plant, which were embraced in the articles conveyed by the deed in trust as security for the payment of the bonds held by petitioners and others, was taken from the possession of appellant and sold to pay a year's rent, then overdue; that the appellant made no resistance to the execution of the warrant of distraint or to the seizure and sale of the property thereunder, nor did the appellant vacate and discharge the levy within five days of the time fixed for the sale; that appellant was, at the time, insolvent.

Counsel for appellees argue that to permit this property to be taken and sold by the landlord under distress was an act of bankruptcy, even though the levy was in other respects lawful. A statute of the state of Virginia in effect gives a lien to the landlord for one year's rent that is due, which lien is by the law superior to the claim of others of the tenant's creditors. This statute provides, in substance, that the landlord may distrain for his rent at any time within five years from the time it becomes due; that the distress shall be made by a constable, sheriff, or sergeant of the county or corporation wherein the premises, or some part thereof, yielding the rent may be, or the goods liable to distress may be found. The warrant of distraint is issued by a justice or a clerk of a circuit or corporation court, and is founded upon an

affidavit of the person claiming the rent or his agent that the amount of money or other thing to be distrained (to be specified in the affidavit) as he verily believes is justly due, etc. The law provides further that the distress may be levied on the goods of the tenant, his assignee, or undertenant found on the premises or which may have been removed therefrom not more than 30 days. There is a further provision that, if the goods of the tenant are subject to a lien when carried on the premises, then only his interest is subject to distress; but if the lien is created while the goods are on the leased premises they shall, notwithstanding such lien, be liable to distress for one year's rent.

The position of the appellees' counsel that the action of the appellant in this transaction was an act of bankruptcy is based on the ground that the latter, being insolvent, suffered its property to be taken under legal proceedings, thereby giving a preference to one of its creditors. It will be observed that the proceeding under the Virginia statute, to recover rent, is summary. The initiative is the ex parte affidavit of the landlord or his agent, and upon the filing of the affidavit, without summons or notice to the tenant, the warrant of distraint is issued to the officer, and under this, without further proceeding, he is authorized to levy upon the property of the tenant, his assignee, or his undertenant found upon the leased premises. To this point, so far as we can find in the Virginia law, there is no opportunity afforded the tenant to be heard. Of course, if the warrant of distress were issued upon a false affidavit or for more rent than was due, or under other circumstances wrongfully affecting the rights of the tenant, he would have his remedy by injunction or some other adequate proceeding. But in this case it is an admitted fact that the rent claimed by the landlord, and for which the distraint was made, was due, and that the landlord had the right, under the Virginia law, to levy upon the property of the tenant found on the premises and sell the same to satisfy the claim. In this situation, it would seem there was no alternative left to the tenant except to pay the amount or permit the officer to proceed with the distress.

A further contention of the counsel is that the appellant should have sought, by injunction, to stop the landlord, and thus prevent his obtaining a preference over the petitioners in the distribution of the estate. We cannot see the force of this contention, under the circumstances. The petitioners were bondholders, claiming a lien upon the property by virtue of the deed in trust executed to secure the payment of their bonds. The landlord, by virtue of the Virginia statute, claimed a lien for his rental. There was no contest between the general creditors of the appellant. It was simply one between the bondholders on the one side and the landlord on the other as to which had a prior lien upon certain property of an insolvent debtor. The failure of the tenant to espouse the cause of either is not, in our opinion, an act of bankruptcy. It is insisted that some of the property seized under the warrant was fixtures and was therefore not liable to distraint for rent. If this be true, then the lien of the bondholders, if such they had, has not been divested by the seizure and sale, nor their security for the payment of their bonds thereby diminished; for the property, although taken and removed from the premises, is still subject to the lien which attached

by reason of the deed in trust. Another view: If the fixtures were of such character that they became a part of the freehold, then it may well be argued that such fixtures belonged to the landlord, and that the levy under the distress for rent was made upon his own property, and no right of the petitioners was infringed.

In order to give a preference by legal proceedings such as to constitute an act of bankruptcy, an insolvent debtor must suffer or permit the proceeding to be consummated by which the preference is obtained without having vacated or discharged it within five days before the sale or the disposition of the property. This principle applies where the proceeding is made effective within four months of the filing of the petition, and the proceeding must, of itself, be the means by which the preference is obtained. Under the law of Virginia, the right of the landlord to distrain the property of the tenant for rent has a priority over any lien created on such property after it is carried onto the leased premises. In other words, as we understand the Virginia statute, the lien of the landlord for rent attaches to the property of the tenant as soon as it is placed on the premises, and this lien continues and is capable of being enforced in the manner and under the conditions provided in the statute. It has priority over all other liens subsequently created and retains this position of dignity, provided the landlord pursues his right in apt time. It has been held that the preference by legal proceeding contemplated by the bankrupt act does not include a levy upon a judgment of foreclosure of a lien which affects only the property bound by the lien. Loveland's Bankruptcy (2d Ed.) 167. Authorites cited in note 95.

Following in the line of this principle, it is our opinion that, if the property seized by the landlord was subject to his lien for rent, it was not an act of bankruptcy for the appellant to suffer or permit the distress proceeding; and, on the other hand, if the property taken was subject to the prior lien of the deed in trust as security for the payment of the bonds of the petitioners, as claimed by them, its seizure by the landlord was an invasion of the rights of the petitioners for which the law provides a remedy, but which in no sense can be construed into a preference by the appellant of one creditor over another. In fact, as before stated, this controversy is confined to the petitioners, who are holders of bonds secured by deed in trust and the landlord, with his claim for rent; each claiming priority of lien upon the property of an insolvent corporation. The general or unsecured creditors of the corporation, if there be such, can have no interest in the result. The law in regard to preference by legal proceeding is that the existence of the lien obtained by the proceeding shall work a preference; that is, shall enable some one of the creditors of the insolvent debtor to obtain a greater percentage of his debt than other creditors. How can this principle apply here, when the sole question involved is as to which one of two creditors, each claiming a lien upon certain property of an insolvent debtor, is entitled to priority. No matter how this question is determined, it would in no way tend to secure an equitable distribution of the insolvent's estate among his creditors, which is the purpose of the bankrupt act. Another contention of appellees' counsel is that

it was the duty of the appellant, when it discovered itself to be in such extremity financially, and when the landlord was about to distrain the property for rent, to file a voluntary petition in bankruptcy. We do not think that this position can be maintained. In Wilson v. City Bank, 17 Wall. 473, 21 L. Ed. 723, the case decided under the provisions of the act of 1867, it is held that there is no legal obligation on the debtor to file a petition in bankruptcy, and that the failure to do so is not sufficient evidence of an intent to give a preference to the judgment creditor or defeat the operation of the bankrupt law. It is true that the decision in that case was, as stated, under the law of 1867, by the provisions of which the intent to prefer was a necessary element of preference by legal proceeding in order to constitute an act of bankruptcy on the part of the debtor; but the reasoning will apply with as much force in the administration of the present act as of the former; that is, that there is any obligation resting upon the insolvent debtor to file a voluntary petition in bankruptcy can only be argued from implication, for it is clear that there is no such duty imposed by the terms of the act. There is nothing in the law requiring an insolvent person to file a petition under any circumstances. He has the right to do so when he finds that he is unable to pay his debts and desires to make a surrender of his property, under the provisions of the bankrupt act, distribute it equally among his creditors, and be relieved from further liability. The right of voluntary petition is a privilege extended by the law to be exercised or not by a debtor, as he may see proper. It is the right of the creditor to institute and prosecute involuntary proceedings, but he cannot, under any conditions, compel the debtor to take the initiative.

The other alleged act of bankruptcy is based upon the following facts:

"It is further admitted that Corbin Warwick is president of the said spike company and has been for a number of years; that he has within four months next preceding the filing of the petition in this cause sold property covered by the said deed of trust, being part of said Manchester plant, and applied the proceeds of sale to pay salary due him as president of said company."

For an insolvent debtor to transfer property, subject to a lien, in behalf of a creditor or class of creditors, is not, of itself, an act of bankruptcy. A transfer, in order to constitute an act of bankruptcy, must be made with intent on the part of the debtor to prefer a creditor. The underlying principle of the bankruptcy act is that, when a debtor becomes unable to pay all of his debts in full—when he has not sufficient property and effects to discharge his indebtedness—his creditors are entitled to have his estate equally distributed among them. In such condition, therefore, if the debtor makes a transfer of property to one of his creditors in order to give that creditor a preference, he thereby commits an act of bankruptcy, provided the transaction is within four months of the filing of the petition for adjudication. The position of the appellees' counsel is that the president of this insolvent company, having sold certain property which was covered by a deed in trust executed as security for the payment of certain bonds of the company held by the petitioners, and applied the proceeds in payment of his salary, that this was an act of bankruptcy on the part of the company. If the property sold was, as is contended, covered by the deed in trust,

Warwick, the president, had no right to sell it, and his act was wrongful. There is no evidence that he sold it by authority of the company, or that the company ratified his action; nor are we advised that it was within the scope of the president's power to sell the property which composed the plant and operating machinery of the company. As will be seen, the property sold was a part of the Manchester plant. If it be true that Warwick, without authority, disposed of property which was subject to the lien of the bondholders, this would be his act, for which he would be individually liable, but the company cannot be held responsible. However, it is not necessary to adopt this course of reasoning as a basis of opinion in this case. Let it be taken as a fact that the company disposed of the property referred to and used the proceeds in payment of the salary of the president. We do not think that, under the conditions which were shown to exist about the affairs of the company, this was an act of bankruptcy. If the salary of the chief officer of a corporation has accumulated and thus become an existing debt, and the corporation being insolvent, and in contemplation of such insolvency pays the debt with intent to prefer it over their other creditors, this would be an act of bankruptcy. But it is a very different case when a corporation, carrying on the business of a manufacturer at a time when unable to pay all of its debts, uses a part of its assets to pay current expenses. The current salary of the president of a corporation, if confined within a reasonable amount, is a part of the necessary running expenses, and it has to be paid in order to keep the establishment in operation. So far as appears here the money paid to Warwick was for his current salary; that its payment was necessary in order that his services might be retained to manage and continue the company's business. Undoubtedly there are times in the course of the affairs of many corporations and business concerns when they, if brought to a settlement, would be found without property and effects sufficient to pay their indebtedness, and yet they continue to operate, buy material, pay for it, sell product and other property, and pay the current expenses of the business from the proceeds, including salaries of officers. No court, so far as we find, has held such transaction to be an act of bankruptcy. To do so would, in many instances, stop operations, and, instead of benefiting, would affect injuriously the interests of creditors.

Our conclusion is that the appellant did not commit an act of bankruptcy in either instance stated in the facts. The order of adjudication entered by the District Court is therefore vacated, and the judgment reversed.

Reversed.

THE ALTA.

UNITED STATES v. WARD.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1906.)

No. 1,281.

SHIPPING—TONNAGE DUTIES—NATIONALITY OF VESSEL.

A vessel not registered in the United States is a vessel "not of the United States," within the meaning of Rev. St. § 4219 [U. S. Comp. St. 1901, p. 2848], although owned by a citizen of the United States, and on her entry from a foreign port is subject to tonnage duty at the rate of 50 cents per ton thereunder.

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

On the 8th day of September, 1904, the barkentine Alta, a vessel of 1,289 tons net, belonging to D. H. Ward, a citizen of the United States, arrived at the port of Port Townsend, Wash., in ballast from the foreign port of East London, Cape Colony, South Africa. The vessel was built in Glasgow, Scotland, and had no American register. She was seized by the collector of customs for the collection district of Puget Sound for failure to pay the tonnage duties as required by section 4219 of the Revised Statutes [U. S. Comp. St. 1901, p. 2848], and for failure to pay light money as required by section 4225 of the Revised Statutes [U. S. Comp. St. 1901, p. 2855]. To the libel of information the owner as claimant answered that he was the sole owner of the barkentine and that he was a citizen of the United States, residing in Manila, Philippine Islands. The answer admitted that the vessel was liable for the payment of $77.34 under Act June 19, 1886, c. 421, 24 Stat. 81 [U. S. Comp. St. 1901, p. 2850], and alleged that the owner had tendered said amount to the collector of customs before the seizure; that he had applied to the collector of customs of the United States for the Philippine Archipelago for an issuance to him of a certificate of ownership and a certificate of protection under the laws of the United States, and had delivered to said collector the bill of sale whereby he had acquired the ownership of said vessel; that said collector issued to him a certificate of ownership and a certificate of protection; and that at the time of the arrival of said vessel at Port Townsend it was his intention to take a cargo of lumber from Port Gamble, Wash., to Cape Colony, South Africa. The answer also alleged that all discriminating or countervailing duties of Great Britain and of Cape Colony, so far as they might operate to the disadvantage of the United States, had long since been abolished under the laws of Great Britain and of Cape Colony; that American vessels entering ports of Cape Colony from the United States or any territory thereof were entitled to enter without paying any duties or taxes on tonnage; and that no tonnage taxes or duties in excess of the tonnage duty of six cents per ton was collectible within any collection district of the United States upon any vessel entering from any port of Cape Colony or Great Britain. The libelant filed an exception to the answer. The cause came on for hearing upon the libel, the answer, and the exceptions, and the District Court held that the vessel was subject to the payment of $77.34, but overruled the exceptions to the other portions of the answer and dismissed the libel. From the decree thereupon entered this appeal is taken.

Jesse A. Frye and Alfred E. Gardner, for appellant.

Hughes, McMicken, Dovell & Ramsey, for appellees.

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.

In the case of The Alta, 136 Fed. 513, 69 C. C. A. 289, we had under consideration the question of the liability of the Alta for tonnage duties on her entry into a port of the United States from the port of Manila, Philippine Islands. We held that she was not subject to tonnage duties under Revised Statutes, § 4219, as amended [U. S. Comp. St. 1901, p. 2850], since she did not enter from a foreign port or place, and that she was not subject to such duty under Act March 8, 1902, c. 140, 32 Stat. 54 [U. S. Comp. St. Supp. 1905, p. 388], extending such duties to foreign vessels entering from the Philippine Archipelago, since, while she was not a vessel of the United States because not entitled to a registry, she was an American vessel by virtue of the citizenship of her owner. In the case at bar the vessel comes to a port of the United States from a foreign port, and a new question is presented.

Section 4219 of the Revised Statutes provides as follows:

"Upon vessels which shall be entered in the United States from any foreign port or place there shall be paid duties as follows: On vessels built within the United States but belonging wholly or in part to subjects of foreign powers, at the rate of thirty cents per ton; on other vessels not of the United States, at the rate of fifty cents per ton. Upon every vessel not of the United States, which shall be entered in one district from another district, having on board goods, wares or merchandise taken in one district to be delivered in another district, duties shall be paid at the rate of fifty cents per ton. Nothing in this section shall be deemed in any wise to impair any rights or privileges which have been or may be acquired by any foreign nation under the laws and treaties of the United States relative to the duty of tonnage on vessels. On all foreign vessels which shall be entered in the United States from any foreign port or place, to and with which vessels of the United States are not ordinarily permitted to enter and trade, there shall be paid a duty at the rate of two dollars per ton; and none of the duties on tonnage above mentioned shall be levied on the vessels of any foreign nation if the President of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nations, so far as they operate to the disadvantage of the United States, have been abolished. In addition to the tonnage-duty above imposed, there shall be paid a tax, at the rate of thirty cents per ton, on vessels which shall be entered at any custom-house within the United States from any foreign port or place; and any rights or privileges acquired by any foreign nation under the laws and treaties of the United States relative to the duty of tonnage on vessels shall not be impaired; and any vessel, any officer of which shall not be a citizen of the United States shall pay a tax of fifty cents per ton."

This section imposes duties on vessels built within the United States, but belonging wholly or in part to subjects of foreign powers, at the rate of 30 cents per ton; on other vessels not of the United States at the rate of 50 cents per ton. The question is whether the barkentine Alta is a vessel "not of the United States," within the meaning of this statute. Section 4131 [U. S. Comp. St. 1901, p. 2803] provides:

"Vessels registered pursuant to law and no others except such as shall be duly qualified according to law for carrying on the coasting trade and fisheries or one of them shall be deemed vessels of the United States and entitled to the benefits and privileges appertaining to such vessels."

Here is a distinct statutory provision appearing at the head of the title which deals with the regulation of commerce and navigation. Its evident purpose is to define "vessels of the United States," and to de-

clare the meaning of those words wherever they shall be used throughout the title. The appellees earnestly contend that the Alta does not fall within the class designated by the term "other vessels not of the United States," and counsel refer to various provisions of the statute, from the terms of which they argue, first, that a vessel is of the United States whenever it is documented, enrolled, licensed, or recorded under any law of the United States, as, for instance, a vessel licensed to engage in the coast trade, a vessel built in the United States, but owned by foreign subjects, and recorded under section 4180, a licensed yacht, a vessel protected under a sea letter or certificate issued under section 4190 [U. S. Comp. St. 1901, p. 2837] to certain vessels owned by citizens of the United States, and they refer to section 4135 [U. S. Comp. St. 1901, p. 2807], which makes use of the expression "recorded as an American vessel of the United States," which they contend shows the intention of Congress toward any American vessel recorded as such under any law of Congress.

They contend, further, that many of the enactments of Congress in which the term "vessel of the United States" is used manifestly were not intended to refer alone to vessels registered under section 4131, but were intended to include vessels whose nationality is American. Thus it is said that section 1718, referring to a vessel of the United States, applies to all vessels flying the American flag, and that certain regulations found in sections 4233, 4234, and 4238 [U. S. Comp. St. 1901. pp. 2893, 2900, 2903], in regard to collisions at sea and duties of the masters of vessels of the United States, were intended to apply to all vessels whose nationality is American, and that the protection afforded by section 4293 [U. S. Comp. St. 1901, p. 2950] to merchant vessels of the United States was intended to be extended to all vessels flying as of right the American flag, whether registered or not. Other sections are cited from which the same argument is deduced. We find in the consideration of these various statutes no ground for disregarding the plain language of section 4219, and it is not necessary to speculate concerning the proper construction of the various sections so cited. We have to deal only with the question: What is the meaning of the term "vessels of the United States," as used in section 4219? That meaning is so plainly declared in a statute expressly made for our guidance as to leave no room for construction. In White's Bank v. Smith, 7 Wall. 646, 19 L. Ed. 211, the court said:

"Ships or vessels of the United States are the creations of the legislation of Congress. None can be denominated such or be entitled to the benefits or privileges thereof, except those registered or enrolled. * * * Ships or vessels not brought within these provisions of the acts of Congress, and not entitled to the benefits and privileges thereunto belonging, are of no more value as American vessels than the wood and iron out of which they are constructed. Their substantial, if not entire, value consists in their right to the character of national vessels, and to have the protection of the national flag floating at their mast's head.

In The Merritt, 17 Wall. 582, 21 L. Ed. 682, the court had under consideration the status of a vessel, the property of citizens of the United States, but foreign built. The court said:

"That she was owned by citizens of the United States did not make her a vessel of the United States. By the statute of 1792 only ships which have been registered in the manner therein prescribed shall be denominated or deemed vessels of the United States are entitled to the benefits or privileges appertaining to such ships."

In The Conqueror, 166 U. S. 110–119, 17 Sup. Ct. 510, 513, 41 L. Ed. 937, Mr. Justice Brown said:

"The privilege, however, of owning foreign vessels is usually of comparatively little value, since in order to carry on a foreign trade, the coasting trade, or the fisheries they must be entitled either to registry, or to enrolment and license, a privilege, as above stated, not granted to foreign built vessels, though owned by American citizens."

Counsel for the appellees contend that this construction of the statute results in an unconstitutional discrimination against American citizens, and presents the anomaly that two English built ships may sail from the same foreign port to an American port, the one owned by a British subject, the other owned by an American citizen, and the first will pay no duty, while the second must pay 50 cents per ton. This anomaly furnishes no ground for disregarding the statute. The anomaly has its basis in the policy of the legislation of Congress, to which body is intrusted the regulation of the whole subject-matter here involved. Nor can we see that Congress in so enacting has not acted strictly within its power.

The appellant asserts a claim to light money under section 4225, Rev. St. The record shows that the proper showing to absolve the vessel from that payment was made soon after her arrival. Under the ruling we made in The Alta, 136 Fed. 513, 69 C. C. A. 289, we hold that there was no error in denying the demand for the imposition of this penalty.

The decree is reversed, and the cause is remanded, with instructions to enter a decree for the United States for the tonnage duties of 50 cents per ton under section 4219.

OTTO KUEHNE PRESERVING CO. v. ALLEN et al.

(Circuit Court of Appeals, Eighth Circuit. October 22, 1906.)

No. 2,311.

1. DEATH—ACTION FOR WRONGFUL DEATH—RECOVERY OF EXEMPLARY DAMAGES UNDER MISSOURI STATUTE.

Rev. St. Mo. 1899, § 2866, which provides that in actions for wrongful death "the jury may give such damages, not exceeding five thousand dollars, as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default," does not authorize the allowance of exemplary damages in all cases, but only where, under the pleadings and evidence, the deceased would have been entitled to recover such damages, had he lived, in a suit for the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 98.]

2. SAME—PLEADING.

To authorize the recovery of exemplary damages under such statute, the defendant must have acted maliciously or wantonly, or have been guilty of

negligence so gross as to evince a conscious disregard of the rights of others, and the complaint must allege such facts. A mere allegation that defendant's negligence was gross is not sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 69.]

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

The Allens recovered a judgment against the preserving company for damages for the death of their minor daughter, who, while in the service of the company, was killed by the collapse of its factory building at Kansas City, Mo. The complaint of the parents charged that the defendant utterly disregarded its duty to furnish its employés a reasonably safe place in which to perform their duties; that the building was unsafe for the purpose for which it was used and in the manner in which it was used, and "was known to be unsafe by defendant, or could have been known by it in the exercise of reasonable and proper diligence and care on their part." After describing the age of the building and the weakness and unfitness of its walls, supports, and floors, it was further averred that "it was gross negligence for defendant to use it and to place therein its employés"; further, that "all of which said acts were negligent and grossly negligent on the part of the defendant"; also, "plaintiffs aver that by reason of the foregoing facts and premises defendant was guilty of gross negligence in placing their said daughter in a building that was not a safe place to work in."

H. C. Timmonds (Boyle & Guthrie, William Warner, O. H. Dean, W. D. McLeod, and Hale Holden, on the brief), for plaintiff in error.

Edwin H. Stiles, James H. Reed, E. E. Yates, T. A. J. Mastin, C. M. Howell, and C. M. Kackley, for defendants 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 defendant requested the court to instruct the jury, first, that under the pleadings in the case, and, next, that under the evidence, they should award the plaintiffs nothing in the way of exemplary damages. The court denied the requests, and, on the contrary, instructed them that under certain conditions stated they might, in their discretion, allow damages of that character. The verdict returned for the plaintiffs was for a single sum, and, as the jury were not directed to state the damages that were compensatory separately from those that were by way of punishment, it is to be presumed that the amount of the verdict was in part made up of damages of the latter character. The requests were sufficiently definite to challenge the attention of the court to the contention that exemplary damages were not claimed in the complaint and that the evidence in the case did not warrant their allowance. Was this a case for exemplary damages?

The action was brought under a Missouri statute (section 2865, Rev. St. 1899) providing for liability in case of the death of a person caused by the wrongful act, neglect, or default of another. The succeeding section (2866) provides that:

"In every such action the jury may give such damages, not exceeding five thousand dollars, as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default."

It is not denied that the plaintiffs were the proper parties to bring the action. The sections of the statute referred to have received authoritative construction from the Supreme Court of Missouri. Gray v. McDonald, 104 Mo. 303, 16 S. W. 398. No new cause of action is created by them. There is simply transmitted to designated survivors the cause of action which the party injured would have had, if death had not occurred. The damages recoverable are compensatory for the necessary injury, and also exemplary when sufficient cause therefor exists. In the latter respect the statute differs from those in most states. The clause of section 2866 providing that regard may be had to the mitigating or aggravating circumstances attending the wrongful act, neglect, or default means that in a proper case exemplary damages may be awarded in addition to compensation for the necessary loss. Gray v. McDonald, supra. In other words, if the injury was inflicted under such circumstances as would have authorized a recovery of exemplary damages by the person injured, had he survived, such right of recovery is, in the event of his death, transmitted to a designated survivor. But it is not meant that in every case exemplary damages are recoverable, or that in every case the jury may be instructed to consider the mitigating or aggravating circumstances. Barth v. Railway Company, 142 Mo. 535, 558, 44 S. W. 778. Whether such damages might have been recovered by the injured person, had he survived is still to be determined by settled principles of general law. In this particular the statute adds nothing and takes nothing away. As applied to the case at bar the statute simply passed along to the parents the right to exemplary damages, if any, that would have been possessed by the daughter, had death not resulted from the accident. The rules of pleading and evidence in respect of a demand for exemplary damages that apply in case the injured person survives and sues, likewise apply in an action brought under the statute. A case should be stated in the complaint which, according to settled principles of law, authorizes the recovery of such damages, and this should be followed by sufficient proof to merit an award by the jury.

In Barth v. Railway Co., 142 Mo. 535, 558, 44 S. W. 778, 785, it was said:

"It is now the settled rule of decision in this court that where there is neither allegation of malice, wickedness, or wantonness in the tort complained of, nor evidence of any aggravating circumstances, it is improper in the instruction to include the words 'having due regard to the mitigating or aggravating circumstances.' Those words are only proper in a case in which punitive damages or smart money may be allowed."

And in Holwerson v. Railway Co., 157 Mo. 216, 243, 57 S. W. 770, 778:

"No instruction basing a right to recover upon wantonness should be given, unless the pleadings raise an issue of wantonness as distinguished from negligence, and unless there is substantial proof to support such an issue. The common practice of giving such instructions when no such issue is raised, and there is no evidence to support such a claim, has caused much of the confusion and incongruity that exists in the law, and the failure of courts and judges and text-writers to distinguish between negligence (that is, the want of ordinary care) and wantonness (that is, intentional injury purposely inflicted) is responsible for the balance of such confusion."

In Dorsey v. Railway Co., 83 Mo. App. 528, 543, the court said:

"Instruction No. 2 given for plaintiff is clearly erroneous. There is no allegation in the petition to warrant an instruction for exemplary damages; nor is there a line of testimony in the record tending to show that the engineer acted wantonly, maliciously, or unlawfully, with the intent to do wrong or to injure the passengers on his train."

While the doctrine of exemplary damages did not find its place in our jurisprudence without controversy and diversity of judicial opinion, it is now generally accepted. Indeed, an inclination is not infrequently manifested to extend it beyond its rational limitations and apply it to cases that appeal to courts and juries and excite compassion because of distressing features of the injury rather than by reason of any wanton conduct on the part of the defendant. The conditions authorizing the allowance of such damages are well settled and clearly defined. In Day v. Woodworth, 13 How. 363, 14 L. Ed. 181, it was held that in actions of trespass exemplary damages might be awarded where the injury was wanton and malicious, or gross and outrageous, and that the amount depended upon the degree of malice, wantonness, oppression, or outrage of the defendant's conduct. This case was followed in Railroad Co. v. Quigley, 21 How. 202, 16 L. Ed. 73, where it was said:

"Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations."

Railway Company v. Arms, 91 U. S. 489, 23 L. Ed. 374, was an action for damages sustained by a collision of railroad trains. The trial court instructed the jury that, if they found that the accident was caused by the gross negligence of defendant's servants, they might award to the plaintiffs exemplary damages. This was held to be error. The Supreme Court, after quoting from the Quigley Case, said:

"Although this rule was announced in an action of libel, it is equally applicable to suits for personal injuries received through the negligence of others. Redress commensurate to such injuries should be afforded. In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go farther, unless it was done willfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. In that case, the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages."

And, after discussing the significance of the term "gross negligence," the court added:

"In this sense the collision in controversy was the result of gross negligence, because the employés of the company did not use the care that was required to avoid the accident. But the absence of this care, whether called gross or ordinary negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury actually inflicted. To do this, there must have been willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences."

In Railway Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97, the court again expresses the rule that such damages may be awarded if the defendant "has acted wantonly or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations." See, also, Scott v. Donald, 165 U. S. 58, 86, 17 Sup. Ct. 265, 41 L. Ed. 632; Times Pub. Co. v. Carlisle, 36 C. C. A. 476, 94 Fed. 762.

While many observations upon this subject not altogether harmonious may be found scattered through the decisions of the Supreme Court of Missouri, we believe that the limitations of the doctrine announced by the Supreme Court of the United States have been substantially recognized in that state:

In Parsons v. Railway Company, 94 Mo. 286, 297, 6 S. W. 464, 468, the court, in speaking of the sections of the statute which have been considered, referred to the established rule of public policy—

"Which permitted the party entitled to sue to also recover exemplary damages, when the act complained of was willful or malicious, or characterized by cruelty, wantonness, or oppression, or was the result of such negligence as evinced a conscious disregard of the rights of others."

Brown v. Plank Road Company, 89 Mo. 152, 1 S. W. 129, was an action for damages sustained while driving on a defective road. The court said:

"There is nothing in the evidence to show that the failure of defendant to remove the obstruction thus occasioned was either wanton or malicious, one or the other of which elements must appear to justify awarding punitive damages."

In Engle v. Jones, 51 Mo. 316, the court said:

"As an abstract proposition of law the instruction was correct, but the objection to it is there was no evidence in the case justifying it. No aggravating circumstances were disclosed calling forth the rule applicable to vindictive damages. Unless the trespass is committed in a wanton, rude, or aggravated manner, indicating oppression, malice, or a desire to injure, the damages should be compensatory only."

In Kennedy v. Railroad Company, 36 Mo. 351, 364, it was said:

"To authorize the giving of exemplary or vindictive damages, either malice, violence, oppression, or wanton recklessness must mingle in the controversy and form one of the chief ingredients. The act complained of must partake something of a criminal or wanton nature, else the amount sought to be recovered will be confined to compensation," etc.

The complaint in this case was framed strictly upon the theory of compensatory damages. As a general rule of pleading it is not necessary to claim exemplary damages by name, but such averments must be made as will advise the defendant that he will have to meet a demand of that kind at the trial. If the wrongful act is of a character or is attended by such conduct or animus of the defendant that the law authorizes the assessment of exemplary damages, the complaint should so describe it that it may appear therefrom to be a case of that class. Vine v. Casmey, 86 Minn. 74, 90 N. W. 158; Jacob's Adm'r v. R. Co., 10 Bush. (Ky.) 263; Potter v. Stamfli, 2 Kan. App. 788, 44 Pac. 46; Sullivan v. Navigation Co., 12 Or. 392, 7 Pac. 508, 53 Am. Rep. 364. This requirement is essential to fairness in pleading, and there is fully as much reason for it as there is for the rule, universally recognized, that

a claim for special damages beyond those that necessarily flow from the act complained of must be definitely asserted in the plaintiff's pleading. It is to be presumed that a plaintiff who sets forth in his complaint a case of negligence calling only for compensatory damages, without charge or averment of malice, oppression, wantonness, or other accompaniment of the negligent act or omission warranting the punishment of the defendant in the interests of society, makes no demand beyond reimbursement for his actual loss. Aside from a description in plaintiff's complaint of the defective condition of the building, which, it is averred, was either known to defendant or could have been known by it through the exercise of reasonable and proper diligence and care, there is nothing except the frequent characterization of the negligence as gross. This is insufficient in an instruction (Railway Company v. Arms, supra), and it is insufficient in a pleading, there being nothing else showing the existence of those conditions upon which the right to exemplary damages depends.

The same conclusion would follow, were the complaint to be tested by the rule of pleading which obtains in the state courts of Missouri. The complaint was first filed in the local court from which the cause was removed. A statute of the state (section 594, Rev. St. 1899) provides that:

"In all actions where exemplary or punitive damages are recoverable the petition shall state separately the amount of such damages sought to be recovered."

There was no compliance with this requirement, and nothing else indicating that the prayer for judgment included anything more than the pleaders' assertion of the necessary injury sustained. Without considering whether the Missouri statute continued to apply after the removal of the cause, it is fair to say that the omission to comply with it indicates that there was no intention upon the part of the plaintiffs, when the complaint was framed and filed, to claim more than compensatory damages.

A thorough consideration of the evidence adduced at the trial impels us to say, also, that it went no further in affording a basis for exemplary damages than the averments of the complainant. There was no substantial evidence fairly tending to show that the neglect of the defendant was wanton, willful, or malicious, or so reckless as to imply a conscious disregard of its civil obligations. When these conditions are absent, the punishment of passive neglect in the conduct of a lawful occupation by pecuniary imposition for the benefit of a private suitor beyond an award of just and fair compensation must have its origin in some legislative enactment. Extreme cases, appealing to the sympathies, but lacking the exceptional features mentioned, are apt to give rise to precedents that invade the province of the Legislature and tend to result in the unrestricted introduction of the doctrine of exemplary damages into the law of civil negligence.

We are of the opinion that error was committed in respect of the instructions, and this makes it unnecessary to consider the other matters assigned, as they may not arise at a subsequent trial.

The judgment is reversed, and the cause remanded for a new trial.

WALLACE v. OCEAN GROVE CAMP MEETING ASS'N OF METHODIST EPISCOPAL CHURCH.

(Circuit Court of Appeals, Third Circuit. November 22, 1906.)

No. 19

1. LANDLORD AND TENANT—ACTION BY LANDLORD TO RECOVER POSSESSION—DEFENSES.

A tenant, who repudiates that relation and claims title adversely to the landlord, cannot defend against an action by the landlord to recover possession on the ground of the insufficiency of the notice to terminate the lease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 1191.]

2. SAME.

A tenant, who paid rent under a lease up to the time of being served with notice terminating the same, cannot deny his landlord's title in an action to recover possession, although he was in possession prior to the execution of the lease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 168.]

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

Thomas E. French, for plaintiff in error.

James Buchanan, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. This is a writ of error to the Circuit Court for the District of New Jersey. In that court the Ocean Grove Camp Meeting Association recovered a verdict in ejectment against Mrs. Margaret L. Wallace, individually and as executrix of Adam Wallace, deceased, for certain lots in the township of Neptune, Monmouth county, N. J. On entry of judgment she sued out this writ, assigning for error the action of the court in directing the verdict for plaintiff and in refusing to direct it for defendant.

In the trial of the cause it was shown that in 1870 one Osborn, who was in possession of the land in question, made a deed therefor to the plaintiff association, under which it entered. It was also shown that on December 18, 1895, the plaintiff association by writing, also signed by the husband and devisor of the defendant, leased said premises to him for one year from the 1st of April, 1896, at a rental of $150. The lease stipulated that:

"The said Rev. A. Wallace, his executors and administrators, * * * at the expiration of the said term will yield up and surrender the possession of the said premises unto the said party of the first part, its successors and assigns, in the same good order and condition as the same now are, reasonable wear and tear thereof and accidents happening by fire or other casualties excepted. And it is hereby agreed between the said parties, for themselves, their legal representatives, and assigns, that this lease shall continue from year to year, on the terms aforesaid and for the rent aforesaid, payable as aforesaid, unless terminated by a three months' notice, in writing, from either party, of the desire of such party to terminate the same on the first day of May following the expiration of such three months' notice."

At the expiration of the first year the lease was continued by oral agreement; Dr. Wallace agreeing to an increase of rent to $200. It was also shown that on December 15, 1903, the plaintiff served on Margaret Wallace, individually and as sole executrix of Adam Wallace, notice to surrender possession of the premises to the plaintiff on April 1, 1904. There was evidence the defendant repudiated the landlord's title and the relation of tenant by her abstract of title, which averred "possession adverse to plaintiff since the year 1870" and title under a recorded deed from John S. J. McConnell, treasurer, for said premises, to Adam Wallace, dated October 22, 1901. Upon these facts, and in the absence of any countervailing ones, the right of the plaintiff to recover possession was clear. While possibly the three months' notice to quit on April 1st, instead of on May 1st, as provided by the lease, did not serve to terminate the tenancy, had the tenant stood on her rights as a tenant, yet, having repudiated that relation and disclaimed the landlord's title, her rights to notice as tenant cannot avail her. Jackson v. Collins, 11 Johns. (N. Y.) 1; Crowther v. Lloyd, 31 N. J. Law, 399; Warvelle on Ejectment, p. 74, § 64; Appleton v. Ames (Mass.) 22 N. E. 69, 5 L. R. A. 206; Chamberlin v. Donahue, 45 Vt. 54; Catlin v. Washburn, 3 Vt. 25.

On the termination of the plaintiff's case the defendant's counsel opened her case, and stated that Adam Wallace and his predecessor, Connell L. Rowland, had been in possession of the land in question since 1870, and that defendant will claim the land by adverse possession. A motion was then made by plaintiff's counsel to overrule the opening of defendant's counsel, on the ground that it presented no matter of defense. The court having granted this motion, its action is assigned for error. The practice in the federal courts of this circuit, under such circumstances, is to make an offer to prove the facts intended to be shown, and have an exception noted to the court's rejection of such offer; but for the present purpose we will treat counsel's opening as being, in effect, an offer to prove the facts stated by him. In substance it was an offer by one in possession under lease to set up a title hostile to the landlord. The principle that a tenant cannot, unless the tenancy was brought about by fraud, deceit, or misrepresentation by the landlord, contest a landlord's title, is based on wholesome reason and is firmly established. These grounds are summarized in Blight v. Rochester, 7 Wheat. 547, 5 L. Ed. 516, where it is said:

"This principle originates in the relation between lessor and lessee, and, so far as respects them, is well established, and ought to be maintained. The title of the lessee is in fact the title of the lessor. He comes in by virtue of it, holds by virtue of it, and rests upon it to maintain and justify his possession. He professes to have no independent right to himself, and it is a part of the very essence of the contract under which he claims that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease, and that possession shall be surrendered at its expiration. He cannot be allowed to controvert the title of the lessor without disparaging his own, and he cannot set up the title of another without violating that contract by which he obtains and holds possession, and breaking the faith which he has pledged and the obligation of which is still continuing and in full operation."

To the same effect are the cases of Thayer v. Society, 20 Pa. 62, Western Union Telegraph Company v. Penna. R. R. Co. (C. C.) 120 Fed. 380, affirmed 123 Fed. 33, 59 C. C. A. 113, affirmed on writ of error 25 Sup. Ct. 150, 49 L. Ed. 332, and Rankin v. Simpson, 19 Pa. 475, 57 Am. Dec. 668.

That the tenant was in possession prior to the lease and did not obtain possession by virtue of it does not change the rule. In the last case it was said:

"If a purchaser by parol take possession under his contract, and afterward attorn to the vendor as landlord, or fix upon himself any other character than that with which he entered, he lets go his equities, and his possession is referred to his new agreement. And where the agreement, as in this case, is reduced to writing in terms perfectly inconsistent with the idea of a parol sale, it becomes the most faithful memorial which ingenuity can devise or the law adopt."

To the same effect is Thayer v. Society, supra.

The assignments not being sustained, the judgment is affirmed.

PITTSBURGH LIFE & TRUST CO. v. NORTHERN CENTRAL LIFE INS. CO.

(Circuit Court of Appeals, Third Circuit. November 22, 1906.)

No. 1.

1. FRAUD—ACTION FOR DECEIT—GROUNDS.
   To sustain an action for deceit, there must have been a fraudulent intention on the part of defendant to deceive the plaintiff, and a false statement, made through carelessness, although without reasonable ground for believing it to be true, is not fraudulent if it was made in the honest belief that it was true.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 2, 4, 5.]

2. SAME—FACTS CONSIDERED.
   The fact that written statements, furnished by officers of an insurance company in negotiations for the sale of its property and business, were incorrect with respect to premiums collected and sums due from its agents, will not support an action for deceit by the purchaser, where it appears that the statements were prepared by employés for the company's own use prior to the negotiations, and there is no evidence whatever that the officers representing the company in such negotiations knew them to be inaccurate, or of any intention to deceive the purchaser.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 2, 4, 5.]

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

For opinion below, see 140 Fed. 888.

Frank Ewing and John S. Ferguson, for plaintiff in error.

W. S. Dalzell and Harold W. Fraser, for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and LANNING, District Judge.

LANNING, District Judge. This is an action for deceit. The plaintiff, the Pittsburgh Life & Trust Company, avers that on August 3, 1903, it entered into a contract with the defendant, the Northern Central Life Insurance Company of Ohio, in which the plaintiff agreed

to reinsure the policies of insurance issued by the defendant in force on August 1, 1903, and pay the defendant $104,515.30, in consideration for which the defendant agreed to transfer to the plaintiff certain mortgages, money, and other property particularly described in the plaintiff's statement of its case, and that, upon the execution of the contract, the plaintiff paid to the defendant the said sum of $104,515.30, and the defendant transferred to the plaintiff the said mortgages, money, and other property. The plaintiff also avers that previous to the execution of the agreement, and while negotiations between the parties were pending, the defendant, by its agents and officers, made to the plaintiff the following false and fraudulent representations: (1) That the defendant had just and valid claims against its agents amounting to the sum of $7,254.54, whereas, in fact, $5,000 of that amount was fictitious; (2) that no premiums falling due after August 1, 1903, upon policies reinsured by the plaintiff had been collected by the defendant, whereas such premiums to the amount of $2,501.18 had been collected by the defendant; (3) that the total amount of reserve required upon the defendant's policies in force on August 1, 1903, was $249,947, whereas by reason of a number of policies known as "Guaranteed Return Premium Policies" the reserve should have exceeded that sum by $3,090; and (4) that the total amount of reserve required upon the defendant's policies in force on August 1, 1903, was $249,947, whereas by reason of a number of policies known as "Special Guarantee Policies" the reserve should have exceeded that sum by $4,155. Each of these representations, it is further averred, was well known to the defendant, its agents, and officers to be false and fraudulent, and that the plaintiff was thereby deceived and suffered damage to the extent of $14,746.18.

The leading English case concerning the doctrine underlying an action for deceit is Pasley v. Freeman, 3 T. R. 51, decided in 1789. From this case, and the case of Derry v. Peek, L. R. 14 App. Cas. 337, decided by the House of Lords in 1889, the following rule is extracted and stated in 12 English Ruling Cases, at page 235:

"When a person, with a view to influence the conduct of another, willfully leads him into a false belief, and this other person acts accordingly to his hurt, the act is said to have been induced by fraud; and the former is liable to the latter in damages in an action for deceit. To constitute the fraud, it is not essential that the defendant was, or expected to be, benefited by the deceit; but it is essential that he should have been guilty of willful falsehood (or at least reckless disregard of truth) in the representations made."

This, by the decided weight of authority, sets forth the American doctrine on the same subject. To sustain an action for deceit, there must be fraud in the defendant, intention to deceive the plaintiff, and damage to the plaintiff. A false statement made through carelessness and without reasonable ground for believing it to be true may be evidence of fraud, but it does not necessarily amount to fraud. If made in the honest belief that it is true, it is not fraudulent, and does not support an action for deceit. Lord v. Goddard, 13 How. 198, 211, 14 L. Ed. 111; Ming v. Woolfalk, 116 U. S. 599, 6 Sup. Ct. 489, 29 L. Ed. 740; Marshall v. Hubbard, 117 U. S. 415, 6 Sup. Ct. 806, 29 L. Ed. 919; Union Pacific Railway Co. v. Barnes, 64 Fed. 80, 12 C. C. A. 48; Kimber v. Young, 137 Fed. 744, 70 C. C. A. 178.

Applying this rule to the case in hand, it would have been the duty of the court to submit the case to the jury, and not to have given judgment of nonsuit, as was done, provided there was any evidence from which the jury might properly have inferred that any agent of the defendant having authority to bind it by his representations knew, when the negotiations for the contract which led to its execution were pending, that the written statements of the defendant's policies, of the premiums collected and of the balances due from its agents, presented to the plaintiff, were false, and that they were presented with intent to deceive and injure the plaintiff. But we think the case is utterly barren of any evidence which would justify such an inference. It does not appear by whom the statements were prepared. The evidence, as it stands, proves that they were incorrect, but they were prepared some years before the plaintiff was organized and while the defendant was carrying on its business without any purpose of disposing of it, and were relied on as correct by the defendant in the transaction of its own business. Presumably the errors were the result of carelessness on the part of bookkeepers or other subordinate employés of the defendant. The proofs in the case fail to show that any of the officers of the defendant with whom the plaintiff carried on its negotiations leading up to the contract of August 3, 1903, had any knowledge whatever that the statements were incorrect, and there is nothing showing or tending to show that there was any intent on the part of any of those officers, or, indeed, of any of the employés or agents of the defendant, to deceive the plaintiff. We think, therefore, that the judgment of nonsuit was properly entered.

This conclusion makes it unnecessary for us to consider the other questions raised by the assignments of error and discussed by counsel, namely, whether the plaintiff is estopped by having undertaken to make for itself an investigation of the defendant's condition, or whether the court below was right in the views expressed on the subject of loss or damage to the defendant. On neither of these questions do we express any opinion.

The judgment of the Circuit Court will be affirmed, with costs.

HILDRETH v. DUFF et al.

(Circuit Court of Appeals, Third Circuit. November 21, 1906.)

No. 5.

1. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—CERTAINTY.

In a suit for specific performance of a contract, the burden of establishing the precise terms and certainty of the contract rests on the complainant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 383.]

2. SAME—EVIDENCE CONSIDERED.

Evidence considered in a suit for the specific enforcement of a contract by requiring the defendant to assign a certain patent to complainant, and *held* not to show with sufficient certainty that the contract covered the invention of such patent to entitle complainant to relief.

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

For opinion below, see 143 Fed. 139.

George P. Dike and Wm. A. Macleod, for appellant.

Kay, Totten & Winter (W. S. Dalzell, James I. Kay, Frederick W. Winter, and R. P. Elliott, of counsel), for appellees.

Before GRAY and BUFFINGTON, Circuit Judges, and LANNING, District Judge.

BUFFINGTON, Circuit Judge. This is an appeal of Herbert L. Hildreth from a decree of the Circuit Court for the Western District of Pennsylvania. In that court Hildreth filed a bill in equity against Duff and Kitzmiller to enforce, by assignment of a certain patent, specific performance of a contract entered into between complainant and one Charles Thibodeau, from whom respondents subsequently bought said patent. The respondents, Duff and Kitzmiller, then filed a cross-bill to quiet title to the patent. On final hearing the court entered a decree dismissing the original bill and granting the relief prayed in the cross-bill. Its opinion is reported in 143 Fed. 139. From such decree Hildreth took this appeal.

The contract on which the bill is based is as follows:

"Whereas, Herbert L. Hildreth, of Boston, candy manufacturer, is desirous of having perfected and manufactured a certain machine or machines for use in the manufacture of candy and especially for sizing, shaping, cutting, wrapping and packing, also the pulling of molasses candy, and whereas, I, Charles Thibodeau, being a skilled mechanic, and desirous of entering the employ of said Hildreth, for the purpose of constructing, improving and perfecting such machinery: Now, therefore, in consideration of such employment and of the payment of wages to me at the rate of ($3.25) three dollars and twenty-five cents per day, I hereby agree with said Hildreth to enter his employ, and that I will give him my best services, and also the full benefit and enjoyment of any and all inventions or improvements, which I have made or may hereafter make relating to machines or devices pertaining to said Hildreth's business. I also further agree that should said Hildreth not desire to patent any of said inventions or improvements, but to keep the same secret, I will do all in my power to assist him in this, and will not disclose any information as to the same or any of them, except at the request of said Hildreth."

This paper is not self-explanatory, and requires oral proof to supplement it. Now, when specific performance is sought of a contract, the burden of establishing the precise terms and certainty of the contract rests on him who seeks performance. Hennessey v. Woolworth, 128 U. S. 438, 9 Sup. Ct. 109, 32 L. Ed. 500. That burden the complainant has not met by showing the contract covered the invention noted in the patent here involved. That contract was dated May 29, 1897. It provided, as we have seen, that whereas, "Hildreth * * * candy manufacturer, is desirous of having perfected and manufactured a certain machine or machines for use in the manufacture of candy and especially for sizing, shaping, cutting, wrapping and packing, also the pulling of molasses candy," etc., that Thibodeau agreed in consideration of employment to give Hildreth "the full benefit and enjoyment of any and all inventions or improvements which I have made or may hereafter make relating to machines or devices pertaining to said Hildreth's business." When this contract was made,

Thibodeau was working on a machine for Hildreth which had a pulling, or, rather, a feeding process in which candy, already whitened, was pulled down to a required size to feed for cutting and wrapping in such machine. It was the improvement of a machine of this type the parties had in view when the contract was made. There is no evidence that during the three years of his employment by Hildreth Thibodeau worked on, or had his attention directed to, any other type of machine. This course of conduct is significant. Said Sudgen, Chancellor, in Attorney General v. Drummond, 1 D. & War. 368:

"Tell me what you have done under such a deed, and I will tell you what that deed means."

Some three years later a machine was built in the west in which the prior practice of whitening candy by hand pulling was first done by machinery. As soon as this came to Hildreth's attention, he himself devised a machine to whiten by pulling for which he obtained a patent. Thibodeau also seems to have devised at home at nights for which the patent in controversy was granted. The promptness with which Hildreth set to work when the idea of a machine of this novel type was brought to his attention, and the quickness with which both men devised machines to do that particular kind of pulling, afford persuasive evidence that neither when their contract was made or for three years thereafter had in view a pulling machine for whitening candy. Such a machine embodied a wholly different process and effected a totally different result from the pulling machine which Thibodeau had in view when he contracted to improve and give the full benefit of such improvement to Hildreth. Such being the case, we think it fair to conclude that there was no intent to cover by this contract the invention by Thibodeau of this radically different type of machine.

The appeal will therefore be dismissed, and the decree of the Circuit Court affirmed.

STEELE v. TANANA MINES R. CO.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1906.)

No. 1,308.

1. MINES AND MINERALS—PLACER MINING CLAIMS—NECESSITY OF DISCOVERY.
   An appropriate discovery of mineral is as necessary to the lawful location of a placer mining claim as to the location of a lode claim.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, §§ 23, 27.]

2. SAME—MINERAL CHARACTER OF PUBLIC LANDS—SUFFICIENCY OF DISCOVERY TO ESTABLISH.
   Under the established rule that, when public land is sought to be taken out of the category of agricultural lands, the evidence of its mineral character should be reasonably clear, the finding of colors of gold, even though fairly good prospects of gold, in placer prospecting, is not sufficient to establish the mineral character of the ground and to sustain a mineral location thereof as against a prior entry under the homestead laws.

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

The appellant filed his bill in equity, alleging that at the date of the commencement of the suit the appellee was engaged in constructing a line of railroad in the territory of Alaska, and that in such construction it had entered upon certain land claimed by the appellant as a placer mining claim located by him on November 3, 1904, and had cleared and graded a right of way and roadbed, and would, unless enjoined, construct a permanent roadbed over and across said placer mining claim, lay the ties and railroad iron necessary for the operation of its railroad, and construct a passenger depot near the southerly line of said placer claim. The prayer of the bill was that the appellee be restrained from entering upon said placer claim and from doing anything further in constructing said roadbed and railway, and that such injunction be made perpetual. The appellee in its answer justified its possession of the premises in controversy under a grant of a right of way from certain entrymen of homesteads under entries made prior to the date of the location of the placer claim, to-wit, on April 25, 1903. The trial court on the issues presented found for the defendant on two grounds: First, that the appellee obtained grants of its right of way and terminal grounds from persons claiming and actually occupying and holding said ground as homestead claimants under entries made prior to the location of the appellant's placer mining claim; and, second, that the appellant failed to show upon the trial a valid mineral location of the lands described in the complaint, or to prove that said lands were mineral lands subject to entry under the mining laws. The decree was that the bill be dismissed.

Louis K. Pratt and Pratt & Johanson, for appellant.

Carr & Nye, for appellee.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

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

We find it necessary to consider only the second ground on which the court found the equities with the appellee and dismissed the bill. The trial court upon the evidence found that there had been no discovery of mineral sufficient to sustain the placer location. Although in some instances courts have questioned the necessity of an actual discovery of mineral upon gold placer ground, it is established by the decided weight of authority that appropriate discovery is as necessary to the location of a placer claim as to the location of a lode claim. 1 Lindley on Mines, § 437; 20 Am. & Eng. Ency. of Law, 708, and cases there cited.

The evidence of the discovery of mineral on the placer claim is as follows: The appellant testified that for about 10 days prior to locating the claim he prospected the ground, and in so doing panned frequently, with the result that in most instances he secured colors of gold and in some instances fairly good prospects of gold. Another witness, one Woodward, who was hired to further prospect on the claim, testified that the result of his panning "showed colors of gold in each instance, and many of such pans showed what miners and prospectors are in the habit of calling 'good prospects' of gold." The testimony of another witness was that he panned several pans of gravel and dirt on said claim and found colors of gold in each instance, and that, while there he saw several pans washed out by Mr. Woodward with somewhat better results, all of said pans contained colors readily and easily seen and in some instances quite a number of them. The sum and substance of this evidence is, not that gold had been discovered on the claim in

such quantities as to justify a person of ordinary prudence in further expending labor and means with a reasonable prospect of success, but that colors of gold had been found which were fairly good prospects of gold. Doubtless, colors of gold may be found by panning in the dry bed of any creek in Alaska, and miners, upon such encouragement, may be willing to further explore in the hope of finding gold in paying quantities. But such prospects are not sufficient to show that the land is so valuable for mineral as to take it out of the category of agricultural lands and to establish its character as mineral land when it comes to a contest between a mineral claimant and another claiming the land under other laws of the United States. In Chrisman v. Miller, 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770, the Supreme Court affirmed the doctrine, which had previously been announced (1 Lindley on Mines, § 336, and cases there cited), that, when the controversy is between two mineral claimants, the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural or other entry under the land laws. The reason for this distinction is said to be that, when land is sought to be taken out of the category of agricultural lands, the evidence of its mineral character should be reasonably clear, while in respect to a controversy between rival claimants to mineral land the question is simply which is entitled to priority. That doctrine is applicable to the present case. A greater portion, if not all, of the land of the appellant's placer claim had been previously entered under the homestead law, and as to the remainder, if remainder there were, it was subject to appropriation by the railroad company under Act May 14, 1898, c. 299, 30 Stat. 409 [U. S. Comp. St. 1901, p. 1412], granting rights of way over public lands of the United States in the territory of Alaska to such railroad companies as should accept the grant and evidence their acceptance in the manner required by the act. In Chrisman v. Miller, the court approved the ruling of the Land Department in Castle v. Womble, 19 Land Dec. Dep. Int. 457, as follows:

"Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby 'all valuable mineral deposits in lands belonging to the United States * * * are * * * declared to be free and open to exploration and purchase.'"

The court quoted with approval, also, the following from Lindley on Mines, § 336:

"The facts which are within the observation of the discoverer, and which induce him to locate, should be such as would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property."

The decree of the District Court is affirmed.

DECKER v. KEDLY.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1906.)

No. 1,293.

HUSBAND AND WIFE—RIGHTS OF ACTION BETWEEN—ACTION BY WIFE FOR DAMAGES.

A wife cannot, either before or after divorce, maintain an action to recover damages from her husband for his failure to supply her with the necessaries of life, or for any other act or failure of duty connected with or arising from the marital relation.

In Error to the District Court of the United States for the District of Alaska, Division No. 1.

On February 7, 1905, the plaintiff in error brought an action against the defendant in error to recover damages. She alleged in her complaint that from August 22, 1902, until January 18, 1905, she and the defendant in error were husband and wife; that during the whole of that time the defendant in error, although he was sound in body and pecuniarily able to furnish his family with the necessaries of life, willfully, wrongfully, and wantonly refused, failed, and neglected so to do; that by said willful, wrongful, and wanton acts of the defendant in error the plaintiff in error has been damaged in the sum of $2,071.75. She demanded judgment for said sum, and for $2,000 additional thereto as exemplary damages. The defendant in error demurred to the complaint on the ground that it stated no cause of action. The demurrer was sustained, and judgment was entered for the defendant in error. To review that judgment the plaintiff in error brings this writ of error.

E. M. Barnes, for plaintiff in error.

R. F. Lewis, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and DE HAVEN, District Judge.

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

This case may be disposed of in a few words. A woman sues a man for damages on the ground that the latter, during the time while he was her husband, wantonly refused to supply her with the necessaries of life. The allegations of the complaint leave it uncertain whether at the time of bringing the action the parties thereto had been divorced. It is not important to the decision of the question here involved whether there had or had not been a divorce. In either case the allegations of the complaint present no cause of action. It is true that the statutes of Alaska, as do those of many of the states, remove certain disabilities which at common law attend the wife during her coverture, and declare that neither the husband nor the wife shall have an interest in the property of the other, provide that should either obtain the possession of the property of the other the latter may maintain an action therefor in the same manner and to the same extent as if they were unmarried, and make further provision that neither shall be liable for the other's debts. Such statutes do not mean that the husband is answerable to the wife in damages for failure to supply her with the necessaries of life, or for any other act or failure of duty connected with or arising from the marital relation, and it has never been so held. Such a right of action, it is

enough to say, has not been conferred by the statutes of Alaska, is wholly at variance with the theory of the marital relation, and is unknown to English or American jurisprudence.

The judgment of the District Court is affirmed.

LEE JOE YEN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1906.)

No. 1,266.

1. APPEAL—REVIEW—OMISSION TO MAKE FINDING.
   The omission to make findings will not be considered in an appellate court in the absence of a request therefor in the court below.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1315.]

2. ALIENS—DEPORTATION OF CHINESE—SUFFICIENCY OF EVIDENCE.
   Evidence *held* to sustain a judgment ordering the deportation of a Chinese person as being unlawfully within the United States.

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, James Cole, and Edward E. Cushman, Special Asst. to Atty. Gen., for the United States.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

GILBERT, Circuit Judge. This is an appeal from the judgment of the District Court affirming the order of a United States Commissioner, and adjudging that the appellant be deported to China, whence he came. The judgment recites that the appellant is a Chinese laborer and a subject of the emperor of China; that he is not registered as required by the acts of Congress approved May 5, 1892 (27 Stat. 25, c. 60 [U. S. Comp. St. 1901, p. 1319]), and November 3, 1893 (28 Stat. 7, c. 14 [U. S. Comp. St. 1901, p. 1320]), and that he does not belong to one of the excepted classes of Chinese persons.

As grounds for reversal, the appellant relies on the point that the court erred in not making and filing findings of fact and conclusions of law, and that the judgment is contrary to the evidence. Without passing upon the question whether in this summary proceeding findings are necessary, it is a sufficient answer to the first point to say that no findings were requested in the court below. The omission to make findings will not be considered in an appellate court, in the absence of a request therefor in the court below. 2 Cyc. 729; Hicklin v. McClear, 18 Or. 137, 22 Pac. 1057; Umatilla Irrigation Co. v. Barnhart, 22 Or. 389, 30 Pac. 37; Noland v. Bull, 24 Or. 481, 33 Pac. 983; Tatum v. Massie, 29 Or. 140, 44 Pac. 494; Crisfield v. Neal, 36 Kan. 278, 13 Pac. 272; Kruck v. Prine, 22 Iowa, 570.

We find no ground for saying that the judgment was contrary to the evidence. The court below was influenced largely by the unexplained fact that the appellant came to Portland, the place where he was arrested, surreptitiously and by a devious route. In addition to this, his testimony was discredited by his own previous contradictory statements made before the immigration officer. The burden of proof was upon him to establish by affirmative proof to the satisfaction of the court below that he was entitled to be and remain in the United States. Li Sing v. United States, 180 U. S. 486, 21 Sup. Ct. 449, 45 L. Ed. 634. He failed to sustain that burden. We entertain no doubt of the correctness of the judgment.

It is affirmed.

MEILY CO. v. LONDON & LANCASHIRE FIRE INS. CO.

(Circuit Court of Appeals, Third Circuit. December 3, 1906.)

No. 12.

INSURANCE—ACTION ON POLICY BY CORPORATION—DEFENSE OF WILLFUL BURNING.

Evidence which warrants a finding that the property of a corporation plaintiff was willfully burned by its president, who had full control of its affairs and was the owner of practically all of its stock, the remainder being owned by members of his family; that the business was on the decline, the lease about to expire, and the property overinsured; and that the overvaluation was participated in by other members of the family—is sufficient to charge the corporation with the act of incendiarism, and to constitute a defense to an action to recover the insurance.

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

For opinion below, see 142 Fed. 873.

A. H. Wintersteen, for plaintiff in error.

Frank R. Shattuck, for defendant in error.

Before DALLAS, GRAY and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. This is a writ of error to the Circuit Court for the Eastern District of Pennsylvania. In that court the Meily Company, a merchandizing corporation, brought suit against the London & Lancashire Fire Insurance Company to recover on two fire insurance policies—one upon its store goods, and the other on its store fixtures. The insurance company defended, inter alia, on the ground the plaintiff had set fire to the store. The jury found for the defendant, and the plaintiff sued out this writ.

While there are numerous assignments of error, the case may be treated from the aspect well summarized in the brief of the plaintiff in error, viz.:

"The verdict was practically equivalent to a finding that the plaintiff corporation intentionally and fraudulently caused the fire, or knowingly participated in an act of incendiarism upon the stock and fixtures destroyed, and therefore it was not entitled to recover."

Now such verdict would be warranted if the jury found that George W. Meily, the president of the plaintiff company, was the actual owner of all of its stock and that he set fire to the store in question, or, in case he was not the sole owner, that he set fire to the store with the assent of his fellow shareholders; Kirkpatrick v. Allemania Fire Insurance Company (N. Y.) 102 App. Div. 327, 92 N. Y. Supp. 466. The testimony in the case is so voluminous, the trial lasting more than a week, that it cannot be here quoted at length; but we have carefully examined it all. Without referring in detail to the evidence, and noting the fact that there was testimony to the contrary, we find that facts were proved from which the jury could infer that the business of the plaintiff was on the decline to a marked degree; that the lease had nearly expired and the landlord was unwilling to extend it; that the property was insured in excess of its value; that the plaintiff company was a family corporation; that the business was really George W. Meily's, and was carried on in corporate form as a cloak to shield it from his creditors; that the fire was caused by his incendiary act; and that the participation by his sons in the alleged overvaluation of the stock afforded ground from which the jury could infer their acquiescence in the alleged incendiarism. The jury having before it evidence of facts from which such inference could be drawn, "it is not within the province of this court to inquire, or by deduction to surmise, how the whole or any part of that evidence was dealt with by the jury." Lear v. United States, 147 Fed. 349. Such being the case, the testimony of the witness Sponsler tending to show the alleged incendiarism was properly admitted, and no error was made in the answer to the points.

The allusion in the charge to George W. Meily as the plaintiff was a mere verbal slip, which could not have misled the jury, in face of the clear and repeated statements therein that the Meily Company was the plaintiff.

The judgment will be affirmed.

WINTERS et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1906.)

No. 1,336.

INDIANS — LANDS — RESERVATION — APPROPRIATION OF WATER FROM PUBLIC STREAM—CONSTRUCTION OF INDIAN TREATY.

The Indian treaty of May 1, 1888 (chapter 213, 25 Stat. 124) by which the Ft. Belknap Reservation in Montana was reduced in size, and "the middle of the main channel" of Milk river made its northern boundary, by implication reserved to the Indians the right to a portion of the waters of such river for irrigating purposes, which right is paramount to that of persons subsequently taking desert land claims on the public lands adjacent to the river.

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

E. C. Day, James A. Walsh, Carpenter, Day & Carpenter, and Walsh & Newman, for appellants.
Carl Rasch, for appellee.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

GILBERT, Circuit Judge. This is the second appeal in this case. The former appeal was taken from an interlocutory order granting a preliminary injunction pendente lite enjoining the appellants from using or in any manner interfering with the use by the government of the United States or the Indians, upon the Ft. Belknap Indian Reservation, of 5,000 inches of the waters of Milk river and its tributaries in the district of Montana. Winters v. United States (C. C. A.) 143 Fed. 740. The present appeal is taken from the final decree entered in said cause upon the bill and answer making the preliminary injunction perpetual. It is admitted that the answer sets forth the same facts that were presented in the affidavits on which the preliminary injunction was granted. We have carefully considered the record, and we find that the questions here presented are precisely the questions which were discussed and determined upon the former appeal, and that the record brings to our attention no new issues or questions. The appellants cite a case not considered on the former appeal (United States v. Choctaw Nation, 179 U. S. 494, 21 Sup. Ct. 149, 45 L. Ed. 291), and earnestly insist that under the principles there announced the treaty which is involved in the present case should be construed in accordance with their contention. In that case the court construed the following provision of a treaty with Indians:

"The Choctaws and Chickasaws, in consideration of the sum of $300,000.00 hereby cede to the United States the territory west of the ninety-eighth degree of west longitude known as the Leased District."

The contention was that the lands were conveyed in trust, but the court held that the treaty made an absolute, unconditional cession to the United States, and in the course of the opinion used the following language, which is relied upon by the appellants herein:

"It has never been held that the obvious palpable meaning of the words of an Indian treaty may be disregarded because in the opinion of the court that meaning may, in a particular transaction, work what it would regard as injustice to the Indians."

And the court said in substance that if the words of the treaty reasonably interpreted import beyond any question an absolute unconditional cession of lands, free from any trust, the court had not the power to amend the treaty "merely because one party to it held the relation of an inferior and was politically dependent upon the other, or because in the judgment of the court the Indians may have been overreached." We think, upon a careful consideration of the authority so cited, that it not only does not conflict with the construction which we have placed upon the treaty with the Indians of the Ft. Belknap Reservation, but that it is in entire harmony therewith. It affirms the doctrine that the intent of the parties to an Indian treaty should be ascertained by apply-

ing the established rules for the interpretation of treaties, and that those rules permit the relation between the Indians and the United States to be taken into consideration. Our former decision does not disregard "the obvious palpable meaning of the words of an Indian treaty," nor does it incorporate therein something which is inconsistent with the clear import of its words. It construes and gives effect to what we understand to be the obvious meaning and intent of the treaty, and holds that by the expressed terms of that treaty there was reserved to the Indians the waters of Milk river as a part and parcel of the reservation set apart to them. We find no ground to question the correctness of our former decision.

The decree of the Circuit Court is affirmed.

LOUDEN MACHINERY CO. v. JANESVILLE HAY TOOL CO.

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

No. 1,254.

1. PATENTS—INFRINGEMENT—HAY CARRIERS.

The Burkholder patent, No. 490,738, for an adjustable stop device for hay carriers, is limited as to all of its claims to a device having extending wings as shown in the specification and drawings. As so construed, *held* not infringed.

2. SAME—INVENTION.

The Louden patents, Nos. 493,216 and 526,839, both for track hangers for hay carriers, show only combinations of old elements each previously used to perform the same functions in analogous arts, and are void for lack of invention.

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

For opinion below, see 141 Fed. 975.

The complainant below, the Louden Machinery Company, appeals from a decree upon final hearing dismissing its bill, which alleges infringement by the appellee of three patents owned by the appellant.

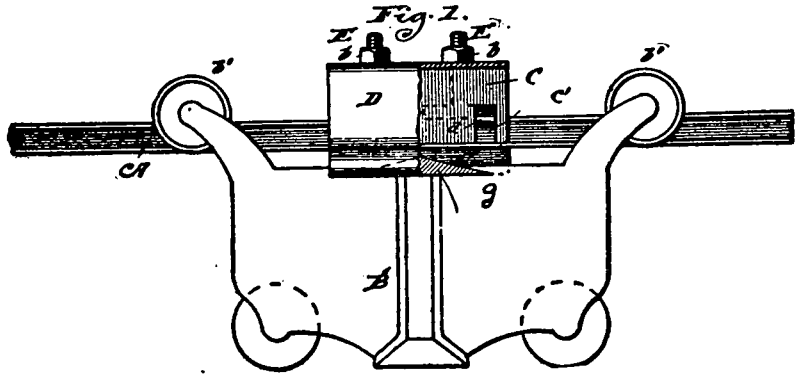
The several patents and their claims, respectively, involved in the controversy are as follows:

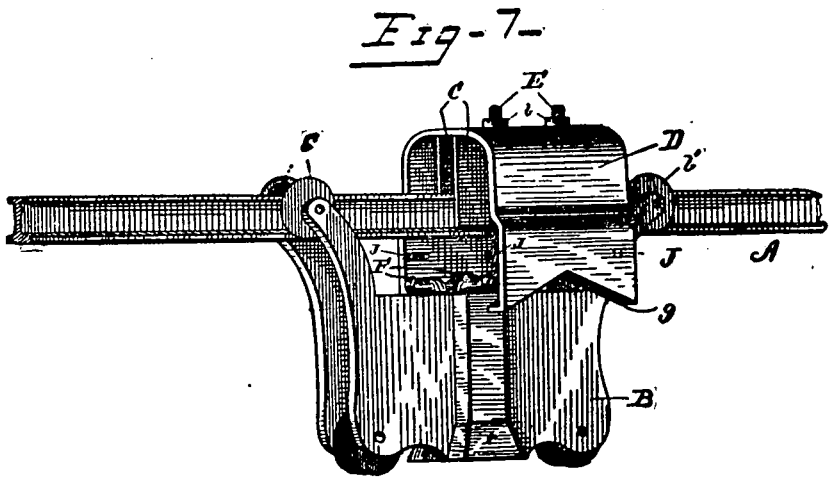
First. Patent No. 490,738, issued to John H. Burkholder January 31, 1893, which is called in the record the "stop block" patent. It states the object of the invention: "To provide a suitable stop for hay carriers, which can be easily adjusted to any point along the suspended track upon which said hay carrier travels; which does not interfere in any way with the lateral flanges of the track upon which the truck of such carrier travels, and which does not require any tapping or other mutilation of the said track, substantially as hereinafter fully described, and as illustrated in the drawings."

The main specification is as follows: "My invention consists of a casting having two corresponding vertical lugs, C, C, which are parallel to each other and are separated a distance corresponding to the width of the bead on the upper edge of the vertical part of track, B, so that they may rest upon the basal flanges thereof on either side of its vertical part. These lugs are connected a suitable distance above the track by a suitable web and have projecting laterally outward from their upper ends the wings or arms, D. These wings, D, are elevated such a distance above the tread of the rail that the travelers of the hay carrier truck can easily pass under them, and the extent of their lateral projection is such that the frame work of the upper part of the hay carrier when passing thereunder will not interfere with the vertical

part of said wings which extend downward to a suitable point below the frame of the rail where their lower edges are turned inward a suitable distance so as to arrest and stop the further progress of the hay carrier when traveling toward it. These wings constitute one of the most important features of my invention, and they may be of any shape or design desired which will permit their lower ends to get in such position that they will stop the progress of the hay carrier by reason of the end of the carrier striking against said stop, or by reason of a suitable lateral projection, J, of the hay carrier striking against the end adjacent to the free extremities of the wings, substantially as shown in Fig. 1. It is obvious, then, that they may be made of a more open construction than that shown in the accompanying drawings and yet serve the purpose of my invention."

Figures 1 and 7 of the patent drawings illustrate the invention.



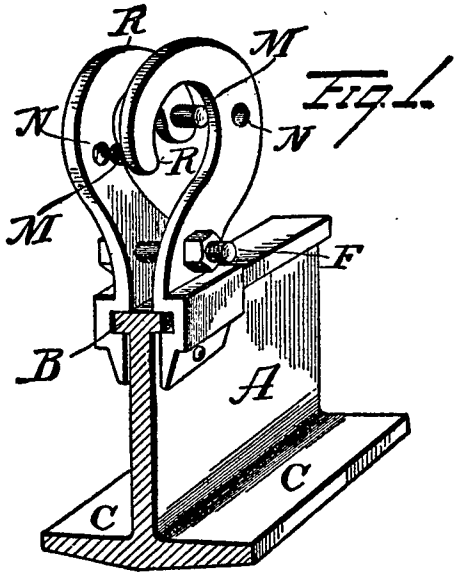


There are six claims in the patent, but claim 1 is relied upon, reading as follows: "(1) The combination with an inverted T-shaped track, and a hay carrier stopping device secured to and over the vertical portion of said track, and carying on both sides the double inclined lug, g, of a hay carrier having a vertically movable catch block, F, the upper ends of which extend above the

sides of said carrier and have lateral projections, which engage with said inclines, as set forth."

Second. The second patent, called a "track hanger patent," is No. 493,216, issued to William Louden March 7, 1893, for "Hay Carrier Track," which states the invention to be "in hay carrier tracks wherein an inverted metal T-rail is used for the track, and it has for its object the arrangement of the track hangers so that they can be readily attached to any part of the smaller upper flanges of said rail without having to drill holes in the rail or cut away any part of the flanges, so that it can be properly suspended and the lower and larger flange left free for the passage of the carrier over them, all this being accomplished by the use of my improved track hangers without the employment of any extra clamps or other rigging except the means necessary to hold the hanger in position on the rail. I attain this by the mechanism illustrated in the accompanying drawings."

The following drawing shows the device:



Claims 1, 6, 7, and 8 are involved, as follows:

"(1) In hay carriers, a track suspending device consisting of two separable parts having means at their lower ends to embrace the edge of a track rail, and at their other ends means to catch over an extraneous supporting device, the said parts being arranged side by side, and means for holding the two parts together, substantially as set forth."

"(6) A track suspending device consisting of two parts having flanges at their lower ends adapted to fit under the flanges of the rail, extensions, O, resting against said web, a suspending loop at the upper ends of the parts and means for holding the two parts together.

"(7) In a hay carrier, the combination with an inverted T-rail, of a suspending device consisting of two separable parts having means at their upper ends to embrace the upper edge of the rail leaving the side flanges free for the passage of the carrier, a loop at their other ends for attachment to an overhead support, and means for locking the two parts of the suspending device together, substantially as set forth.

"(8) A track suspending device consisting of two separable parts constructed at one end to embrace the edge of a track rail and at the other end to form a

loop, the two parts being arranged side by side, and means for holding the two parts together."

Third. The third patent, also called a "track hanger" patent, is No. 526,839, issued to William Louden, October 2, 1894, for a "Hay Carrier Apparatus." The claims in suit are 1, 2, 3, and 4 (of the 15 claims in the patent), and they sufficiently describe the device, as follows:

"(1) In hay carriers the combination of a metallic track having an upper central web, a two part clamping device to embrace the web and a threaded bolt and nut to hold the parts together, said clamping parts where the bolt passes through them being set to one side of the center line of the track, substantially as and for the purpose set forth.

"(2) In hay carriers, the combination of a metallic track having an upper central web, a two part clamping device to embrace the web and a threaded bolt and nut to hold the parts together, one of said clamping parts being dished into the other one where the bolt passes through them, so as to set the head of the bolt further from the center of said track than the nut of said bolt."

"(3) In hay carriers, the combination of a metallic track having an upper vertical web and two horizontal side flanges, a two part hanging device adapted to clamp upon the web and support the track, a carrier adapted to traverse the side flanges and having an opening through its upper edge to escape the hanger, and a threaded bolt and nut to hold the parts of the hanger together, said clamping parts, where the bolt passes through them, being set to one side of the center line of the track, substantially as, and for the purpose set forth."

"(4) In hay carriers, the combination of a metallic track having an upper vertical web, and two horizontal side flanges, a two part hanging device adapted to clasp upon the web and support the track, a carrier adapted to traverse the side flanges and having an opening through the upper edge to escape the hanger, and a threaded bolt and nut to hold the parts of the hanger together, one of the parts of said hanging device being dished into the other part where the bolt passes through them, so as to set the head of said bolt further from the center of said track than the nut of the bolt."

W. Clyde Jones, for appellant.

Chas. K. Offield and Albert H. Graves, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

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

The parties to the controversy are manufacturers of hay carriers, among other products, with various devices in the field for competition in their sale. Owning three patents adapted to conjoint use in a hay carrier, the appellant sues for alleged infringement by the appellee in such use. The first patent in suit is No. 490,738, for an "adjustable stop device for hay carriers," issued to J. H. Burkholder January 31, 1893, and the defense of noninfringement is upheld by the opinion filed below. Upon the other patents, both issued to William Louden, for track hanger devices—No. 493,216 of March 7, 1893 and No. 526,839 of October 2, 1894—the fact of infringement is unquestionable, but the court was of opinion that each was invalid for want of invention and relief was denied in conformity with that view. Each of these patents in suit presents the meritorious features of utility and simplicity. The issue referred to under each is within narrow compass, but is, nevertheless, not free from difficulty in respect of the two track hanger patents.

1. When Burkholder applied for the patent, issued as No. 490,738, hay carriers were common, with analogous devices, as mentioned and exemplified in Boyd v. Janesville Hay Tool Co., 158 U. S. 260, 261, 15 Sup. Ct. 837, 39 L. Ed. 973; and he was merely an improver upon the means for an adjustable stop-block. The claim of novelty rests on the adaptability of the stopping device to adjustment on inverted T-rail tracks without "tapping or other mutilation" of the track. In the specifications of the patent the invention is described as "a casting having two corresponding vertical lugs, cc"—located with reference to each other and the bead of inverted T-rail tracks as specified—connected above the track by a web and having "projecting laterally outward from their upper ends the wings or arms, D." These wings are arranged so that "the travelers of the hay carrier truck are easily passed under them," and the "carrier will not interfere with the vertical part of said wings which extend downward to a suitable point below the frame of the rail, where their lower edges are turned inward" for stopping the carrier; and it is further specified that the wings "constitute one of the most important features of my invention, and they may be of any shape or design" which will serve such purpose, or "may be made of a more open construction than that shown" in the drawings. All the claims except the first expressly mention these wings, D D, as elements of the combination, while claim 1 which is relied upon, states the combination in more general terms, namely:

"An inverted T-shaped track, and a hay carrier stopping device secured to and over the vertical portion of said track, and carrying on both sides the double inclined lug, g, of a hay-carrier having a vertically moving catch block, F, the upper ends of which extend above the sides of said carrier and have lateral projections which engage with said inclines, as set forth."

The device made by the appellee alleged to be an infringement is even simpler than that specified in the patent. The so-called "double incline lug" is used, with the vertical T-rail; but it is secured to the top of the rail web, stands above the rail, and is thus adapted to engage the trip mechanism of the hay carrier. So arranged, the wings specified in the patent, to carry the inclined lugs below the rail, are, of course, obviated, and no element is employed which answers their description. Nevertheless, it is contended that claim 1 is infringed, that such claim is generic and the wings were omitted in that view, and that claim 1 is not otherwise distinguishable from claim 2, which includes the wings, and must therefore be broadly construed as covering the appellee's structure.

The question of interpretation thus raised calls for no detailed review of the prior art disclosed in the various patents in evidence, as facts and circumstances which are deemed sufficient to that end are either conceded or established beyond doubt; nor is it needful to discuss the merits of the invention, or the classification in the appellant's brief of the stages of evolution in stop-block means of which the patent is assumed to be the "culminating step." In the first place the patentee, in his specifications, has carefully guarded against prior references both by definition of his invention—as resting in his novel form of casting and arrangement of stop device and lugs, with special reference

to the wings as "one of the most important features"—and by disclaimer of novelty in the hay carrier, or in "the catch block, F, except so far as the extending outward of the extremities thereof is concerned when used in conjunction with my invention." It is settled by the evidence, as well, that use of the inverted T-rail and of the "double inclined lugs" appeared in like prior combinations with these elements for hay carriers, and we are satisfied, not only that the scope of the patentee's invention was narrow in fact, but that such limitation was advisedly recognized in his specifications, and is conclusive against the broad interpretation now sought.

As claim 1 was allowed by the Patent Office with no express mention of the wings, aside from the mention of a stopping device secured to and over the track "and carrying on both sides the double inclined lug, g," and is thus susceptible, when read either alone or on reference to claim 2, of interpretation for generic means to carry the lugs, it may be true, in the absence of other proof of the intention of the parties to the grant, that such interpretation would be subject only to the test of validity. The contract, however, is within the cardinal rule that the manifest intention of the parties must govern its construction (vide O. H. Jewell Filter Co. v. Jackson, 140 Fed. 340, 343, 72 C. C. A. 304), and the evidence is unmistakable, as we believe, that the carrying means referred to were understood to be the so-called wings specified in the patent, varied only as there stated, "of any shape or design desired which will permit their lower ends" to contact with the carrier and perform their function, "substantially as shown in Fig. 1."

This understanding of the grant appears throughout the specifications, without qualification, and is confirmed by the attending circumstances of the grant to one Myers of letters patent No. 466,616 January 5, 1892, which describes a hay carrier stop-block, without the wings and identical with the appellee's structure. While this patent was issued more than a year in advance of the patent in suit, the application for it was filed 11 days after that of Burkholder, so that they were for a time co-pending in the Patent Office. No interference was declared, as the rules of that office required in case the claims were deemed conflicting, or the claim of the one included that of the other (Ex parte Upton, 27 Off. Gaz. 99), and the priority of invention rested there—as it rests here—on the date of filing. That the existence of the Myers' patent was recognized and its drawings cited during the pendency of the Burkholder application is a conceded fact. Whether the failure to declare interference was intentional or inadvertent, or whether the language of claim 1 was duly observed in the allowance, are not pertinent inquiries upon the present issue. The fact of the allowance, with the grant to Myers in view, and under the circumstances stated, is presumptive of an understanding that claim 1 was limited to the structure substantially as described—not in conflict with Myers' device—and of purpose to confer monopoly within such scope. The presumption thus arising would not overcome the grant for an invention which was broadly specified and broad in fact; but we are of opinion that it is consistent with the specifications of the Burkholder patent and conforms to the utmost scope of invention under the evidence.

The claim in suit was construed by the trial court in accord with this view, and it was rightly ruled thereupon that patent No. 490,738 was not infringed.

2. The first track hanger patent of Louden, No. 493,216, describes an adjustable means for the suspension of an inverted T-rail for use in hay carrier tracks. It is a simple structure of a pair of sister hooks or loops, to be clamped upon the rail by means of a bolt or slip-ring, and provided at the lower end with groove or flange to engage the flange of the rail. Like means were in common use for analogous purpose, and the want of novelty in the mechanism is not seriously disputed; but it is contended, in substance, that this means was not used for a track hanger, although "long sought in the hay-carrier art," and that "the difficulty of attaining the idea" to adapt the means to this use involved patentable invention (vide Hobbs v. Beach, 180 U. S. 383, 393, 21 Sup. Ct. 409, 45 L. Ed. 586), even if the "mechanical alterations" were otherwise without that quality. The rule is unquestionable that new adaptation of old means may constitute invention—that the test may reside in the creative thought, rather than the mechanical difficulties to be overcome—but it is equally well settled that monopoly cannot be granted for an adaptation which is merely a double use, or calls only for the exercise of ordinary mechanical skill. So the rule referred to furnishes no solution of the present issue, whether the use of this means to support the track of a hay carrier involved invention in the sense of the patent law, or mere mechanical skill. The line of distinction between the one and the other attribute is incapable of clear general definition, and the grant of a patent which is rightly presumptive of invention should not be defeated as wanting that quality, unless the prior art plainly taught such adaptation. But, when analogous use of the means is well known and no substantial departure appears in the patentee's adaptation, monopoly cannot be authorized within the policy of the law.

The argument of counsel and experts in support of the appellant's contention rests upon an array of hay-carrier devices—from the crude beginnings with tracks of "wooden beams fixedly mounted in position" to the present development, referred to in the foregoing discussion of patent No. 490,738—and the so-called evolutions of this art are therein classified as showing nine steps in the development of the track-hanger means, with extended references to the devices and the means shown in each for carrying the track, culminating in the patent in suit, which discloses the first use of a two-part hanger, or sister hooks. Our examination of the patents referred to leads to the conclusion that the array is more specious in the classification than pertinent in the actual facts to the present inquiry, and that they do not sustain the contention, either of long-standing want of means to suspend the T-rail track of a hay carrier, or of extended and unsuccessful effort by inventors to solve the alleged problem. Indeed, the adoption of the inverted rail for the hay carrier was too recent at the time Louden claims to have invented his hanger, to afford room for the evolution recited.

The provision for support of the track in most of the patents referred to was merely incidental to the invention described in each, and

well adapted to the special track; and the evolution as classified was in hay carriers, and not track supporters, except that three of the references for the last three classifications were for improvement in metal tracks which included suspension means and two (of 1890) were for supports. These devices for tracks and supports are Ney's patent (1883) No. 287,772; Grosscup's (1884) No. 293,452; Myers' (1886) No. 340,055; Porter's (1890) No. 423,274; and Myers' (1890) No. 440,602. In the patents of Ney and Grosscup the essence of the claim in each was the special form of track, with the simple form of hook, as an incidental (adjustable) hanger means—one with "T-shaped heads" to embrace and support the "angle-irons" and the other inserted through holes in the "channel iron"—and each ample for the purpose. Myers' patent of 1886 was for a special form of double track and means for coupling the tracks together, with like simple form of hook, which was adjustable between and clamped the rails, and performed its functions completely. With the 1890 patents of Porter and Myers the track hanger makes its first appearance as the feature of alleged invention, the one arranged to slip over and embrace the bead of an inverted T-rail, and the other bifurcated at the lower end having gripping jaws to engage the rail and was then secured by a bolt or slip ring. Porter thus had another object in view—to carry the hanger (adjustably) on the rail and avoid clamping—for which the device was effective, so it is not in point (laying aside the matter of its recent date), and the Myers last-mentioned patent appears to be the only one which shows prior effort directed to the special problem which was solved by Mr. Louden, notwithstanding the parade of such efforts mentioned in his testimony; and even these patents of 1890 are not to be considered in this view, if the Louden device was actually perfected, as he states, prior to either application.

The question of invention, therefore, as we believe, is not aided materially for solution by these references, nor can its consideration be narrowed to the field of hay-carrier devices. The need of suspension means for a track which will accommodate various carriers is not uncommon, and each adaptation to the special purpose is not per se entitled to a patent. When invention is claimed of the means so adapted, it must be tested as well by the general art; and the claims in suit are subject to such broad inquiry as indicated in the opinion of the trial court. The suspension means of the so-called sister hooks or loops, in the patent device, were plainly without novelty for such purpose. Their general definition in the Standard Dictionary—as "a pair of hooks so mounted that they face and overlap each other; match hooks"—is mentioned in the opinion below as recognition of like form and use. Familiar examples appear on singletrees for a wagon, in harness for a horse, and in the clip hooks for vessel rigging. In Patterson's Nautical Encyclopedia, "clip hooks" are thus defined:

"Two regular shaped iron hooks having one side flat, suspended (reversed to one another) from a small iron thimble. By overlapping, these two shapes form one complete inclosing hook. These are also known as sister hooks."

Substantially identical means and use, moreover, for clamping and suspending a rail, appear in Forshey's patent of 1888, No. 308,483, for

a "track fastener," and in Daft's of 1887, No. 361,676. The means for clamping the rail are met in P. A. Myers' patent of 1884, No. 307,725, for a hay carrier, and that structure, although not in the sister-hook form, appears to answer the language of three of the claims in suit.

We perceive no escape from the conclusion that the means described in each of the claims were thus within public knowledge, and that the adaptation to suspend the inverted T-rail in the improved hay carrier, when need arose, to accommodate the improved means, was not, for such function, patentable invention.

3. The remaining patent of Louden, No. 526,839, includes another form of clamping or suspension device for hay carriers, wherein the two parts are "dished," so that the bolt and nut will not project to interfere with the carrier; or, in the language of appellant's brief, "to carry the nut and threaded end of the bolt inward toward the medial line, thus equalizing the position of the bolt as a whole." Of the claims in suit, the first two appear to be drawn broadly for a clamping device, and the other two for a two-part hanger. The method pointed out of "dishing or setting to one side" is the only feature of the device which differs from the claims of the above-mentioned patent No. 493,216, and this expedient, commonly called "countersinking," is so well known that it would surely occur to the mechanic whenever it was discovered that the bolt interfered or was liable to interfere with the operating of the carrier. We are of opinion that such provision is plainly within the range of ordinary mechanical skill—not the "inventive idea" for which the appellant contends—and that no patentable feature appears in these claims, under the general doctrine above stated in reference to No. 493,216.

The decree of the Circuit Court conforms to the foregoing views, and is affirmed.

ELECTRIC STORAGE BATTERY CO. v. GOULD STORAGE BATTERY CO.

(Circuit Court, S. D. New York. October 11, 1906.)

PATENTS—INFRINGEMENT—ELECTRIC CURRENT REGULATOR.

The Mailloux patent, No. 430,868, for a regulator for electric currents, was not anticipated and discloses invention in the placing of the regulating coil in the working circuit, but in view of the prior art it is limited to such feature, and is not infringed by the device of the Hubbard patent, No. 651,664, in which such coil is placed in the generating circuit.

In Equity. On final hearing.

Augustus B. Stoughton (Edmund Wetmore, of counsel), for complainant.

Kenyon & Kenyon (Wm. Houston Kenyon and Richard Eyre, of counsel), for defendant.

HAZEL, District Judge. Complainant is the owner of letters patent No. 430,868, granted to Cyprien O. Mailloux, inventor, on June 24, 1890, for automatically regulating electric currents. The invention is principally applicable to circuits which are subject to marked changes of load or sudden and violent fluctuations of the current energy, as in electric railway circuits, where the variations of load are very rapid. The patent has 14 claims. At the hearing infringement of claims 2 and 6 was charged, which claims read as follows:

"(2) The combination, with a dynamo machine and the working circuit supplied thereby, of a compensating storage battery, a supplemental reinforcing generator in the battery connection, and means for varying the power of such generator in accordance with fluctuations of current on the working circuit."

"(6) The combination, with a dynamo machine and circuit supplied therefrom, of a compensating storage battery fed from such dynamo and a supplemental dynamo whose electro-motive force re-enforces the battery on discharge, and whose field is variable according to the fluctuations of electrical energy on the supplied circuit."

The essence of claim 2 is for a regulation "in accordance with fluctuations of current on the working circuit," and claim 6 epitomizes a supplemental dynamo machine "whose field is variable according to the fluctuations of electrical energy in the supplied circuit." The defenses interposed are want of novelty, noninfringement, and that the regulating system in suit is inoperative, except when employed with generators having a so-called "drooping" characteristic. The various elements comprising the claims are a main dynamo machine, the working circuit, a compensating secondary battery, a supplemental dynamo machine or generator, smaller than the main generator, and technically called a "booster," which is placed in the battery circuit, a regulating coil, which controls the power and distributes or varies it in accordance with the fluctuations on the working circuit.

It will perhaps conduce to a better understanding of the claims in controversy to outline at the outset the main characteristics of the apparatus to which the improvement pertains. The employment of supplemental generators to produce a compensation of the battery as an adjunct to storage batteries was known at the date of the invention in

suit, although their successful use in the United States for electric railsystems is limited to about the past 10 years. Nor was there novelty in the use of intermediate dynamos in series with a storage battery to accumulate and re-enforce the electro-motive force from the main generator in order to maintain constant the voltage of the battery circuit. The novelty of complainant's invention is the electrical connection between the booster and the working circuit, whereby the fluctuations in that circuit are transmitted to the re-enforcing generator or booster, and through it to compel the battery to discharge in response to the load demand. The specification says:

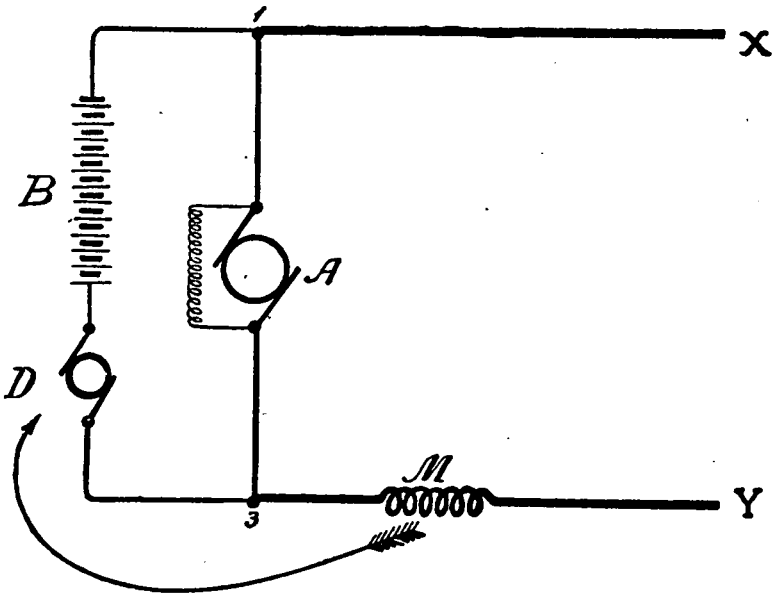
"This I propose to accomplish by means of an electric coil, which I term the 'regulating or controlling coil,' or by other electro-responsive device made to control the action of the dynamo or other supplemental generator in any of the ways known to electricians. A convenient way is to make such regulating coil the field coil for the dynamo, thus varying the field of the machine automatically. It might be made to shift the brushes of the dynamo by any means, so as to vary the electro-motive force to operate or produce a controlling action in other ways and directly or indirectly through other devices, the coil in any case being electrically connected into the main circuit, so that fluctuations or changes of electrical condition of such circuit would be felt in the coil."

It will be observed that the distinctive characteristic of the invention is the manner of positioning or connecting the coil. The proofs are open to the inference that it was important and necessary that the regulating coil to produce the desired action on the booster should be connected into the main or working circuit, which terms are interchangeably used by the expert witness for complainant. Indeed, the fluctuations on the working circuit would not have affected the booster in the manner stated in the claims unless the exciting coil were so connected. The significance of this point is apparent when it is understood that in the defendant's system the regulating coil is connected in that branch of the generator circuit between the main dynamo and the battery; a patentable departure in that respect being claimed by the defendant.

The evidence shows that in the systems of the prior art, because of the rapid fluctuations of the energy on the working circuit, the efficiency and durability of the machinery was considerably impaired, and that machines of greater capacity were required. It is shown that there are generators or dynamo machines common in the art constructed to either raise, lower, or maintain constant the voltage. The obstacle to complete success of such prior systems as stated in the specification was owing to the fact that the electro-motive force of the battery discharge was considerably lower than that of the charge, hence the compensating effect of the battery was inefficient, and from an economic standpoint unsatisfactory. Hence remedial means were demanded to effect the regularity and equilibrium in the distribution of current energy to overcome the difficulties experienced. In the system described in the specification of the Mailloux patent the voltage of the main generator at all times remains constant, and the compensating circuit supplied a higher voltage of the discharge than that of the charge. The voltage of storage batteries, which depends upon the number of cells used in their electro-motive force, is increased upon being charged and diminished by the outflow or discharge. The load on the generator gradually

changes or varies according to the number of lights or cars on the translating device, and, though such variations probably are slight, they are nevertheless exceedingly rapid. In the patent in suit the battery cells are arranged in series in the circuit leading to the armature in the main generator, and are charged by it when the supplemental generator is inert. As soon as the latter is engaged in generating electro-motive force, the charging of the cells by the main generator is diminished, and thereupon the electro-motive force of the supplemental generator antagonizes that of the main generator. In this manner a harmonious electrical activity is reached; the general result being to enable the storage battery to relieve the generator when the load on the translating device is heavy. It should also be understood that in the main generator, which preferably charges the storage battery and is usually driven at uniform speed, the electro-motive force is mantained practically constant; its voltage being ascertained by the current in the main circuit.

The asserted difficulties of the prior art are claimed to have been removed by the automatic regulation due to the coil connected into the main or working circuit between the booster and such circuit, by which the variations of current in the working circuit are transmitted to the booster, with the result that the supplemental generator controls the electrical discharge of the storage battery. The following is a simplified diagram of the Mailloux patent:



D represents the supplemental generator or booster in the circuit with the batteries; A, the main generator; M, the regulation coil, electrically connected into the main circuit, which controls the booster and responds to the fluctuations of electric conditions on the working circuit, X, Y;

B is the storage battery in a branch connected to the terminals of armature of the main dynamo. Referring to the drawings, Fig. 1, the specification says:

"In the operation of the system both of the armatures, A and D, are rotated at their respective speeds by the application of motive power either from the same or different sources. The number of cells in the series, B, is proportioned in accordance with the potential used, as are also the windings of the armature, D, as well as the speed of the small dynamo, F. The field winding, M, M, must be proportioned with reference to the current beyond which the batteries are to assist in compassing fluctuations."

Assuming the validity of the claims, the first question presented is whether they must be limited in scope to the special means mentioned for the regulation of the compensating action of the storage battery. As already observed, a method of conveying electricity from one point to another, storing it, and utilizing the same in the working circuit when required, was well known at the date of the invention in suit, and the feature of supplementing the battery by an apparatus commonly called a "booster," either to maintain a constant pressure or obtain a varying voltage, is described in the British patent to Perry, No. 55, of 1882. In Telegraphic Journal & Electrical Review, London, of February 24, 1883, it is stated that to obtain a constant difference of potential between the mains a magneto shunt dynamo and a small series dynamo may be combined for the purpose of supplying a constant electro-motive force to that produced by the dynamo or regulating machine. In the British patent to Edison, No. 4,553, of 1881, means are described for maintaining electro-motive force supplied by storage batteries, and a supplemental dynamo in series was used which could be automatically regulated from the main circuit. But as the patents to Edison and Perry do not disclose a main generator, the booster and regulating coil manifestly were not, as in the Mailloux construction, connected with any source of power. The principle of the patent in suit in my opinion was not anticipated by those inventions. The defendant's best references are the patents to Lane Fox and to Leonard. In the Lane Fox patent, No. 254,948, of 1882, is described a compensating storage battery connected in parallel with an intermediate generator of the end cell type. The latter, like the supplemental dynamo of the Mailloux patent, is located in the battery circuit and the automatic regulation of the main circuit is induced or affected by a regulating coil connected across the circuit, which also operates to automatically regulate the supplemental generator. The distinction between the regulating coil of Mailloux and that of Lane Fox simply consists in a difference of location by which, on the one hand, the fluctuations of current in the working circuit compel the regulating coil to perform its function, and, on the other, the voltage changes in the working circuit produce similar results. In both methods the conditions of the working circuit apparently affect the regulation. Complainant contends that the Lane Fox patent belongs to a different type of generator, namely, one which depends upon a so-called "drooping" characteristic at the battery terminals to induce the charging and discharging of the battery. To concisely differentiate the Mailloux and Lane Fox systems,

Mr. Duncan, complainant's expert witness, on cross-examination, testified:

"X-Q 167. The substantial differences between the Lane Fox system and that of Mailloux shown in the patent are (1) that Lane Fox employs a battery, instead of a dynamo, as the auxiliary source of electro-motive force; and (2) that he regulates the voltage of this auxiliary source by voltage fluctuations of the circuit, instead of by current changes of the working circuit? Please state whether this is correct, and do so without entering into any discussion on the relative merits or arrangements of the two systems. A. I think your statement is correct."

That the supplemental dynamo of Mailloux and the cell type generators were equivalents in the art is not denied. Indeed, it is thought that the specification fairly includes different types of generators. Moreover, it cannot be disputed successfully that the Lane Fox system could be used in connection with different types of generators; i. e., generators having rising or drooping characteristic. In these circumstances the point that the voltage regulation of Lane Fox could only be employed in a main generator, in which the voltage was lowered as the generated current increased, is not sustained by the evidence. The main difference between the Mailloux system and that of Lane Fox, as already pointed out, would seem to be the electrical connection of the regulation coil into the working circuit, instead of subjecting it to the voltage changes of such circuit. There is no such departure from the Lane Fox patent by the patent in suit, despite its claimed advantages, to warrant a construction of the involved claims to include the specific action of its regulating coil.

In the patent to Leonard, No. 435,700, dated September 2, 1890, an automatic regulation of the booster in the compensating circuit is disclosed, and a fair preponderance of the evidence indicates that the battery is regulated by the coil in the battery circuit in accordance with the variations of load upon the main or working circuit. The current in the regulation coil of the Leonard system is not, as in the system of complainant, directly affected by the fluctuations and changes in the working circuit, but such currents are primarily controlled by the battery circuit. This difference in operation, however, is not thought to be of primary importance, inasmuch as the electric conditions of the working circuit and the fluctuations therein cause corresponding changes in the battery circuit which thereupon acts upon the regulating coil. Complainant contends that in the Leonard patent the regulating coil is not in the circuit supplied by the main generator, but is in the battery connection; and it is argued, quoting from complainant's brief:

"This regulation coil carries the battery current, and, unless there is current to and from the battery, this coil has no effect, and whatever effect it has is due to the battery current, so that the battery must first charge or discharge before the regulating coil influences the booster. In this Leonard system the battery must first charge or discharge, and this causes the regulating coil to operate. Since the regulating coil does not compel the battery to charge or discharge, but merely operates after the battery commences to charge or discharge, there must in the Leonard system be some cause other than the regulating coil for causing the battery to charge or discharge, and this cause is the characteristic of the main generator, by which characteristic the voltage of the main generator drops upon increase of load, thus changing the voltage at the terminals of the battery connection, thereby causing the battery to discharge."

Defendant's position in relation to the Leonard system, as testified to by Mr. Wagner, is as follows:

"The Leonard regulating coil thus carries and is directly affected by the current in the battery branch, while the Mailloux coil carries and is directly affected by the combined current from the battery branch and the main dynamo branch. The Mailloux coil is thus directly affected by the whole current in the working circuit, and the Leonard coil is indirectly affected by the whole current of the working circuit or directly affected by only a part of the current delivered to the working circuit. The Leonard system with the shunt field coil, S, in addition to the series coil, is substantially the same as the system of Mailloux Figs. 2, 5, and 6, excepting as to the location of the series field coil, U, before noted. The compensating effect of the battery and reinforcing generator of the Leonard system would be the same as that of the Mailloux system with a proper design and adjustment of coils."

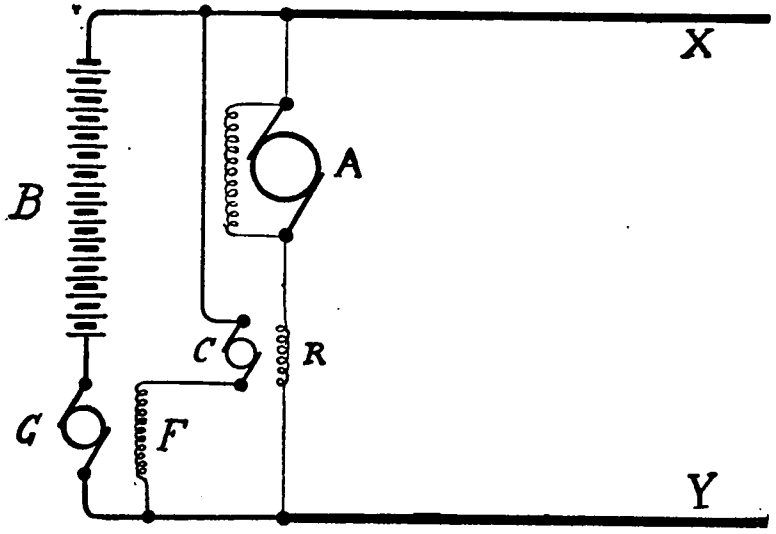
I incline to the belief that the defendant's position is correct.

The prior art does not produce a booster directly controlled by change of the electro-motive force in the circuit supplied by the main generator, and it is thought that the Mailloux system presented some patentable invention, although it is earnestly insisted that it needed only the skill of the engineer to put the regulation coil directly into the main circuit, especially as Fox in his prior patent suggested such an arrangement. The substantial novelty of the Mailloux invention lies in his selection of circuits for the regulating coil. His improvement must, therefore, be limited to electrically connecting the regulating means into the working circuit, to the end that they are directly and completely influenced by the fluctuations of electrical energy on such circuit.

Evidence is found in the record to show that the supplemental generator of the patent was inoperative with a main generator having a so-called "flat" characteristic, the claim being that the generator of the patentee was of the drooping characteristic type. Upon this point the Peekskill experiment, which from the discrepant statements of the witnesses called to support the respective propositions, is not persuasively illuminative. But this experiment does not require extended attention. In the defendant's device, which is constructed under the Hubbard patent, No. 651,664, dated June 12, 1900, the regulating coil is in the generator circuit, between the generator and the battery, and is affected by that circuit, and not by the fluctuations or variations of the working circuit. If, however, we assume that it is affected by the fluctuations of such circuit, such effect is partial, indirect, and merely incidental to the operations of the system, without materially contributing to the functional result. It is thought a different principle results from the electrical connection of the regulation coil in the generator circuit. Although complainant's expert does not agree with the experts of defendant in the proposition that the working and generator circuits, as applied to apparatuses of the kind under consideration, are functionally different, yet I believe it has been proven that the electrical connections in such circuits to regulate a supplemental generator produce a different kind of regulation and distinct results. Evidence has been given to show that the working circuit is that part of the system which leads from the junction of the generator and battery circuits out to the translating devices, while in the generator circuit the electric energy is precisely that of the main generator. The characteristic difference

in such electrical forces are well understood in the art, and it is not thought that the patentee by the use of the words "main circuit" intended to include in its meaning the generator circuit.

To point out in detail the differences between defendant's construction and the Mailloux patent and mode of construction I quote from the defendant's brief and attach hereto a simplified diagram showing the system of the defendant:



"The circuit, X, Y, is the main or working circuit in which the translating devices are connected. A is the main generator, B the battery, and G the armature of the booster. The field winding of the booster is shown at F, being in a branch circuit colored black. The current in this field coil of the booster controls the voltage of the booster armature and thereby the battery current. In turn the current in this coil is regulated in accordance with the relation between the voltage across the system and that generated by a special regulating dynamo known as a counter electro-motive force machine. This machine voltage is in turn regulated by, and only by, the fluctuations of current on the main generator, A, this being effected because the field winding of the counter machine shown at R is connected in the generator circuit. * * * The primary regulation is effected by the coil, R, in the generator circuit. When the load on the generator is at is desired average this coil, R, will have such a current that the counter machine voltage will exactly equal that across the generator and therefore no current will flow through the booster field, F. When, from any cause whatever, the generator current rises above the desired average, this increase of current in the coil, R, will cause the voltage of the counter machine to rise above that of the main generator, and so compel current in one direction to traverse the coil, F. When, from any cause whatever, the current on the main generator falls, this decrease, falling upon the coil, R, decreases the voltage of the counter machine to a point below that of the main generator and therefore current in the other direction traverses the booster field, F."

My conclusion is that the claims cannot be given a scope to embrace a booster automatically regulated by a coil in the generator circuit when such regulation occurs by the conditions of such circuit. It follows

that the defendant's system cannot be included in the scope of the claims in suit, and its means of regulation do not correspond to those of complainant, nor do they produce the same result. This view makes it unnecessary to discuss the points arising from the claim that the Mailloux patent is a paper patent, and that, if practicable at all, it was owing to the subsequent patent to Entz, No. 625,098, dated May 16, 1889.

The bill is dismissed, with costs.

HARMON S. PALMER HOLLOW CONCRETE BLDG. BLOCK CO. v. PALMER.

(Circuit Court, E. D. New York. April 26, 1906.)

1. PATENTS—INFRINGEMENT—MACHINE FOR MOLDING BUILDING BLOCKS.
   The Palmer patent, No. 375,377, for a machine for molding building blocks, construed, and *held* not infringed.
2. SAME.
   The Palmer patent, No. 623,686, for a machine for molding building blocks, construed, and *held* infringed as to claims 6 and 7, and not infringed as to claims 8 and 14.

In Equity. On final hearing.

Dickerson, Brown, Raegener & Binney (H. P. Doolittle and R. A. Parker, of counsel), for complainant.

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

THOMAS, District Judge. The bill is filed to restrain infringement of letters patent No. 375,377, dated December 27, 1887, and No. 623,686, dated April 25, 1899, for machine for molding building blocks. The claim of the first patent is as follows:

"The improved brick-mold herein described and shown, comprising the table or frame having the opening, B, in its top, the removable bottom plate resting on the table-top and provided with the central opening, E, corresponding to the opening, B, the vertically-moving core-block E, moving through said openings, B and E', the side and end plates hinged to the table-top, and means for holding said plates in an upright position, substantially as specified."

The patent expired after the bill was filed. The claim calls for a table with an "opening, B, in its top, the removable bottom plate resting on the table-top and provided with the central opening, E, corresponding to the opening B, the vertically-moving core-block, E, moving through said openings, B and E'."

The specification states:

"E represents a core-block adapted to move vertically in the opening, B. The base of this core-block exactly fits in the said opening; but the sides and ends of the core-block are slightly inclined, as shown, and thereby the upper end of the core-block is slightly smaller than the base thereof, the core-block being thus rendered substantially wedge-shaped. * * * I represents a removable bottom plate, which is provided with a central opening, E', corresponding in size and shape with the opening, B."

The table-top of the defendant's machine has an opening as large as the entire mold-box, and hence the correspondence between the opening in the table and in the removable plate is entirely absent. The patentee wished to so limit his patent, and there is no good reason shown for broadening the claim and eliminating this very exact correspondence of parts. This claim also provides for "side and end plates hinged to the table-top, and means for holding said plates in an upright position, substantially as specified." The language of the claim accords with the specific language of the description. This arrangement is entirely absent in defendant's machine. The side plates slide horizontally outwards, and the means for fastening them when in position have no resemblance to anything suggested by the patent. In fact, the defendant's arrangement is as different as it is superior, as regards the means for removing the block. There is no infringement.

Patent No. 623,686 has several claims, of which those alleged to be infringed are 6, 7, 8, and 14. They are as follows:

"(6) In a machine for forming building-blocks, the combination with a mold having removable sides and ends, and a removable bottom plate, of two or more cores, and an intermediate parting or division core, and a transverse division-plate, substantially as specified.

"(7) The combination with a mold having movable sides and ends, two or more reciprocating tapering cores, an intermediate parting or division core, the ends of the mold being provided with core-blocks, and a transverse division-plate, substantially as specified.

"(8) In a machine for molding concrete building-blocks, the combination of a mold, a core-carrying cross-head, cores carried by the cross-head, racks on said cross-head, shafts, H2, H3, gears connecting said shafts, and gears on one of said shafts meshing with said racks, crank, P, racks at both ends of the machine, and gears meshing with said racks, substantially as specified."

"(14) In a machine for molding hollow concrete building-blocks, the combination with the bed-plate, a movable bottom plate and the mold having hinged sides, of a movable core and removable face-plates, all substantially as specified."

Claim 7 is unlike claim 6, in that it does not provide for a removable bottom plate, and does require that "the ends of the mold" be "provided with core-blocks." A more important matter of alleged difference will be later considered. Claim 8 differs from claims 6 and 7 in the detailed statement of machinery for operating the machine. Claim 14 is said to have its patentable novelty in its provision for "removable face plates."

The defendant's machine shows in combination a mold having sides and ends that can be moved away from the block and back into position, a bottom plate that is detachable, whereon the block is carried away from the machine, two or more cores, an intermediate parting or division core, and a transverse division plate. This brings the defendant's mold within claim 6, unless the words "removable sides and ends" mean molding plates placed within the sides and ends, not only detachable in fact, but intended to be so detached as occasion may require.

It is thought that in the specifications and claims, except in claim 6, the word "movable," rather than "removable," is used in connection with the side and end plates, and usually the word "removable" is used in connection with the detachable bottom plate, although claim 14

provides for a "movable bottom plate." This seems to require that the word "removable" in claim 6 should be given the meaning "detachable." The sides and ends of the defendant's structure are detachable. Therefore it technically falls within claim 6, and infringes the same by the use of the transverse division plate. For the same reason claim 7 is infringed.

Claim 7 provides for "a mold having movable sides and ends, two or more reciprocating tapering cores, an intermediate parting or division core, the ends of the mold being provided with core-blocks, and a transverse division plate, substantially as specified." Now, it is claimed that all the parts of this combination are old, but attention is not called to any former device where there was a transverse division plate through a core-block. It is unnecessary to take up in detail the defendant's references in this regard. In no one of them does the division plate traverse the core-block. So the only question is whether this combination shows invention. It has an evident value; and, as patents are interpreted, it is deemed to show invention to a degree entitling it to patentability and protection.

Claim 8 provides for specific mechanism for operating the mold. It combines the use of well-known and ordinary parts, adjusted for the particular office of moving up and down the core-blocks. Among other things, provision is made for "racks at both ends of the machine, and gears meshing with said racks." Indeed, in the specification, page 1, line 75, it is said:

"I connect the cross-head carrying said core at each end to vertically-moving operating devices or racks, so that the force exerted upon the core to withdraw it can produce no tilting or binding action of the core in the block from which it is to be withdrawn."

In the defendant's machine the racks are placed near the middle of the machine, and in view of the prior art, notably Allen, No. 162,515, and Pierce, Reissue No. 3,413, the complainant's claim should be limited to the exact mechanism whereby the racks are separated and carried at the ends of the machine.

Claim 14 has no patentable feature unless it be the removable face plates. Here again is a distinct use of the words "movable" and "removable." The bottom plate is described as "movable." It is also detachable. The core is described as a "movable core." In fact, it is not detachable, but reciprocates vertically. The face plates are described as "removable face plates." That is, the word "movable" is used for both a part that may be taken out, and for a part that cannot, and is not intended to be taken out, to wit, the core; and then the word "removable" is used in connection with face plates—and the question is, in which class does it fall? Even the defendant's expert showed vacillation as to what the words "removable face plates" refer. In one place he states that they are "clearly and unmistakably the face plates, d^2, of the patent and not the face plates, N." Later he states it is his opinion that:

"The removable face plates referred to in claim 14 are not the face plates d^2 referred to in the patent."

And, when asked to designate in the drawings of the patent the face plates referred to in claim 14, he said:

"I do not find in the patent any designation by letter of reference of what I have construed as the removable face plates. The only face plates designated as such which can give character or design to the block which are designated by letters of reference being the movable face plates, N, and the removable face plates, d, these latter having the core-block, d^4, formed thereon. This is, of course, a removable face plate."

On page 3 the specification states:

"The movable side plates, D, and end plates, D', are each preferably provided with a removable or detachable face plate, d^2, secured thereto by screws, d^3, so that it can be readily removed and replaced by others when it is desired to give a different design or configuration to any of the sides or ends of the block. The end plates, D', D', or the removable or detachable face plates, d^2, d^2, secured thereto, are provided with tapering polygonal-shaped cores, d^4, d^4, corresponding each to one-half of the parting core, C', for the purpose of forming the vertical recess or cavity in the end of the block, as will be readily understood from Fig. 1 of the drawings."

These are the plates to which reference is had in claim 14. The defendant does not use such face plates. He uses side and end plates, with or without core-blocks, replacing one plate by another as the nature of the work requires. There is nothing new in such plates as defendant uses. In Derrom, No. 139,050, the claim is for "the face piece, a, and false bottom, b, combined with the hinged sides, constructed as shown and specified, for the purpose described." A shows a mold, one of the sides of which, a, may be moved away from the block, although the side, a, is hinged to the bottom of the mold. Provision is not made for removing a, and for the substitution of another side, but that is a mere matter of screws and a screw driver. The same operation is necessary in claim 14. The use of face plates is illustrated in patent to Wise, No. 86,961; Lowry, No. 80,358; Downie, No. 444,628. Obviously the defendant does what was done prior to complainant's invention.

The complainant should have a decree enjoining the use of the transverse division plate, pursuant to claims 6 and 7. As to the first patent, and claims 8 and 14 of the second patent, the bill will be dismissed.

DAVIS & ROESCH TEMPERATURE CONTROLLING CO. v. TAGLIABUE et al.

(Circuit Court, E. D. New York. July 18, 1906.)

PATENTS—AGREEMENT TO ASSIGN FUTURE INVENTIONS—ENFORCEMENT IN EQUITY.

By contracts between defendant, an inventor, and two other persons, defendant assigned to each of such persons a one-third interest in inventions for which applications for patents were pending, and agreed to devote his best skill and energy to the making of improvements and further inventions in the same art, and to assign a like interest in all such inventions. Subsequently complainant corporation was organized by the three, to which the patents then issued were assigned, and defendant also assigned inventions covered by certain pending applications "and any and

all inventions of like nature or similar thereto which I have already completed or which may hereafter be completed by me." Thereafter, while a stockholder in and an employé of complainant, he made other similar inventions which he assigned to complainant pursuant to such contracts, and also two similar inventions for which he subsequently obtained patents, which he assigned to his codefendant after leaving complainant's employ. *Held*, that complainant was entitled to a decree as against both defendants requiring the assignment to it of such patents; it being shown that the second defendant had knowledge of the terms of the contracts at the time he took the assignments.

In Equity.

James C. Chapin, for complainant.
Kenneson, Emley & Rubino, for defendants.

THOMAS, District Judge. Roesch was by occupation an inventor in the art involving air and fluid controlling and regulating devices. Davis was acquainted and occupied with the same art, and associated with Roesch in the employment of the Johnson Company, and Wadsworth was a member of the New York Stock Exchange, and able to furnish capital for the promotion of inventions. November 14, 1896, these three men, Roesch as the first party, Wadsworth as the second party, and Davis as the third party, entered into an agreement in writing, which recited, first, that Roesch had on the date named sold to Davis and Wadsworth, each, a one-third of "all his right and title and interest in and to the invention upon which he had heretofore made application for letters patent for improvements in automatic heat regulating devices [serial No. 600,317, filed July 23, 1896], and for improvements in thermostats [serial No. 609,935, filed October 24, 1896]"; second, that "all the parties hereto have entered into an agreement by which the said parties of the first and third parts (Roesch and Davis) are to devote their skill, kowledge and ability to the development and mechanical improvement and further invention of the said devices and all other new and kindred inventions, which may be discovered by them in the development of the same general line of mechanics"; third, that Wadsworth, "said party of the second part, has agreed to advance to them [Roesch and Davis] a limited sum of money, to assist them in and about the said matters and to pay the expenses of taking out letters patent for said inventions and others that may be hereafter applied for by the said parties of the first and third parts" (Roesch and Davis). And thereupon the parties stipulated,

"First. That said parties of the first and third parts hereby covenant and agree that they will devote their best skill and energy during the time that may be at their disposal in connection with the performance of their other duties, to the improvement, development and betterment of the said inventions hereinbefore particularly described and that they will further use their best endeavors to make other and further discoveries and inventions in and about the said general business, upon which they have now entered in their own interest and the interest of the said party of the second part, and that they will divulge and disclose to the said party of the second part and to each other all their said discoveries, inventions and mechanical ideas which may occur to them as often as may be required by either of the parties hereto and that they will make, execute and deliver to each other and to said party of the second part any and all papers, writings, transfers, assignments and agreements

which may be necessary or proper to invest each other and said party of the second part each with one-third of the title to any of the said inventions, discoveries, improvements, devices or mechanical ideas herein before referred to.

"Second. And said party of the second part hereby agrees that he will pay and advance from time to time, as may be necessary for the benefit and advantage of the said efforts to be faithfully made by said parties of the first and third parts and for the development thereof and for the procuring of letters patent for any inventions that have now been or may hereafter be made by said parties of the first and third parts or either of them severally, such sums as may be required to the extent of not more than five hundred dollars.

"Third. That said parties hereto further mutually agree with each other that at such time as may seem prudent, they will each and all severally sell, assign, transfer and set over unto any corporation, joint stock company or other combination as that may be devised for the benefit and development of the said business, each and all their interest in each and all said inventions or in any patents to be granted therefor.

"Fourth. This agreement is understood to extend to and include in and be binding upon all the heirs, executors, administrators and assigns of the several parties hereto."

About May 1, 1897, Roesch left the employ of the Johnson Company, and on May 7, 1897, Roesch wrote Davis as follows:

"Our agreements are as good as gold. No one can take them away from us. The only thing about them is that each of us can sell our interest, and each of us can manufacture separately without any of the other two getting profits from the business. If W. B. W. and yourself want me to go ahead as agreed, I will take out all the other patents, while I am here now. The agreements are just as good as if they were dated after the granting of the patents. * * * I will sign any agreement that will bind the three of us. * * * Davis, that agreement of yours is worth $10,000 to you easily, because it includes all my inventions as long as I live in that line. * * * You will have to leave and go right up to Bridgeport with me, and it won't take long to get started. * * * I will go right ahead with the patents. All you have to say is, 'Go ahead.'"

On May 10, 1897, the three parties entered into the agreement marked "Partnership Restriction Agreement," which is as follows:

"Memorandum of agreement by and between Alfred Roesch, party of the first part, William Wadsworth, party of the second part, and Frederick H. Davis, party of the third part, witnesseth:

"That whereas the said party of the first part has heretofore and on or about the 14th day of November, 1896, sold, assigned and transferred unto the said parties of the second and third parts and to each of them severally one-third (⅓) of all his right, title and interest in and to certain inventions upon which he, said party of the first part, had theretofore made application for letters patent of the United States for improvements in automatic heat regulating devices (serial No. 600,317, filed July 23, 1896), and for improvements in thermostats (serial No. 609,935, filed October 24, 1896). And whereas by said assignment the said parties hereto own and control each one-third (⅓) of the full and exclusive right to the said inventions assigned as aforesaid, and it is agreed between them that it is desirable that the entire right and interest in the said inventions and the right to manufacture and sell thereunder, shall be kept together and maintained as a whole.

"Now, therefore, this agreement witnesseth, that the said parties hereto in consideration of the premises and the mutual covenants and agreements herein contained, and of the sum of one dollar ($1.00) by each to the other in hand paid, the receipt whereof is hereby acknowledged, it is mutually agreed as follows: That for the term of seventeen years from and after the date of these presents neither of the said parties shall sell, assign or transfer his interest in the said invention or in the letters patent to be issued thereon nor any

part thereof nor in any improvements and further additions and inventions relating thereto, nor assign nor grant any right, privilege or interest in or under said inventions or said letters patent to any person, firm or corporation without first having obtained the written consent thereto of the other parties to this agreement."

After signing the restriction agreement, Roesch and Davis both went to Bridgeport to work on Roesch's improvements, under an arrangement with Wadsworth that each should be paid $5 a day, and Wadsworth advanced for tools and machinery, wages, etc., over $6,000 up to the formation of the company. Before the execution of the second contract Roesch had applied for a third patent, and shortly after going to Bridgeport, and on June 7, 1897, he made four new applications, so that at the date of the formation of the company there were pending in the Patent Office five applications. Two patents for inventions already assigned had issued to Roesch, Davis, and Wadsworth. On September 18, 1897, the three men incorporated the Davis & Roesch Temperature Controlling Company, the complainant. The certificate of incorporation provided for $45,000 of common stock and $5,000 of preferred stock, and that all of the preferred stock should be taken by Wadsworth, whereby he was enabled to choose a majority of the directors. On September 23 and 24, 1897, the directors of the company passed the following resolutions:

Resolution of September 23.

"Whereas, Alfred Roesch, William B. Wadsworth and Frederick H. Davis have offered to transfer, or cause to be transferred, to this company certain inventions and patent rights, including the patent of United States of America numbered 583,632, automatic heat regulator, Alfred Roesch, of Brooklyn, N. Y., assignor of two-thirds to William B. Wadsworth, Plainfield, and Frederick H. Davis, Elizabeth, N. J.; filed July 23rd, 1896, serial No. 600,317; and also a certain patent No. 583,633, thermostat, Alfred Roesch, Brooklyn, N. Y., assignor of two-thirds to William B. Wadsworth, Plainfield, and Frederick H. Davis, Elizabeth, N. J.; filed October 24, 1896, serial No. 609,935, and also certain other applications for patents which have been filed in the office of the Patent Office of the United States, to which patents have not yet been issued, and also certain other property, all of which is more especially described in the proposed written conveyance thereof presented for the consideration of the stockholders this day (for full copy of conveyance see pages 73–76 of this minute book) and to cause a proper conveyance thereof to be executed and delivered to this company in consideration of the issue of stock to the amount of the value thereof in payment therefor, to wit, the sum of forty-five thousand dollars, and whereas, it appears to the stockholders of this company that such property is necessary for the business of this company and that the consideration named is the value of the property proposed to be purchased. Now, therefore, be it resolved, that the company do purchase the said property above mentioned for said price and that the directors and officers of this company be authorized and instructed to perfect the purchase of the said property, and to cause to be issued therefor in proper form, pursuant to the laws of the state of New Jersey, full paid stock of this company to the extent of forty-five thousand dollars, provided that in the judgment of the board of directors of this company the above is the value of the property to be purchased."

Resolution of September 24.

"Whereas, by resolution duly passed at a meeting of the stockholders of this company, held on the 23rd day of September, 1897, the directors were authorized and instructed to purchase certain specified property (for description of this property see pages 73 to 76), and upon the transfer of the same to pay

for the said property the sum of forty-five thousand dollars in full paid common stock of this company provided in the judgment of the board of directors the said price was a fair valuation thereof; and whereas, in the judgment of the board of directors the said property is necessary for the business of the company, and that the value thereof is the amount at par of the stock proposed to be issued in payment therefor. Now, therefore, be it resolved, that in accordance with the provisions of the said resolution of the stockholders, this company do purchase the said property for the sum of forty-five thousand dollars to be paid for in the full paid stock of this company at par value; and the president and treasurer of this company are hereby authorized, empowered and directed, upon the execution and delivery of the said conveyance (the form of which is hereby approved), of the said property to issue and deliver in accordance with the said resolution the full paid common stock of this company to the amount of forty-five thousand dollars being four hundred and fifty shares of the par value of one hundred dollars each in payment therefor."

It is conceded that two assignments were made and delivered to the company, and constitute the matter to which reference is made for description on page "73 to 76" of the minutes of the directors.

The assignments were as follows:

Joint Assignment to Company, Dated October 11, 1897.

"Whereas, letters patent of the United States Number 583,632 for an automatic heat regulator and letters patent Number 583,633 for a thermostat were issued on the first day of June, 1897, to Alfred Roesch of the city of Brooklyn, county of Kings, and state of New York, William B. Wadsworth of Plainfield, Union county and state of New Jersey, and Frederick H. Davis of Elizabeth, Union county and state of New Jersey; and whereas, we, said Alfred Roesch, William B. Wadsworth and Frederick H. Davis, are the sole owners of said letters patent and of all the rights under the same; and whereas, the Davis & Roesch Temperature Controlling Company, a corporation organized under and pursuant to the laws of the state of New Jersey, is desirous of acquiring the entire interest in the same:

"Now, therefore, to all it may concern be it known that for and in consideration of the sum of one dollar to each of us in hand paid, the receipt of which is by each of us hereby acknowledged, we the said Alfred Roesch, William B. Wadsworth, and Frederick H. Davis have sold, assigned, and transferred and by these presents do sell, assign and transfer unto the said Davis & Roesch Temperature Controlling Company, its successors or assigns, our whole right, title and interest in and to said letters patent No. 583,632 and 583,633 and the inventions therein contained together with all rights or causes of action which may have heretofore accrued to us through any infringement by others of said letters patent; the same to be held and enjoyed by the said Davis & Roesch Temperature Controlling Company for its own use and behoof and the use and behoof of its legal representatives to the full end of the term for which said letters patent are or may be granted as fully and entirely as the same would have been held and enjoyed by us had this assignment and sale not been made."

Sole Assignment Made by Roesch to Complainant, Dated October 11, 1897, and Recorded in the Patent Office October 12, 1897.

"Whereas, I, Alfred Roesch, of the city of Brooklyn, county of Kings and state of New York, have invented certain new and useful improvements in air and fluid controlling and regulating devices, and have filed applications for United States letters patent therefor, which applications were filed and numbered as follows:

"Serial No. 618,160, filed January 6, 1897, for air controlling devices.

"Serial No. 639,757, filed June 7, 1897, for automatic temperature regulator for water heaters.

"Serial No. 639,758, filed June 7, 1897, for automatic temperature regulator.

"Serial No. 639,759, filed June 7, 1897, for air controlling mechanism.

"Serial No. 639,760, filed June 7, 1897, for device for actuating fluid controlling valves by fluid pressure; and

"Whereas, the Davis & Roesch Temperature Controlling Company, a corporation organized under and pursuant to the laws of New Jersey are desirous of acquiring the entire interest in said invention and the letters patent to be obtained therefor:

"Now, therefore, to all whom it may concern be it known, that for and in consideration of the sum of one dollar to me in hand paid, the receipt of which is hereby acknowledged, I, the said Alfred Roesch, have sold, assigned and transferred, and by these presents do sell, assign and transfer unto the said Davis & Roesch Temperature Controlling Company the full and exclusive right to the said inventions as fully set forth and described in said various applications filed and numbered as aforesaid, and any and all inventions of like nature or similar thereto which I have already completed, or which may hereafter be completed by me. I do hereby authorize and request the Commissioner of Patents to issue the letters patent granted upon the foregoing applications to the said Davis & Roesch Temperature Controlling Company as assignee of my entire right, title and interest in and to the same and the inventions therein contained, for the sole use and behoof of the said Davis & Roesch Temperature Controlling Company and its legal representatives."

It will be observed that the joint assignment specifies the two patents definitely mentioned in the first and second agreements made by the three men, while Roesch's assignment specifically mentions the serial number of five applications and upon which four patents were afterwards issued, Nos. 595,654, 616,141, 616,142, 662,092. Thereafter Roesch continued to make inventions that were improvements upon the devices covered by the assignment, and assigned 19 thereof to the complainant; and to compel the defendant to assign two other similar inventions the bill is filed. Tagliabue is joined as a defendant, as he holds assignments of such two inventions dated severally July 7 and 25, 1903.

Roesch contends that he did not assign the 19 inventions pursuant to the stipulation contained in the assignment of October 11, 1897, but that such assignments were pursuant to a new agreement, whereby Roesch was to have royalties on the devices covered by such 19 patents. Although Roesch, after the formation of the company, exhibited dissatisfaction with his relations to the complainant and proposed a readjustment of such relations, and although Wadsworth proffered a written plan for a change of such relation, nothing resulted. And it is considered that Roesch did assign the 19 patents pursuant to the October, 1897, agreement. The two patents that he did not assign are of a like nature or similar to those covered by his sole assignment, and as between him and the complainant they belong to the latter if they are covered by the terms of the assignment. The language specifies certain inventions, "and any and all inventions of like nature or similar thereto which I have already completed, or which may hereafter be completed by me." Roesch seems to have regarded the assignment as covering future similar inventions by his transfer of inventions through the several following years. In his letter of November 30, 1897, to Wadsworth he says:

"Now, as to future inventions I wish to say this: I have agreed to assign them to the D. & R. Co., and I propose to live up to it. Of course, there were no conditions mentioned in the agreement. What I want to come to is this, what interest am I to have in these inventions?"

He then points out the hardships and possible vicissitudes of his existing relations to this company, and makes a suggestion for his benefit and protection. That he was dissatisfied with what was secured to him is apparent, as is the fact that Wadsworth proposed a new arrangement. But the proposal by Wadsworth or Roesch for a different or fairer allotment of interest does not change the legal status of the parties. The first agreement between the men covered the two patents in controversy, and the corporation was the outgrowth of that agreement, and was created pursuant thereto. The three assigned to the company whatever was in esse when the contract was made, and Roesch with the necessarily implied assent of Wadsworth and Davis assigned by the sole assignment to the company whatever had come into existence up to that time, and whatever Roesch should thereafter complete along the same line. It is considered that the agreement and declarations of Roesch, and the conduct of the parties after the sole assignment, illustrate that the intention was to vest future similar inventions in the complainant, and that Roesch should by the decree of this court be directed to execute proper assignments of the two patents.

The next question is whether Tagliabue is affected by the assignment or notice thereof. Tagliabue has made thermometers and kindred instruments at 53 Fulton street, New York, for over 30 years. He bought goods of the complainant in the usual way from July, 1899, to 1901. Then relations became more intimate, and Wadsworth suggested the combination of the complainant's business and that of Tagliabue, but it was not done. But in July, 1901, Tagliabue and the complainant made a contract for the sale by the former of the latter's devices, and Davis was at that date engaged by Tagliabue as a salesman, and that relation continued until December 31, 1902. In 1901 Roesch had a conversation with Tagliabue about entering his service, and defendants charge that Davis urged such an arrangement and that Wadsworth prevented it, and that Davis had repeatedly stated to Tagliabue and to his superintendent that Roesch had no contract with the complainant that would prevent Roesch entering Tagliabue's employ and devising temperature regulators that would not infringe Roesch's inventions under which complainant was manufacturing. On December 31, 1902, Davis left Tagliabue's service and devoted himself entirely to the complainant's business, and Roesch took charge of complainant's factory in Jersey City, where he continued to April, 1903, when he went to Chicago upon complainant's business, but converted his trip into a debauch, to which he was subject, and upon Wadsworth refusing to send him money Roesch's service with the complainant ceased. While Roesch was so absent and in April, 1903, Davis met Tagliabue at the Astor House, and, as he testifies, explained to him the nature of Roesch's obligation to the complainant, and described the rights of the complainant to such inventions as Roesch might make in the manner now claimed by the complainant. Tagliabue denies that such information was imparted to him, and the evidence of other witnesses is involved upon the question of such specific notice. On May 14, 1903, Roesch entered Tagliabue's employ to devise temperature controlling devices, which devices defendants state should not infringe existing

patents. On July 8, 1903, Wadsworth in his individual capacity wrote to Roesch, relating to the purchase if the latter stayed in the complainant's employ:

"As you know, I have already over $30,000 in the company. I am not very anxious to put more in, and especially as I see you are getting out a new hot water regulator that is going to eclipse ours. Whether this is true or not you know better than I. If it is true and you have a better regulator, I do not think the Davis and Roesch stock would be worth much of anything."

It was about September, 1903, that the complainant made a formal statement of its present claim to Tagliabue and Roesch, and the present bill was filed September 28, 1903. In October, 1904, Hohmann, who had been for several years in Tagliabue's employ, left it for service with Taylor Bros., who had the selling agency of complainant's goods. This is noticeable as his evidence relates to the question of actual notice to Tagliabue of the scope of complainant's rights.

Reference has been made to the proposed consolidation of complainant's and Tagliabue's business in 1901. At that time complainant contends that the partnership agreement of November 14, 1896, the restriction agreement of May 10, 1897 (called herein "second" agreement), and the assignments of October 11, 1897, were submitted to Tagliabue. The evidence is conflicting, but it is probable that these papers were submitted to Tagliabue. Complainant's evidence of specific acts and conversations furnishes an affirmative history that is more persuasive than the negation of Tagliabue and Roesch. As Tagliabue saw these documents, as he had been and continued in such familiar business relations to the complainant's company, buying and selling complainant's goods made pursuant to Roesch's patents, and had conversation with Davis about Roesch's relation to the complainant, although he denies notice of ownership of future inventions, it is concluded that he had notice of the complainant's interest to such an extent that he must be declared to have known that the two patents in question were invented while Roesch was still in the complainant's employment, and presumably belonged to it. Hence they do not fall under Tagliabue's contract with Roesch, and are identified as inventions that Roesch brought into being for the very purpose of becoming the property of the complainant. Roesch entered Tagliabue's service May 14, 1903. By July 7th he had assigned one patent to Tagliabue; by July 27th he had assigned another. It is difficult to believe otherwise than that Tagliabue knew that he was taking assignments of patents not invented in his service. If it can be contended successfully that the assignment could not carry the products of Roesch's mind that he conceived and executed in Tagliabue's employment, which employment was undertaken and continued at Tagliabue's expense for the very purpose of stimulating and effecting such inventions, yet as regards the two patents the result was essentially reached, while Roesch was practically fulfilling the contract between him and the complainant with the facilities and appointments that such employment offers.

It is decided that the complainant is entitled to a decree directing the defendants to assign to complainant the two patents in controversy.

DAVIS & ROESCH TEMPERATURE CONTROLLING CO. v. ROESCH et al.

(Circuit Court, E. D. New York. July 18, 1906.)

PATENTS—INFRINGEMENT.

The Roesch patent, No. 717,122, for a pressure governor, claim 5 construed, and as limited by the prior art *held* not infringed.

In Equity. On final hearing.

James C. Chapin, for complainant.

Kenneson, Emley & Rubino (Seabury C. Mastick, of counsel), for defendants.

THOMAS, District Judge. This is a suit in equity to enjoin the defendants from the infringement of claim 5 of letters patent No. 717,122, issued to A. Roesch December 30, 1902. Claim 5 is as follows:

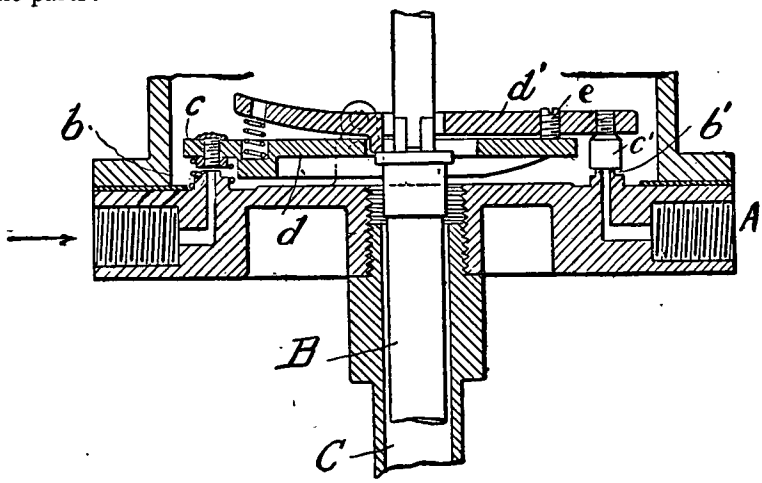
"In a regulator, the combination with a valve-casing having two valve-seats, of two oppositely-opening valves fitted to said casing to engage said seats and arranged in line with each other, and an adjustable screw, fitted to one valve and engaging the other, substantially as and for the purpose set forth."

Assuming that Roesch is bound by the patent, so far as concerns the fifth claim, it is thought that the invention as claimed is not broad enough to cover defendants' structure, as shown in Exhibit B. The patentee used two valves, each on its own stem to act alternately, so that, when one was by certain pressure forced shut, it would by contact force the other open. To effect this the length of the combined valves and their stems must be somewhat greater than the distance between the seats of the valves. But the distance that it was desirable that the valves should open might vary, and to meet any demands in that regard he threaded an adjusting screw in the end of one valve. By screwing this in or out he got the proper adjustment. This is what he says:

"The inner ends of the valves, 14 and 15, are in contact with each other, and I have provided an adjusting-screw, 26, in screw-threaded engagement with one of said valves and bearing against the other, in order to adjust the amount of opening possible for either of the said valves. The adjusting-screw, 26, will be so adjusted that when either one of the valves is closed the other valve will always be open. In the position in which the parts are illustrated herein the inlet-valve, 14, is closed, and consequently the discharge-valve, 15, is opened. When pressure rises in the pressure-chamber, 5, so as to further overcome the tension of the spring, 22, the discharge-valve, 15, will be closed, while the inlet-valve 14 will be opened."

The use of a screw to adjust mechanical parts to desired dimensions had been long in general use. The use of a screw in relations similar to those appearing in the present combination had been suggested by Cullingworth & Potter in letters No. 287,105 in 1883, by Davison in letters No. 364,708 in 1887, by Clark in letters No. 478,688 in 1892. Hence the use of a set screw to adjust the length of a valve or valves could not be claimed by the patentee. In fact, he did claim it quite narrowly. He diagrammatically showed two valves meeting in the casing, alternately pushing each other in and out. To do this

they had to open in opposite directions. They had to be "arranged in line with each other." To make one long enough to push the other out, but yet not so long as to push it too far out, one had to carry an adjustable screw at its inner end, "engaging the other valve." The language exactly fits the specification and the diagram. It is simple and ought to be construed to mean what it plainly says. The complainant contends that "oppositely-opening valves" does not refer to direction, "but to their operation, by which the opening movement of one is against or opposed to the opening movement of the other." It is understood that the complainant urges that "oppositely-opening" means "alternately opening," or oppositely opening in point of time. This is interpretation by argument. The plain interpretation needs no argument. The words say that valves open oppositely, and so they do. If they open oppositely in this case, they cannot both be open and shut at the same time, because one in shutting pushes the other open. The defendants' combination shows a screw used to increase or to decrease the combined lengths of two valves and the stems to which they are attached. There are two valves. Each is attached to a stem or lever, and each is at right angles to its stem and engages a seat in the casing. But the stems are not placed end to end, with a screw in the end of one to enlongate or to shorten it. One stem is pivoted on bearings supported in the casing, the other is supported by bearings supported on the first stem, so that one stem rides on the other, and the screw is used to vary the distance between them. The following sketch shows the parts:



Complainant describes the device as follows:

"d and d' are levers carrying respectively valve, c c', controlling parts, b and b'. Fitted to one lever, d', and engaging the other lever, d, is a screw, e, which adjusts the movements of the valves, c c'. B is a carbon rod inside of a metal tube, C, and when, by variations in temperature, the metal tube, C, contracts, the carbon rod is lifted thereby, and acts against the shoulder of lever d' to lift the valve, c', from its seat, and open it. The opening movement of valve, c', acts against valve, c, to close the latter. When the tempera-

ture rises and the metal tube, C, expands, rod, B, which is of carbon, and less sensitive to the variations in temperature than tube, C, will fall, and lever, d', being relieved of the pressure of the rod, will be actuated by the spring, f', to close valve, c', because the tendency of the spring, f', is to lift valve, c, off its seat; the opening movement of valve, c, closes valve, c'. In brief, the opening movement of one valve necessarily produces a closing movement of the other, the valves acting always in opposition to each other."

The valves are not "oppositely-opening," except in the sense that one opens when the other shuts. In the nature of the case they cannot be oppositely opening. The valves are not "arranged in line with each other," within the meaning of the description of the claim, nor is there an adjustable screw "fitted to one valve and engaging the other, substantially as * * * set forth," although the screw in one stem engages the screw in the other "for the purposes set forth"; that is, to make the combined stem and valves longer or shorter.

The whole case seems to be this: The defendants' device infringes if, in view of the prior art and the well-known use of set screws, the complainant's claim is broad and unlimited enough to cover the use in pressure governors of a set screw, to increase or decrease the combined length of two valves (including their stems), so that one valve will, under pressure, drive the other shut, and the pressure being removed, allow it to open. It is considered that the complainant is not entitled to such invention under the claim in question.

The bill will be dismissed.

LOCKLIN et al. v. BUCK.

(Circuit Court, E. D. New York. May 7, 1906.)

PATENTS—INFRINGEMENT—WOVEN WIRE FABRIC.

The Locklin and Fox patent, No. 655,253, for an improvement in woven wire fabrics, which consists in flattening the ends of the coils to bring the wires into a common plane, and binding the same "by a metallic strip folded longitudinally so as to inclose the flattened ends of the coiled strands of the fabric and then folded again upon itself," discloses patentable invention, and is valid in view of its acknowledged utility, but is limited by its language to the use of a strip which is folded "again upon itself," and is not infringed by a construction in which the upper side of the binder as first applied is narrower than the lower side and the second fold is made upon the fabric.

In Equity. On final hearing.

James H. Raymond, Otto R. Barnett, and Arthur M. Pierce, for complainants.

William Parmenter Martin and Clarence Ladd-Davis, for defendant.

THOMAS, District Judge. The bill is filed to restrain the infringement of letters patent No. 655,253, dated August 7, 1900, on an application filed August 14, 1899, for improvements in woven wire fabrics. The claim is as follows:

"As a new article of manufacture, a woven-wire fabric comprising woven coiled-wire springs having the ends thereof flattened to a common plane and bound by a metallic strip folded longitudinally so as to inclose the flattened

ends of the coiled strands of the fabric and then folded again upon itself, substantially as described."

The specification states:

"The fabric is composed of a series of parallel strands, B, composed of a number of coiled wires spaced a slight distance apart and connected by a pair of single-wire strands interposed therebetween, which single wires are interlaced with each other and with the strands, B, in the course of manufacture of the fabric, the single-wire strands being formed in coils of a diameter substantially equal to that of the plural-wire strands, so that the whole forms a fabric of substantially-uniform thickness."

The specification states the mischiefs that arose before the use of the patented article:

"When the ends of the wires forming the various strands are not properly held before being attached to a frame they not only spring longitudinally out of their relative positions in the fabric, so as to cause the separation and entanglement thereof, but by reason of their spiral winding they all bend and twist laterally in all directions, sometimes causing disintegration of the fabric."

To prevent such results the patentees provided for each side of the fabric a metallic binding strip, and the method of application is described in the specification, as follows:

"When the fabric is formed to the desired length, the ends of the coils are pressed flat upon each other and inserted in the U-shaped metal strip, C, as shown at the right hand side of Fig. 3, so that the ends of all the coils are secured and cannot become displaced. The U-shaped metal strip is then bent transversely upon itself, as illustrated at the left hand side of Fig. 3, and the whole subjected to powerful compression, so that the strip, with the ends of the strands inserted therein, will remain permanently in the form shown at the left in Fig. 3. * * *

"The binding strip in our fabric has a three-fold function to perform—that of fastening or securing the ends of the coils as against unraveling or spreading, that of securing such ends in such a way as to withstand the great pressure to which a woven-wire fabric is subjected in use as a bed-spring, and that of affording a means of firmly and securely fastening the fabric to a bed-frame."

The evidence shows the value of the binding for such purpose, also for the preservation of the integrity of the fabric in handling, storing, and transportation, and the appreciation of its value by extended use, and the acquiescence of the trade in the patent.

It is hardly necessary to make reference to articles in any particular art to illustrate that there was nothing new in preserving the edges of a fabric by covering the same with a metal binding. For instance, in the patent No. 454,027, issued to Brothers in 1891, the specification states:

"The wire fabric of the bed-bottom is secured between clamping-pieces 11 and 12, and the pieces 11 and 12 are preferably secured together by rivets."

To make use of these clamping pieces it is presumable that the wires were brought to the same plane. The letters do not seem to indicate whether the clamping pieces are of wood or of metal. In letters patent No. 507,844, issued in 1893 to Rich, for a window screen, the wire fabric was secured, as described in the specification, as follows:

"The lower edge of the wire, I, secure in a rigid metallic frame, constructed preferably as shown in Figs. 3 and 4 and consisting of the cross-bar, L', and the guide strips, M, at the ends of the cross-bar. This I preferably make of

tin or other suitable sheet metal, folding the tin double to form sockets in the top of the cross-bar and the inner side of the guide strips into which the lower edge and the lower end of the side edges of the wire cloth are adapted to be engaged. To secure the cloth in the cross-bar, I, preferably double it upon itself, as shown in Fig. 4, by making the loop or bend, N."

So far as the insertion of the cloth in the metallic frame and the doubling of the frame upon itself are concerned, the process is precisely the same as that employed by the patent in suit, and the complainants have transferred this method of binding and folding from one art to another. However, it must be noticed that it was some six years from the Rich application to the application for the patent in suit, and also that the refractory and troublesome fabric to which the present patent applies is quite another matter from the wire cloth used for screens, and that meantime no one had made any progress toward, or suggestion of, the present binding, until the patentees came forward with their application. It seems a simple matter to flatten down the ends of the spiral wires to a common plane, to clasp them in a metallic border, and fold this border over upon itself. Yet this method of binding was so long in coming, it cured so many annoying and expensive evils in the handling of spiral fabrics, it has been so welcomed by the trade, it has so appealed to the Patent Office, that the court can hardly fail to ascribe to it patentable novelty.

But here it should be observed that the claim is not broadly for a metallic binding, folded either upon itself or upon the fabric, but for such a binding folded "again upon itself," and so it is shown. Now, the defendant does not do this, literally at least. The defendant clasps the edge of the fabric with a metallic binder, but the upper side of the binder is shorter than the lower side. Thereupon the upper side is carried upward and forward, until it is folded upon the fabric itself. In other words, it is not folded upon itself, but upon the fabric. The complainants urge that this falls within the claim, because, as asserted, the defendant obtains the same result. If by this it is meant that he has a practicable binder, the statement is true; but he does not obtain the same result by the same method of folding. In the complainants' fabric when the binding is complete—that is, when two folds have been made—there are two layers of the fabric and four of the strip with which it is bound, while at this state the defendant shows two layers of the fabric and three of the strip. In its final condition, what may be called a hook in the complainants' fabric is caught around a fold in what was at the first folding the upper side of the binder, and held firmly by another fold in what was the lower side of the binder. The defendant's arrangement is dissimilar. When the binder is folded upon the fabric, the axis of its primary fold rests against the outer edge of the upper side of the binder; so that the fold of the fabric in the defendant's case has a thrust and consequent support quite different from that of the complainants. In the complainants' case the original lower side of the fold of the fabric fits into a fold in the lower side of the binder. The same is true of the defendant's binder.

It is concluded that the complainants have so limited their claim that they may not justly charge the defendant with infringement.

EASTWOOD et al. v. CUTLER-HAMMER MFG. CO. et al.

(Circuit Court, E. D. Wisconsin. November 16, 1906.)

1. PATENTS—SUIT FOR INFRINGEMENT—PLEADING.

A bill for infringement of a patent must specifically allege all of the facts necessary to show the validity of the patent under the statutes, and a failure to allege that it was issued in the name of the United States or under the seal of the Patent Office, or that it was signed by the Commissioner of Patents, renders the bill demurrable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 507, 508.]

2. SAME.

A bill for infringement of a patent containing a number of claims must specifically enumerate the claims to be relied on, and where it does not the objection may properly be raised by demurrer on the ground that it is inequitable and unconscionable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 509.]

In Equity. On demurrer to bill. This was a bill for infringement of a patent, to which a demurrer was filed; the fourth ground being that there was no allegation that the letters patent in suit were issued in the name of the United States of America, nor under the seal of the Patent Office, nor that they were signed by the Commissioner of Patents, and the eighth, ninth, and eleventh grounds, in substance, that the bill was inequitable and unconscionable, in that it did not specify which of the 18 claims of the patent were relied on.

Pierce & Barber, for complainants.

Jones, Addington & Ames, for defendants.

QUARLES, District Judge. This is a demurrer to a bill in equity filed by complainants for the infringement of a patent and for an injunction and accounting. The demurrer is based upon 11 grounds. The demurrer is overruled as to the second, third, fifth, sixth, seventh, and tenth grounds of demurrer. The demurrer is sustained as to the fourth, eighth, ninth, and eleventh grounds.

The ruling on the fourth ground, that "there is no sufficient allegation that the letters patent in suit were issued in the name of the United States of America, nor under the seal of the Patent Office, nor that they were signed by the Commissioner of Patents," is predicated upon the case of Elliott & Hatch Book Typewriter Co. v. Fisher Typewriter Co. (C. C.) 109 Fed. 331, where the averments of the bill were identical with those in suit upon this subject. Under a liberal rule of pleading, the general averments in the bill that the patent was issued by the proper officers of the government, in conformity with the special acts of Congress relating to that subject, would probably be sufficient; but, inasmuch as the sufficiency of such general averments in a bill of this kind has been passed upon, I feel constrained to follow the authority of the case above cited.

As to the eighth, ninth, and eleventh grounds of demurrer, it was practically conceded by the learned counsel for the complainants, upon the argument, that it would be inequitable and unjust to require the defendants to make search and preparation upon the 18 claims in the

patent in suit, as would be necessary under a bill alleging infringement of the patent generally, without specially enumerating the claims to be relied upon, and that the actual litigation contemplated by the complainants against the defendants would probably involve only 4 or 5 of such claims. Under these circumstances, I hold that the bill is defective, in that it does not allege which of said 18 claims are embodied by the defendants in the infringing mechanism, and this objection is properly raised by demurrer.

Leave is granted for the complainants to amend the bill, as they may be advised, on or before the January rule day.

UNITED STATES v. STANDARD OIL CO.

(District Court, N. D. Illinois. January 3, 1907.)

1. CARRIERS—INTERSTATE COMMERCE—CONSTRUCTION OF STATUTE PROHIBITING REBATES.

The purpose of Congress in the enactment of Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599], known as the "Elkins Law," was to secure uniform freight rates to all shippers, and its provisions are violated by the giving or receiving of any rebate or concession whereby any property shall be transported at a less rate by any interstate carrier than that named in the tariffs published and filed by such carrier, whether by direct agreement between shipper and carrier or indirectly by "any device whatever"; and where a railroad company has published and filed a schedule of rates on interstate shipments to points beyond its own line said section applies to such rates equally with those between points on its own road.

2. SAME—REBATES RECEIVED BY CONSIGNEE.

A consignee, no less than the consignor, is chargeable with a violation of section 1 of the Elkins law of February 19, 1903 (32 Stat. 847, c. 708 [U. S. Comp. St. Supp. 1905, p. 599]), by receiving rebates or concessions from the published tariffs of an interstate carrier through the cancellation of terminal charges at the point of destination which form a part of the tariffs as so published.

3. SAME—STATUTE—TIME OF TAKING EFFECT.

The joint resolution of Congress approved June 30, 1906, providing that the rate law of June 29, 1906 (34 Stat. 584, c. 3591), "shall take effect and be in force sixty days after its approval by the President of the United States," was ineffective to prevent such law from going into effect in accordance with its terms on the date of its approval by the President, which was the preceding day.

4. STATUTES—EFFECT OF REPEAL OF PENAL STATUTE—STATUTORY RULE OF CONSTRUCTION.

Rev. St. § 13 [U. S. Comp. St. 1901, p. 6], which provides that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability," was not an attempt by the Congress which enacted it to curtail the authority of succeeding Congresses by limiting in advance the effect to be given to their enactments, but was the substitution of a new rule of construction to be observed by the courts with respect to statutes to be thereafter enacted which is to be followed until abrogated by some later Congress; and under it the repeal of a penal statute extinguishes no penalties previously incurred

thereunder in the absence of an express extinguishing clause in the repealing act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 368–370.]

5. CARRIERS—ACT REGULATING INTERSTATE CARRIERS—EFFECT OF REPEAL OF PRIOR STATUTES.

Section 10 of the rate law of June 29, 1906 (34 Stat. 595, c. 3591), which provides that "all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law," was not intended to relieve offenders under the old law from subsequent indictment and prosecution for such offenses, while leaving those previously indicted subject to punishment, but merely to prescribe the rule of procedure which should control in pending causes, and in view of Rev. St. 1871, § 13 [U. S. Comp. St. 1901, p. 6], must be so construed.

6. SAME—INDICTMENT FOR RECEIVING REBATES.

An indictment for violation of section 1 of the Elkins law of February 19, 1903 (32 Stat. 847, c. 708 [U. S. Comp. St. Supp. 1905, p. 599]), for giving or receiving rebates, need not allege that the carrier's published rate was a reasonable rate, nor set out its tariffs in full, it being sufficient to aver that a certain named rate was in force between designated points as shown by the published tariffs.

7. SAME.

An indictment for receiving rebates in violation of section 1 of the Elkins law of February 19, 1903 (32 Stat. 847, c. 708 [U. S. Comp. St. Supp. 1905, p. 599]), which charges that there was an arrangement between several carriers having connecting lines for the continuous transportation of property over such lines between certain points, and that the lowest total rate as shown by the published tariffs of said several carriers was a certain sum per hundred pounds on a particular product, but that such product was transported for defendant at a lower rate, is bad, in that it does not negative the existence of a joint through rate lower than the total of the local rates.

On Demurrers to Indictments.

Edwin W. Sims, U. S. Atty., and James H. Wilkerson, Special Asst. U. S. Atty.

John S. Miller and Alfred D. Eddy, for defendant.

LANDIS, District Judge. These prosecutions are for alleged violations of section 1 of the act approved February 19, 1903, known as the "Elkins Law." Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]. The charge is that the defendant obtained the transportation of its property by various railway companies at rates less than those named in the carriers' published schedules. The offenses are alleged to have been committed prior to the enactment of the law approved June 29, 1906, known as the "Rate Law." Act June 29, 1906, c. 3591, 34 Stat. 584. The indictments were returned August 27, 1906.

I shall consider first the defendant's contention that the Elkins law did not prohibit a shipper from taking directly from a carrier a less rate than the published tariff; the defendant's claim being that the purpose of the law was merely to prohibit the parties from resorting to indirect methods, or inventing fraudulent devices to obtain preferential treatment. Now, until this argument was advanced here, the

court had supposed that everybody agreed that what Congress was trying to do was to secure uniform freight rates, and that the various prohibitions and penalties were imposed to accomplish that result. I had never heard an intimation to the contrary from any quarter; and have heard nothing in this argument to change the court's mind on this proposition. It is written in every section and line of the law that the thing sought by Congress was a fixed rate, absolutely, unvaryingly uniform, to be adhered to until publicly changed in the manner provided by law. The thing prohibited was the departure from that rate by any means whatsoever, whether direct between the parties or indirect by the employment of the most deviously circuitous subterfuge.

It is also urged by the defendant that, to require a shipper to adhere to a fixed published rate, defeats the ultimate object of the interstate commerce legislation, that object being the transportation of property for a reasonable compensation. The court is unable to see that this result follows. What Congress wanted to bring about was reasonable rates for all shippers, not simply for some shippers; and Congress knew that as an essential prerequisite to this preferences would have to be abolished. To abolish preferences, the law provides that the published rate shall be the only lawful rate. This does not mean that a rate once fixed and published shall never be changed, but it does mean that, when the change is made, it must be in the way provided by law, namely, by publication, to the end that the new rate may be available to all shippers at the same time, on equal terms.

Another point urged is that at least some of the indictments are bad because they allege that the defendant procured its property to be transported for less than the published rate from or to points beyond the carrier's own line; the argument being that the interstate commerce law requires the carrier only to publish rates for the transportation of property between points on its own road. This means that if a railway company, owning a road extending from Chicago to Springfield, Ill., and connecting therewith a line extending to Memphis, Tenn., should, by some sort of arrangement with such connecting line, equip itself to transport property from Chicago to Memphis, and should thereupon publish a rate showing its charges for such transportation, it is under no obligation to adhere to such published rate, but is at liberty to extend such preferential treatment as business expediency may seem to require. The court does not understand this to be the law. The shipping public is no more concerned with the question of whether the carrier owns the roadbed through to destination than it is with the question whether the carrier owns the car in which the property is transported. In such case the law regards such carrier so publishing its rate as thereby announcing that it has facilities for the transportation of property between the points mentioned in the schedule. Whether part of the distance is covered by lease, license, or some species of traffic arrangement is wholly immaterial. The rate once published, until publicly changed according to law, is no less binding upon all parties than it would be if the carrier owned outright the entire line.

The storage charge refund indictments are attacked by the defendant. There the allegation is that the published freight tariffs of the

Lake Shore & Michigan Southern Railway Company showed that the carrier would impose a certain charge for the storage of shipments of petroleum after their arrival at Chicago; that a quantity of oil product was shipped from Whiting, Ind., to the Standard Oil Company at Chicago, and remained in the custody of the railway company until a substantial claim had accrued in favor of the carrier on account of such storage; and that the debt was canceled as a concession or rebate to the Standard Oil Company in respect of the transportation of the property. The law requires the published tariff to show everything in the way of terminal regulations which in any way affects the cost of the service rendered by the carrier, and such published terminal charge is no less binding on the parties than is the tariff specified for the transportation. The defendant challenges these indictments because it does not appear that the Standard Oil Company was the shipper, but was only the consignee. I do not understand that the law is operative only on consignors who, as such, would, in the very nature of things, have little, if any, interest in the question of such terminal charges as are mentioned in these indictments.

It is contended in behalf of the United States that the act of June 29, 1906, did not go into effect until after these indictments were returned. The pertinency of this proposition will appear hereafter. It is urged that this postponement was effected by the adoption of the joint resolution by Congress, approved June 30, 1906. That resolution provides that the rate law "shall take effect and be in force sixty days after its approval by the President of the United States." Of course, the purpose of this resolution is obvious. But it was wholly ineffective until approved by the President. This occurred on June 30th. And by its own terms the act became effective upon its approval by the President one day before. Plainly, therefore, on June 30th the resolution was powerless to postpone that which had already occurred on June 29th. While possibly on June 30th the resolution might operate to suspend the act for a period of time (and as to this I express no opinion), the questions presented by the demurrers to these indictments are to be determined as if a postponement or suspension of the act had not been attempted.

This brings us to what the court esteems to be the real question involved in the pending controversy. For the United States, it is conceded that under common-law rules of construction the repeal of a penal statute operates to wipe out all offenses against such repealed law, unless there is a statutory provision expressly authorizing their future prosecution. But it is denied that the act of June 29th repealed section 1 of the Elkins law, and it is maintained that, even if it were so repealed, offenses against the Elkins law are kept alive for future prosecution by section 13 of the Revised Statutes, enacted in 1871 [U. S. Comp. St. 1901, p. 6], which provides:

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

This law has been attacked here as an unwarranted attempt by the Congress that enacted it to curtail the authority of succeeding Congresses by limiting in advance the effect to be given to their enactments. Now, under our Constitution each Congress is the equal, in point of power, of any predecessor or successor. Therefore no Congress has authority to draw in the boundaries of the legislative domain to the embarrassment of any other Congress. But, as I read section 13, this is not attempted. It is rather the substitution of a new rule to be observed by the courts in the construction of statutes thereafter to be enacted. It seems to me that such new rule is no more an impairment of the legislative power of succeeding Congresses than was the previously existing common-law rule an impairment of the power of preceding Congresses. That Congress had the constitutional power to make the change is plain. That any succeeding Congress may abrogate the new rule and restore the old rule is equally plain. That, until such old rule is restored, each succeeding Congress intends that the courts shall be guided by the new rule in giving effect to their enactments, seems to me beyond question.

But for the defendant it is urged that section 10 of the rate law contains a provision which expresses the intention of the Congress that enacted that section to pardon all offenders against the repealed Elkins law, except as to those offenses upon which indictments had been returned prior to June 29, 1906, the date of the approval of the rate law. The language of section 10 (34 Stat. 595) is:

"That all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

The contention of the defendant is that this provision was the enactment by Congress of its own saving clause, and that, therefore, section 13 cannot be held to apply here, because of the common-law rule providing that:

"Specific provisions in a statute relating to a particular subject must govern in respect to that subject as against general provisions in other parts of the law which might otherwise be broad enough to include it."

The theory upon which the defendant insists this rule should control is stated in State v. Showers, 34 Kan. 269, 8 Pac. 474, relied upon by defendant, as follows:

"The question as to what should be repealed and what saved was before the Legislature. It had the entire subject-matter thereof under consideration, and evidently intended to cover the entire ground; and evidently intended that nothing should be repealed except what it expressly repealed, and that nothing should be saved except what it expressly stated should be saved. It expressly saved some things; therefore, it must be inferred that it intended to save no others."

The defendant further maintains that the substance of the saving clause in section 10 respecting "causes now pending" was fully embraced within section 13; that, presumably, the Congress that enacted section 10 was familiar with section 13, and it is argued that to apply section 13 here, as authorizing the prosecution of an offense upon

which an indictment had not been returned prior to June 29th, and which was, therefore, not a pending cause when the rate law became operative, would be to deny to the saving clause in section 10 any effect whatever; the defendant's position being that that clause, by saving only pending causes, exhibits the will of Congress to extinguish all other offenses.

Of course, this court will not assume that Congress enacted section 10 in ignorance of section 13. On the contrary, it will be presumed that they were familiar with that section, and it must also be presumed that they knew what meaning had been given to it and to another saving clause like unto the one in section 10 when, in the case of Lang v. United States, 133 Fed. 201, 66 C. C. A. 255, decided two years before section 10 was adopted, the Circuit Court of Appeals of this circuit was appealed to by a convicted man to release him from imprisonment, for the same reason urged by defendant against the indictments in the pending controversy. There, as here, the indictment was returned after the repeal of the law which the defendant was accused of having violated. The repealing statute contained the following so-called special saving clause:

"Nothing contained in this act shall affect any prosecution or other proceeding, criminal or civil, begun under any existing act hereby amended, but such prosecution or other proceeding, criminal or civil, shall proceed as if this act had not been passed.

"All acts and parts of acts inconsistent with this act are hereby repealed."

It was argued that, inasmuch as this clause specifically authorized the future prosecution of "proceedings begun," Congress must be presumed to have thereby expressed its intention that nothing else should be prosecuted. The court, however, affirmed the judgment of conviction, each member of the court writing a separate opinion; Judge Jenkins dissenting from the judgment of the majority. Judge Grosscup, writing for affirmance, construed the special saving clause as if it read "proceedings heretofore begun or hereafter to be begun." He says:

"It was not the purpose of Congress in the employment of the word 'begun' in the connection here used, to provide that there should be no prosecutions under the old statute unless they had been already begun. Congress, presumably, was looking to the future, as well as the past. It meant that in the matter of importations of this character, there should be no interim of noncriminality. The amendatory statute only enlarged and tightened the preceding statute. No prosecutions could be based on the amendatory statute for acts done prior to its enactment; what Congress meant in the section preserving the right to prosecute under the statute was, that no prosecutions begun under that statute, whether they were then pending, or should thereafter be brought, should lapse by reason of this effort to enlarge and tighten the hold of the government upon this class of importations. It is to carry out this purpose that the word 'begun' is employed, merely as a connective to identify a prosecution pending or to be brought, with the statute under which it is brought."

Concurring with Judge Grosscup, Judge Baker held that section 13 was not "an attempt to tie the hands of succeeding Congresses," but rather a command to "the courts to treat a repealed statute as still remaining in force for punishment of violations, unless the courts shall find that the repealing statute expressly provides that such repealed act shall not sustain any prosecution for its violation"; that therefore

section 13 applied, inasmuch as the special saving clause was silent respecting "the fate of those unconvicted violators of the original act against whom prosecutions had not been begun by March 3, 1903" (that being the date of the repealing act).

He further says:

"If section 13 is in force in its entirety, it is the court's duty to apply the rule of interpretation therein laid down and to treat the repealed act as being alive for the purpose of sustaining any proper prosecution for the enforcement of its penalties, unless the amendatory and enlarging act be found to contain an express provision for the forgiveness of the unconvicted. There is no pretense that the repealing act expressly so provides."

In harmony with the defendant's contention before me, and in line with the ruling in State v. Showers, 34 Kan. 269, 8 Pac. 474 (cited by the defendant here), Judge Jenkins holds that the phrase "proceedings begun" means prosecutions begun at the time the repealing act was passed, and that the propositions laid down by the majority of the court are opposed to those common-law rules of construction for which the defendant contends here. Speaking of United States v. Reisinger, 128 U. S. 398, 9 Sup. Ct. 99, 32 L. Ed. 480, respecting the effect of which there has been much debate here, he says:

"The case of United States v. Reisinger is relied upon by the government to sustain this prosecution, but it is readily distinguishable from the case in hand. There the proviso to the act is to the effect that the rights of parties 'shall not be abridged or affected as to contracts in pending cases,' but there was no proviso with reference to criminal prosecutions for offenses committed under the repealed act. The Supreme Court ruled that the question whether the prosecution of offenses was saved was determined by general statute (section 13), and because the Legislature had not spoken in the new act to the question of offenses committed under the old act evidenced clearly an intention that with respect to that subject the general statute should control. The act saved contracts in pending causes because there was no general statute of construction which would save them, and rights would have been lost by the repeal except for the proviso."

It will be noted that in distinguishing the Reisinger Case from the Lang Case, Judge Jenkins assumes that in the former case the Supreme Court was dealing with a saving clause without the inclusion of which in the repealing act "contract rights would have been lost." In this, however, he appears to have been under a misapprehension, as is conceded here by counsel for the defendant, for, quoting from their brief:

"With those contracts the repealed law had no concern. They were not forbidden by the law repealed. They were entered into in the exercise of the valid contract rights of the parties."

This erroneous assumption by the dissenting opinion (which opinion the Standard Oil Company maintains states the true rule) would seem to deprive that opinion of the authoritative weight to which the great name of its author would otherwise entitle it.

As I read this case, the question presented to the Court of Appeals was precisely the question here. And, while the construction Judge Grosscup placed upon the special saving clause cannot be given to the clause found in section 10, the judgment of the court (which is most important) and the reasoning of Judge Baker are diametrically opposed to the position of the defendant in the pending cause and to the Kansas case and other authorities relied upon by the defendant.

Furthermore, the general trend of Judge Grosscup's reasoning is indicative of a strong indisposition on his part to countenance extinguishment by implication.

It is the duty of the court to enforce the will of Congress as expressed in the written enactment. In the ascertainment of that will, I am not at liberty to ignore the ultimate object of the law. That object was the establishment of uniform railroad rates, reasonable in amount. The former law had failed to accomplish this, and was therefore strengthened. Instead of being wiped off the books as having served its purpose, additional and severe liabilities were created, and more drastic remedies and penalties authorized. For the offense with which the defendant stands charged, the preceding Elkins law prescribed punishment only by fine. The view entertained by the present Congress respecting this offense finds expression in the provision authorizing the additional penalty of imprisonment in the penitentiary. And the court is asked to hold that this same Congress deliberately intended to pardon all unindicted prior offenders, whose conduct it was, more than all other causes combined, that moved Congress to enact the rigid and far-reaching measure of June 29th.

My opinion is that whereas, at common law, the repeal of a penal statute extinguished all penalties for offenses against its provisions in the absence of an express saving clause, under section 13 the repeal of a penal statute extinguishes no such penalties in the absence of an express extinguishing clause, which the rate law does not contain; that the so-called "saving clause" in section 10 was inserted for the purpose of definitely prescribing the rule of procedure that should control the prosecution of causes then pending in various stages in the courts, thus avoiding the confusion and controversy which, as experience has shown, must otherwise have resulted. For, had Congress not enacted that "the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law," the new procedure of the rate law would probably have controlled steps thereafter taken in such pending cases.

I reach this conclusion for the following reasons: In the first place, it is inconceivable that the Congress of the United States, while addressing themselves to the task of drafting a law the great object of which was to secure to all men fair treatment in respect of the transportation of property on the basis of absolute equality, could possibly have gotten into such a frame of mind that they would divide all prior offenders into two classes, and say that those who had been indicted should be punished, and those who, up to that time, had avoided the grand jury, should be pardoned. For Congress to do such a thing would be both absurd and unjust. In the second place, the saving clause is just such a provision as would have been drawn by a lawyer who had examined section 13 and desired to relieve the courts of unnecessary controversy growing out of questions of procedure. And, in the third place, in the light of the affirmance of Lang's conviction, it is not such a provision as would have been drawn by any lawyer whose purpose was to insure the pardon of violators of the law.

It is necessary to add, only, that in the court's opinion an indictment for violation of the Elkins law need not allege that the published rate is a reasonable rate. And without needlessly (as it seems to me) extending this review of the questions raised, it is my opinion that such an indictment need not set out in full the carrier's tariffs; that, with the exception of Nos. 3716 and 3722, the indictments sufficiently aver what the published rates were; and that the defendant's property was transported at the preferential rate; that the allegation that a certain named rate was in force between designated points, as shown by the published tariffs, necessarily carries with it its own negative that any other lawful rate was in force between the same points at the same time. The demurrers to indictments Nos. 3715, 3717, 3718, 3719, 3720, 3721, 3723, and 3724 are therefore overruled.

In the indictments Nos. 3716 and 3722 it is alleged that there was a common arrangement between several carriers for the transportation of property over their roads having a continuous line from Whiting, Ind., to southern points; that the lowest total rate for the transportation of petroleum products, as shown by the printed tariff schedules of the several carriers, was 39½ cents per hundred pounds; and that the product of the Standard Oil Company was transported between the designated points for 25⁹/₁₀ cents per hundred pounds. These indictments are bad, for the reason that the allegation that the lowest total rate was 39½ cents implies that amount to be the sum of the several local rates in force on the respective roads, and does not negative the existence of a joint through rate lower than the total of the locals. The demurrers to indictments Nos. 3716 and 3722 are therefore sustained

THE REBECCA SHEPHERD.

(District Court, D. Maine. November 17, 1906.)

No. 203.

1. SALVAGE—NATURE OF SERVICE—TOWING INJURED SCHOONER INTO PORT.

The three-masted schooner Rebecca Shepherd, laden with stone, left the port of Rockland, Me., and when 20 miles out struck on a ledge, and, although she got off after pounding for 20 minutes, was so injured that she began to leak. She started back for Rockland with the crew pumping; but the wind and tide were against her, and the water in her hold was gaining, and she hoisted a signal for assistance. The tug Sea King, which was towing a vessel to sea, on seeing the signal left her tow and went to the assistance of the Shepherd and towed her safely into the harbor of Rockland, where she was beached. There was no other vessel which could have rendered the service, and there was a possibility at least that without it the Shepherd would have foundered before reaching port. The Shepherd and her cargo were sold under process and realized the sum of about $4,000 net. The value of the Sea King was about $30,000, and she carried a crew of eight men. *Held*, that the service was a salvage service and entitled to be compensated as such; that an award would be made of $450, of which $50 should be divided among the crew and the remainder paid to the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, §§ 23, 24, 80–82, 94, 101.

Awards in federal courts, see The Lamington, 30 C. C. A. 280.]

2. SAME—DUTY TO RENDER SERVICE—ABANDONMENT OF TOW.

A court will not encourage a tug to abandon a contract of towage and expose her tow to great danger in order to go to the assistance of another vessel, but such action is commendable where the tow will not be subjected to any special peril of the sea or weather; the case being one in which the master is required to exercise good judgment under the circumstances.

In Admiralty. Suit for salvage.

B. Thompson, for libelant.
A. S. Littlefield, for interveners.
Geo. E. Bird, for claimant.

HALE, District Judge. The Knickerbocker Steam Towage Company brings this libel for salvage in its own behalf, and in behalf of the master and crew of the steam tug Sea King, against the schooner Rebecca Shepherd and her cargo of stone. The schooner and cargo have been sold under process issued by this court; the schooner for $3,500, and the cargo for $725. After paying expenses of the sale, the balance of the proceeds of the schooner, $3,394.55, and the balance of the proceeds of the cargo, $636.24, are now in the registry of the court.

The schooner Rebecca Shepherd is a three-masted vessel of the burden of 390 tons. In May, 1906, she loaded at Mt. Waldo, Me., a cargo of 3,500 paving blocks, estimated by the captain to be about 550 tons weight. She was drawing, when loaded, 14 feet aft and 13 feet 6 inches forward. She was towed out of her port of loading by a tug of the libelant corporation. She proceeded on her voyage and made a harbor at Rockland. On May 30th, at 5 o'clock in the morning, she set sail from Rockland and proceeded on her voyage, in good weather, with a fresh breeze. She made from five to seven knots, and about 8 o'clock in the morning she struck on Matinic Ledge, off the northerly end of Matinic Island, about 20 miles from Rockland. She struck, owing to the fact, as her captain says, that the buoy indicating the ledge was out of position. At the time of grounding there was an ebb tide. The schooner remained, pounding on the ledge, about 20 minutes, at the end of which time her crew worked her off. They then tried her pumps and found her leaking. They pumped until about 9 o'clock, when the pumps sucked. After a short time they again started the pumps and continued pumping until she reached Rockland. During all this time, the testimony tends to show that the water kept gaining on them. Her captain headed her for Rockland with the intention of beaching her; that being the nearest harbor where a vessel of her draft could be beached. He set her colors in the starboard mizzen rigging for assistance. The testimony tends to show that, in getting into Rockland harbor, she would have the wind ahead; that the water was gaining in spite of pumping; and that it would have "been almost impossible to beat in against wind and tide," had it not been for the assistance of the tug which made fast to her off Two Bush Island, between 9 and 10 o'clock in the morning.

The Sea King is an ocean tug of about 124 gross tons, about 95 feet in length, drawing about 12 feet. Her value is estimated at from

$28,000 to $30,000. At the time of rendering the services in question, she carried a crew of eight men, consisting of master, mate, engineer, two firemen, steward, and two deck hands, whose wages were $370 a month. She left Bangor on May 30, 1906, at 2 o'clock in the morning, with a four-masted schooner, the Edward E. Briery, in tow. The Briery was ice laden, with a draft of 22 feet, and was bound on a voyage to New York. She was under contract to be towed by the Sea King to sea. Between 9 and 10 o'clock in the morning, the master of the Sea King, Capt. Hathorne, saw the Shepherd with the flag in her starboard mizzen rigging off Two Bush Island. He knew that she was stone laden. He saw that she was close hauled; that the men were at her pumps; that there was a signal for assistance. He knew she was in trouble and trying to work back to a harbor. He said to his mate: "We'll let go of this schooner and go back and see what's the matter." He accordingly cast off the Briery's hawser, although he had about 10 miles further to tow her to sea before completing the contract of towage. He proceeded to the Shepherd under a speed bell, approached her on the windward side, and found the mate and four men pumping. The mate told him that they wanted to go to Rockland and be put on the mud. He then made fast to the schooner, at once started ahead, and towed her at half speed on a tow line of about 50 fathoms, not thinking it safe to tow her at full speed, because he said the swell "throws the vessel ahead and slacks the line down and throws the boat ahead and it comes up taut like a fiddle-string." He watched the tow line, and says he towed her as fast as he dared. The testimony tends to show that the crew of the schooner remained at her pumps from the time the tug made fast until she reached Rockland; that the mate also was working at the pumps for a part of the time; that later the crew took intervals of rest of about 1½ minutes; that, all the time, the water kept gaining; that there were no other vessels in the vicinity that could have been of any assistance; that no other tug was in sight during the morning, nor until after they reached Rockland; that the schooner could not have received help from the life saving station, or from any other source. The tug and her tow passed in by Rockland breakwater about noon; Capt. Hathorne signaled for the Shepherd to haul in her hauser, and wanted her captain to let his anchor go, and get a harbor tug to put his schooner where he wanted her. Capt. Hathorne said he was not familiar with the docks, and did not dare to risk his tug in trying to put the schooner in, fearing that she would break her wheel, as she was drawing 12 feet. But the captain of the schooner insisted that the tug should put her in, and said: "Cap., I do not want to lie here. I want you to shove me into shoaler water. I don't want you to leave me here." The testimony tends to show that the Shepherd had lost her headway; that the tug headed up into the harbor with the Shepherd, the mate of the tug sounding with a lead all the time; that the vessels proceeded slowly towards the mud, the tug's wheel stirring up the mud behind her, and pushing the schooner up onto the mud as far as she would go; that the anchor of the schooner was then let go; that the master of the tug went ashore, at the request of the captain of the schooner, to get a local steam tug, but, not

finding the towboat offices in Rockland open, he went to the wharf and found the master of the tug Somers N. Smith, who agreed to go off and do what he could; that the Sea King then left, and, later in the afternoon, the tug Somers N. Smith proceeded to the schooner and towed her to Tilson's Dock and made her fast; that the crew of the schooner continued to pump, two at a time, for ten minutes, with intervals of rest of from 3 to 5 minutes, until 6 o'clock that afternoon; that the captain of the schooner hired four men from the shore to pump until 6 o'clock the next morning; that later the crew and four extra men kept the pumps going up to 4 o'clock of the morning of the 31st, when the tug Somers N. Smith began to pump, and continued until June 5th; that the schooner did not leak worse after getting into Rockland than she did before; that the crew were exhausted with pumping; that the employment of the tug Somers N. Smith was necessary; and that she was paid $120 per day for pumping on June 3d and 4th.

I have found it necessary to give the above testimony in detail, as it becomes material in coming to a conclusion in regard to the character of the services rendered by the tug.

1. Was the service rendered by the steam tug Sea King a salvage service?

In Baker v. Hemenway, Fed. Cas. No. 770, Judge Lowell said:

"That a vessel in distress accepting services without a special contract, and the absence of a usage of the port, accepts a salvage assistance, is abundantly established. * * * The important and difficult part of the case is not the name by which it is to be called, but the amount which shall be decreed. * * * The service resembled towage. I do not mean that there is any generic difference between towage and salvage. In the absence of a contract, the towing of a vessel in peril or disabled is salvage; but, as a convenient word to distinguish an ordinary case of contract from one of salvage, 'towage' is often used."

Further on in the opinion, Judge Lowell cites a certain case, where Judge Blatchford, "refusing salvage, had allowed to the corporations what he called a liberal allowance for work and labor." He then speaks of the affirmance of Judge Blatchford's decision by the Circuit Court of Appeals, and says:

"That affirmance was wrong, unless Judge Blatchford had in fact, though not in name, given salvage. And such I suppose to be the case. He spoke of a liberal compensation. But liberality is salvage. There is no place for liberality in an action of contract. * * * The essential difference in assessing damages in contract and in salvage is that in the former nothing can be considered but the means employed; in salvage, even when the value saved is left out of account, or nearly so, the general results are quite as important as the means used to accomplish them. * * * As well as I can estimate the intent of the courts, it has been to give the tugs what will be a handsome gratuity, enough to induce prompt and even eager assistance; and this would be enhanced slightly by a great value at risk, though in no important or definite proportion to value."

It would be difficult for any court to declare the whole counsel of the law relating to salvage in clearer or more expressive terms. The court in this district has frequently had occasion to refer to that opinion. The Lyman M. Law (D. C.) 122 Fed. 816; The Lottie E. Hopkins (D. C.) 133 Fed. 405.

As Judge Lowell has said, there is no generic difference between towage and salvage. The same service may sometimes be called by either name; but, when a court decides that the service calls for liberality and holds that a bonus should be given in order to encourage similar services, then such court should properly and strictly call the service a salvage service, for "liberality is salvage, there is no place for liberality in an action of contract." It often becomes material, too, for courts to draw a distinct line between salvage and towage, for the reason that a reward ought sometimes to be given to the crew of the salving vessel and to other participants in salvage services; and such reward should not be given if the services wer held to be merely towage. The J. C. Pfluger (D. C.) 109 Fed. 93.

It ought to be said further that for towage—that is, for merely expediting the voyage—the ship alone can be charged, while the cargo also, as well as the ship, may be brought in for contribution in case of salvage. The definitions of salvage and the distinction between salvage and towage in this circuit have been along the lines stated in the above cases. M. B. Stetson, Fed. Cas. No. 9,363; Adams v. Island City, Fed. Cas. No. 55; Bowley v. Goddard, Fed. Cas. No. 1736; The Lyman M. Law, supra; The Lottie E. Hopkins, supra.

Judge Addison Brown considered this subject in the case of the Colon (McConnochie v. Kerr [D. C.] 9 Fed. 50). He said:

"A salvage service is a service which is voluntarily rendered to a vessel needing assistance, and is designed to relieve her from some distress or danger either present or to be reasonably apprehended. A towage service is one which is rendered for the mere purpose of expediting her voyage, without reference to any circumstances of danger. 'Mere towage service,' says Dr. Lushington (The Reward, 1 W. Rob. 177), 'is confined to vessels that have received no injury or damage; and mere towage reward is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any damages or accident.'" The Plymouth Rock (D. C.) 9 Fed. 413; The Athenian (D. C.) 3 Fed. 248; The Independence, Fed. Cas. No. 7,014; Hennessey v. Versailles, Fed. Cas. No. 6,365; The Apache (C. C.) 124 Fed. 905; The J. C. Pfluger, supra.

My attention has been directed to The Robert S. Besnard (D. C.) 144 Fed. 992, a recent case arising in the South Carolina district, where the court held the service to be towage and not salvage, but showed liberality in the award, and, I have no doubt, did substantial justice. The same court, in The Apache, supra, had employed the reasoning and conclusions in regard to salvage awards which have been adopted by the courts of this circuit. I think, however, that the remark of Judge Lowell in Baker v. Hemenway, supra, that, in a case referred to, "Judge Blatchford had in fact, though not in name, given salvage," applies also to the case of the Besnard; but, however that may be, it is certain that the facts in the Besnard Case are not sufficiently like the case at bar to cause it to serve as a guide.

Under the rules of law in this circuit, I have no hesitation in coming to the conclusion that the service rendered by the Sea King in the case at bar is a salvage service. In my opinion the tug did more than merely expedite the voyage of the schooner. She rendered a prompt, careful, and effective service to a vessel in some apprehended danger. The

schooner was in a position which clearly called for assistance. She was in a leaky condition. She had been pounding upon a ledge for 20 minutes. Her crew found it necessary to pump until the tug arrived, and throughout the voyage to Rockland, until they were exhausted. Without the aid of the tug there is, at least, a possibility that she might not have been able to reach Rockland, against wind and tide, with the water constantly gaining in her hold. Even if she had suffered no great injury by her contact with the ledge, she was clearly in a position where she required aid, and where such aid might possibly be absolutely necessary in order to bring her to a port where she could be beached.

2. What shall be the amount of the salvage award?

This question, as Judge Lowell has said, is the only really important question in a salvage case. It often makes no difference in the result whether the service is called towage or salvage. But it is important that a proper and just award be given. There is no rule which is of much aid to courts in fixing the amount of such award. It is a matter where the spirit of justice and of sense should prevail.

The tug, as I have said, rendered prompt and efficient service. Her captain saw the schooner with a signal calling for assistance. It was not a typical signal of distress, but it was a signal which called for help. He knew that the schooner had sailed, stone laden, from a Penobscot port. He saw that she was in the vicinity of dangerous ledges. How great injury she had suffered, and how great peril she was then encountering, he did not know. For aught he knew, she might be in a sinking condition, in deep water, with 550 tons of stone aboard. It was a time when a thoughtful man would naturally see that he ought to offer aid, or at least to inquire what help was needed. It must also be borne in mind that the master of the tug was in a peculiar situation. He had a large vessel in tow. He was under contract to take her to sea. His contract would not be performed until he had taken her 10 miles further. He might have made the excuse that he was under a contract, and that he would not leave his tow in any peril, however slight. But he made no such excuse. He says that, without any consultation with his tow, he cut loose her hawser and went quickly to the help of the schooner. It is urged by the libelant that, in doing this, he should be rewarded for taking the risk of abandoning his contract and of paying the heavy damages which might result from his tow suffering injury by reasons of the tug's default. This presents an important consideration. It is clear that a tugboat should not be encouraged to leave a tow in great danger, either from bad weather or from the perils of the sea. In The Lyman M. Law, supra, this court held that it could not encourage a passenger steamer, even under exigent circumstances, to endanger her own passengers in order to go to the rescue of a ship. So the court must say in the case at bar that it cannot encourage a tugboat to abandon a contract and expose to great danger the tow to which she is under contract. But, in this case, there were no great perils of the sea, or dangers of the weather, to which the Briery would be exposed. The captain should be encouraged, and should have some liberality shown him, however, because he exercised good judgment under the peculiar circumstances, and did not make his

towage contract, almost performed, an excuse for not heeding the call of the schooner. No rule can be given as to the duty of captains under circumstances like this. They must be held to the exercise of good judgment. Capt. Hathorne did exercise good judgment in the premises. He also exercised a proper spirit of humanity. He should have some reward. The subject of salvage award has been fully considered by this court in The Lyman M. Law, supra. This court there discussed all the elements which ought to enter into the conclusions of the court in reference to the amount of the award. The courts in this circuit have not been in the habit of giving exaggerated bounties, and thereby aiding salvors in devouring what the sea has saved. Here the value of the property now in the registry of the court does not furnish a controlling guide in coming to a conclusion as to what salvage should be paid; nor does the value of the tug rendering the service afford a test. Both elements are to be considered, but awards are often made "on no important or definite proportion of value."

Taking all the circumstances into consideration, I award the gross sum of $450 to the steam tug Sea King, her master, officers, and the members of the crew.

3. It is urged by the respondent that, in the condition of the vessel as shown by the testimony, the libel was unnecessary and was prematurely brought. Some authorities have been shown me bearing upon this contention. I do not think it necessary to discuss the evidence in detail upon this matter. In my opinion the evidence does not show that the libel was prematurely brought, and does not take the case out of the ordinary rule as to costs.

4. The sum of $450 which I have awarded as salvage shall be apportioned between the proceeds of the vessel and the proceeds of the cargo in proportion to the respective amounts thereof. The costs herein awarded are to be divided in the same manner. Out of the $450 awarded, the sum of $25 shall be paid to James A. Hathorne, the master of the steamtug, and the sum of $25 shall be divided among the remaining members of the crew of the steam tug as follows:

To Charles Kingsbury,	Mate,	$10 00
" Reuben Hammond,	Engineer,	5 00
" Chester Oliver,	Cook,	2 00
" Carl Steinkamp,	Fireman,	2 00
" John Heidenberg,	Fireman,	2 00
" Herman Woodside,	Deckhand,	2 00
" Jacob T. Wheeler,	Deckhand,	2 00

The above amounts shall be net to the master and crew, free of all counsel fees or other expenses. The balance of the award, namely, the sum of $400, shall be paid to the Knickerbocker Steam Towage Company.

Let a decree be entered in accordance with this opinion, with costs.

BEACH v. McKINNON et al.

(Circuit Court, S. D. New York. November 26, 1906.)

CORPORATIONS—CONTRACTS WITH DIRECTORS—IMPEACHMENT.

A bill by the receiver of an insolvent corporation against a promoter and subsequently a director of the corporation for a discovery and an accounting with respect to certain promissory notes, payable to the corporation and alleged to have been transferred by it to defendant, does not state a cause of action, where it fails to allege, even on information and belief, that the transfer was fraudulent or without full consideration, but merely that the notes were and remained the property of the corporation, without stating any facts to sustain such allegation; such transfer not being, prima facie, either invalid or fraudulent because of the fiduciary relation between the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1401.]

In Equity. Demurrer to bill seeking discovery and accounting as to certain moneys collected on certain notes given to the International Mercantile Agency, of which the complainant is receiver, and also as to certain promissory notes made payable to said mercantile agency. One of the grounds of demurrer is that the bill is without equity, and another, that the bill does not state a cause of action against the defendant.

Rose & Putzel, for complainant.
Frank L. Crocker, pro se.

RAY, District Judge. The complainant, George R. Beach, is the duly appointed receiver of the International Mercantile Agency, a body corporate created by and lately existing under the laws of the state of New Jersey. The defendant McKinnon is a resident and citizen of the province of Ontario in the Dominion of Canada. The defendant Crocker is a citizen and resident of the state of New York. The amount involved is upwards of $100,000. The International Mercantile Agency was a New Jersey corporation, and McKinnon was one of its promoters, and later became one of its directors and a member of the executive committee of the board of directors, and continued as such down to the time of the dissolution of the corporation and the appointment of the complainant as receiver thereof. September 6, 1904, the said International Mercantile Agency was duly adjudged to be insolvent by the Court of Chancery of the state of New Jersey, and said court issued an injunction restraining said corporation from further exercising its corporate franchises, and appointed the complainant receiver of all its property. The complainant has qualified as such and entered on the discharge of his duties. April 13, 1905, said court made another decree dissolving said corporation pursuant to the general corporation act of the state of New Jersey. By virtue of these proceedings title to all the property of said mercantile agency passed to the receiver. These facts are fully set out in the bill of complaint. The bill of complaint further states that in the course of its business said corporation from time to time received, on the sale of its stock and otherwise, promissory notes and drafts and bills receivable of a large amount, payable to the order of said corporation; that certain of these said McKinnon procured

the officers of said corporation to indorse over to him, and procured said officers to collect others of same and pay the proceeds thereof to McKinnon. The aggregate value of these so indorsed over and collected is alleged to be upwards of $50,000. There is no allegation in the bill of complaint that these notes, checks, and bills were so indorsed over to McKinnon without full and adequate consideration, duly received, or by means of fraudulent conduct, representations, or statements. There is no allegation that the proceeds of the notes, bills, and checks collected were paid over without full consideration or through fraudulent representations or conduct. The bill of complaint further alleges that about July 1, 1904, and when the corporation was in financial difficulty to the knowledge of McKinnon, he procured certain officers or employés of the corporation to indorse and deliver to him certain other promissory notes belonging to said corporation, of the aggregate value of over $50,000, and also other notes, not specifically named, the details of which are unknown. As to these notes the bill of complaint says:

"That said notes were, however, the property of said agency and in equity so continued to be until the appointment of your orator as receiver, as hereinafter set forth, since which time your orator has succeeded to the rights of the corporation therein. That your orator is unable to ascertain upon what terms, conditions, or consideration said McKinnon obtained said notes, and therefore charges that the said defendant is bound to make discovery therefor and account to your orator for said notes as the property of said International Mercantile Agency."

There is no charge or allegation that these notes were indorsed over to McKinnon without full and adequate payment therefor, without full consideration paid, through fraudulent practices or conduct or representations, or that they were so turned over as collateral security or upon any trust. There is no allegation that the complainant has any knowledge or information sufficient to form a belief to the effect that any of these notes mentioned in the complaint, or that any of the proceeds of notes, etc., mentioned in the bill of complaint, were so indorsed over and delivered, or that any of the money was paid over, without full consideration, or through any fraudulent misconduct or representations, or as security. We have the bare statement that the said property, referring to the notes last mentioned, continued to be the property of the mercantile agency in equity until the appointment of the receiver. No fact is alleged tending in any way to show that this is so. The bill further states, in substance, that these bills, checks, and notes have been delivered to the defendant Crocker, and that he is proceeding to collect the same on behalf of McKinnon, who is now traveling in Europe.

It seems clear to this court that the bill of complaint is fatally defective in not alleging, at least upon information and belief, that these promissory notes, drafts, and bills receivable, and the moneys collected and received, were so indorsed over and transferred without full consideration, or fraudulently, or as security, or in some way or under some arrangement tending to show that the receiver is either in fact the owner or has an equitable ownership therein. If the details of the transaction complained of are unknown, there can be general allegations inserted in the bill, accompanied by a statement that the details of the

transaction are unknown to the complainant. I do not think a prima facie case is made by merely alleging that McKinnon was one of the original promoters of the corporation, and became a director thereof and a member of the executive committee of the board of directors, and that he continued to occupy these positions until the dissolution of the corporation, and that while he occupied such position the notes, drafts, bills, and money were indorsed and passed over to him. There is no allegation that under the laws of the state of New Jersey such a transaction is void or voidable, nor is there any allegation that under the laws of the state of New Jersey such a transaction is forbidden. Clearly, under the laws of the state of New York, and under the law as applied by the courts of the United States, a corporation may transfer its property to a director, provided it is done fairly and honestly, without fraud, and for a full and adequate consideration, and for the benefit of the corporation. There is no allegation here to the contrary, and no presumption arises against the fairness of the transaction. Where such transfers are made, it requires but little evidence to overthrow the transfer; but the transaction is not prima facie invalid or fraudulent.

In re Castle Braid Co., Southern District of New York (D. C.) 145 Fed. 224, I recently held, after an examination of the authorities which are there cited, that:

"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."

In Twin-Lick Oil Co. v. Marbury, 91 U. S. 588, 589, 23 L. Ed. 328, 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. M. & S. R. Co., 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."

The following cases also throw light on the subject: 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.

The demurrer is sustained, but with leave to the complainant to amend on payment of taxable costs of the demurrer within 20 days after service of a copy of the order sustaining the demurrer.

REED v. MUNN et al.

IBEX MINING CO. v. MUNN et al.

MUNN et al. v. IBEX MINING CO. (two cases).

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

Nos. 1,713, 1,890, 2,319, 2,320.

1. EQUITY—DECREE MUST CONFORM TO THE BILL OF COMPLAINT.

Where a bill in equity seeks to enforce an unrecorded trust interest in a mining claim, the legal title to which is in an assignee of the locator, under a syndicate agreement, to the constitution of which the bill alleges the cestui que trust assented, *held*, to be error to decree a revocation of such conveyance, and to revest the title to the mine in the cestui que trust as he had waived his right to reclaim the mine itself. His recovery should be limited to his share in the proceeds of the lease and sale under the syndicate agreement.

2. TRUSTS—ENFORCEMENT—EVIDENCE.

Where the locator of a mining claim has conveyed the legal title thereto to A., who is alleged to have executed back to the grantor an agreement to account to him for a certain interest therein, such agreement being unrecorded, and 14 years after the legal title had so passed from such trustee to third parties such beneficiary sues to enforce the trust, *held*, that he must present such proofs as to satisfy fully the judgment and conscience of the court, both of the existence of the trust and the essential terms thereof.

3. SAME—INCONSISTENCY AND CONTRADICTION IN SUCCESSIVE BILLS OF COMPLAINT.

Claim of notice of such trust to subsequent creditors and purchasers is greatly weakened where it appears from successive bills of complaint that when the suit was first brought the facts sworn to failed to state sufficient grounds for relief, and set out a claim inconsistent with that ultimately pleaded; as it should not be expected that subsequent purchasers and creditors should have notice of more or different facts than were known to the suitor when he swore to the first bill.

4. SAME—ACTIVE TRUST—LEGAL CHARACTER OF CONSOLIDATION AGREEMENT.

Where the claimants of conflicting locations of mining property, in order to adjust the controversy among themselves, conveyed to a designated trustee under a written agreement, specifying the proportion of the respective interests of the owners, with authority in the trustee to lease or sell the property upon the written request of two-thirds in value of the beneficial owners, *held*, that such agreement, under the rule in Brandies v. Cochrane, 112 U. S. 344, 5 Sup. Ct. 194, 28 L. Ed. 760, constituted an active trust, as distinguished from a mere trust power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 178.]

5. EXECUTION—PROPERTY SUBJECT—INTEREST IN REAL ESTATE.

As, under the statute of Colorado, mining locations are declared to be real estate, and under the statute and decisions of the Supreme Court of the state every interest in land, legal and equitable, is subject to levy and sale under execution, *held*, that the equitable interest of the beneficial owners under said trust agreement was subject to seizure and sale under execution, and the purchaser under sheriff's deed acquired the interest of the beneficial owner under the consolidation agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 91.]

6. SAME—SUFFICIENCY OF DESCRIPTION OF PROPERTY UNDER EXECUTION AND LEVY.

Any description of property under sheriff's levy and sale is sufficient which, taken as a guide, will point the way to the land, and easily en-

able the inquirer to identify it. Even parol testimony may be resorted to to aid the identification. Description in this case *held* sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 334; vol. 20, Evidence, § 2115.]

7. SAME—TRANSFER OF BID AT SHERIFF'S SALE.

The successful bidder at sheriff's sale may transfer his purchase to another, who becomes the recipient of the sheriff's deed; but such transferee acquires no better title or right than the bidder would have acquired under the deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21; Execution, § 828.]

8. SAME—NOTICE OF EQUITABLE INTEREST TO SUBSEQUENT PURCHASERS AND CREDITORS.

Where notice of an outstanding equitable interest in property sold under execution is not obtained until after judgment lien has attached, sale made, and purchase money paid, *held*, not to be sufficient to affect the title of the purchaser, although sheriff's deed is not made until after such notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, §§ 781, 783, 785.]

9. VENDOR AND PURCHASER—PURCHASER WITH NOTICE UNDER PURCHASER WITHOUT NOTICE.

Held to be a bona fide purchaser for value, as he succeeds to the position of the first innocent purchaser.

10. SAME—VALUABLE CONSIDERATOIN DISTINGUISHED FROM AN ADEQUATE CONSIDERATION.

Although a purchaser from one who, by reason of financial distress, may feel compelled to sell his property at a sacrifice, yet, if the transaction is free from duress, deceit, or fraud on the part of the purchaser, and he pays a valuable consideration therefor, although he may not pay an adequate price for the property, the transaction is not assailable by a stranger on the ground that such purchaser is not a bona fide purchaser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 567, 572.]

11. CORPORATIONS—NOTICE OF EQUITABLE CLAIM TO A PURCHASING CORPORATION.

To affect a corporation acquiring the legal title to real estate with notice of an outstanding equitable claim, knowledge thereof to a stockholder or director prior to the organization of the corporation will not ordinarily affect the corporation; and such knowledge on the part of a director after the organization of the corporation will not bind the corporation unless such director receive such notice either while acting for the corporation or under circumstances which, in fidelity to the company, it was his duty to impart to it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1750–1752, 1757.]

12. VENDOR AND PURCHASER—BONA FIDE PURCHASERS—THE TRUE EQUITY RULE.

As applied to the facts of this case, courts of equity will not impute to a purchaser for a valuable consideration notice of an outstanding equity, unless the circumstances are such as to warrant the court in saying, not only that he might have acquired, but also that he ought to have acquired, it but for his gross negligence in the conduct of the business in question. It is not sufficient that he had the means of obtaining, and might with prudent caution have acquired, the knowledge, but whether the fact of not obtaining it was culpable negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 477.]

13. MINES AND MINERALS—QUALITY OF A MINING LOCATION.

The locator of a mine, without obtaining patent, acquires the possessory

title thereto against all the world and against the government so long as he performs the annual amount of work thereon. This title passes to the purchaser under him, who, as the apparent owner, holds it against the unrecorded equitable claim or interest therein, without notice. Between such claimant of a prior equitable interest and the subsequent purchaser of the legal title of the locator, the latter has the prior equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 68.]

14. LANDLORD AND TENANT—RIGHT OF LESSEE TO BUY IN TITLE OF LANDLORD.
A lessee has the right to purchase the landlord's title at execution sale, or to acquire by deed through the landlord the fee, and thereby put an end to the relation of landlord and tenant.

15. EQUITY—LACHES.
Doctrine of laches applied to the facts of this case.

(Syllabus by the Court.)

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

The above-entitled causes grow out of one controversy, and are so allied that they may be considered and disposed of in one opinion. The controversy grows out of the claim of N. A. Munn and R. G. Munn to an alleged equitable interest in what is termed the "Independence Lode," or mining claim, located at Leadville, Colo. For convenience the said Munns will be designated in this statement and the discussion as the complainants, and the other parties to the litigation as the defendants. In 1878 the complainants, by discovery and location, became the owners of an undivided one-half interest in said mine. J. S. Brown, Jr., and Charles Johnson were the like owners of the other half, in the proportion of one-fourth each. This location was soon checkered over with other conflicting claims, and became the prolific source of strife and litigation, rendering the development and operation of the mine, if not impracticable, of little certainty and profit; so that in 1879 the complainants executed to one Cartwright a full power of attorney, acknowledged and recorded, authorizing him to sell and convey their interest therein, under an oral agreement that for his services in effecting such sale he should account to them for one-half of the proceeds. Afterwards, in the same year, Cartwright, under said power, conveyed this interest to one James Henshall in fee simple for the expressed consideration of $1,000, receipt of which was acknowledged. This deed was duly acknowledged and recorded. Thus the record title stood until 1881, when on account of the complications and litigation growing out of the various conflicting claims, the parties in interest by deed conveyed to one Clinton Reed their respective claims, including said Henshall; and in September, 1881, entered into what is termed the "Archer Consolidation Agreement," which included some other contiguous allied properties not involved in this litigation. The parties to that agreement were as follows: Clinton Reed, party of the first part, and trustee for said parties of the second part, to wit: John B. Stone, J. P. Van Lice, A. L. Ordeen, James Henshall, James B. Belford, Lewis C. Rockwell, James S. Brown, J. B. Bissell, Thomas L. Darby, Jacob Mack, John Powell, Daniel Powell, John Slattery, Patrick Sullivan, John W. O'Brien, Michael Finnerty, C. Donnelly, John Fox, Peter Hanrahan, R. E. Goodell, William Gilman, Leonard S. Ballau, David A. Gage, Alexis M. Lay, and Newton B. Lord. The agreement witnesseth:

"That whereas, said parties of the second part have conveyed to said party of the first part, as trustee for the purposes hereinafter stated, the following lode mining claims, to wit, the Archer lode, the Independence lode, the San José lode, the Little Stella lode, the General Shields lode, the Burlington lode, the Winnemuch No. 2 lode, and the Uncle Sam lode. And whereas, said parties of the second part have made such conveyances to said Reed for the purpose of consolidating all of said claims and said interests in one property, to be owned by said parties of the second part, as follows: All of said claims are to represent in said consolidation and to be valued for the purposes of such

consolidation at the sum of two hundred and sixty-eight thousand three hundred and thirty-three ($268,333) dollars. Of said sum the Archer, the Independence, and San José lodes are each valued at forty thousand dollars, the Little Stella and General Shields lodes are each valued at twenty thousand dollars, the Burlington, and Winnemuch No. 2 lodes are each valued at the sum of twenty thousand ($20,000) dollars, and the Uncle Sam lode is valued at the sum of sixty-eight thousand three hundred and thirty-three dollars, of which several sums the several owners of said several claims own an interest proportionate to their several shares or interest in the several claims, and, if said trustee shall sell or dispose of the said claims under the direction of two-thirds in value of the owners thereof, he shall pay to the several and undivided owners sums proportionate to their interests, upon the above basis. And the said party of the first part, as such trustee, shall be governed in the sale and disposal of said consolidated property, and in the holding thereof, by the directions of two-thirds in value of the owners thereof, and shall, whenever called upon by such two-thirds in value of the owners thereof, convey said premises or take such steps in reference thereto as they may direct, such direction to be in writing, signed by the said two-thirds in value; it being expressly understood and declared that said property shall be held, disposed of, or sold upon such terms and in accordance with the direction and authority of two-thirds in amount of the owners of said property, and that the amount of interest that each of the several owners have in said several claims shall be determined by what is shown by the records of Lake county to be the interest of such owner in the premises. And it is expressly understood and agreed, and this trust is executed upon the condition, that the said trustee shall be bound to act upon the direction of said two-thirds, notwithstanding any objections of the minority."

In pursuance of said trust arrangement, on the request and direction of the required two-thirds in amount of the owners, said Reed made a lease of said consolidated properties, and on the 28th day of June, 1890, on like request of the beneficiaries, including said Henshall, Reed made a lease thereof to one Campion, for a term of three years, with an option to purchase the same at any time during the term at the stipulated price of $75,000. This lease and option was, on the 18th day of March, 1891, duly assigned by said Campion to the Ibex Mining Company, a corporation organized about the 7th day of March, 1891, which, in the exercise of the right of said option, on the 5th day of February, 1894, elected to make the purchase; and thereupon said Reed, pursuant to the terms of said trust, executed and delivered to the company a deed of conveyance to all of said property. To correct some error in said deed Reed, on the 27th day of June, 1894, made a second deed to the company. The said company by mesne conveyances also acquired said lease of said J. S. Brown and Charles Johnson. Through the efforts of the parties to said consolidation agreement other than said Henshall, patents were obtained to the various mining properties involved, and these titles vested in the Ibex Mining Company. Under said leases the said properties were worked and developed until 1893–94, so that the properties which, prior to the Archer consolidation agreement, had been of little worth, proved to be very valuable and promising. In this condition of affairs, on the 13th day of July, 1894, the complainants, as citizens of the state of Texas, filed their bill of complaint against the Ibex Mining Company, George W. Trimble, Charles Cavender, A. V. Hunter, and J. T. Campion, as directors thereof, and Clara M. Richardson and James Henshall. This bill, after setting forth the discovery and location of the Independence Mining lode and the making of the power of attorney to said Cartwright, charged that, in disregard of his trust, Cartwright, without their knowledge, in July, 1879, entered into some arrangement or agreement with said Henshall, the nature and conditions of which were to them unknown, alleging the fact to be that Cartwright never sold or disposed of their said interest in said mine, and that if he did make a deed to Henshall it was not the sale of their interest in said property, and that no consideration passed to them; that they had believed that Henshall was only a co-owner with them in the Independence lode, not derived from them; that Henshall in 1882–83 told them that he never held their interest in said mine, and they believed their interest

therein remained intact in their name on the records of Lake county until about April 15, 1884, when they learned that the defendants other than Henshall were in possession and taking ore from said claim. Knowledge of the rights and claim of the complainants was charged against the defendants. The prayer of the bill was that the complainants be declared to be the owners and entitled to the possession of an undivided one-half in the Independence mine, and that the defendants account for the ore mined therein. This bill having been held bad on demurrer, the complainants on March 20, 1895, filed an amended bill, in which they took the position that Cartwright, being unable to dispose of and sell said claim, relinquished his interest therein, and entered into an arrangement on their behalf with Henshall in writing, whereby Henshall, for an interest of one-fourth of said claim, agreed to defray all the expenses, to defend and prosecute adverse suits respecting said claim, and to perfect the title thereto; and, in the event he failed to perfect said title, the conveyance from Cartwright should be void and of no effect. It was further alleged that Henshall entered into the Archer consolidation agreement with the consent of the complainants, and that Reed leased the properties to one Campion under the terms of said Archer consolidation trust with their knowledge and consent. Demurrer was filed to this bill, but without action thereon the complainants, on the 3d day of July, 1895, filed a second amended bill, in which said Clinton Reed was joined as a defendant. In this amended bill they, in effect, allege that they, in connection with said J. S. Brown and Johnson, entered into an agreement with said Henshall, by which they were to convey to him their undivided one-half interest in said Independence mine in consideration of his undertaking to perfect the title thereto; that he was to defray all expenses, prosecute and defend all adverse or other suits necessary to that end; that he was also to prosecute action before the Land Office Department to obtain a patent for said mine. It averred that through said Cartwright they made a deed to Henshall, whereupon Henshall in writing executed the agreement to the effect alleged in the first amended bill. They thus asserted an express trust between them and said Henshall, and reaffirmed the statement that through Henshall they entered into the Archer consolidation agreement, and consented thereto. They alleged notice of their claim and rights to the subsequent purchasers, with a prayer for discovery, decree of ownership of the undivided one-half of the Independence lode or mine, and for an accounting. In 1899 one Frank R. Jeffery and Ed. Dale recovered a judgment in the county court of Lake county, Colorado, against said Henshall. The execution issued thereon was levied upon all the right, title, and interest of Henshall standing in the name of said Reed as trustee in said Independence lode and Archer consolidation, under which said interest was sold at sheriff's sale, and bought in in the name of M. M. Jeffery, wife of said F. R. Jeffery, in satisfaction of said judgment. No redemption having been made from such sale within the specified statutory period, the said interest in the premises was duly deeded by said sheriff to said M. M. Jeffery on the 1st day of December, 1890. On the 13th day of May, 1893, Mrs. Jeffery and her husband joined in a deed of conveyance of said property to said James J. Brown for the expressed consideration of $6,000 in hand paid. Upon the same day Brown conveyed by deed said property to the Ibex Mining Company. This title so obtained is assailed by the bill of complaint for reasons that will appear hereafter in the opinion, and notice upon the purchasers thereunder of the trust interest of the complainants in the property is charged.

The defendant Henshall, though duly summoned, made no answer to the bill, and the defendant Cartwright, notified by order of publication, entered no appearance. The other defendants made defense. In his testimony, taken and read in the hearing of the issues, Henshall stated, in respect of the alleged contract between him and said Cartwright, that he was to push the matter of the conflict of claims to a conclusion, to obtain the title and deed of the one-half thereof to the complainants; that they had an understanding that if a sale was made they would be notified and consent to it, and receive their proportion of the purchase money; that in any event they were to get one-half and he one-half of the proceeds whether he carried the litigation through successfully or not, under any disposition that he made of the property; that he could sell it or enter into consolidation agreements with other

properties, or make compromises, and that it was not necessary that he should successfully carry on any litigation in order to have an interest; and testified that he carried out his agreement so as to become entitled to his interest. N. A. Munn testified that he never gave a deed and never heard of a deed until December, 1895, supposing all the time that the title stood in his name. He admitted that he gave a power of attorney to Cartwright, who afterwards brought Henshall to him, saying that Henshall could handle it, and that Henshall made him a proposition to take hold and perfect the title for one-fourth interest, and that nothing else was said. He further testified that Henshall was to go ahead and get a deed from the government; that he knew nothing of any conflicting claims that were put forward against the property except two; that if there was any litigation Henshall was to stand it, and if he did not succeed in obtaining a title he would get no interest, but he would have his interest in whatever he did get. He could not give the contents of the contract between Henshall and Cartwright.

R. G. Munn testified that the contract in his favor was the same as the one made between Henshall and said Brown; that he saw the contract in 1879 in the possession of Cartwright, which was then left in Cartwright's safe; that he never knew of the deed until Henshall told him about it in 1894; that he first heard of the Archer consolidation in 1882. He also testified that he signed the agreement with Henshall; that the contract did not mention the deed to Henshall. His understanding of the alleged contract was that, if Henshall perfected the title, the Munns were to deed to him, and that he still understands the same. Referring to the letter of one of the Munns to Trimble, hereafter mentioned in the opinion, he stated his present idea of the condition of affairs, and that his present understanding is the same as when he wrote said letter. He admitted that Henshall told him their interest had been sold to pay the said debt of Henshall to said Jeffery and Dale; that he looked up Henshall, to see what he had done with the property, long after he knew, according to his testimony, it was in the Archer consolidation and not in Henshall's name. He also testified that he believed in 1894 that his interest had never been deeded to Henshall, although he had been told in 1882 that the property had been transferred to the Archer consolidation. After the amended bill was read to him, he said he still did not know that the deed was made to Henshall, and did not consider that Henshall had ever conveyed to Reed; that he approved the lease, and wished the royalties to be paid for it, and intended his letter to Trimble to be a demand for royalties under the lease made in 1890.

Other important facts will appear in the following opinion.

On the issues joined under the evidence, the Circuit Court, on June 18, 1901, entered decree declaring title in the complainants, and vesting in them an undivided one-half interest in said Independence mine, setting aside the deed made by Reed to the Ibex Mining Company, and the title derived under the sheriff's deed to M. M. Jeffery. The court referred the matter of the accounting to the master, who in his final report awarded to the complainants the sum of $193,448.30, which was affirmed by the court. From the decree finding the issues for the complainants, the Ibex Mining Company and Clinton Reed prosecuted separate appeals, and from the decrees on the accounting both parties prosecuted appeals.

Charles J. Hughes, Jr. (Charles Cavender, on the brief), for Clinton Reed and the Ibex Mining Company.

T. J. O'Donnell and Edwin H. Park, for N. A. Munn and R. G. Munn.

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

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

In view of the allegations of the bill, on which the case was tried, that

Henshall, the unquestioned holder of the legal title of the complainants' interest in the Independence mine, entered into the Archer consolidation agreement with their knowledge and consent, and therefore as their agent, pursuant to the provisions of which Reed, the trustee, conveyed to the Ibex Mining Company, it is remarkable that the Circuit Court should not only have decreed an accounting of the complainants' interest in the ore mined under the operation of the Archer consolidation agreement and by the Ibex Mining Company, but also have devested the company of the title to the undivided one-half interest in the Independence mine, and vested the same in the complainants. "Equity suffers no person to approbate and reprobate the same deed." 1 Kane's Equity, 317; 1 Bell, Com. 146. As said in Newham v. Kenton, 79 Mo. 382, 385:

"It is a great misapprehension to suppose that one cause of action can be stated in a bill of equity, and by some sort of comprehensive flexibility of chancery jurisdiction relief can be administered growing out of a state of facts not embraced within the facts pleaded. The rule that under the general prayer for relief a party may have any relief to which he may show himself entitled is limited to relief founded on and consistent with the facts set out in the bill, and not such as may be proven at the hearing. * * * A party is not entitled to a judgment on a finding of facts different from any theory of the case set up in the petition or answer."

In Phelps v. Elliott (C. C.) 35 Fed. 455, 461, Judge Wallace expressed the rule as follows:

"The proofs must be according to the allegations of the parties, and if the proofs go to matters not within the allegations, the court cannot judicially act upon them as a ground for decision, for the pleadings do not put them in contestation. * * * A party can no more succeed upon a case proved but not alleged than upon a case alleged but not proved."

If, as the bill alleges, Henshall entered into said trust agreement with Reed, in pursuance of which Reed conveyed the interest in Henshall to the Ibex Mining Company, it concluded the complainants as to this title, leaving them to an accounting with Reed as to their interest in any earnings received by him under the leases and their proportion of the purchase price of the sale to said company.

In Johnston v. Standard Mining Company, 148 U. S. 369, 13 Sup. Ct. 588, 37 L. Ed. 480, Mr. Justice Brown said:

"If he assented to the formation of the corporation and to the transfer of the mine to it, he clearly waived his right to reclaim an interest in the mine itself."

Passing beyond this, do the proofs and the law entitle the complainants to any relief whatever against the defendants? The foundation of the suit is the existence and the terms of an unrecorded written contract, not presented in evidence, claimed to have created the relation of trustee and cestui que trust between Henshall and the complainants, alleged to have been executed in 1879, more than 14 years prior to the institution of this suit to enforce it. Where a suitor thus comes into court to enforce the provisions of such an undisclosed trust after such a lapse of time, and in respect of mining property constantly changing hands and shifting in value, under developments resulting from the expenditure of labor and money by its holders, every consideration of

justice demands that he should come with proofs so clear and persuasive as to satisfy fully the judgment and conscience of the chancellor, not only of the existence of the written instrument, but as to its essential terms. The varying sworn bills of complaint herein and their own testimony show that they themselves, when they first advised their counsel of the facts, did not understand that such a trust instrument as they now claim was given by Henshall to Cartwright. On the contrary, they averred that they did not know what it was, and denied that Cartwright ever conveyed to Henshall. The case as stated in the bill merely charged a violation of the confidence reposed by them in Cartwright. No claim was then advanced that Henshall held the legal title under a trust condition that he should render certain services and make certain expenditures, for a half interest, or any interest, in the property. But under oath they averred that they had believed that Henshall held only as co-owner under an interest acquired aliunde. Even their own testimony is inconsistent with the allegations of the second amended bill, and is inconsistent with the trust asserted. How can they expect the court to believe and find that the subsequent purchasers had any notice of an unrecorded, unpublished instrument, containing provisions other than those sworn to by them in February, 1894? In confirmation of the fact that when they instituted this action the complainants did not understand that any such trust contract existed between Henshall and Cartwright in their favor, set out in the final amended bill, in a letter written by R. G. Munn to George Trimble, one of the defendants, of date April 11, 1894, he stated that:

"I met to-day Mr. James Henshall, who was a resident of Leadville in 1879, and at that time I was prospecting there, and in 1878 I located the Independence claim and had it surveyed and recorded, and afterwards the Little Johnny surveyed across my claim and others done likewise until it and other claims were all in litigation, and in settling I and my father, N. A. Munn, agreed to quitclaim our interest in the Independence, and the agreement was made in the shape of a contract, and the contract was put on record and the amount stipulated in contract. Now I understand that Judge Belford and Mr. Rockwell and others have all signed quitclaim deeds to the property, and received their compensation. My father and myself have not signed away our right in the Independence, and as we can only hold the Little Johnny to the amount of the contract on record, with interest from July, 1879, until the present time, I now demand that such amount, with interest, be paid us in full, and as I understand you are one of the principal stockholders in the group of mines of which the Independence is one, I ask you to look after this matter, and advise me at your earliest convenience, and oblige."

The reasonable import of this statement is that the consideration of the quitclaim deed to Henshall for their interest was a stipulated amount, and that they then understood that their only right was to claim "the amount of the contract" against the Little Johnny, with interest. If this information had been conveyed to the Ibex Mining Company before its acquisition of the legal title to the property, it would only entitle them to claim the amount of the purchase price stipulated for the quitclaim deed.

As proof that Henshall himself was not publishing any trust relation respecting this property between him and the complainants, in a letter written by him February 1, 1890, to said Jeffery and Dale, judgment

creditors of his, who evidently had asked him to convey to them his interest in the Independence mine, he said:

"Yours of January 24th only just received on my return from Clear Creek county. I note its contents, and would willingly give the deed asked, if you wish it after knowing the circumstances. The records will show that the Independence mine was located by an old man by the name of Munn, and a son, and a Mr. Brown and some one else. When the excitement was running high in 1879, and the Independence was overlaid with the Uncle Sam, Little Johnny, Gen'l Shields and others, the owners deeded to me, if I would fight the matter through. I gave them an obligation to pay them quite a large amount when the mine was sold or disposed of by me. If you will accept the deed under these conditions, and release me from your judgment and costs, I will deed to you. My interest in the Independence is five-eighths. Reed can tell you the relation the Independence holds to the combination. The Little Link is subject to costs of patent. You know the condition of things, and can elect what you will do, or I will raise the money, and pay one-half of the judgment and costs, $165.21, if I can be released from the judgment, and you hold Cunningham for the other half."

This was a distinct statement by Henshall that the claim was deeded to him in consideration of his fighting through the contest of title, and the obligation in case of success "to pay them quite a large amount when the mine was sold or disposed of by me [him]." He had already placed the mine in the Archer Consolidation Syndiate, in pursuance of which trust agreement Reed afterwards conveyed absolutely to the Ibex Mining Company, whereby Henshall's "obligation to pay them [the complainants] quite a large amount" became absolute, if the title or interest had not then passed under the sheriff's deed.

In the second amended bill the complainants, to affect the subsequent purchasers with notice of the existence of the trust agreement with Henshall, seek to attach or connect themselves with the trust instrument executed between said James S. Brown, Jr., and Henshall as to Brown's undivided one-fourth interest in said mine, which instrument was duly put to record. As this agreement between Henshall and Brown was not executed for more than three months subsequent to the date of Cartwright's deed to Henshall and the making of the alleged agreement between them, the very reverse of what is claimed by counsel would seem to be the effect, to wit, that as Brown's contract was put to record, and no such contract between the complainants and Henshall was of record, the clear implication would arise in favor of subsequent takers under Henshall that no like agreement was made by Henshall with complainants. By the terms of the Archer consolidation agreement, the interest of Henshall, as the apparent owner of the property, was placed in Reed, as trustee, for the purpose of consolidating the conflicting claims to all the properties named, with power to dispose of upon the condition of the future determination and request of two-thirds of the beneficiaries in interest, they being designated as "the owners," and until executed Reed had only a power to dispose of or sell as trustee. There was unquestionably, therefore, an equitable interest in Henshall as the beneficial owner pro tanto.

A majority of the court are of opinion that under the authority of Brandies v. Cochrane, 112 U. S. 344, 5 Sup. Ct. 194, 28 L. Ed. 760, the Archer agreement constituted an active trust as distinguished from a technical trust power. This, however, does not dispose of

the question as to whether, under the Colorado statute, that interest was subject to seizure and sale under execution for Henshall's debts. The ruling in the case of Brandies v. Cochrane, supra, that a judgment against the grantor under a trust agreement, with power of appointment, such as existed in that case, did not create a lien on the equitable estate so as to bind a subsequent purchaser with notice, was predicated of the statute of the state of Illinois, which did not change the common-law rule in the particular case. The Illinois statute in question, which provided that judgments should be a lien on the real estate of the judgment debtor, declared that:

"The term 'real estate' in this section shall be construed to include all interest of the defendant, or any person to his use, held or claimed by virtue of any deed, bond, covenant, or otherwise, for a conveyance or as mortgagee or mortgagor of lands in fee, for life or for years."

As under the decision of the Supreme Court of Illinois, where the legal title to lands is in a trustee to subserve the purposes of an active trust, the judgment creditor acquired no lien at law, but could only secure one by a bill in equity, according to the chancery practice act, prescribed by the statute of that state, it controlled the law of the particular case.

It will be observed that the court adverted to the ruling in White v. McPheeters, 75 Mo. 286, that:

"That case arose under the Missouri statute, which appears to be broader than that of Illinois in its definition of real estate subject to seizure and sale on executions at law, and was, in fact, a proceeding in equity by a creditors' bill to subject the estate, which was subject to the power of appointment, and had been conveyed to a volunteer in pursuance thereof, to the satisfaction of judgments."

The Colorado statute (Mills' Ann. St. § 2529), in force at the time of the rendition of the Jeffery judgment, goes far beyond the provisions of the Illinois statute. It declares that:

"All and singular the goods and chattels, lands, tenements and real estate of every person against whom any judgment shall be obtained in any court of record * * * for any debt, damages, costs or other sum of money, shall be liable to be sold on execution, * * * and the said judgment shall be a lien on such lands, tenements and real estate, from the last day of the term of the court in which the same may be rendered, for the period of seven years. * * * The term real estate in this section shall be construed to include all interest of the defendant or any person to his use, held or claimed by virtue of any deed, bond, covenant, or otherwise, for a conveyance or as mortgagor of lands, in fee, for life or for years."

Section 2582 of said statute is as follows:

"Legal and Equitable Interests in Land Subject to Execution.—Every interest in land, legal and equitable, shall be subject to levy and sale under execution, and the claim or possessory right of any defendant in execution, in or to any public lands, may be levied upon and sold under execution, in the same manner as if the same were held by such defendant in fee simple; Provided, that nothing in this chapter contained shall be so construed as to give any plaintiff in execution the right to levy on any land filed on by any person, in the land office of the Colorado Land District, and occupied as a homestead by the defendant in execution."

It has been expressly held by the Supreme Court of Colorado that while such equitable interest in real estate may be properly reached

by a bill in equity to subject it to the payment of the debts of the cestui que trust, it may likewise, under the broad terms of the statute, be seized and sold on execution. In McFarren v. Knox et al., 5 Colo. 217, 221, the court, speaking of judgment liens, referred to the statute of the state defining what property might be sold under execution, and held that it constituted a lien upon whatever real estate might be levied upon:

"In this view the judgment of McFarren, upon being filed in the office of the recorder, became a lien upon McGovney's interest in the land in dispute as assignee of the bond from Rose, which was an equitable interest, unless such interest passed by virtue of the prior assignment."

The court further said:

"The assignment by the obligee or his assignee of a bond for the conveyance of real estate comes clearly within the provisions of this section, and unless recorded will not take effect as against a subsequent bona fide purchaser or incumbrancer without notice."

In Barnes v. Beighly, 9 Colo. 479, 12 Pac. 908, the court said:

"Under our statutes all equitable interests in property are subject to levy and sale on execution. For the purpose of acquiring a lien on any real estate owned by a judgment debtor, or which he may acquire after judgment, situate in a different county from that in which the judgment is entered, it is provided by section 1839 that the creditor may file a transcript of his judgment with the recorder of such county."

In O'Connell v. Taney, 16 Colo. 356, 27 Pac. 888, 25 Am. St. Rep. 275, the court, speaking of the provisions of the general statutes of the state, said:

"Every interest on land, whether legal or equitable, is made subject to levy and sale under execution. Under this provision, appellee might have caused the execution issued upon the judgment * * * to have been levied upon the latter's interest in the very property here in controversy, and had the same sold in satisfaction thereof. Had this course been pursued, the purchaser thereafter could have maintained an action for the purpose of having his interest in the premises determined."

In that case the judgment creditor resorted to a creditors' bill, and the court only said that:

"The judgment creditor was not, however, compelled to resort to this mode of procedure [by execution sale]. The action which he did institute might be pursued with at least equal propriety."

This same doctrine is again recognized in Mulock v. Wilson, 19 Colo. 301, 35 Pac. 534, where it is said:

"That a person having procured a sheriff's deed to land, based upon valid proceedings, may maintain an action to set aside and cancel a deed given by the judgment debtor before the recovery of the judgment, with intent to defraud the judgment creditor. * * * A judgment creditor desiring to set aside a supposed fraudulent deed of real estate may bring his action therefor to test the validity of the deed before attempting to subject the premises to execution sale; or the purchaser, after such sale, may bring his action to remove the cloud from the title by canceling the supposed fraudulent deed, and to recover possession of the premises."

In La Fitte et al. v. Rups, 13 Colo. 208 (22 Pac. 309), the syllabus is:

"Where one purchases and pays for real property, causing title to be conveyed to another without consideration, a trust results in favor of the former, by means of which the property may be subjected to execution."

So in Stock Growers' Bank v. Newton, 13 Colo. 246, 249, 22 Pac. 444, 445, the court said:

"A judgment creditor, desiring to set aside a supposed fraudulent deed of real estate, may bring his action therefor to test the validity of the deed before attempting to subject the premises to execution sale; or the purchaser, after such sale, may bring his action to remove the cloud from the title, etc. [Citing authorities.] It is scarcely necessary to add that by section 1883, Gen. St., every interest in land, legal and equitable, is subject to levy and sale under execution in this state."

Freeman in his work on Executions, vol. 2 (3d Ed.) p. 953, adverting to statutes broader than the statute of 29 Charles II, said:

"In California, Colorado, Connecticut, Indiana, Iowa, Kansas, Maryland, Minnesota, Montana, New Hampshire, Nevada, Pennsylvania, Utah, and Washington, equitable estates are subject to execution much more extensively than under the statute of 29 Charles II. In fact, in most of these states all beneficial estates are liable to be taken in execution, irrespective of the question of whether they are legal or equitable."

The case of Fallon v. Worthington, 13 Colo. 559, 22 Pac. 960, 6 L. R. A. 708, 16 Am. St. Rep. 231, cited by complainants' counsel to support the contention that such an equitable interest in land at bar cannot be sold under execution, is not in point. An examination of that case discloses that, although Fallon had an interest in the property at one time, and at one time held a trust deed thereon, that interest had been disposed of and the trust deed released; so when execution was levied upon the supposed interest of Fallon, he had neither a legal nor equitable interest therein, but simply a personal contract between himself and the grantee. Therefore, the court said:

"The entire legal title was in Worthington. He was in possession of the property. Fallon reserved no interest or estate in the land whatsoever."

As the foregoing construction placed upon the local statute of Colorado by the Supreme Court of the state becomes a rule of property as affecting real estate situate therein, it is absolutely binding on the federal court.

In Hervey v. R. I. Locomotive Works, 93 U. S. 664, 671, 23 L. Ed. 1003, it was said:

"It was decided by this court in Green v. Van Buskirk, 5 Wall. (U. S.) 307, 18 L. Ed. 599; Id., 7 Wall. (U. S.) 139, 19 L. Ed. 109, that the liability of property to be sold under legal process issuing from the courts of the state where it is situated must be determined by the law there, rather than of the jurisdiction where the owner lives. These decisions rest on the ground that every state has the right to regulate the transfer of property within its limits."

So in Warburton v. White, 176 U. S. 496, 20 Sup. Ct. 409, 44 L. Ed. 555, it is said:

"Where state decisions have interpreted state laws governing real property, or controlling relations which are essentially of a domestic and state nature, —in other words, where the state decisions establish a rule of property—this

court, when called upon to interpret the state law, will, if it is possible to do so, in the discharge of its duty, adopt and follow the settled rule of construction affixed by the state court of last resort to the statutes of the state, and thus conform to the rule of property within the state. It is undoubted that this rule obtains, even although the decisions of the state court, from which the rule of property arises, may have been for the first time announced subsequent to the period when a particular contract was entered into."

In Christy v. Pridgeon, 4 Wall. (U. S.) 203, 18 L. Ed. 322, Mr. Justice Field says:

"The interpretation within the jurisdiction of one state becomes a part of the law of that state, as much so as if incorporated into the body of it by the Legislature."

In an early case (McKeen v. Delancy, 5 Cranch [U. S.] 32, 3 L. Ed. 25) Chief Justice Marshall said:

"In construing the statutes of a state on which land titles depend, infinite mischief would ensue should this court observe a different rule from that which has been long established in the state."

An examination of the cases cited by counsel for complainants will show that they either present distinguishing facts, or depend upon rules of decision where the statute of Colorado has supplied the very provisions wanting in the state, the absence of which left the court free to follow its own notion. Mrs. Jeffery, as the purchaser under the sheriff's deed of the equitable interest represented by Henshall in the Archer consolidation agreement, sustained the same relation to that interest occupied by Henshall at the time of the sale, and was invested with all the rights and remedies at law or in equity for the protection and enforcement of that interest secured by Henshall as a party to the trust arrangement.

Contention is made by complainants' counsel, in the attempt to liken the Colorado statute to that of 29 Charles II, subjecting lands, tenements, etc., to sale, that "trusts which come within the operation of the statute are only such pure and simple trusts as exist when the cestui que trust has the whole beneficial interest, and the trustee the naked legal title, and that any complicated trust, or where other persons are interested besides the judgment debtor, are not within the statute, and can only be reached through a court of chancery." There are several answers to this: (1) The Colorado statute is broader than the English statute in subjecting any equitable interest in lands of the debtor to execution. (2) Under the trust agreement, each of the cestuis que trust owned an entire beneficial interest, in the ratio or proportion expressly designated and declared by the trust agreement, without any present, remote, or contingent interest in any one else, with no provision that any other interest under any contingency may be grafted thereon during the continuance prior to sale thereunder by appointment, as provided.

Underhill on Trusts & Trustees (Amer. Ed.) art. 58, title "Power of One of Several Beneficiaries Partially Interested in a Special Trust," says:

"(1) The authority of one of several beneficiaries in a special trust in general depends upon the terms of the trust as construed by the court; but if sui juris, a beneficiary cannot be restrained from assigning his or her interest,

save only in the case of a married woman, who may, by apt words, in the settlement, be restrained from doing so during her coverture, but not before or afterwards.

"(2) An equitable tenant for life of land, within the meaning of the settled land act, 1882, has all the powers of selling, enfranchising, partitioning, leasing, mortgaging, etc., conferred on tenants for life by that act. And such person may prevent the trustees exercising their powers of the like character without his consent." See 2 Beach on Trusts & Trustees, § 712.

In Sparhawk v. Cloon, 125 Mass. 263, Chief Justice Gray said:

"At law, any property, real or personal, that a man owns, may be alienated by him, or may, unless specially exempted by statute, be taken for the payment of his debts; and no form of grant or device can enable the grantee or devisee to hold the estate without its being subject to alienation, attachment, and execution. From the time of Lord Eldon, the same rule has prevailed in the English Court of Chancery to the extent of holding that where the income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by, and liable in equity to the debts of, the cestui que trust, and that this quality is so inseparable from the estate that no provision, however express, which does not operate as a cesser or limitation of the estate itself, can protect it from his debts. The English doctrine has been approved in many decisions and dicta in this country. On the other hand, it has been maintained by judges whose opinions are entitled to the highest respect that the founder of a trust may secure the enjoyment of it to other persons, the objects of his bounty, by providing that it shall not be alienable by them or be subject to be taken by their creditors; and that his intentions in this regard, when clearly expressed by him, must be carried out by the court."

Obviously enough, the foregoing enunciation in no wise conflicts with the doctrine that the creator of a trust may so construct it in favor of the object of his bounty as to render it inalienable by him, or to place it beyond the reach of execution for his debts. There is in the Archer consolidation agreement no prohibition upon alienation by the cestuis que trust, expressed or implied, and consequently no exemption from levy and sale under execution under the Colorado statute, and there is no limitation of the use to which the income therefrom may be applied. See Farmers' & Merchants' Savings Bank v. Brewer, 27 Conn. 599, and note to article 58 of Underhill on Trusts and Trustees, American Edition.

No power of disposition was vested by the trust agreement in Reed, except upon the authorization by two-thirds in interest of the cestuis que trust. Even without this reservation of power in the beneficiaries, in the absence of express authority conferred on the trustee to alien or apply the income or proceeds to a third designated beneficiary, it remained in the cestuis que trust. The whole scope and purpose of the Archer consolidation agreement was to create a trustee to do certain things, for the exclusive benefit of the named beneficiaries as owners, under a conventional plan of organization among the conflicting claimants to the properties concerned, to do that which by concert of action they might have done themselves without the designation of the agent Reed. In the event of nonaction or nonconcurrence by the two-thirds in interest, the respective interests of the beneficiaries remained until such action, subject to the liabilities of the interest of each to respond to the obligations imposed under the Colorado statute to answer for his debts.

The validity of the sheriff's deed to Mrs. Jeffery is assailed on the ground that the description of the property levied on is bad for incompleteness or uncertainty. The levy was made upon:

"All the right, title, and interest of James Henshall and P. J. Cunningham in and to the following described property, to wit: * * * The Independence lode, the Archer lode, the San José lode, the Little Stella lode, the General Shields lode, the Burlington lode, the Winnemuck No. 2 lode, and the Uncle Sam lode (these were the properties constituting the conflicting claims), situate on Breece Hill, in California Mining District, Lake county, Colorado, and now standing in the name of Clinton Reed or C. Reed, trustee, on the records of said Lake county, known as and called the 'Archer Consolidation.'"

The criticism made, in its substantive effect, is that the description did not more specifically state what the interest of Henshall was by saying it was an undivided one-half interest in the Independence mine. As already shown, the statute of the state subjected to execution every interest in lands, legal and equitable, and the claim or possessory right of any defendant in execution, in or to any public lands, in the same manner as if the same were held by such defendant in fee simple. Section 2582, Mills' Ann. St. Colo. It is the generally recognized rule of law respecting levies and sheriffs' deeds that a description is good and sufficient which, taken as a guide, will point the way to the land, and readily enable the inquirer to identify it, and for this purpose even parol evidence may be resorted to. "There may not be a certainty to every intent, nor is it necessary that there should be in such a case; certainty to a general intent, such as would put the owners and purchasers upon inquiry, affording the means of complete information, is all that can be expected." By the decided weight of authority this description was sufficient. Blair v. Burns, 8 Colo. 397, 8 Pac. 569; Stevens v. Wait, 112 Ill. 544; Small v. Jenkins, 82 Mass. 155; Travelers' Insurance Company v. Yount, 98 Ind. 454; Frey v. Clifford, 44 Cal. 335; Shewalter v. Pierner, 55 Mo. 216; Field v. Huston, 21 Me. 69; Freeman on Executions (3d Ed.) § 381; Devlin on Deeds, § 1435; Murfree on Sheriffs, §§ 1697, 697; Brown v. Smith, 7 B. Mon. (Ky.) 261; Smith v. Crosby, 86 Tex. 15, 23 S. W. 10, 40 Am. St. Rep. 818; Inman v. Kutz, 10 Watts (Pa.) 90; Laughlin v. Hawley, 9 Colo. 170, 11 Pac. 45.

The Independence mine had a local habitation and a name, well known in that mining region. The very situs of it was given in the levy and deed—"situate on Breece Hill in the California Mining District, Lake county, Colorado." More than that, it recited, "now standing in the name of Clinton Reed or C. Reed, trustee, on the records of said Lake county, known as and called the 'Archer Consolidation'" —an instrument that declared what Henshall's interest was.

It was competent for Frank R. Jeffery, in bidding off the property at execution sale, to transfer his purchase to his wife, who thereby became the recipient of the sheriff's deed and invested with the title. Gwynne on Sheriffs, 376; Jamison v. Tudor, 3 B. Mon. (Ky.) 357; Frizzle v. Veach, 1 Dana (Ky.) 212; Massey v. Young, 73 Mo. 260. Mrs. Jeffery, however, would acquire thereby no better right or title than Frank R. Jeffery had the deed been made to him. Baird v. Given, 170 Mo. 302, 70 S. W. 697. The title of Mrs. Jeffery having passed

by deed to J. C. Brown and from him to the Ibex Mining Company, and there being no infirmity apparent of record, the title of the complainants thereby passed and vested in said company, unless invalidated by something dehors the record. On the other hand, if there was any fatal infirmity in this chain of title, the legal title of complainants passed under the deed from Henshall to Clinton Reed, and from Reed under the Archer consolidation agreement vested in the Ibex Mining Company. To meet this situation the complainants contend that the company took with notice of the alleged trust agreement between them and Henshall.

Conceding, for the purposes of this contention, the existence of the trust in favor of complainants, what proof does this record furnish of notice of its existence or its terms to the subsequent purchasers? In respect of the title acquired under the Jeffery and Dale execution sale and sheriff's deed, contention is made that the letter written by James Henshall to Jeffery and Dale, of date February 1, 1890, imparted notice of an equitable interest in the complainants. Even if it were conceded that this letter suggested the existence of such a trust agreement between Henshall and the complainants as pleaded, the information was conveyed, not only after the judgment was rendered, which constituted a lien upon the Henshall interest in the property, but it was after the sale under the execution and the payment of the purchase money. Under the Colorado statute (section 446, Mills' Ann. St.) it is provided as follows:

"Notice Takes Effect From Filing Record, Except as to Parties Having Notice.—All deeds, conveyances, agreements in writing of, or affecting title to real estate or any interest therein, may be recorded in the office of the recorder of the county wherein such real estate is situate, and from and after the filing thereof for record in such office, and not before, such deeds, bonds and agreements in writing shall take effect as to subsequent bona fide purchasers and incumbrancers by mortgage, judgments or otherwise not having notice thereof."

In McFarren v. Knox, 5 Colo. 217, it was expressly held that, in respect of an assignment not recorded, the subsequent judgment lienor and purchaser without notice obtains the better title.

In Gates Iron Works v. Cohen, 7 Colo. App. 341, 348, 43 Pac. 669, the court said:

"By the terms of our statute concerning conveyances, instruments in writing affecting title to real estate do not take effect as to subsequent bona fide purchasers, or incumbrancers by mortgage, judgment, or otherwise, not having notice thereof, until they are filed for record in the office of the recorder of the county in which the real estate is situate. General Statutes, § 215. By these statutory provisions the lien of an attachment would take precedence of an outstanding interest in the land, where such interest is evidenced by an unrecorded deed or contract of which the attachment or judgment creditor had no notice. The statute changes the rule which, prior to its passage, was of universal application, so as to place attachment and judgment creditors upon the same footing with purchasers in respect of land, a legal or equitable interest in which has been conveyed, but the deed not recorded." See, also, Wahrenberger v. Waid, 8 Colo. App. 200, 45 Pac. 518.

Although the sheriff's deed was not delivered until the 1st of December, 1890, after the expiration of the period for redemption, when delivered it had relation back to the lien of the judgment. If, therefore,

it had been shown that J. C. Brown, the grantee of Jeffery, had notice of the alleged trust in favor of the complainants when he bought, it would not affect his title, as it is well-settled law that a purchaser with notice may protect his title by purchasing that of a bona fide purchaser without notice. Funkhouser v. Lay, 78 Mo. 459, 465. This for the reason, stated by Chancellor Kent in Bumpus v. Platner, 1 Johns. Ch. (N. Y.) 220, "to prevent a stagnation of property, and because the first purchaser, being entitled to hold and enjoy, must be equally entitled to sell." The question of notice, therefore, as it pertains to the title acquired under the Jeffery and Dale judgment, is thus effectually disposed of, and may be regarded as out of the controversy.

Counsel for complainants in this connection, however, both in oral argument and brief, criticise with much severity the transaction by which J. C. Brown obtained the deed of conveyance from Jeffery and wife; that Jeffery being in great financial straits, and his wife's ill health demanding change of locality, it is urged that Brown took advantage of Jeffery's distress to obtain his property at an unconscionable sacrifice, and that the Ibex Mining Company, in whose interests Brown was acting, had in its possession at the time funds due to Henshall's interest more than the purchase price. Without entering into detail, it is sufficient to say that the evidence shows that for a year or more preceding the consummation of this transaction Jeffery had been endeavoring to dispose of his interest in this property and a claim in connection with the Idlewild claim, connected with the Little Johnny group, respecting which there was some pending litigation. Brown was more particularly concerned in obtaining from Jeffery the Little Johnny interest. The importunities for sale came from Jeffery rather than from Brown. The evidence is that the consideration of $6,000, expressed in the deed, was paid by Brown, as acknowledged in the deed. The share of the accrued royalties in the hands of Reed and the Ibex Mining Company, amounting to $166, was paid to Mrs. Jeffery afterwards. We are unable to find any just basis for the contention that these royalties in fact amounted to $1,200. The matter of the claim of $2,000 was no part, in fact, of the purchase price of said interest. It pertained to a disputed claim then in litigation, growing out of an option to purchase and mine, and to apply the proceeds on the purchase price in a collateral matter. Neither do we find any deceit practiced or misrepresentation made by Brown to mislead or overreach Jeffery in the transaction. Jeffery was not prevented from disclosing to Brown the facts of his situation or his reason for desiring to sell. The two parties to the deal were sui juris, and dealt with each other at arm's length. We know of no authority or reason for holding that what Jeffery consented to take disentitles Brown to the position of a bona fide purchaser for value. If it were conceded that Jeffery was entitled to a claim for royalties growing out of the Little Johnny or other properties, greater than the consideration paid him by Brown, he knew the fact better than any one else. If, without duress or fraud practiced upon him, he consented to take less than the actual value, how the complainants in this controversy, to which Jeffery is not a party, can avail themselves of any injustice done him, challenges comprehension. With full knowledge

of what he was selling and what he was getting therefor, he parted with his title, and from that day to this he has never challenged by action the validity of the transfer, nor invited the Munns or their counsel to take up the wage of battle for them, or put them in legal position to undo what he voluntarily did.

There is a broad distinction between a valuable and an adequate consideration, as applied to this situation. The consideration paid for a conveyance may be so inadequate, coupled with other attendant circumstances, as to afford sufficient ground for the party wronged to ask a court of equity to relieve him. The consideration paid may also be so greatly disproportioned to the actual value of the property as to appeal to the discretion of the chancellor, in saying that such a purchaser did not buy in good faith. But it is well-recognized law that the consideration, while it must be valuable, need not be commensurate with the actual value of the property. The evidence in this record presents no such state of facts as to warrant the court in saying that Brown or the Ibex Mining Company was not a bona fide purchaser for value.

Neither is there foundation for the suggestion made that the whole consideration for this conveyance to Brown was not paid at the time suit was brought. The consideration for the Archer consolidation and the Idlewild interest was paid on the 13th day of May, 1903. The deferred payment pertained solely to the interest in the Little Johnny claim owned by another person not connected with the title to the premises in dispute.

Turning to the title derived through Clinton Reed under the Archer consolidation agreement, what is there in this record to warrant a decree in favor of the complainants predicated of notice to the Ibex Mining Company of the existence of the alleged trust relation between Henshall and the complainants? There is some shadowy evidence of one Geo. Trimble, who afterwards became a stockholder and director in the Ibex Mining Company, having received information as far back at 1878 of complainants being interested as locators of the Independence lode. But what of it? The record afterward showed that under a power of attorney given by the complainants to Cartwright the latter conveyed the absolute title to Henshall. There was no record evidence of any trust agreement between the grantor and the grantee conditioning the transfer of the title. The Ibex Mining Company did not come into existence until about 12 years thereafter. The letter from Munn to Trimble, of date April 11, 1894, was nearly a year after the Ibex Mining Company had obtained the title of Jeffery, and of Reed under the Archer consolidation agreement; and, even if it were conceded (which we do not find sufficient evidence to support) that J. C. Brown obtained some information sufficient to excite inquiry during his dealings with Jeffery, as already shown, he was an innocent purchaser under the Jeffery judgment and execution sale.

In much of the contention of learned counsel for complainants respecting incidents invoked as a basis of notice to the Ibex Mining Company they seem to misconceive the correct rule of law applicable to the case. There has rarely been a more exact statement of the rule of notice in question than that expressed by Judge Vories in Hayward v.

National Insurance Company, 52 Mo. 191, 192, 14 Am. Rep. 400, where he said:

"The meaning must be that the notice must be given to the agent while his agency exists, and it must refer to business which comes within the scope of his authority. When this is the case, I think that notice to the agent is notice to the principal; in fact there is no other way to notify a corporation than to notify an agent. A corporation only acts through and by agents, and the proper and only way to give notice to a corporation is to notify an agent, and generally it is sufficient to notify an agent, whose proper business is to attend to the matter in reference to which the notice is given."

He then quoted from Story's Agency, paragraph 140, as follows:

"Upon a similar ground, notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with, the subject-matter of his agency; for upon general principles of public policy it is presumed that the agent has communicated such facts to the principal, and if he has not, still the principal, having intrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory on the principal; otherwise the neglect of the agent, whether designed or undesigned, might operate most injuriously to the rights and interests of such party. But unless notice of the facts come to the agent while he is concerned for the principal, and in the course of the very transaction, or so near before it that the agent must be presumed to recollect it, it is not notice thereof to the principal; for otherwise the agent might have forgotten it, and then the principal would be affected by his want of memory at the time of undertaking the agency. Notice, therefore, to the agent before the agency is begun or after it has terminated will not ordinarily affect the principal." See, also, Mechem on Agency, §§ 718, 719.

As notice to the principal is predicated of the fact of notice to the agent while engaged on the business of his agency, because of the obligation imposed, in fidelity to his principal, to impart the information to him, it must follow that when the condition on which the notice to the principal is presumed does not exist, notice to the principal cannot be assumed. See, also, Thompson on Corporations, vol. 4, §§ 5189, 5190, 5191, 5192, 5204; Phœnix Insurance Company v. Fleming, 65 Ark. 63, 44 S. W. 464, 39 L. R. A. 789, 67 Am. St. Rep. 900; Armstrong v. Abbott, 11 Colo. 223, 17 Pac. 517; Yerger v. Barz, 56 Iowa, 82, 8 N. W. 769.

In a general and indiscriminate criticism of the testimony of Charles Cavender, counsel for the complainants seek to create the impression that he must have discovered something touching the complainants' interest which should be imputed to the Ibex Mining Company. Cavender was the attorney who examined for the company the Jeffery title to this property. So far from the evidence warranting the remotest inference that he acquired any information of any trust agreement between the complainants and Henshall, his testimony is full and explicit that he made a thorough examination, and finding that the records showed title in Henshall, and being of opinion that the deed from the sheriff effectually vested that title in Mrs. Jeffery, and having no notice of the complainants' claim, he reported the title good. The law did not exact of him that without any admonition to excite such inquiry he should have inquired of Henshall if there might not be some unrecorded, undisclosed compact conditioning his record title. So far from Henshall imparting to the Ibex Mining Company, or any one representing it, information respecting complainants' interest, in his letter of

April 29, 1902, to one Darby, who was interested in the Archer consolidation trust, and was soliciting consent of the beneficiaries therein to an extension of the lease, he said:

"Your note received. I suppose I have lost my interest in the Independence. Judgment was obtained against me on a debt contracted by Pat Cunningham years ago, and the property was sold; so I suppose I am out, and if you find I am in it, I will gladly sign."

The Pat Cunningham debt referred to Henshall claimed he was only surety for, on which the said judgment was obtained against him.

Some other incidents have been discussed by counsel touching the question of notice, but they are so intangible and inconsequential as not to deserve consideration. As said in Scott v. Gallagher, 14 Serg. & R. 332, 16 Am. Dec. 508:

"Courts of justice view secret agreements with a jealous and scrutinizing eye. The owner of the legal title should have direct, express, and positive notice; otherwise he takes the property discharged of the trust which existed between the original parties. There would be no hardship in the case on Gallagher, because it was his own folly to place himself and others in the power of McCormick. If any person suffers it should be Gallagher, and not Scott, for this plain and obvious reason, that he has been the cause of the loss sustained. Equity says, if one of two innocent persons must suffer, he who has been the cause shall bear the loss."

This rule has recently been affirmed in United States v. Detroit Lumber Company, 200 U. S. 321, 332, 333, 26 Sup. Ct. 285, 50 L. Ed. 499, in which Mr. Justice Brewer, speaking for the court, said:

"No one is bound to assume that the party with whom he deals is a wrongdoer, and if he presents property, the title to which is apparently valid, and there are no circumstances disclosed which cast suspicion upon the title, he may rightfully deal with him, and, paying full value for the same, acquire the rights of a purchaser in good faith. Jones v. Simpson, 116 U. S. 609, 615, 6 Sup. Ct. 538, 29 L. Ed. 742. He is not bound to make a searching examination of all the account books of the vendor, nor to hunt for something to cast a suspicion upon the integrity of the title. * * * The rule in respect to constructive notice was thus stated in Wilson v. Wall, 6 Wall. (U. S.) 83, 90, 91, 18 L. Ed. 727: 'A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge. On this point we need only to refer to Sugden on Vendors, p. 622, where he says: "In Ware v. Lord Egmont the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as to enable the court to say, not only that he might have acquired, but also that he ought to have acquired, it but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether not obtaining was an act of gross or culpable negligence."' And again in Townsend v. Little, 109 U. S. 504, 511, 3 Sup. Ct. 357, 361, 27 L. Ed. 1012: 'Constructive notice is defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted. Plumb v. Fluitt, 2 Anst. 432; Kennedy v. Green, 3 My. & K. 699. * * * As said by Strong, J., in Meehan v. Williams, 48 Pa. 238, what makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell. See,

also, Holmes v. Stout, 3 Green Ch. 492; McMechan v. Griffing, 3 Pick. 149, 15 Am. Dec. 198; Hanrick v. Thompson, 9 Ala. 409.'"

See, also, discussion of this question by Sanborn, J., in same case (United States v. Detroit Timber & Lumber Co., 131 Fed. 668, 67 C. C. A. 1).

It is next insisted that, as the fee to the Independence mine remained in the United States until patent issued, the purchaser under Henshall acquired only an equitable interest no greater than that of the complainants. Mining claims are by the Colorado statute (Mills' Ann. St. § 456) declared to be real estate. This character of property possesses the quality of any other possessory title to land. It passes by inheritance, sale, mortgage, or execution sale. "Where there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator." St. Louis Mining Co. v. Montana Mining Co., 171 U. S. 655, 19 Sup. Ct. 61, 43 L. Ed. 320. So long as the locator or his assignee performs the required amount of work, his right of possession is exclusive against every person and against the United States. He may never obtain the patent, but when it does issue, it has relation back to the location. For the purpose of attack and defense he is the owner, and when this title passes from him to an assignee or grantee, it is protected in the hands of such assignee or grantee by the registration statutes of the state against an equitable claim thereto or interest therein not of record and unknown at the time of the transfer. Revised Statutes of the United States, § 910 [U. S. Comp. St. 1901, p. 679]; Roseville Co. v. Iowa Gulch Co., 15 Colo. 29, 24 Pac. 920, 22 Am. St. Rep. 373; McFeters v. Pierson, 15 Colo. 201, 24 Pac. 1076, 22 Am. St. Rep. 388; Forbes v. Gracey, 94 U. S. 767, 24 L. Ed. 313; Belk v. Meagher, 104 U. S. 283, 26 L. Ed. 735; Manuel v. Wulff, 152 U. S. 511, 14 Sup. Ct. 651, 38 L. Ed. 532; Butte Co. v. Frank (Mont.) 65 Pac. 1; Bakersfield Co. v. Kern County (Cal.) 77 Pac. 892.

Incidental and parallel to the latter contention, the further proposition is advanced that, as the fee to this property remained in the United States until patent issued, the position of the complainants, as equitable owners, being prior in time to that of the purchasers under the locator, theirs is the superior equity. This question is so effectually settled against the contention of the complainants by the ruling of this court in United States v. Detroit Timber & Lumber Company, 131 Fed. 668, 67 C. C. A. 1, affirmed by the Supreme Court in 200 U. S. 321, 26 Sup. Ct. 282, 50 L. Ed. 499, as to render further discussion a work of supererogation.

With apparent assurance of confidence, learned counsel for the complainants advance the ultimate proposition that the only right the Ibex Mining Company could possibly assert as against Henshall would be to offset what it paid for said interest against what was coming to him under the terms of the Archer consolidation, with the right in Henshall to exact, within a reasonable time, a conveyance to him of his interest in the mine before refunding the purchase price paid by the company as the tenant in possession; such reasonable time being commensurate with the duration of the lease and such time thereafter as might be

deemed consonant with equity under the circumstances of the particular case. It might be sufficient to say, in answer to this pronouncement, that in all the years which have accumulated since such right, if a right might have been asserted, the complainants have not exhibited faith enough in it to actively invoke it. The underlying theory of this contention, we take it, is that at the time it is claimed Brown acquired the Henshall title under the Jeffery and Dale judgment and Mrs. Jeffery, he was acting for the Ibex Mining Company, which was at the time a tenant under lease from Reed, trustee; therefore, the purchaser falls under the ban of the law which prohibits a lessee from buying in an outstanding title so as to oust the landlord, and hence the claim to the right of redemption. This contention is as disregardful of the facts in this record as the law applicable to the situation. In the first place, Henshall's legal title had passed out of him by operation of law under the execution sale, as he afterwards recognized in his letter to Jeffery, and by his voluntary act in conveying to Reed under the consolidation agreement, which, as the record title stood, the purchaser had the right to assume he was fully empowered to do.

Even, however, if the relation of landlord and tenant existed between Henshall and the Ibex Mining Company when the title under Jeffery was acquired, the fact did not conclude the company from adversing the landlord's title by acquiring it under a proceeding in invitum against the landlord. We understand the law to be that the tenant may buy in the landlord's title under judgment and execution sale. In such case he may plead against the landlord that, although he had an interest in the premises at the time of the creation of the relation of landlord and tenant, it terminated by act of the law, or under voluntary grant of the fee by the landlord. Taylor's Landlord & Tenant (9th Ed.) §§ 639, 705, 708; Hardin v. Forsythe, 99 Ill. 312; Elliott v. Smith, 23 Pa. 131–137; Camley v. Standfield, 10 Tex. 546, 60 Am. Dec. 219; Lamson v. Clarkson, 113 Mass. 348, 18 Am. Rep. 498. "It is always competent for a tenant to set up that the title of his landlord has come to an end subsequent to the date of the lease, and that whenever the enjoyment ceases by lawful title, rent, which is the recompense of enjoyment, also ceases." Duff v. Wilson, 69 Pa. 316; Shields v. Lozear, 34 N. J. Law, 496, 3 Am. St. Rep. 256; Presstman v. Silljacks, 52 Md. 647; Jenkinson v. Winans, 109 Mich. 524, 67 N. W. 549.

Judge Cowen, in Nellis v. Lathrop, 22 Wend. (N. Y.) 121, 34 Am. Dec. 285, said:

"So long as he [the tenant] is not expelled, he has, in general, no right to question his landlord's title. He cannot deny that he had a right to demise at the time of the lease. He cannot defend, on the ground that he has acquired an outstanding title adverse to that of the landlord. But I am not aware that the estoppel goes further. If the landlord part with his title pending the lease, the duty of the tenant, including that of paying rent, is due to the assignee; and should the tenant buy in the assignee's right, the lease would be extinguished. So, should the landlord sell and release to the lessee. * * * Therefore, had there been a sheriff's sale of the whole reversion in the demised premises, and the tenant had redeemed or purchased under the judgment, no action could have been sustained; for a purchase or acquisition of title under a judgment against the lessor is the same thing as if he had granted by deed. It is, to be sure, acquiring title indirectly and by operation of law from the lessor, but it comes through his act and consent, or his neglect, and

is, therefore, the same in legal effect as if he had granted or devised a reversion."

In 17 Amer. & Eng. Encyc. of Law (2d Ed.) p. 676, it is said:

"The general rule applies to the purchase by one tenant of the property at a judicial sale, and such purchase will inure to the benefit of his co-tenant. There is no rule of law, however, forbidding one tenant in common to purchase the interest of his co-tenant at such sale: this not being the purchase of a hostile or adverse title." See, also, page 678.

In Bissell v. Foss, 114 U. S. 252, 262, 5 Sup. Ct. 851, 854, 29 L. Ed. 126, the court held that there was no relation of trust or confidence between mining partners, which is violated by the sale and assignment by one partner of his share in the property and business to a stranger, or to one of his associates without the knowledge of the other. The court, while fully recognizing the rule that one of the tenants in common, holding by a common title, cannot purchase an outstanding title or incumbrance upon the joint estate for his own benefit, said:

"It is true that one of two or more tenants in common, holding by a common title, cannot purchase an outstanding title or incumbrance upon the joint estate for his own benefit. Such a purchase inures to the benefit of all, because there is an obligation between them, resulting from their joint claim and community of interest, that one of them shall not affect the claim to the prejudice of the others. [Citing authorities.] But this rule cannot apply to Hunter and Foss. They purchased no outstanding title or incumbrance to the prejudice of the other tenant in common. They did what any tenant in common with entire good faith might do, namely, purchase the interest of some of their co-tenants without consulting the others. The title which they purchased of the Missourians was not antagonistic or hostile to the title of Bissell. Their purchase did not in any degree tend to injure or damage his interest. His share was just as valuable after as before the purchase, and his rights were the same. In such a purchase no trust or confidence is violated."

If Henshall had been the entire owner of the property, and had leased the same to the Ibex Mining Company, could it be maintained that it could not, during the existence of the lease, purchase direct from him the fee, and thereby defeat eviction by the landlord? If, under the terms of the Archer consolidation, Reed, in execution of the power, could sell direct to the Ibex Mining Company all the interest of Henshall, could Henshall thereafter be heard to say that the Ibex Mining Company could not assert title under that purchase against the subsequent assertion of the landlord's claim against it as tenant? If not, how can it be maintained under the Colorado statute, which subjected Henshall's interest to sale under execution, that the company which acquired the title under operation of law could not plead a divestiture and termination of such landlord's title? The title which the law of landlord and tenant forbids the tenant to acquire so long as he retains possession under his entry is an outstanding, hostile title, antagonistic to that of the landlord, so as to destroy it. Moreover, the lease with the option to purchase, made by Reed, was in strict conformity to the terms of the Archer consolidation agreement, to which Henshall assented. It was in force at the time of the execution sale. At that time neither Jeffery and Dale nor Mrs. Jeffery were tenants of either Reed or Henshall. By the sale and sheriff's deed Henshall's interest and title in the property ceased, and devolved upon Mrs. Jeffery.

Finally, the equitable claim put forth by the complainants is condemned by the doctrine of laches. By virtue of their own inherent power in affording relief, in recognizing and enforcing unpublished trusts affecting the title to real property, courts of equity may shorten the time allowed by statute in actions of ejectment, where the ends of justice require it. While, for the purposes of this case, it may be conceded that such a state of facts might be presented as to warrant the chancellor, in good conscience, to extend the time for relief beyond the statutory period, the complainants' conduct in this case does not appeal to the favor of the court. Their claim rests upon an unrecorded secret trust between them and Henshall, created in 1879, nearly 14 years prior to its assertion in court. It concerns and affects the title to a mining claim—a class of property which, because of its well-known constantly vacillating character may be practically worthless to-day, and under the energy and expenditure of money by an after-taker and claimant, in a brief period may develop the presence of vast wealth in ore. In respect of such a claim equity demands that the claimant should be awake to his rights, prompt in their assertion, and eager in their pursuit, lest his slothfulness and indifference work a great wrong to innocent parties. Vigilantibus et non dormientibus jura subveniunt. The evidence shows that when the complainants executed the power of attorney to Cartwright they regarded their claim of little value. It was checkered over with conflicting locations, and exposed to the devouring greed of promoters of litigation. So little value did they attach to it that for the services of merely disposing of it Cartwright was to have one-half of what he could obtain. While they claim to have seen the agreement in 1879 between Henshall and Cartwright, they never took interest enough in it to either put it to record or to look after it to see what became of it. They practically abandoned it to whithersoever the winds of fortune might drift it. Its condition when it passed under the care and sustentation of the Archer Syndicate is described in the testimony of Mr. Cavender, the attorney who undertook for the syndicate to look after the adverse litigation and the patent. When inquired of as to what was the situation of the Independence in respect of matters of patent, he said:

"The Independence was entirely gone. There was no application for a patent. All but 1.22 acres were patented to the Little Johnny, the Uncle Sam, and the San José claims, and that 1.22 acres had been covered by many relocations before the Ibex Mining Company or Mr. Campion had any interest in it."

He said it was a very doubtful proposition that in such condition a patent could be issued. He further said:

"I examined the ground—that is, traveled over it in connection with the engineer of the company—and found the discovery workings were gone—patented or relocated—I forget which now; I think patented or relocated by some one else. All the ground that was not patented was covered by other locations or claims, so that there was virtually nothing to patent."

When inquired of as to whether he examined the proceedings in the land office, he answered:

"I think the San José took in all the workings, the discovery shaft, etc.—discovery tunnel I think it was. My recollection is that that was done by

the San José. The application for that claim was in '80 or '81—I forget the exact date—but some ten years before. The other portion of the ground, down the hill, was covered by several new conflicting locations. The discovery shaft had been taken in by a patent upon another claim. That would terminate the title, except that which had already been obtained by the San José, Uncle Sam, and Little Johnny."

He further testified that at the time the acts were done which resulted in this ground being absorbed by the other claims neither Campion nor the Ibex Mining Company had any connection with the matter. It was in that condition when the lease and bond were given. In such low estimate was this property held that at the public auction under the Jeffery and Dale judgment in 1889 it sold for only sufficient to satisfy a judgment for $245.45 and the costs of suit. In perfect indifference, the complainants lingered and remained about that mining region and points of easy access to it, with the public records of the county showing that whatever apparent title they had had been conveyed under their power of attorney to a third party, who, as the apparent absolute owner, was contracting debts and being prosecuted therefor unto judgment; dealing with the property as his own; conveying it to Reed; entering into a syndicate agreement, under which it was leased to strangers, who were working and developing it, and paying the rental to the trustee. And after the Ibex Mining Company was organized, taking over the lease and purchasing outright the title of Henshall, in pursuance of the option given under the lease contract, expending money in developing the property, proving it to be valuable, and its stock presumably passing into the hands of investors, these complainants went off to the state of Texas without proclaiming or asserting to said interested parties their secret claim until more than 14 years after its birth. So long had they thus suffered this undisclosed trust to slumber, unnurtured and unattended, that when they came to ask the court to give it life and operation they were unable to recognize its features or specify its qualities, and only after long study, suggestion, and resort to analogy of their claim with some other found of record could they present even a plausible claim for specific relief. No fitter case has ever been presented for the application of the wholesome rule that "where one of two innocent parties must lose, and one of them is in fault, the law throws the burden of the loss on him." Hearne v. Nickols, 1 Salk. 289; Magee v. Manhattan Life Ins. Co., 92 U. S. 98, 23 L. Ed. 699.

The conclusion reached on the principal case renders it unnecessary to discuss the matter of the accounting.

It results that the appeal in No. 1,713, Clinton Reed (impleaded with the Ibex Mining Company et al.), appellant, vs. N. A. Munn and R. G. Munn, appellees, is sustained, and the decree of the Circuit Court therein is reversed; that the appeal in No. 1,890, the Ibex Mining Company, appellant, vs. N. A. Munn and R. G. Munn, appellees, is sustained, and the decree of the Circuit Court therein is reversed; that the appeal in No. 2,319, the Ibex Mining Company, appellant, vs. N. A. Munn and R. G. Munn, appellees, is sustained, and the decree of the Circuit Court therein is reversed; and that the appeal in No. 2,320, N. A. Munn and R. G. Munn, appellants, vs. The Ibex Mining

Company, appellee, is not sustained, and the same is dismissed, at the cost of the appellants; and the causes No. 1,713, No. 1,890, and No. 2,319 are remanded, with directions to the Circuit Court to set aside and vacate the decrees therein, and to dismiss the bill of complaint, at the cost of the appellees.

THE JOSEPH B. THOMAS.

(Circuit Court of Appeals, Third Circuit. November 22, 1906.)

No. 4.

1. SEAMEN—SHIPPING ARTICLES—LEGALITY OF PROVISIONS.
   A provision, in shipping articles signed by seamen for a voyage on a vessel then detained in port by ice, which usually went out within a very few days, that "the crew shall make no claim for wages or provisions while the vessel is detained by ice prior to departure," is not in violation of the statutes made for the protection of seamen, but is reasonable, and binding upon the crew where they had full knowledge of it before signing.
2. SAME—RIGHT TO WAGES.
   Libelants signed as seamen for a voyage on a vessel then ready to sail from the port of Philadelphia, but detained by ice; the shipping articles containing a provision that they should make no claim for wages or provisions while the vessel was so detained. They went on board, and were furnished light work and given their provisions for a few days, and were then sent on shore by the master, but were told to be in readiness to come back whenever the vessel should be able to get away. When that time came, a week later, they either could not be found or refused to go. *Held*, that they were not discharged, and were not entitled to wages for the time they were on board, nor to extra pay, under Rev. St. § 4527 [U. S. Comp. St. 1901, p. 3077], as upon a wrongful discharge.
3. ADMIRALTY—SUIT FOR WAGES—APPELLATE JURISDICTION.
   Where a number of libelants join in a suit in admiralty for wages, as permitted by Rev. St. § 4547 [U. S. Comp. St. 1901, p. 3087], their claims are several, and not joint, and cannot be added together to give jurisdiction to an appellate court.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Admiralty, § 719; vol. 2, Appeal and Error, §§ 276–279.]
4. COURTS—JURISDICTION OF CIRCUIT COURT OF APPEALS—AMOUNT IN DISPUTE.
   The provision of Rev. St. § 631, limiting appeals from the District to the Circuit Court in equity and admiralty to cases where the sum in dispute exceeded $50, is not applicable to appeals to the Circuit Court of Appeals, but was superseded by the act establishing such courts, which creates a new appellate jurisdiction without any pecuniary limitation.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania, in Admiralty.

For opinion below, see 136 Fed. 693.

J. Hill Brinton, for appellants.

John F. Lewis, for appellee.

Before GRAY and BUFFINGTON, Circuit Judges, and LANNING, District Judge.

GRAY, Circuit Judge. This is an appeal from a decree of the District Court, dismissing the libel for wages, filed by the appellants against the ship "Joseph B. Thomas" and her master. The libel al-

leges that the libelants, five in number, had shipped as seamen on board the schooner "Joseph B. Thomas," for and during a voyage not exceeding three months, at the rate of $35.00 per month, and that for the due performance of said voyage, had signed shipping articles then in possession of the master; that the said shipping articles were signed on the 31st of December, 1903, and that libelants went on board the schooner January 2, 1904, at the port of Philadelphia, and while on board performed all duties required of them; that on January 7, 1904, prior to the departure of said schooner, they were discharged by her master without sufficient reason for so doing; that the said master justified his discharge of the libelants by the following clause, which was inserted in the articles prior to the shipment of the said crew, viz.:

"The crew shall make no claim for wages or provisions while the vessel is detained by ice prior to departure."

The libel then concludes as follows:

"That the libelants, being unlawfully discharged before the termination of said voyage and the expiration of 30 days from the date of shipment, are each entitled to one month's extra pay, viz., $35.00, in accordance with section 4527 of the Revised Statutes of the United States, making in all the sum of $210.00."

From the answer of the master of the schooner and from the testimony sent up in the record, it appears to be undisputed that the libelants were engaged as seamen, through a shipping agent, by the master of the schooner "Joseph B. Thomas," then in the port of Philadelphia, for a voyage from that port to Brunswick, Ga., and return, for a term not exceeding three calendar months, at the rate of wages of $35.00 per month; that shipping articles to this effect were signed by the libelants on December 31, 1903; that in addition to the usual stipulations contained in such articles, there was inserted in, or stamped upon, the same the clause set out in said libel, viz.:

"The crew shall make no claim for wages or provisions while the vessel is detained by ice prior to departure."

It is admitted that by order or request of the master, the libelants went on board the schooner, which was then tied up at a wharf in the port of Philadelphia, on the 2d day of January, 1904; that, while the port was not absolutely closed at that time, by ice, increasing frosts for some days following said 2d of January, made the navigation of the river so difficult that tugs could not be obtained to tow the schooner to sea, and it seems to be established by the testimony that it would not have been prudent to have attempted the same before the date of departure on January 14th. It appears by the undisputed testimony, that on the day the libelants went on board, they were ordered by the mate to clear the snow off the decks and put some lashings upon a deckhouse; that, with this exception, no work was required of them during their stay on board, but that they regularly received three meals a day, as to the character of which there was no complaint. On the 7th of January, it is admitted that libelants left the schooner, taking with them all their luggage. There is little conflict of testimony as to what occurred at the time of their leaving, and the reasons existing therefor. The libelants testified that the master of the schooner told them the

night before, that he could not afford to keep them any more on board, and that they were at liberty to go ashore. The captain and mate, on the other hand, testify that, as the men were getting restless, they were told that they might go ashore and earn what they could, while waiting for the vessel to sail, but should hold themselves in readiness when notified of that fact. Seven days thereafter, on January 14th, the ice in the river having broken up sufficiently to permit the departure of the schooner, the master notified the shipping agent to have the crew on board, and the shipping agent testifies that after a diligent search, he could only find two of the crew, who refused to go on board. Another crew was obtained, and the vessel sailed on the day last named.

The contention of the libelants is that they were unlawfully discharged by the captain of the schooner on the 7th of January, and that in consequence, the vessel and her master are liable, under section 4527 of the Revised Statutes, for one month's wages, in addition to the wages for the seven days they were on board, at the rate of $35.00 a month.

On behalf of the appellees, it is contended that libelants were bound by what is called the "ice clause" in the articles, above referred to, and that no wages were consequently due until the day of sailing; that on that day, some of the crew not being on hand and others having refused to go on board, libelants had violated their contract and thereby forfeited all claim under it.

The question we are called upon to consider, therefore, is whether this clause was a binding obligation on the libelants, or should be disregarded as an abridgment of their rights under the law maritime, and inconsistent with the public policy recognized in that law, of protecting seamen from imposition, where undue advantage is taken of their ignorance and improvidence. It is conceded by counsel for libelants, that if the above clause as to wages and provisions shall not be deemed to be "opposed to the statutes made for the especial benefit and protection of seamen, the libelants are bound by their contract, and the conclusions of the learned court below are correct in the premises; in other words, if the libelants were in all respects sui juris, they may not be heard to complain that the contract was hard."

Notwithstanding the care and solicitude exercised by courts in protecting seamen from the results of ignorance and improvidence, in making their contracts, they are not to be exempted from contractual obligations freely and fairly made, and as to which no suspicion of misunderstanding or imposition attaches. Their service on shipboard is regulated by contract, express or implied, and the relation between them and the master of the ship is largely, if not altogether, a contractual one. It is only when a given stipulation of their general contract of shipment, signifies such improvidence or ignorance on the part of the seamen, as to make its enforcement unreasonable, or is such as contravenes a settled policy of the law maritime, that it will be considered void and without obligatory force. The stipulation here in question is:

"The crew shall make no claim for wages or provisions while the vessel is detained by ice prior to departure."

It is admitted that, before signing the articles, the inserted ice clause was distinctly read to the libelants, and that they fully understood the

same at the time of signing. In determining the reasonableness of this stipulation, it cannot be considered abstractly, but only in the light of the circumstances surrounding it. For this reason, we have recited the purport of the testimony as to the situation at the time the contract was made. If the words "prior to departure" had been omitted, the stipulation might or might not be reasonable, according to circumstances. If, for example, the ship had started upon her voyage, and, short of her destination, should be detained by ice at some intermediate port or place, it would be unreasonable to say that the ship or the master could refuse provisions during the time of such detention, even though wages might be reasonably intermitted. On the other hand, the words "prior to departure," in the stipulation here in question, relieved it from the unreasonableness inherent in the case just supposed. We are to consider that the testimony disclosed by the record shows that, when the libelants signed the articles, and went on board, they had knowledge that he river was blocked with ice. There is evidence, too, of the fact of which we might take judicial notice, that such blocking of the Delaware river by ice, at Philadelphia, is of temporary and, usually, of short duration, so that, though blocked with ice at the signing of the articles, it might be expected that the river would be clear enough to permit the departure of the schooner within a few days. As a matter of fact, she was detained only 14 days after the signing of the articles, and only 7 days after the crew left the vessel. In effect, it was the hiring of a crew on the condition that their services were to begin at a future day, to be determined by the freedom of the river from obstructing ice. Their going on board while the schooner was still detained by ice, and their being provisioned for the 7 days they were on board, was a partial waiving of the condition that no provisions were to be furnished before the vessel was ready to depart, and was doubtless the result of the belief on both sides that the detention would be of short duration. We see nothing unreasonable in the stipulation, in view of the circumstances under which it was made. The vessel was tied up to the wharf in Philadelphia, and the crew were in Philadelphia when they signed the articles, and the contract was admittedly made with full knowledge and understanding of the seamen that, under their contract, neither their services nor their keep or wages were to commence until the ice in the river permitted the departure of the vessel, and undoubtedly it was supposed at the time of entering into this contract, that the period during which the vessel would be ice-bound, would be a short one. A prolongation of the period beyond ordinary experience, might make it unreasonable that seamen so shipping should be bound for a longer time than was usual in such cases. We have not, however, such a case here, as the men were on board for 7 days, and the vessel was ready to sail seven days after they left.

On the whole, we think there was no obligation, during the time that elapsed between the signing of the articles and the sailing of the ship, to pay wages or furnish provisions under the stipulation freely and understandingly entered into by the libelants when they signed the articles. Quoad this transaction, the libelants were sui juris. They signed the articles in Philadelphia, where presumably they resided, at least tem-

porarily, and where presumably they could maintain themselves until the time when the ice might be expected to so break up as to allow the departure of the vessel, at which time, according to their contract, their service and compensation were to begin. We see no hardship in this situation so great, as to render the contract, freely and understandingly made in relation thereto, unreasonable.

Appellants, however, contend that such a contract is directly controlled by the mandatory provisions of certain statutes, and they refer us to sections 4511, 4524 and 4523 of the Revised Statutes [U. S. Comp. St. 1901, pp. 3068, 3075, 3076]. The record furnishes us with no copy of the shipping articles, but merely tells us that they were signed before a commissioner, and furnishes us with the special "ice clause" stamped thereupon, with the admission that the libelants thoroughly understood the same at the time of signing. We do not think that any of these sections, or all of them taken together, forbid the making of such a contract, or were meant to control the relation of the parties in contravention of the requirements of an express and reasonable contract, such as the one presented in the case at bar. We think with the trial judge that there is no evidence that the seamen commenced work prior to the departure of the vessel. The shoveling of snow off the decks, when they first went on board, would have taken only a few moments, and was much more than compensated for by the provisions furnished them during the five days. This is too trifling to be considered a commencement of work, within the meaning of the statute. All the evidence goes to show that the going on board, and being fed for five days, while the boat was tied at the wharf and ice-bound, was a favor to the libelants which the master was not obliged to continue, contrary to the stipulation of the articles in that regard. Outside of this stipulation, we are not shown where any time is specified in the articles for the commencement of work or presence on board of the libelants.

The sole question in the view thus taken, is, whether the seamen were discharged by the master in violation of the law of their contract, when he told them on the 7th of January that he could no longer furnish them with provisions until the vessel was ready to sail, and said they were at liberty to go ashore and get employment, if they pleased, in the interval. We agree with Judge McPherson in his finding, that "they were not discharged, although they so declare, but were merely directed to await on shore the time when the ship would begin her voyage," and with him we are "unable to perceive any obligation on the part of the ship to pay wages in the face of the contract." We also agree with him, that "certainly there is no liability to a penalty which is only to be inflicted in case of wrongful discharge."

We have discussed this appeal upon its merits, and must now take some notice of the motion to dismiss. The ground alleged for this motion is, that no appeal from a decree of a District Court, in a cause of admiralty jurisdiction, is allowable, unless the matter in dispute exceeds the sum or value of $50.00, exclusive of costs; this being the pecuniary limitation prescribed by section 21 of the judiciary act of 1789 (1 Stat. 83, c. 20), as amended by the act of March 3, 1803 (2 Stat. 244, c. 40), in regard to appeals in such causes from the District

Courts to the Circuit Courts. If this pecuniary limitation of the appellate jurisdiction of the Circuit Courts is applicable to the appellate jurisdiction of the Circuit Courts of Appeals in such cases, we have no doubt that we are without jurisdiction as to this case. It is admitted that the claim of each libelant is only $42.00, and the fact that the aggregate claims of the five libelants who were joined in the suit amount to $210.00 does not suffice to give the required jurisdiction. The claims, though united in one suit, under the provisions of section 4547 of the Revised Statutes [U. S. Comp. St. 1901, p. 3087], are not joint but several. The claim of each libelant, though all joined in one libel, is several and individual, and the decree must be separate and distinct as to each claim, and not a joint decree for the whole amount. Where jurisdiction depends upon the amount of the claim, therefore, the test must be, not the aggregate of all the claims joined in one suit or libel, but, the amount of each individual claim. This being so, the pecuniary limitation of appellate jurisdiction to $50.00 would bar the appeal in this case, where the amount of each several claim joined in the libel is under $50.00. The citations in support of the motion to dismiss, abundantly support this statement of the law: Oliver v. Alexander, 6 Pet. 143, 8 L. Ed. 349; Stratton v. Jarvis, 8 Pet. 4, 8 L. Ed. 846; Rich v. Lambert, 12 How. 347, 13 L. Ed. 1017; Shields v. Thomas, 17 How. 3, 15 L. Ed. 93; Putney v. Whitmire (C. C.) 66 Fed. 385; The Columbia, 73 Fed. 226, 19 C. C. A. 436; Ex parte B. & O. R. R., 106 U. S. 5, 1 Sup. Ct. 35, 27 L. Ed. 78; Henderson v. Wadsworth, 115 U. S. 264, 6 Sup. Ct. 40, 29 L. Ed. 377; Gibson v. Shufeldt, 122 U. S. 27, 7 Sup. Ct. 1066, 30 L. Ed. 1083; Walter v. Railroad Co., 147 U. S. 370, 13 Sup. Ct. 348, 37 L. Ed. 206.

The more difficult question remains, whether the pecuniary limitation of appellate jurisdiction prescribed in section 21 of the judiciary act of 1789, as amended in 1803 and embodied in section 631 of the Revised Statutes, is applicable to the appellate jurisdiction of the Circuit Court of Appeals, as to final decrees of the District Court in the causes described in said section. Section 631 is as follows:

"Sec. 631. From all final decrees of a District Court in causes of equity or of admiralty and maritime jurisdiction, except prize causes, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, an appeal shall be allowed to the Circuit Court next to be held in such district, and such Circuit Court is required to receive, hear, and determine such appeal."

By the provisions of this section, a specially limited and defined appellate jurisdiction from the decrees of District Courts had been vested in the Circuit Courts, from the time of the establishment of those courts down to 1891. By section 4 of the judiciary act of that year (Act March 3, 1891, c. 517, 26 Stat. 827 [U. S. Comp. St. 1901, p. 548]) it was provided:

"That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any District Court to the existing Circuit Courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing Circuit Courts, but all appeals by writ of error (or) otherwise, from said District Courts shall only be subject to review in the Supreme Court of the United States or in the Circuit Court of Appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing Circuit Courts shall be had only in the Supreme Court

of the United States or in the Circuit Courts of Appeals hereby established according to the provisions of this act regulating the same."

Sections 5 and 6 (26 Stat. 827, 828 [U. S. Comp. St. 1901, p. 549]) then proceed to distribute the appellate jurisdiction theretofore exercised by the Supreme Court and the said Circuit Courts, between the Supreme Court and the Circuit Courts of Appeals established by the act. These sections are in part as follows:

"5. That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:

"(1) In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

"(2) From the final sentences and decrees in prize causes.

"(3) In cases of conviction of a capital or otherwise infamous crime.

"(4) In any case that involves the construction or application of the Constitution of the United States.

"(5) In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

"(6) In any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

"6. That the Circuit Courts of Appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision(s) in the District Court(s) and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws under the revenue laws, and under the criminal laws and in admiralty cases."

It is plausibly argued that the appellate jurisdiction of the Circuit Courts, as described in section 631 of the Revised Statutes, was, by these sections, transferred as it then existed to the Circuit Courts of Appeals, and retained the pecuniary limitation that theretofore had characterized it. The fallacy of this argument inheres in the theory, that by the act of March 3, 1891, there was merely a transference of certain appellate jurisdiction from one tribunal to another, and that consequently all conditions, whether of restriction or otherwise, were transferred with it. If this were so, the appellate jurisdiction of the Circuit Courts, given as to final judgments of a Dictrict Court in civil actions, by section 633 of the Revised Statutes, would be characterized by the same pecuniary limitation when exercised by the Supreme Court or the Circuit Courts of Appeals. This theory, however, does not correctly describe the function and purpose of the act of March 3rd, 1891. The appellate jurisdiction established thereby, while in most respects the same as to subject-matter and extent, as theretofore existed in the Circuit Courts and in the Supreme Court, was established anew and distributed between the Supreme Court and the then newly established Circuit Courts of Appeals. Section 4 of the act declares that "all appeals, by writs of error or otherwise, from said District Courts, shall only be subject to review in the Supreme Court of the United States or in the Circuit Court of Appeals hereby established,"

and by section 6, the Circuit Courts of Appeals established by the act are required to exercise appellate jurisdiction in all cases other than those provided in the preceding section. Moreover, it has been uniformly held that the appellate jurisdiction of the Circuit Courts of Appeals is subject to no pecuniary limitation, though the appellate jurisdiction of the Supreme Court before the passage of the act as to the same classes of cases, was subject to an important pecuniary limitation.

It is true that section 691 of the Revised Statutes, conferring appellate jurisdiction on the Supreme Court from final judgments of Circuit Courts, or of District Courts acting as Circuit Courts in civil actions, where the matter in dispute exceeds the sum or value of $2,000 (afterwards increased to $5,000) was expressly repealed by section 14 of the Act of March 3, 1891 (26 Stat. 829, c. 517 [U. S. Comp. St. 1901, p. 553]); but section 692, in which there are like provisions limiting the appellate jurisdiction of the Supreme Court in reference to appeals from final decrees of the Circuit Courts, in cases of equity and of admiralty and maritime jurisdiction, is not repealed by the said act, nor is there any express repeal in said act of section 695, establishing the appellate jurisdiction of the Supreme Court from all final decrees of a District Court in prize causes, and limiting the same to cases where the matter in dispute exceeds the sum or value of $2,000, and providing that, without reference to the value of the matter in dispute, the appeal shall be allowed, on the certificate of the district judge that the adjudication involves a question of importance. Yet it is significant that as to causes described in these two sections, appellate jurisdiction without pecuniary limitation has uniformly been held to have been conferred by the judiciary act of 1891, upon the Supreme Court and the Circuit Courts of Appeals. This latter act has been held to be a substitute for the old judiciary act, and supersedes and supplies the creation and regulation of appellate jurisdiction by said old act and its amendments, except where they are consistent with the provisions of the later act, or are preserved in force under the last paragraph of section 10 of that act.

This conclusion is clearly supported and made necessary by the decision of the Supreme Court in the case of The Paquete Habana, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320. This was an appeal from the decree of District Courts of the United States for the Southern District of Florida, condemning two fishing vessels and their cargo as prizes of war. The two vessels were sold, one for the sum of $490 and the other for $800, and it was suggested that the court had no jurisdiction to hear and determine these appeals, because the matter in dispute in either case did not exceed the sum or value of $2,000, and the district judge had not certified that the adjudication involved a question of general importance. This brought directly before the court the question whether the limitations on the appellate jurisdiction, contained in section 695 of the Revised Statutes, above referred to, were abrogated by the act of March 3rd, 1891, "establishing the Circuit Courts of Appeals and creating a new and complete scheme of appellate jurisdiction, depending upon the nature of the different cases, rather than upon the pecuniary amount involved." Mr. Justice Gray, in delivering the opinion of the court, says:

"The act of 1891 nowhere imposes a pecuniary limit upon the appellate jurisdiction, either of this court or of the Circuit Court of Appeals, from a District or Circuit Court of the United States. The only pecuniary limit imposed is one of $1,000 upon the appeal to this court of a case which has been once decided on appeal in the Circuit Court of Appeals, and in which the judgment of that court is not made final by section 6 of the act. Section 14 of the act of 1891, after specifically repealing section 691 of the Revised Statutes and section 3 of the act of February 16, 1875 (18 Stat. 316, c. 77 [U. S. Comp. St. 1901, p. 526]), further provides that 'all acts and parts of acts relating to appeals or writs of error, inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act, are hereby repealed.' 26 Stat. 829, 830. The object of the specific repeal, as this court has declared, was to get rid of the pecuniary limit in the acts referred to. McLish v. Roff, 141 U. S. 661, 677, 12 Sup. Ct. 118, 35 L. Ed. 893. And, although neither section 692 nor section 695 of the Revised Statutes is repealed by name, yet, taking into consideration the general repealing clause, together with the affirmative provisions of the act, the case comes within the reason of the decision in an analogous case, in which this court said: 'The provisions relating to the subject-matter under consideration are, however, so comprehensive, as well as so variant from those of former acts, that we think the intention to substitute the one for the other is necessarily to be inferred and must prevail.' Fisk v. Henarie, 142 U. S. 459, 468, 12 Sup. Ct. 207, 210, 35 L. Ed. 1080. The decision of this court in the recent case of United States v. Rider, 163 U. S. 132, 16 Sup. Ct. 983, 41 L. Ed. 101, affords an important, if not controlling precedent."

As to the last-mentioned case, the learned justice says:

"That judgment was thus rested upon two successive propositions: First, that the act of 1891 gives appellate jurisdiction, either to this court or to the Circuit Court of Appeals, in all criminal cases, and in all civil cases 'without regard to the amount in controversy.' Second, that the act, by its terms, its scope and its obvious purpose, 'furnishes the exclusive rule in respect of appellate jurisdiction on appeal, writ of error or certificate.'"

The opinion concludes as follows:

"We are of opinion that the act of 1891, upon its face, read in the light of settled rules of statutory construction, and of the decisions of this court, clearly manifests the intention of Congress to cover the whole subject of the appellate jurisdiction from the District and Circuit Courts of the United States, so far as regards in what cases, as well as to what courts, appeals may be taken, and to supersede and repeal, to this extent, all the provisions of earlier acts of Congress, including those that imposed pecuniary limits upon such jurisdiction; and, as part of the new scheme, to confer upon this court jurisdiction of appeals from all final sentences and decrees in prize causes, without regard to the amount in dispute, and without any certificate of the district judge as to the importance of the particular case."

The ratio decidendi of this case, we think, is controlling as to the case at bar, and no pecuniary limitation attaches to the appellate jurisdiction of this court.

Counsel for appellees, relying upon the case of North American Trading & Transportation Co. v. Smith, decided by the Circuit Court of Appeals for the Ninth Circuit (93 Fed. 7, 35 C. C. A. 183), made no argument upon this point. The result reached in that case, we think, was a desirable one, and the reasons given therefor were cogent, if not satisfactory. In view, however, of the later decision of the Supreme Court in The Paquete Habana, above referred to, the decision of the Circuit Court of Appeals cannot be followed, and the motion to dismiss the appeal is denied and the judgment below affirmed.

WADSWORTH v. BOYSEN.

(Circuit Court of Appeals, Eighth Circuit. November 23, 1906.)

No. 2,456.

1. INDIANS—TREATY CEDING LANDS—CONSTRUCTION AND EFFECT OF AMENDMENT BY CONGRESS.

Complainant entered into a lease with the Shoshone and Arapahoe tribes of Indians in Wyoming by which he acquired the right to mine coal for 10 years on the leased lands, which included 178,000 acres in the Wind River reservation, and said lease was approved by the Secretary of the Interior in accordance with law. During its term Congress, by Act March 3, 1905, c. 1452, 33 Stat. 1016, ratified an agreement by which the Indians ceded, to be disposed of by the government for their benefit, "all the lands embraced within the said reservation," except certain described lands, which were retained as a diminished reservation, and which included a part of the leased lands. Article 2 of the agreement was amended by such act, by adding a proviso that nothing therein should impair complainant's rights under his lease, but he should have "for thirty days from the date of the approval of the surveys of said land a preferential right to locate, following the government surveys, not to exceed 640 acres in the form of a square of mineral or coal lands in said reservation," and to purchase the same "at the rate of ten dollars per acre, and surrender said lease and the same shall be canceled." *Held*, first, that the proviso was not in conflict with the original agreement as made with the Indians; second, that the agreement as approved did not except the leased lands from those ceded, the special object of the proviso being to obtain a cancellation of the lease, to release the ceded lands therefrom, and facilitate their sale; third, that it did not require complainant to select his 640 acres within the boundaries of the original lease, but left him free to make such selection from any of the ceded lands.

2. TREATIES—CONSTRUCTION—LEGISLATIVE AMENDMENT.

Whenever a conflict is alleged to exist between a treaty requiring ratification and a legislative act of amendment, the courts, in construing them, while endeavoring to give effect to both, if they cannot be reconciled, will give effect rather to the legislative amendment.

3. STATUTES—RULES OF CONSTRUCTION.

In the interpretation of legislative acts, the rule applies that the words and terms employed, both from their obvious import and context, are to be taken in their ordinary sense where certain to a common intent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 266, 267.]

4. SAME—DEBATES IN CONGRESS.

While, in general, the debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body, yet where the only question of fact is whether Congress, when it adopted an act, understood that under a given proviso the right was given to a beneficiary to select 640 acres of mineral or coal land within a certain area, the statement of members in debate may be resorted to for the purpose of ascertaining the general object of the proviso.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 293.

History and passage of statutes and contemporary circumstances as aids to construction, see note to Mosle v. Bidwell, 65 C. C. A. 535.]

5. COURTS—JURISDICTION OF FEDERAL COURTS—SUIT AGAINST UNITED STATES.

A suit to enjoin an Indian agent from obstructing the complainant in prospecting on lands of a reservation for the purpose of making a selection of mineral lands thereon, as he was authorized to do by an act of Congress, is one to restrain an individual tort which would result in irreparable injury to complainant, and not one against the United States, and for that reason not within the jurisdiction of the court, although defendant

claims to be acting in his official capacity as a representative of the government, where such action is without warrant of law.

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

Timothy F. Burke, U. S. Atty., for appellant.

John W. Lacey and John N. Baldwin, for appellee.

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

PHILIPS, District Judge. This is an appeal seeking to reverse the action of the Circuit Court in overruling a demurrer to a bill in equity and granting a temporary injunction. The controversy grows out of the following state of facts:

On the 1st day of July, 1899, the appellee, Asmus Boysen, of the state of Iowa, entered into a contract of lease with the Shoshone and Arapahoe tribes of Indians, occupying the Wind River reservation, in the state of Wyoming, which contract was approved by the Secretary of the Interior. The contract recited that the said Indian tribes were authorized by the provisions of the third section of the act of Congress approved February 28, 1891 (26 Stat. 795, c. 383), as amended by Act Cong. Aug. 15, 1894, c. 290, 28 Stat. 305, to lease the lands for certain purposes, which was ratified by their principal chiefs, etc. This lease embraced a territory of about 178,000 acres. It ran for a period of 10 years, and the use of it was limited to mining coal thereon. The consideration for this lease was the payment of a royalty of 10 per cent. of the cash value of the coal at the mines. While the appellee was thus occupying the leased premises and mining coal thereon, on March 3, 1905, Congress, by Act March 3, 1905, c. 1452, 33 Stat. 1016 et seq., ratified and amended the agreement made between James McLaughlin, United States Indian inspector, respecting their said reservation, whereby said tribes agreed to cede and relinquish to the United States all the right, title, and interest to a portion of the lands embraced in said reservation, within certain prescribed lines, reserving the rights of individual Indians who had made selection of lands to surrender the same and select other lands in lieu thereof within the diminished reserve at any time before the ceded lands were open for entry. In consideration of this cession the United States was to dispose of the ceded lands under the provisions of the homestead, townsite, coal, and mineral land laws, or by cash sale at specified prices, and to hold and distribute the proceeds for the benefit of said Indian tribes in a manner provided in the act. This agreement was accepted and ratified by Congress, with certain amendments made thereto. 33 Stat. 1019, 1021.

The second article of this amended agreement contained the following proviso:

"That nothing herein contained shall impair the rights under the lease to Asmus Boysen, which has been approved by the Secretary of the Interior; but said lessee shall have for thirty days from the date of the approval of the surveys of said land a preferential right to locate, following the government surveys, not to exceed six hundred and forty acres in the form of a square, of mineral

or coal lands in said reservation; that said Boysen at the time of entry of such lands shall pay cash therefor at the rate of ten dollars per acre and surrender said lease and the same shall be canceled. Provided further, that any lands remaining unsold eight years after the said lands shall have been opened to entry may be sold to the highest bidder for cash without regard to the above minimum limit of price; that lands disposed of under the town-site, coal and mineral land laws shall be paid for at the prices provided for by law, and the United States agrees to pay the said Indians the proceeds derived from the sales of said lands, the amount so realized to be paid to and expended for said Indians in the manner hereinafter provided."

As the appellee, Boysen, to avail himself of this provision, had to proceed within 30 days from the date of the approval of the surveys of said ceded lands to make his selection and location of the 640 acres, he at once entered upon the ceded lands with employés and began explorations and examinations to determine the presence of mineral or coal, with the employment of machinery suitable thereto, with a view to making such selection within the prescribed limited time. The appellant, Harry E. Wadsworth, who was at the time the Indian agent in charge of said Indian tribes and reservation, made objection to the said proceedings of the appellee, and forbade his entering upon and selecting said 640 acres outside of the lands embraced within said leased premises. His obstruction went to the extent of suffering the destruction of the machinery so employed by the appellee, and warning him, under threat of forcible ejection, from the lands included in the ceded territory outside of said leased premises. A portion of the leased lands were in the ceded domain, and a portion were within the diminished reserve. The proportion of this division of the leased lands does not affirmatively appear. In this conjuncture the appellee, Boysen, in order to prevent the loss of his right by lapse of the 30-day period, should he carry the contest before the Department of the Interior, filed his bill in equity in the United States Circuit Court for the State of Wyoming against said appellant, Wadsworth, and those concerting with and aiding him in said interference and obstruction, setting out in detail the facts aforesaid, praying for an order and decree enjoining them therefrom. To this bill the United States district attorney for Wyoming interposed a demurrer, which was overruled, and a temporary injunction as prayed was granted.

The chief contention of appellant is (1) that the Indian tribes never assented to the preferential right sought to be given by the act of Congress to the appellee; and (2) that the correct construction of said proviso is that the selection to be made by appellee is limited to 640 acres of mineral or coal lands situate within the boundaries of the original lease.

Is the right reserved to the appellee by the proviso void for the reason that it conflicts with the agreement made with said Indian tribes? The Indian tribes of this country, while somewhat sui generis in their relation to the United States, have ever been recognized as possessing so much of the qualities of national political independence as to be subject to the treaty-making power between them and the government. This is especially so in respect of territory assigned to them as reservations. Such treaties in practice take the form of agreements entered into between the particular tribe and some designated

representative of the Interior Department, or person or persons designated thereto by act of Congress. Like any other treaty, when not self-executing, which becomes the subject of congressional revision and approval, Congress may modify or amend such provisions as affect the United States or its subjects, or entirely supersede them. In such case, whenever a conflict is alleged to exist between the treaty and the legislative act of amendment, the courts, in construing them, while endeavoring to give force and effect to both, if they cannot be reconciled, will give effect rather to the legislative amendment. Head Money Cases, 112 U. S. 581, 5 Sup. Ct. 247, 28 L. Ed. 798; Whitney v. Robertson, 124 U. S. 190, 194, 8 Sup. Ct. 456, 31 L. Ed. 386. The treaty is of no greater force than the act of Congress, and, when it becomes the subject of judicial cognizance in the courts, it is held to be subject to such provision as Congress may attach by modification or amendment. Chinese Exclusion Case, 130 U. S. 587, 600, 9 Sup. Ct. 623, 32 L. Ed. 1068. This rests upon the established rule that the provisions of an act of Congress, passed in the exercise of its constitutional power, when clear and explicit, will be upheld by the courts, although in seeming conflict with an antecedent treaty stipulation. Fong Yue Ting v. United States, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; Ward v. Race Horse, 163 U. S. 511, 16 Sup. Ct. 1076, 41 L. Ed. 244.

We do not, however, perceive any real conflict between the agreement made with the Shoshone and Arapahoe Indian tribes and the act of Congress. The treaty was not self-enforcing, but was made subject to congressional recognition and enforcement, with power to add such amendments thereto as would make it acceptable to Congress. Accordingly Congress did amend it in several particulars, among which was the proviso in favor of the appellee. Appellant was not called upon to complain of any assumed divergence between the agreement and the action of Congress. Neither can we assent to the view expressed by the United States attorney as to the general scope or character of the act in question. He asserts that:

"The act under consideration ratifies the cession of all of the lands north of the Big Wind river, etc., except so much thereof as are described in a certain lease to Asmus Boysen."

The ratification in fact is a confirmation of the cession of "all the lands embraced within the said reservation," except certain described lands, which are not only a part of the leased lands, but the lands retained by said Indians as their diminished reservation. As this contains in fact a part, and only a part, of the leased territory, it follows that the leased lands, as such, are not excepted from the conceded grant, which contains a vastly larger body of lands. We are unable to find any expression in the act indicating an exception of the leased lands from the cession. On the contrary, both the language and scope of the act are to concede to the United States all the lands of the reservation, except the designated territory expressly retained by the Indian tribes as a diminished reservation, the sense and the logic of which, it must be conceded, was the extinguishment of the Indians' rights, sub modo, in "all the lands embraced within said reservation,"

as it existed prior to the cession, saving those expressly reserved. Indeed, one of the considerations expressed in the proviso itself for the preferential right secured to the appellee was that he was to pay at the rate of $10 per acre for 640 acres, "and surrender said lease and the same shall be canceled." It is not perceivable, therefore, how the contention can be upheld that the selection of the 640 acres should be restricted to that part of the leased premises included within the absolute boundary of the ceded land, rather than to any other portion of it.

So far from finding any expression in the act indicating the exception of the leased lands from the cession, it is made clear that, in order that the leased premises within the ceded district should become an integral part thereof, the proviso is that, when the appellee should make his entry of 640 acres, he shall "surrender said lease and the same shall be canceled," whereby the leased premises within the boundary cession would become an integral part of the ceded lands. If the selection of the 640 acres was intended to be from the leased lands, it would be as well within the diminished reservation as the ceded lands—a result utterly contrary to the spirit of the treaty and act of Congress, the express purpose of which was that the entire diminished reserve should remain absolutely free to the exclusive use and occupancy of the Indians. The ceded portion alone was to be subjected to entry and sold to others, to create a permanent fund for the benefit of the Indians. That the 640 acres were to be selected from the ceded lands is further made manifest by the requirement that the selection should be made within 30 days from the approval of the government surveys "of said land," and to be in the form of a square "following the government surveys." The "said land" has reference back for its predicate to the opening words of said article 2 of the act amending and modifying the treaty agreement, to wit: "In consideration of the land ceded, granted," etc. These were the lands to be surveyed by the government, to determine their exact boundaries, following the usual custom in government surveys, by sections, necessary in making sales of the land when opened up for settlement.

To escape from this situation the learned counsel for the government is driven to insist upon interpolating the words "within the leased lands," so as to make the proviso in this respect read as follows: "Said lessee shall have, for thirty days, etc., a preferential right to locate * * * not to exceed six hundred and forty acres * * * of mineral or coal lands within the leased lands of said reservation"—thus inviting the court to commit the offense of amending a legislative act by a bald judicial construction. To escape the absurdity of the appellee, even with such interpolation, being authorized to locate 640 acres within the portion of the leased lands in the diminished reserve, the further words would have to be added, after said reservation, "within the ceded lands"; thus fitly illustrating the indefinite extent to which the courts may be led when once they break through the safeguards of limiting construction to the language of the statute. There is no immunity given to the interpretation of legislative acts from the rule that the words and terms employed, both from their

obvious import and context, are to be conceded their ordinary sense, when certain to a common intent. "A legislative act is to be interpreted according to the intention of the Legislature, apparent on its face. Every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the Legislature." Wilkinson v. Leland, 2 Pet. 627, 662, 7 L. Ed. 542; Parshall v. United States (C. C. A.) 147 Fed. 433.

Mr. Justice Swayne, in United States v. Hartwell, 6 Wall. 385, 396, 18 L. Ed. 830, speaking of the rule of construction according to the manifest legislative intent, said:

"The words must not be narrowed to the exclusion of what the Legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and overstrict construction. The rule does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity, which the Legislature ought not to be presumed to have intended. * * * The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the Legislature."

Still more pertinent is the language of the learned judge in United States v. Bassett, 2 Story, 389, Fed. Cas. No. 14,539:

"A fortiori, such an interpretation is not to be adopted to give effect to particular words, which will require, on the part of the court, the introduction of new provisions and auxiliary clauses, which the statute neither points out, nor even hints at, and yet which are indispensable to make such interpretation sensible and practicable."

Our attention is directed to the fact that the Solicitor General for the Interior department gave the opinion that the selection of the 640 acres of land by the appellee should be confined to the leased premises, for the reason that:

"The rights conferred upon Boysen are based upon his claims under the lease formerly held by him, and he should accordingly be confined, in his selection, to the lands described in that lease. It was through failure on Boysen's part to comply with the required conditions that his former lease was canceled, and in view of that fact and the rule that grants by the government should be construed in favor of the grantor, it is not perceived why the language and meaning of the act should be stretched so as to enlarge the rights of this grantee flowing from his original lease, or why its provisions should not be construed strictly against his contention that he should be allowed to locate outside the limits of the lease."

The assertion that the rights conferred upon Boysen are based upon his claims under the lease, and therefore his selection should be confined to the lands therein described, it seems to us might have been addressed to the consideration of Congress as a reason why it should have so restricted the field of selection, rather than to the court in construing what the grant actually was. On the face of the proviso Congress recognized the fact to be that the appellee had rights under the lease which it conceived ought not to be so impaired by the agreement it was approving as to leave him unprovided for or unprotected. That consideration was legislative, and is not judicial.

It is next stated in the opinion that "it was through failure on Boysen's part to comply with the required conditions that his former lease was canceled." How this information was derived this court is

not advised. There is nothing in the record to sustain the statement. On the contrary, if resort is to be had to extraneous matters, the debate in Congress, of which the court can take judicial notice, when the proviso in question was under consideration and adopted, clearly shows that it was predicated of the sense of that body, based upon the information presented to the committee having the measure in charge, that it was proper and just, in view of the surrender by appellee of his lease, he should be accorded the right to have the preferential selection of 640 acres anywhere in the ceded domain, for the reason that it was deemed expedient to remove as a cloud on the title to the conceded premises any assertion of his rights under the lease. When Mr. Marshall, of the committee having in charge this measure, presented this amendment to the consideration of the House, the following questions were put to him by Mr. Lind:

"Q. Does not this provision of the bill give the beneficiary a blanket right to select 640 acres of land anywhere on this reservation, after it is opened, by paying $10 an acre for it?

"Mr. Marshall: It does.

"Mr. Lind: Do you, as a member of this House, think it is good policy and good legislation to give any one such a bonus and such a privilege, especially where the land is of so peculiar a character as that on this vast reservation?

"Mr. Marshall: I certainly would not think it wise legislation to give it to any one indiscriminately, but I do think it is wise legislation to give it to a man who has an equity. This is in lieu of the equity that he has.

"Mr. Lind: If he has any equity, why do you not confine it to the land that he claims to have an equity in? * * * If he took a coal land lease, why do not you confine him to his coal land lease?

"Mr. Marshall: Because he had a coal land lease of a tract of 180,000 acres, and in lieu of that we give him the privilege of selecting 640 acres of any kind of land by paying the highest price anybody would pay for it."

Thereupon Mr. Lind inquired of Mr. Mondell, Representative from the district of Wyoming, whether he thought this wise legislation, and Mr. Mondell answered:

"I was not desirous of this provision being placed in the bill. At the same time it is true that there is a question among attorneys whether the lease was legally canceled. If it was not legally canceled, then this is a simple way of disposing of any rights that the man may have."

Mr. Lacey of Iowa, then said:

"A somewhat similar situation arose in relation to the Raven Mining Company upon another reservation, and in order to adjust the matter they were given the prior right on a section of land. Now, the proposition here is to allow Mr. Boysen, who has a floating lease on 178,000 acres, and who after prospecting had narrowed it down to perhaps one-half that amount by filing a plat, to have this prior right of selection in this amount of land on condition that all cloud of his lease over any of the lands should be released at the same time. This is a very fair and reasonable adjustment, because the only effect of striking this amendment out would be to allow somebody else, who is not there, and some man or set of men possibly to take the same amount at some other price, if it is coal land, at $10 an acre, and if it is ordinary mineral land at $2.50 or $5 an acre."

See Congressional Record 58th Congress, Third Session, pp. 2818 and 2819.

No suggestion was made to Congress that the appellee had in any particular broken the terms of his lease. On the contrary, it was recog-

nized that he had so kept faith with the Indian tribes as to create a probable right in him for protection; and to free the situation from possible litigation the preferment right was accorded him in the amendment. It may be conceded as a general rule "that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body." United States v. Freight Association, 166 U. S. 318, 17 Sup. Ct. 540, 41 L. Ed. 1007. Yet, in the instance like this, where the only question of fact is whether Congress, when it adopted the act, understood that under a given proviso the beneficiary could select 640 acres of mineral or coal land within a certain area, and the vote was for the declared right, it comes within the rule declared by Mr. Justice Field, on the circuit, in Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546:

"The statements of supervisors in debate on the passage of the ordinance cannot, it is true, be resorted to for the purpose of explaining the meaning of the terms used; but they can be resorted to for the purpose of ascertaining the general object of the legislation proposed and the mischiefs sought to be remedied."

So in Jennison v. Kirk, 98 U. S. 453, 459, 25 L. Ed. 240, the court, in construing an act passed by Congress of which Senator Stewart of Nevada was the author, said:

"These statements of the author of the act in advocating its adoption cannot, of course, control its construction, where there is doubt as to its meaning; but they show the condition of mining property on the public lands of the United States, and the tenure by which it was held by miners in the absence of legislation on the subject, and thus serve to indicate the probable intention of Congress in the passage of the act."

Clearly enough it is apparent on the face of the proviso itself that the leasehold interest of the appellee was to be intercepted and ended, and in lieu thereof the preferential right was accorded to him to select anywhere within the ceded territory 640 acres. This construction of the proviso works no injustice to the Indians. The purpose of Congress was to open up a part of the vast territory occupied by the Indians to settlement. The consideration to the Indians was the creation of a large fund to arise from the sale of the ceded lands for their perpetual benefit. The 640 acres to be selected by appellee was not a gift; but at the time of the entry he was to pay $10 per acre and surrender said lease—the maximum price of mineral or coal lands.

The final contention of appellant is that this suit must fail for the reason that the government is the real defendant, which cannot be sued without its consent, and that in determining the question whether or not the suit in fact is against the government, the party named as defendant on the record does not control, but rather is it to be determined by the result of the judgment or decree which may be entered—citing Minnesota v. Hitchcock, 185 U. S. 377, 22 Sup. Ct. 650, 46 L. Ed. 954; Bockfinger v. Foster, 190 U. S. 116, 23 Sup. Ct. 836, 47 L. Ed. 975; Oregon v. Hitchcock, 202 U. S. 60, 26 Sup. Ct. 568, 50 L. Ed. 935; and Naganab v. Hitchcock, 202 U. S. 473, 26 Sup. Ct. 667, 50 L. Ed. 1113.

The first case, that of Minnesota v. Hitchcock, was an attempt to enjoin the Secretary of the Interior and the Commissioner of the

General Land Office from selling certain sections of land in the Red Lake Indian reservation, and the object and effect of the decree sought was to control the disposition of the lands by the Interior Department, the title to which was in the United States. It will be observed that in that case there was consent to the jurisdiction by act of Congress. The court, however, arguendo, said:

"Now, the legal title to these lands is in the United States. * * * The United States is proposing to sell them. This suit seeks to restrain the United States from such sale—to divest the government of its title and vest it in the State. The United States is, therefore, the real party affected by the judgment and against which in fact it will operate."

Of course, in such case the United States is a necessary party to the litigation, and a suit without its consent could not be maintained.

The case of Bockfinger v. Foster, supra, was an application for a mandamus to compel the trustees of a townsite to convey the lands in controversy to the plaintiff. The court said:

"The United States, as the primary owner of the land, could prescribe the terms upon which it could be disposed of to occupants. A suit against the townsite trustees to compel them, without regard to the act of Congress, to convey to one who was not an occupant within the meaning of that act, was a suit to compel them to convey land which really belonged to the United States."

Necessarily the jurisdiction to make such decree was denied.

In Oregon v. Hitchcock, supra, the suit was brought to restrain the Secretary of the Interior and the Commissioner of the General Land Office from allotting or patenting to any Indians or other persons certain described swamp or overflow lands within the limits of Klamaths Indian reservation. This action was clearly within the ruling in Minnesota v. Hitchcock, supra.

The case of Naganab v. Hitchcock, supra, was an attempt to restrain by suit the Secretary of the Interior from carrying out the provisions of an act of Congress respecting the disposition of pine lands ceded to the United States by the Indians. In its opinion the court said:

"It is apparent * * * that it is in effect a suit against the United States to control the disposition of the lands and for an account of the proceeds of the sales of certain lands conveyed by the Indians to the United States under the act of January 14, 1889."

It is obvious that in such cases, where it is sought to obtain a decree controlling in any wise the disposition of the lands of the United States, such decree would operate directly against the government itself; whereas, in the case at bar no decree is sought divesting or affecting the title of the United States to any of its lands, nor does it seek the adjudication of any matter which would affect that title. The case at bar falls within that class where the individual complainant seeks redress against one or more persons for an invasion of his property rights, and who pretend to be acting under warrant of some federal statute or official, in which the complainant asserts that neither the statute nor the public law confers any such right upon the wrongdoer. As said in Noble v. Union River Logging Railroad, 147 U. S. 172, 13 Sup. Ct. 273, 37 L. Ed. 123:

"If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do."

Included in this rule are the cases—

"Where an individual is sued in tort for some act injurious to another in regard to person or property, in which his defense is that he has acted under the orders of the government. In these cases he is not sued as an officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts the authority of such officer. To make out that defense he must show that his authority was sufficient in law to protect him. In this class is included United States v. Lee, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171, where the action of ejectment was held to be in its essential character an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment, and the defendants Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defense." Stanley v. Schwalby, 147 U. S. 518, 13 Sup. Ct. 418, 37 L. Ed. 259.

To the same effect are the following cases: Meigs v. McClung's Lessee, 9 Cranch, 11, 3 L. Ed. 639; Wilcox v. Jackson, 13 Pet. 498, 10 L. Ed. 264; Grisar v. McDowell, 6 Wall. 363, 18 L. Ed. 863; Brown v. Huger, 21 How. 305, 16 L. Ed. 125; United States v. Schurz, 102 U. S. 378, 26 L. Ed. 167; Marbury v. Madison, 1 Cranch, 137, 2 L. Ed. 60, and Butterworth v. United States ex rel. Hoe, 112 U. S. 50, 5 Sup. Ct. 25, 28 L. Ed. 656.

In the case at bar the appellant was an Indian agent, in charge of the Indian tribes on their reservation. According to the allegations of the bill he was acting without warrant of law, committing a tort, in obstructing and attempting to eject the appellee from prospecting on the lands with a view to making the selection thereon, as he was authorized to do under the act of Congress. The injunction seeks to stay the hand of an individual wrongdoer, to prevent irreparable mischief to the complainant; and consequently such wrongdoer cannot be acting for and in behalf of the government, which stands for the embodiment of law and lawful procedure.

It results that the action of the Circuit Court in granting the temporary injunction was correct, and its decree therefore is affirmed.

VAN DEVANTER, Circuit Judge (concurring). I concur in the decree for the reasons that the act of March 3, 1905, including the provision conferring upon Asmus Boysen a preferential right to locate and to purchase at the rate of $10 per acre not to exceed 640 acres of mineral or coal lands is a valid exercise of the power vested in Congress over tribal Indians and tribal lands, notwithstanding the Indians have not assented to such preferential right (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); that, rightly interpreted, the act both extends and confines this right to the so-called ceded lands; and that, in attempting to exclude Boysen from examining and locating part of the lands to which his right lawfully extends, Wadsworth was not in the exercise of any authority, judgment, or discretion vested in him by reason of his office, but was entirely without the pale of the law and a wrongdoer, so the suit is not in effect one against the United States.

HARRISON et al. v. FITE et al.

(Circuit Court of Appeals, Eighth Circuit. October 22, 1906.)

No. 2,250.

1. BOUNDARIES—WATERS AND WATER COURSES—TITLE TO SOIL UNDER WATERS —LAW GOVERNING.

The question whether the title to the soil under the waters of a lake or stream, whether navigable or not, passes to the grantee of the shore land, is determined by the law of the state in which the land lies.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 96; vol. 37, Navigable Waters, § 181.]

2. SAME—RIPARIAN OWNERS—LAW OF ARKANSAS.

In Arkansas a riparian owner takes all accretions, whether the water course be navigable or not. His title extends to the thread of an unnavigable stream, and in the case of a navigable stream to high-water mark or the limit of the bed; the title to the bed being in the state for the use of the public.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 270–272; vol. 48, Waters and Water Courses, §§ 99–101; vol. 8, Boundaries, §§ 108–117.]

3. NAVIGABLE WATERS—BED OF NAVIGABLE STREAM.

The bed of a navigable stream is that soil so usually covered by water that it is wrested from vegetation, and does not extend to or include that upon which grasses, shrubs, and trees grow, though covered by the great annual rises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 180–227.]

4. SAME—NAVIGABILITY.

To meet the test of navigability as understood in the American law, a water course must have a useful capacity as a public highway of transportation. A theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient to impress upon it a public servitude.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 5–15.]

5. SAME.

It does not follow that, because a stream or body of water was once navigable, it has continued and remains so; and whenever, from any natural or other cause its practical utility as a means of transportation has been permanently destroyed, it should cease to be classed among those waters that are charged with a public use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 5–15.]

6. SAME—EVIDENCE OF NAVIGABILITY—GOVERNMENT SURVEY.

The action of the government surveyor in meandering a body of water or in surveying its bed is to be considered as evidence upon the question of its navigability or unnavigability; but it is not conclusive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 12–15.]

7. BOUNDARIES—TITLE OF RIPARIAN GRANTEES.

If the United States has disposed of lands bordering upon a meandered unnavigable water course or lake by a patent containing no reservations, and there is nothing else indicating an intention to withhold title to the lands within the meander lines, it has nothing left to convey, and whether

the title to the bed of the waters is in the state or passes to the grantee in the patent is determined by the local law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 95–108, 111–114; vol. 37, Navigable Waters, §§ 181, 184, 186, 201–215.]

8. APPEAL—REVIEW—FINDINGS OF FACT.

The finding of a chancellor upon conflicting evidence will be deemed presumptively correct by an appellate court, and will not be disturbed unless an obvious error has occurred in the application of the law or a serious mistake has been made in the consideration of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3974.]

9. EVIDENCE—JUDICIAL NOTICE—NAVIGABILITY OF WATERS.

The courts take judicial notice of the navigable character of important rivers and inland lakes, but as to those of insignificant capacity and doubtful utility the question is one of fact, to be determined on evidence, and the burden of proof rests upon the party who asserts the existence of the public servitude.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 13; vol. 37, Navigable Waters, § 12.]

10. NAVIGABLE WATERS—NAVIGABILITY—FINDING CONSIDERED.

A finding affirmed that Big Lake, in northeastern Arkansas, is not a part of Little river, but that the river flows along its western boundary in a defined channel, and that the lake is not a navigable body of water; also that the river, whatever it may once have been, is not now navigable in a legal sense, and that the lands of riparian owners on the eastern side of the lake extend across it to the thread of the stream.

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

This was a suit by Fite and Acklen, officers and trustees of a voluntary association known as the "Big Lake Shooting Club," for an injunction restraining the defendants, Harrison and 36 others, most of whom were averred to be market hunters and fishermen, from trespassing upon the property of the club and killing wild fowl thereon for shipment and sale. The property in controversy is a part of the bed of what is known as "Big Lake" and "Little River," located in the northeastern corner of the state of Arkansas and extending as far north as the Missouri line. It is not disputed that the complainants, as trustees for their club, hold title to strips of land 10 feet in width adjacent to and abutting upon the meander line of Big Lake as shown by the government survey made about the year 1834. But it is denied by the defendants that the rights of the riparian owners extend further than the meander line. It is claimed by them that Big Lake is a part of Little river and contains various navigable channels over which steamboats can be operated at all seasons of the year; that Little river is itself a navigable stream; and that they have full right to go upon all parts of it, including Big Lake, in their hunting and fishing pursuits. On the other hand, the complainants claim that Little river is unnavigable, and is a distinct stream running along the western margin of the surveyed area of the lake, and that the remainder of the land in controversy is a lake only in name, being nothing more, even in times of high water, than an unnavigable morass or swamp, wholly useless for purposes of navigation, and that it long since became by accretion a part, in fact and title, of the surveyed lands along the eastern meander line; also that as the owners of lands on both sides of Little river their title extends to the thread of that unnavigable stream. Upon final hearing the Circuit Court sustained the theory of the complainants and entered a decree perpetually enjoining the defendants from trespassing upon the property in dispute. The defendants appealed.

As it appears from the maps, the surveyed area of Big Lake embraces many thousand acres. It lies in the basin of the St. Francis river, and well-authenticated accounts say that the sinking of the earth's surface resulting in the

formation of the lake was caused by the New Madrid earthquakes of 1811 and 1812. It is quite certain that Little river, which enters at the north and has outlets at the south, pursues a well-defined channel along the western margin of the lake basin, and that the bed of the lake, so called, is marked by many stumps and fallen trees of kinds that are indigenous only to the uplands. When the survey of this section of the country was made by the national government in 1834, the surveyor's lines meandered the outer margin of the lake. The deeds to the complainants covering the strips of land along the meander lines also purported to convey to them as accretions the lands within the lines to the thread of the stream known as "Little River." The controlling questions in the case are: Is Little river a distinct stream running along the western margin of the lake basin, and is it navigable or unnavigable? Where are the thread of the stream and the eastern line of its bed? Is Big Lake a part of Little river, and is it navigable, or is it in such condition that it should be said to have become through accretion or reliction a part of the surveyed lands along the eastern meander line? A solution of these questions determines the rights of the contending parties.

Ulysses S. Bratton and Harry H. Myers, for appellants.

John I. Moore and J. F. Gautney (W. J. Driver and A. G. Little, 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 shores of navigable waters and the soils under them were not granted by the Constitution to the United States, but were reserved to the states respectively; and the new states upon their admission to the Union have the same rights in respect thereof as the original states. As to lands bounded on unnavigable waters the United States assumes the position of a private owner subject to the general law of the state so far as its conveyances are concerned. In either case the question whether the title to the soil under the waters passes to the grantee of the shore land is determined by the law of the state where the land lies. Hardin v. Shedd, 190 U. S. 508, 519, 23 Sup. Ct. 685, 47 L. Ed. 1156, and cases there referred to.

In Arkansas a riparian owner takes all accretions, whether the water course be navigable or not. Warren v. Chambers, 25 Ark. 120, 91 Am. Dec. 538, 4 Am. Rep. 23. His title extends to the thread of an unnavigable stream. In the case of a navigable stream the title to the bed is in the state for the use of the public, and the riparian proprietor owns only to high-water mark or the limit of the bed. The bed of the river is that soil so usually covered by water that it is wrested from vegetation and its value for agricultural purposes is destroyed. It is the land upon which the waters have visibly asserted their dominion, and does not extend to or include that upon which grasses, shrubs, and trees grow, though covered by the great annual rises. Railway Co. v. Ramsey, 53 Ark. 314, 13 S. W. 931, 8 L. R. A. 559, 22 Am. St. Rep. 195, following Howard v. Ingersoll, 13 How. 381, 14 L. Ed. 189. See, also, Houghton v. Railroad, 47 Iowa, 370.

To meet the test of navigability as understood in the American law a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It

should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient. While the navigable quality of a water course need not be continuous, yet it should continue long enough to be useful and valuable in transportation; and the fluctuations should come regularly with the seasons, so that the period of navigability may be depended upon. Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable a water course must have a useful capacity as a public highway of transportation. Toledo Liberal Shooting Co. v. Erie Shooting Club, 33 C. C. A. 233, 90 Fed. 680; Moore v. Sanborne, 2 Mich. 520, 524, 59 Am. Dec. 209; Morgan v. King, 35 N. Y. 454, 458, 91 Am. Dec. 58; Brown v. Chadbourne, 31 Me. 9, 1 Am. Rep. 641; Griffith v. Holman, 23 Wash. 347, 63 Pac. 239; Wethersfield v. Humphrey, 20 Conn. 218; Rowe v. Granite Bridge, 38 Mass. 344; Gaston v. Mace, 33 W. Va. 14, 10 S. E. 60, 5 L. R. A. 392, 25 Am. St. Rep. 848; Neaderhouser v. State, 28 Ind. 257; Rhodes v. Otis, 33 Ala. 578, 73 Am. Dec. 439; Railroad v. Brooks, 39 Ark. 403, 43 Am. Rep. 277.

It does not follow that, because a stream or body of water was once navigable, it has since continued and remains so. Changes may occur, especially in small and unimportant waters, from natural causes, such as the gradual attrition of the banks and the filling up of the bed with deposits of the soil, the abandonment of use followed by the encroachment of vegetation, and the selection by the water of other and more natural and convenient channels of escape, that work a destruction of capacity and utility as a means of transportation; and, when this result may fairly be said to be permanent, a stream or lake in such condition should cease to be classed among those waters that are charged with a public use.

The action of the government surveyors in meandering a body of water or in surveying its bed is to be considered as evidence upon the question of its navigability or unnavigability at the time; but it is not conclusive. The surveyors are invested with no power to foreclose inquiry into the true character of the water. If the United States has disposed of lands bordering upon a meandered unnavigable water course or lake, by a patent containing no reservations, and there is nothing else indicating an intention to withhold title to the lands within the meander lines (Niles v. Cedar Point Club, 175 U. S. 300, 20 Sup. Ct. 124, 44 L. Ed. 171) it has nothing left to convey; and whether the title to the bed of the waters is in the state or passes to the grantee in the patent is determined by the local law. (Lamprey v. Minnesota, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541).

It is the settled doctrine of this court that the finding of a chancellor upon conflicting evidence will be deemed to be presumptively correct, and will not be disturbed on appeal, unless an obvious error has occurred in the application of the law or a serious mistake has been made

in the consideration of the evidence. Thallmann v. Thomas, 49 C. C. A. 317, 111 Fed. 277. Courts take judicial notice of the navigable character of our important rivers and inland lakes—those that are so within our common knowledge; but there are many of such insignificant capacity and doubtful utility that the question, being one of fact, is to be determined by the evidence produced, and in such case the burden of proof rests upon him who asserts the existence of the public servitude.

The record before us is very voluminous, consisting, as it does, of more than 900 pages. Many witnesses testified upon each side, and there is much conflict in their testimony, more especially concerning the character of the waters, whether navigable or no, and whether there is a defined eastern shore line of Little river, from which Big Lake swells to the eastward as an unnavigable swamp. But, applying the foregoing principles of law to the facts of this case, and bearing in mind the conclusions reached by the trial court and their influence in the determination by this court of disputed questions of fact in a suit in equity, our opinion is that the decree should be affirmed. Whatever may have once been the capacity and utility of the body of water known as "Big Lake" as a highway of commerce or in the floatage of the products of the fields and forests along its banks, the conditions that are to be considered are those of recent years and the present. The capacity of a lake or stream for navigation may be permanently lost from natural causes. Its annual influx of waters may be greatly lessened by works lawfully carried on by the government in the improvement of other natural highways of commerce. Accretion and reliction may work such a complete change that the bed of what was once a navigable body of water may be rapidly approaching that condition which makes it available for the plow. It is a matter of common knowledge that with the construction of levees and drains, and the confining and deepening of the channels of great navigable streams, large areas of land are being rescued from the waters and made useful for grazing and the pursuits of agriculture. Small and unimportant streams and lakes, that partake of the character of swamps during the greater part of the year, may permanently lose whatever occasional navigable capacity they once possessed by the discontinuance of the attention of the government and its improvement of other more capacious and more useful highways of commerce. Through the gradual deposits of silt, the increase of vegetation, and the lessening of the annual volume of water, probably due in large measure to the levee improvements in the valley of the Mississippi, there has been, according to the observation of witnesses, a continuous and progressive upgrowth of the bed of the Big Lake basin; and it is confidently asserted by some that it would soon be available for farming purposes if the outlets of Little river, through which the waters of the lake are discharged at its southern end, were cleared of obstructions. For some years prior to the trial of this case Big Lake has possessed none of the characteristics of real commercial usefulness as a navigable thoroughfare. The sunken basin into which the waters in Little river overflow rises so gradually to the eastward that there are no landing places on the eastern shore. The photographs taken from different points of view and the testimony of the witnesses

show it to be largely a tangled jungle, choked with willows, aquatic growth, and dead trees and stumps. Navigability, in the sense in which the term is used in the law, is not established by proof that during the rainy season the waters rise so that boats of small draft may go here and there by "riding down the willows," or that there are here and there inlets of deeper water that penetrate the tangled growth. These inlets cannot in any true sense be termed useful highways of commerce. They are for the most part tortuous, lacking continuity, and, so to speak, end nowhere. Navigation of them, except with canoes, skiffs, and dugouts, is fraught with hidden dangers, even in the times of highest water; and the use that may be and is made of them is not that which is contemplated by the law for the creation of a public easement.

During the greater part of the year the bed of the lake appears to view, excepting where the deeper depressions allow the waters to stand in scattered pools. There are then seen extensive fields of grass between the higher wooded portions, upon which horses and cattle are pastured and hogs are run for several months in the year. Vehicles are driven over the dry bed, and roads thereon are worked by the citizens. Near the south end a highway is marked upon the maps as crossing the lake. Dead trees and stumps still show the effects of a fire that ravaged the lake basin more than 30 years ago. In recent years efforts at navigation by those means that would have a tendency to show a navigable character and capacity of the water have generally met with disaster. The evidence fully justifies the finding that that part of the area indicated upon the maps and exhibits as being the bed of Big Lake, which extends from the eastern meandered line westward to the east line of Little river, has, by process of accretion and the reliction of the waters, become a part of the patented lands along the eastern margin.

Webster v. Harris, 111 Tenn. 668, 69 S. W. 782, 59 L. R. A. 324, involved the navigability of Reelfoot Lake, in Tennessee, near the Mississippi river. The basin of this lake was doubtless created by the same convulsion of nature that resulted in the sunken lands of Missouri and Arkansas. The physical characteristics of Reelfoot Lake are similar to those shown in the record before us. There is the same aspect of desolation, of dead trees, logs, stumps, snags, and other obstructions. But the depth of the irregular open areas between the higher points of land at ordinary low water exceeds that of Big Lake at flood, and the court held that, though Reelfoot Lake was not navigable in the legal sense, nevertheless, as it possessed capacity for valuable floatage, and for rafts, flatboats, and perhaps small vessels of light draft, it was navigable "in the common acceptation of the term," and that therefore the title to the bed thereof was in the riparian owners, subject to the easement of the public for commercial intercourse and transportation, though, if it had been navigable in the legal sense, the title to the bed would have been in the state for the use of the public. This distinction in respect of the kinds of navigability and the resultant effect upon the title to the soil under the waters do not obtain in Arkansas.

Little river has a well-defined bed, largely free from vegetation and obstruction, running along the western margin of Big Lake basin. There is no controversy about the western line of its bed, and the evidence fairly establishes that the eastern line thereof is defined and marked by higher points of land lying to the eastward, by the stumps and fallen trees of varieties indigenous only to the uplands, and by willows and aquatic growth. We also approve of the conclusion of the trial court that Little river is not navigable in any real and substantial sense. Witnesses testified that in times of high water there has been no successful navigation of it in recent years, except with a gasoline launch drawing but a few inches of water, and with canoes, skiffs, and dugouts of the hunters and fishermen; that it is not being used to float the products of the fields and forests to market, and cannot be profitably and successfully used for that purpose. And, if practical adaptability and usefulness are the tests, the finding of the court under the evidence was right. The line of division between the lands on the east and those on the west established by the decree was the center line of Little river, which was described with reference to natural monuments as definitely as was practicable.

The decree is affirmed.

PATTERSON v. SAFE DEPOSIT & TRUST CO. OF BALTIMORE.

(Circuit Court of Appeals, Fourth Circuit. November 8, 1906.)

No. 655.

1. LIMITATION OF ACTIONS—RELIEF AGAINST STATUTE—EQUITABLE GROUNDS.
While the exceptions in a statute of limitations may be enlarged to include cases within their equity, although not within their strict letter, such action should be taken with great caution, and only in cases where the plaintiff has proceeded with due diligence and is not chargeable with laches.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 13, 15.]

2. SAME.
Plaintiff commenced an action in the District of Columbia more than two years after the cause of action accrued which was still pending untried more than seven years later, when the defendant died, having in the meantime become a resident and citizen of Maryland. By reason of his nonresidence, the action abated by his death, and more than a year thereafter, and two years after the defendant's death, a new action was commenced against his executor in Maryland, which action was at that time barred by the state statute of limitation. *Held*, that plaintiff was chargeable with laches, and had no equity to be relieved from the operation of the statute, upon an allegation merely that she had no knowledge of the decedent's change of residence until the time of his death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 469.]

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

John C. Gittings (Justin M. Chamberlin and Henry M. Hutton, on brief), for plaintiff in error.

Frank Gosnell (A. A. Hoehling, Jr., on brief), for defendant in error.

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

GOFF, Circuit Judge. The plaintiff in error, on the 2d day of August, 1895, instituted an action of trover in the Supreme Court of the District of Columbia, against Samuel Magill Bryan, for the conversion of a certificate in writing representing and entitling her to receive 100 shares of stock of the National Typographic Company, and 100 shares of stock of the Mergenthaler Linotype Company, and certain cash dividends upon the same, alleging that she had casually lost said certificate out of her possession, and that the same on that day came into the possession of the defendant by finding. Such action, to which said Bryan had duly pleaded, was pending against him at the time of his death on the 23d day of January, 1903. The defendant in error, having been by the will of Bryan appointed his executor, and also trustee as to certain funds mentioned therein, qualified as such, but failed to enter its appearance in such action, whereupon the same thereafter, on the 24th day of January, 1904, abated.

The plaintiff in error, on the 2d day of May, 1905, commenced her action at law against the defendant in error, in the Circuit Court of the United States for the District of Maryland, averring her possession and ownership of said mentioned certificate in writing, setting up the loss of the same, and the finding of it by Samuel Magill Bryan, as before mentioned. The declaration alleges that the defendant's testator, well knowing the said certificate or agreement to be the property of the plaintiff and of right to belong to her, but contriving and fraudulently intending craftily and subtly to deceive and defraud the plaintiff, did not during his lifetime deliver (and that the defendant as executor and trustee has not as yet delivered) the said certificate or agreement or any of the shares of stock or dividends of money to the plaintiff, although often requested so to do, and hath wholly refused so to do, and afterwards converted and disposed of such agreement or certificate and said shares of stock and the dividends due thereon to his own use to plaintiff's damage, wherefore this suit.

To this declaration the defendant below pleaded that it did not commit the wrong alleged; that the said Samuel Magill Bryan did not commit the wrong alleged; that the alleged cause of action did not accrue within three years before the bringing of this suit. On said first and second pleas issue was joined, and to the plea of the statute of limitations the plaintiff below replied as follows:

"That at the time the cause of action herein sued upon accrued, to wit, June 14, A. D. 1893, defendant's testator, Samuel Magill Bryan, was absent out of the state of Maryland, and was then notoriously a citizen and resident of and within the District of Columbia, and the said Bryan continuously thereafter remained such citizen and resident of and within the said District of Columbia to the time of his death, to wit, January 23, 1903, so far as plaintiff had any knowledge, information, belief, or cause for belief, or reason to suspect; that on the 2d day of August, A. D. 1895, plaintiff filed in the Supreme Court of the District of Columbia an action of trover against defendant's testator, Samuel Magill Bryan, the subject-matter of said action being identical

with that declared on in the declaration filed herein, at which time the said Bryan was absent out of the state of Maryland, and was notoriously a citizen and resident of and within the District of Columbia; that said Bryan was personally served with process of said court, appeared in said court submitting to its full jurisdiction in said premises, and pleaded to said declaration, and issue was joined on certain of said Bryan's pleas and certain depositions de bene esse taken; that on March 18, 1899, said Bryan's depositions de bene esse was taken in said action, wherein said Bryan swore that he was a resident of the District of Columbia, and was about to leave Washington, but would return in about two months; that said Bryan's attorney in said action, the late Jeremiah M. Wilson, having died, said Bryan, on August 30, 1902, retained A. A. Hoehling, Esq., of the bar of the Supreme Court of the District of Columbia, who on said date entered his appearance for said Bryan in said action and continued to actively defend same to the time of said Bryan's death, without the slightest intimation or suggestion to plaintiff, or her attorneys, that said Bryan was no longer a resident of the District of Columbia, and was then residing within the state of Maryland; that plaintiff had no knowledge, information, belief, or cause for belief, or reason to suspect, that said Bryan was at any time within the state of Maryland and could there be served with process of this court, or of any court of said state, until the publication of said Bryan's death in the daily newspapers; that, upon receiving notice of the death of said Bryan, and the granting of letters testamentary to the defendant corporation, the plaintiff notified the officers of the defendant corporation of the action then pending in the Supreme Court of the District of Columbia, known as No. 38,105 at law; that at the time of the death of said Bryan said action was then pending, and as late as December 30, 1902, the said Supreme Court of the District of Columbia sustained plaintiff's demurrer to certain pleas filed by the defendant in said action; that, through no fault of plaintiff, but by the failure of the defendant corporation to enter its appearance and defend said action, as provided by section 236 of the Code of Laws for the District of Columbia, said action, thereafter, to wit, on the 24th day of January, A. D. 1904, abated; and that this action was commenced within three years after the plaintiff had any knowledge, information, belief, or cause for belief, or reason to suspect, that defendant's testator was within the state of Maryland at any time subsequent to the right of action herein sued upon accruing, for so long a time as would have enabled plaintiff, who was then and has from that time continued to be and is now a resident of the state of Virginia, to have a writ of this court, or of any of the courts of this state, issue, with a reasonable expectation of deriving a beneficial effect therefrom—to all of which the plaintiff is ready to verify."

To this replication the defendant in error demurred, assigning as cause therefor:

"(1) That said replication is immaterial and insufficient, and does not set out any grounds for the removal of the bar of the statute of limitations, set up in the defendant's third plea.

"(2) That the said replication does not aver or show that the bar of the statute of limitations was not complete at the time the pending action was instituted.

"(3) That the said replication does not aver or allege any reason why the bar of the statute of limitations should be removed.

"(4) That the plaintiff has not averred in said replication any facts which take this case out of the operation of article 57 of the Code of Public General Laws of Maryland, titled 'Limitation of Actions.'

"(5) That the plaintiff has failed, in and by said replication, to aver facts which bring the pending action within any of the exceptions stated in article 57 of the Code of Public General Laws of Maryland, titled 'Limitation of Actions.'"

The court below sustained the demurrer, and the plaintiff in error announcing that she stood upon said pleadings, and that she did not de-

sire to amend the same, judgment was entered in favor of the defendant in error. From the judgment so entered this writ of error was sued out. It is now here insisted by the plaintiff in error that the court below erred in sustaining the demurrer filed by the defendant below to the replication filed by the plaintiff below to the third plea mentioned, in which the statute of limitations was set up. The claim is that the replication alleged facts showing that the case came within the equity of the exceptions to the statute, and that the facts set forth brought it within the legal maxim that, "the act of God shall prejudice no man."

The alleged cause of action accrued against the decedent on the 14th day of June, 1893. The suit in the Supreme Court of the District of Columbia was commenced on the 2d day of August, 1895, and was still pending on the 23d day of January, 1903, when Bryan died, more than seven years after it was instituted, and nearly ten years after the cause of action arose. Why the delay in pressing the case to a final hearing is not disclosed by the record now before us. It is true that the defendant in error was under no legal obligation to appear to the action pending in the District of Columbia, although it was then provided by section 236 of the Code of Public General Laws for that District that it could have done so. It is also true that the plaintiff in error could have instituted her suit in the court below when first advised of the death of Bryan, which was one year before the abatement of the suit then pending in the District of Columbia. The pendency of the action in the District of Columbia would not have been a bar to an action filed by plaintiff in error in the state of Maryland. Cole v. Flitcraft, 47 Md. 312, 319. The first suit was not filed until two years had elapsed from the accruing of the cause of action, and the second proceeding was not instituted until more than two years had passed from the death of Bryan, and until over one year after the abatement of the original action, and such laches, taken in connection with the unexplained delay in prosecuting that action, considered in conjunction with the fact that defendant in error labored under the disadvantage caused by the death of the party familiar with the incidents involved, tend to a great degree to deprive the plaintiff in error of the equity she claims concerning the exceptions to the statute of limitations.

It may be admitted that the letter of the statute of limitations should not always prevail, and that there are a class of cases which are not embraced in the exceptions enumerated in such statutes. If we give the statute applicable to this case the equitable and reasonable construction asked for by the plaintiff in error, we must nevertheless deny the force of her contention, for it appears that her suit was not prosecuted with due diligence, and that she was also guilty of laches not excusable by the circumstances set forth in the record. We admit the force of the principle discussed in the cases relied on by counsel (Jackson v. Horton, 3 Caines [N. Y.] 205, containing the clear presentation of the point by Chief Justice Kent, and its admirable discussion by Judge Thompson; Hanger v. Abbott, 6 Wall. 532, 18 L. Ed. 939, in which the Supreme Court refers to the exceptions not mentioned in the statutes and the cases in which they have sometimes been admitted; Richards v. Maryland Ins. Co., 8 Cranch, 85, 3 L. Ed. 496, in which

the spirit of such statutes is referred to, and the cases described in which it should control), and still we find ourselves compelled to say that the law announced by those cases, taken and applied to the facts disclosed by the record we consider, shows that the court below did not err in its judgment now complained of. They refer to facts, which, while not within any of the exceptions mentioned in the statutes, are at least within the equity of those exceptions—such as instances where the previous suit of the plaintiff had failed because of the act of the defendant, or the act of God, and a new suit had been commenced with due diligence although after the limitation had expired. In those cases no laches was attributable to the plaintiffs. They had proceeded with due diligence. To bring this case within the rule announced in them, the plaintiff in error should have prosecuted her first suit with due diligence, and should have instituted her suit in the court below within a reasonable time after she was advised of Bryan's death, and not have waited over two years after she was so informed; or, knowing of the abatement of the suit she had filed in the District of Columbia, she should have instituted her suit soon thereafter in the court below, and not have allowed over one year to have passed before doing so. Statutes of limitations proceed upon the presumption that claims are extinguished when they are not litigated in the proper forum within the period mentioned in them, and they take away all solid ground of complaint, as they rest on the negligence of the party instituting the suit. The cases in which it has been held that the running of the statute of limitations may be suspended by causes not mentioned in the statute are very limited in character, and should be followed with great caution; otherwise the court would make a law, instead of administering it. The general rule is that the language of the act must prevail, and no reason based on apparent inconvenience or hardship can justify a departure from it. As the Supreme Court said, in Willard v. Wood, 164 U. S. 523, 17 Sup. Ct. 176, 41 L. Ed. 531:

"The general rule in respect of limitations must also be borne in mind that, if a plaintiff mistakes his remedy, in the absence of any statutory provision saving his rights, or where from any cause a plaintiff becomes nonsuit or the action abates or is dismissed, and, during the pendency of the action, the limitation runs, the remedy is barred. Alexander v. Pendleton, 8 Cranch, 462, 470, 3 L. Ed. 624; Young v. Mackall, 4 Md. 367; Wood on Limitations, § 293, and cases cited."

The plaintiff in error knew for two years and three months before this suit was brought that Bryan was at the time of his death a resident and citizen of the state of Maryland; that his legal representative resided in that state; and that, when she proceeded against such representative, it would necessarily be in the courts of that state, and the statute of limitations there enacted would apply. Besides, she had every reason to conclude that Bryan's representative would not appear to the suit in the District of Columbia, and still, although thus advised, we find the delay mentioned, and we notice the utter failure on her part to explain it. The plaintiff in error seeks to withdraw this suit from the operation of the statute of limitations of the state of Maryland, not by reason of the fact that the defendant in error's intestate did not take up his residence in that state more than three years before

it was brought, but because, as the replication states, she "had no knowledge, information, belief, or cause for belief, or reason to suspect, that said Bryan was at any time within the state of Maryland and could there be served with process of this court, or of any court of said state until the publication of said Bryan's death in the daily newspapers."

Section 5, art. 57, p. 1460, 2 Code Pub. Gen. Laws Md. 1904, reads:

"If any person liable to any action shall be absent out of the state at the time when the cause of action may arise or accrue against him, he shall have no benefit of the limitation herein contained if the person who has the cause of action shall commence the same after the presence in this state of the person liable thereto within the terms herein limited."

It is quite obvious, we think, that, if the Maryland statute of limitations is pleaded, in order to prevent its operation a clear and positive averment in a plea must be made that the defendant did not reside in the state more than three years prior to the institution of the suit. Such seems to be the practice recognized by the Court of Appeals of Maryland. Mason v. Union Mills Co., 81 Md. 446, 448, 32 Atl. 311, 29 L. R. A. 273, 48 Am. St. Rep. 524. The recent case of Gibbons v. Heiskell, 90 Md. 6, 44 Atl. 996, in which that statute was discussed, seems to dispose of the question. It was there held that:

"When the statute of limitations once begins to run on a claim, its operation is not suspended by the fact that a suit was instituted in a foreign jurisdiction which was dismissed before judgment, and the statute is a bar to another suit on the same claim instituted in this jurisdiction after the expiration of the time limited."

We find no error.

Affirmed.

SMITH et al. v. CASCADEN et al.

(Circuit Court of Appeals, Ninth Circuit. November 1, 1906.)

No. 1,313.

MINES AND MINERALS—MINING CLAIMS—NOTICE OF LOCATION.

Where it was shown that under the system of locating placer mining claims in Alaska the one first discovered upon a gulch or creek is generally called "Discovery Claim," and other claims are numbered from such claim up or down the gulch or stream, and that it is customary in a certain locality to give to side or bench claims the same numbers as those upon the creek, with the addition of a letter of the alphabet, as "A," "B," or "C," to designate the tiers back from the creek claims, a recorded notice of location of a claim in such locality, which describes it as "13 A. Below Discovery on Cleary creek," is sufficient under Rev. St. § 2324 [U. S. Comp. St. 1901, p. 1426], which requires the notice to contain "such a description * * * by reference to some natural object or permanent monument as will identify the claim."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 46.]

Ross, Circuit Judge, dissenting.

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

J. C. Cambell, W. H. Metson, and McGinn & Sullivan, for appellants.

Miller, West & De Journel, T. C. West, and Hugh O'Neill, for appellees.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

DE HAVEN, District Judge. This is an action brought for the purpose of obtaining a decree that the plaintiffs are the owners and entitled to the possession of a certain mining claim situated on Cleary creek, in the Fairbanks mining district, Alaska, located on January 3, 1904, and described in the complaint as No. "13, below, on the second tier of benches on the right limit of Cleary creek." It appears from the evidence that plaintiffs' claim, as located on the ground, overlaps a portion of a mining claim which the defendant Cascaden located on December 2, 1902. The controversy involves the question of the ownership and right to the possession of the strip of land common to both locations. The decree of the District Court was in favor of the defendants. The plaintiffs have appealed.

1. It will be seen from the foregoing statement that the location under which the appellees claim was made prior to that of appellants, and must prevail, if valid; and, whether it was valid or not, is the general question presented by this appeal. The appellants contend that such location was not made in accordance with the laws of the United States, first, because the boundaries of the claim were not marked upon the ground, as required by the provisions of section 2324 of the Revised Statutes [U. S. Comp. St. 1901, p. 1426]; and, second, because the recorded notice of location was insufficient, in that it did not describe the claim located in such a manner that it could be identified. Whether this mining claim was properly marked upon the ground presents a pure question of fact, and in our opinion the finding of the District Court to the effect that the same was properly marked is sustained by the evidence.

2. The remaining contention of appellants, that the recorded notice of the location under which the appellees claim is insufficient, presents a more difficult question. It is provided in section 15 of the act of June 6, 1900, "making further provisions for a civil government for Alaska, and for other purposes" (chapter 786, 31 Stat. 327), that "notices of location of mining claims shall be filed for record within ninety days from the date of the discovery of the claim described in the notice," and section 2324 of the Revised Statutes provides that all records of mining claims "shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." The object of this statute, as stated by the Supreme Court in Hammer v. Garfield Mining Co., 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964, is "to secure a definite description—one so plain that the claim can be readily ascertained. A reference to some natural object or permanent monument is named for that purpose." The recorded notice under which the appellees claim is in these words:

"Notice is hereby given that the undersigned having complied with the United States mining laws and the local customs laws and regulations, has staked the following described placer mining ground in the Fairbanks district. I claim No. 13 A. Below Discovery on Cleary creek, 1,320 feet up and down stream and 330 feet each side of center stake, for placer mining purposes. D. H. Cascaden."

It is conceded by appellants that, under the system of locating mines in Alaska, the one first discovered "is generally called and known as the 'Discovery Claim,' and when the same is within a gulch or on a stream the claims are marked or numbered from 'Discovery Claim' up or down the gulch or stream." Cleary creek is a natural object; and there is no evidence tending to show that the Discovery claim referred to in the above notice was not a well-known and clearly defined mining claim on Cleary creek, and, in the absence of evidence showing that it was not, it must be presumed that the same was a well-known claim, with definite boundaries, and therefore a natural object or permanent monument, within the meaning of section 2324 of the Revised Statutes [U. S. Comp. St. 1901, p. 1426]. Hammer v. Garfield Mining Co., 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964.

The question then, is whether, in view of the customary mode of describing mining claims in the Fairbanks district in Alaska, a person with the information which this recorded notice gives could find the location of this particular claim on the ground with reasonable certainty by going to the natural and permanent objects referred to in the notice. If he could, the notice is sufficient. North Noonday Mining Co. v. Orient Mining Co. (C. C.) 1 Fed. 522. The answer to this question, it is thought, must depend upon the local meaning of the words "13 A. Below Discovery on Cleary creek"; and what that meaning is may be shown by parol evidence. The land in controversy is not a claim bordering upon Cleary creek, but is in the first tier of bench claims —that is, there is one claim between it and the creek, and that claim is known as "13 Below Discovery"—but the reference to Cleary creek in the notice does not necessarily import that the claim directly abuts upon that creek; and if the words "13 A. Below Discovery on Cleary creek," as commonly understood in the district where it is located, would identify the claim located as one in the first tier of bench claims in the mining district through which Cleary creek runs, and adjoining "13 Below Discovery" on that creek, then the notice is sufficient. The evidence in the record bearing upon this point is very brief. The locator Cascaden, in answer to the question, "Why did you call it A?" answered, "To designate it from the creek claim, which is also marked '13 Below Discovery, Cleary creek.'" Another witness, Buro, testified as follows:

"What is the custom, if you know of any, in staking a claim off, a creek claim that carries a number? How do you identify such a claim?

"A. Just give them a different name, either side claim, or name them by letters.

"Q. Have you seen it done in any other parts?

"A. Yes, sir; I have seen it done in Goldstream."

The only evidence which can be said to conflict with this is that of the witness Long, a deputy recorder of the Fairbanks recording district.

He testified that he was acquainted with the custom in that district in regard to staking bench or side claims, and he was then asked:

"Q. I will ask you to state how they are designated in notices of location?
"A. In regard to bench claims, they are known as bench claims in first tier, or side claims adjoining creek claims, if they are further than that, as second tier or third tier.
"Q. I will ask you if you know of any custom or usage whereby side claims or bench claims are designated by the letters of the alphabet?
"A. Well, only in fractions—for instance, if No. 1, appears to be greater than the law would permit of, it may be called as 'Discovery A.' or 'No. 1 A.' or 'No. 1 A. above or below,' just as it may occur."

Upon cross-examination, however, the witness said:

"Q. Do you know Goldstream?
"A. Yes, sir. * * *
"Q. Is it not a fact that there are some side claims with the number and the letter 'A'?
"A. Yes, sir; there is. Sometimes they designate them by the letter A, and sometimes as side claims and describe them as such.
"Q. What is the custom in that respect?
"A. Well, I presume there are more claims described by the lines than by the use of the letter A."

The testimony of this witness is certainly to the effect that side or bench claims are sometimes described by the use of the letter "A," as was done in the appellees' notice. The fact that such claims are more often described by lines and as side claims is not controlling, so long as in practice they are described in both ways, and this is known in the district where the claims are situated.

Our conclusion is that the recorded notice is sufficient, and the decree appealed from is affirmed.

ROSS, Circuit Judge (dissenting). The record shows without conflict that in the Fairbanks mining district, Alaska, where the piece of mining ground here in controversy is situated, there are what are called "creek" claims—that is to say, placer locations made on and along a creek—and next to them bench claims, called "first tier" or "side" claims, and next to them second tier bench claims, and so on. The evidence in the case further shows without conflict that the particular piece of ground in controversy is not in fact within any of the creek claims, but is on a bench and within one of the first tier or side claims. It is within the boundaries of the Owl mining location made on the 3d day of January, 1904, under which the appellants claim. The validity of this location does not seem to be questioned except on the ground that the particular piece of mining ground in dispute was included in a prior location made by the appellee Cascaden in 1902, and was not, therefore, open to location when attempted to be included in the Owl location. Therefore the principal question in the present case relates to the Cascaden location.

The court below held it to be valid. Was it right in so holding? Assuming that the notice posted by Cascaden on the ground was sufficient, was the record of it sufficient for the identification of the claim? Neither the act of Congress of 1866 nor of 1872 required such notices to be recorded, and in respect to the acts of the locator upon the ground

the requirement of the United States statute is that "the location must be distinctly marked on the ground so that its boundaries can be readily traced." Rev. St. § 2324 [U. S. Comp. St. 1901, p. 1426]. The same section of the United States statute expressly confers upon the miners of each mining district the power to make regulations not in conflict with the laws of the United States or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, and amount of work necessary to hold possession of a mining claim, subject to the requirement in respect to so marking the location as that its boundaries may be readily traced. And it has been uniformly held by the courts that the respective states and territories may make like rules and regulations not in conflict with any law of the United States upon the subject. As a result, in some states and territories, and in some mining districts, the notice of location is required to be recorded and in some it is not. But, whenever required, the express declaration of section 2324 of the Revised Statutes is that such record "shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." It is manifest, therefore, that the court in the case of Gird v. California Oil Co. (C. C.) 60 Fed. 531–536, was quite right in holding, as it did, "that the record of a mining claim, where one is required, is intended to contain a more exact and specific description of the claim than the notice posted upon it." The statute itself admits of no other meaning; for, in respect to the posting upon the ground, the statutory requirement is that "the location must be distinctly marked on the ground so that its boundaries can be readily traced," but that any record thereof that is made "shall contain the name or names of the locators, the date of location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." The reason for the distinction thus made between the notice posted on the claim and the record of such notice is well stated in the case of Gleeson v. Mining Co., 13 Nev. 465, where the Supreme Court of Nevada said:

"There can be no question that the original paymaster's notice was all that the law requires. The only objection to it is that it did not contain in itself a description of the claim by reference to some natural object or permanent monument. It was not necessary that it should. It is only the record of the claim that is required to contain such a description; and there are excellent reasons for making the distinction between the notice and record in this particular: A notice is generally, and for safety ought always to be, posted immediately upon the discovery of the vein, before there is any time to survey the ground and ascertain the bearings and distances of natural objects or permanent monuments in the neighborhood; and, besides, the claim referred to by the notice is always sufficiently identified by the fact that it is posted on, or in immediate proximity to, the croppings. A notice claiming location on 'this vein' has only one meaning. But the notice is exposed to the danger of removal by adverse claimants or destruction by the elements, and for permanent evidence of the location its record is provided for. The record, if it consisted of a mere copy of the notice, would not identify the claim and there would be an opportunity, as well as a temptation, to the locators upon the discovery of a more valuable mine in the vicinity to prove by perjured witnesses that their notice was posted on that mine. The floating of claims was by no means an infrequent occurrence prior to the act of 1872, and, if

such attempts were seldom successful, they were always vexatious, and often the means of levying heavy blackmail. It was on this account that the record (not the notice) was required to contain 'such a description of the claim or claims, located, by reference to some natural object or permanent monument, as will identify the claim.' Revised Statutes, § 2324. It is a sufficient compliance with this provision of the law if a description of the locus of the claim is appended to the notice when it is recorded."

It is plain, therefore, that inasmuch as in the District of Alaska notices of mining locations are by a statute of the United States (31 Stat. 321, c. 786) required to be recorded within 90 days from the date of discovery, which record is also required by a United States statute to contain a description of the claim located "by a reference to some natural object or permanent monument as will identify the claim," it is essential to the validity of such a location in Alaska that the record thereof contain such a description "by reference to some natural object or permanent monument as will identify the claim." Can that be properly affirmed of the description contained in the record of the Cascaden location, which reads:

"I claim No. 13 A. Below Discovery on Cleary creek, 1,320 feet up and down stream and 330 feet each side of center stake for placer mining purposes."

This notice is much more indefinite and uncertain than those involved and sustained in the case of McKinley Mining Co. v. Alaska Mining Co., 183 U. S. 563–570, 22 Sup. Ct. 84, 46 L. Ed. 331. There the creek was identified, the notice posted on a stump in the creek, in which the locator declared that he claimed 1,500 feet running down the creek and 300 feet on each side of the center of the stream. That was the notice posted on the ground. No record of the location appears to have been made in the case, nor to have been there required. Therefore the Supreme Court in that case neither determined nor considered the sufficiency of the description as a record of the location. In the case now before us, however, we have to consider and determine the sufficiency of the record of a location, in which, if it can be properly assumed that Cleary creek was a well-known stream or otherwise identified, there is nothing to indicate whether the ground claimed is on both sides of the creek or on one side of it only, and, if on one side only, then which side. It claims "1,320 feet up and down stream and 330 feet each side of center stake"; but nothing is said to indicate the location of the stake either with reference to Cleary creek or any other natural object or permanent monument or in any manner whatever. But, even if this record could be held to be a valid notice of location of a creek claim, it would not aid the appellees, for the reason that the undisputed evidence shows that the particular piece of ground in controversy is not within any creek claim, but is within the first tier of bench claims. This clearly appears from Cascaden's own testimony. Yet no one, in my opinion, can read the record of his location without coming to the conclusion that he was thereby claiming what is known as a "creek" claim; for the notice expressly states that the ground he claims is "on Cleary creek, 1,320 feet up and down stream and 330 feet each side of center stake." The additional statement in the record notice that the claim is No. 13 A. Below Discovery but adds confusion to the uncertainty and indefiniteness of the notice. Cascaden being asked, "Why did you call it

A.?" answered, "To designate it different from the creek claim, which is also marked '13 Below Discovery.'" Any one going to the record would, therefore, find the express declaration of the locator that the ground he claimed was "on Cleary creek, 1,320 feet up and down stream and 330 feet each side of center stake," and that it was also "No. 13 A. Below Discovery." If the letter "A" necessarily meant that the claim was not on the creek, but was a bench claim, then, manifestly, the record would be wholly inconsistent and uncertain, and could not, therefore, enable any one to identify the ground claimed by the description given. But the testimony of the deputy recorder of the Fairbanks mining district, John L. Long, is to the effect that, according to the prevailing custom in the district, it is as a rule only in the case of fractions that the side or bench claims are designated by the letters of the alphabet, and that while side claims are sometimes designated by the letter "A," the witness, in answer to the question, "What is the custom in that respect?" answered, "Well, I presume there are more claims described by the lines than by the use of the letter 'A.'" The direct testimony of that witness in regard to the custom prevailing in the district is as follows:

"Q. I will ask you whether or not you are acquainted with the custom prevalent in the Fairbanks recording district, District of Alaska, in regard to staking bench claims, or 'side' claims, as they are commonly called?

"A. Yes, sir; I am.

"Q. I will ask you to state how they are designated in notices of location.

"A. In regard to bench claims, they are known as 'bench claims on first tier' or side claims adjoining creek claims. If they are further than that, as 'second tier' or 'third tier.'

"Q. I will ask you if you know of any custom or usage whereby side claims or bench claims are designated by the letters of the alphabet?

"A. Well, only in fractions. For instance: If No. 1 appears to be greater than the law would permit of, it may be called as 'Discovery A.' or 'No. 1 A.' or 'No. 1 A. above or below,' just as it may occur."

I can but regard the record of the location under which the appellants claim as falling far short of meeting the statutory requirement that it shall contain such a description by reference to some natural object or permanent monument as will identify the claim.

The record further shows that the Owl claim, including the piece of ground in controversy, was located in the name of the appellant Smith by Pyne acting for him. There is evidence to the effect that Pyne was a mining partner of Smith. Afterwards Pyne, as "agent for and also including" Smith, entered into an agreement with the appellant Robarts and one Beers by which Robarts and Beers agreed to sink a shaft upon the Owl claim to bedrock for an undivided one-half interest therein. They started a shaft on the particular piece of ground in dispute, and Beers' interest in the contract then passed to the appellant Sorenson. When the shaft was down about 40 feet, Cascaden notified Pyne that the shaft was being sunk on his ground, and that, if the work was not stopped, he would commence suit to enjoin its prosecution. As a result a written agreement was entered into between Cascaden and Pyne and Robarts, and which was also signed, "W. R. Smith, by C. C. Pyne," in which Cascaden's right to the ground in controversy was, among other things, acknowledged, which acknowledgment, however, Pyne,

Robarts, Smith, and Sorenson undertook within a few days by written notice to Cascaden to withdraw and cancel. On behalf of the appellees it is contended that the acknowledgment so made of Cascaden's right to the disputed ground operates as an estoppel against the appellants. There are several reasons why that is not so. First, because no such estoppel was pleaded by the defendants. Hanson v. Chiatovich, 13 Nev. 395; Clarke v. Huber, 25 Cal. 594; Davis v. Davis, 26 Cal. 40, 85 Am. Dec. 157; McKeen v. Naughton, 88 Cal. 462, 26 Pac. 354; Page v. Smith, 13 Or. 410, 10 Pac. 833; Conway v. Hart, 129 Cal. 487, 62 Pac. 44; Encyclopedia of Pleading & Practice, vol. 8, p. 7. Secondly. Because no written or other authority was shown in Pyne to disclaim any title that appellant Smith might have. The statute of Alaska in respect to such a matter is that "an agreement concerning real property made by an agent of the party sought to be charged, unless the authority of the agent be in writing," is void. Carter's Ann. Codes of Alaska, § 1044, subd. 7, pt. 4, p. 355, and section 1046, pt. 4. And, lastly, because it does not appear that Cascaden parted with any right or gave any consideration for the acknowledgment almost immediately withdrawn, or that he acted upon it in any way.

In respect to the question of possession, the case shows that the appellants were in the possession of the ground in controversy, actually and actively engaged in sinking the shaft, at the time of bringing the action.

I think the judgment should be reversed, and the cause remanded to the court for a new trial.

LANGE v. ROBINSON et al.

(Circuit Court of Appeals, Ninth Circuit. October 22, 1906.)

No. 1,295.

1. MINES AND MINERALS—LOCATION OF MINING CLAIM—DISCOVERY.

The object of the law in requiring a discovery to precede the location of a mining claim is to insure good faith on the part of the locator and prevent frauds upon the government, and to constitute a discovery which will support the location of a gold placer claim as against another mineral claimant it is not necessary that gold should have been found thereon in paying quantity, but there must have been such a discovery of gold as gives reasonable evidence that the ground is valuable for placer mining, taking into consideration its character, location, and surroundings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 27.]

2. SAME.

Plaintiff located certain gold placer mining claims along a creek in Alaska, and before doing so washed on each a few pans of the sediment deposited along the sides of the creek, and in each found small particles or colors of gold. Placer gold in paying quantities had been found on the bed rock on a tributary to the creek, and within a mile of such locations, and the bed rock at the place of the locations was from 125 to 150 feet below the surface. Plaintiff and other experienced miners testified that the gold found was sufficient to reasonably justify the investment of money to sink shafts. *Held*, that there was a sufficient discovery to support the locations as against another mineral claimant.

3. SAME—ACTION AGAINST ADVERSE CLAIMANT—ALASKA STATUTE.
A plaintiff who was living in a tent on one of a number of adjoining mining claims owned by him, and had commenced the sinking of a shaft thereon, had sufficient possession to entitle him to maintain a suit under Alaska Code of June 6, 1900, c. 786, 31 Stat. 321, against an adverse claimant of the ground.

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

Carr & Nye, for appellant.

J. C. Campbell, W. H. Metson, and McGinn & Sullivan, for appellees.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

DE HAVEN, District Judge. This action was commenced in the District Court for the District of Alaska, Third Division, for the purpose of determining that the plaintiff is the owner and entitled to the possession of certain mineral lands, to which the defendants assert an adverse claim. At the conclusion of the evidence offered by the plaintiff the defendants moved for a dismissal of the action upon the ground that the plaintiff had failed to show that he had any legal or equitable estate in the land described in the complaint, and for the further reason that it was not shown that he was in possession of such land at the date of the commencement of the action. The motion was granted upon the ground first stated, and it was thereupon adjudged that the action be "dismissed without prejudice against the plaintiff of any kind whatsoever," the defendants to recover costs. From this judgment the plaintiff has appealed.

The lands in controversy embrace 10 separate placer mining claims, containing 20 acres each. One of these claims was located by H. W. Benson, grantor of plaintiff, one by the plaintiff for himself, and the remaining eight by the plaintiff acting as agent for others, who have since conveyed to him. The locations were made on April 15, 1905; and the first question which we will consider is whether prior to that date the locators had made such a discovery of gold thereon as entitled them to locate the lands as placer mining claims. These claims are situate on Cripple creek in the Fairbanks mining district, Alaska, and the evidence shows that prior to their location gold had been found on Esther creek, a tributary of Cripple creek. This discovery was made within less than one mile from the land in controversy. In Alaska, as indeed in all places where there is placer gold, it is almost the universal rule that the "pay streak," so called, is in and upon, or near, the bed rock; and until that is reached it cannot be determined whether any particular claim contains gold in such quantity as to be of value for placer mining. The bed rock on Esther creek is from 90 to 100 feet below the surface, while upon the land involved in this action this rock is from 125 to 150 feet below the surface, and the overlying ground is of no value; that is, it does not contain sufficient gold to pay for working it. The plaintiff is a miner of many years' experience, and testified, in sub-

stance, that before making his locations he washed upon each claim a few pie plates of the sediment deposited in and along the sides of the creek upon which the claims are located, and found in the several washings from two to six fine colors of gold. This was all of the gold actually discovered by him before he made the locations. The plaintiff also testified that his belief that there was gold on the bed rock of the claims located by him was based upon the colors which he had found, and the further facts that the same general character of sediment deposit and rock and soil formation were found on these claims as on the mineral land on Esther creek, and that in all localities where placer mining is conducted, wherever gold is found on the surface, there will be more or less on the bed rock. He also stated that the "pay streak" in lands of this character is narrow, and usually confined within the limits of an old channel, that it is often found necessary to sink many shafts before it is located, and that the sinking of shafts to such depths as is required upon the lands in controversy would be very expensive. In addition to this, one Field, an experienced miner, who prospected the ground after the locations had been made by plaintiff, and discovered therein colors of fine gold such as were found by plaintiff, testified as follows:

"Q. What would you say to the reasonableness of a man's pursuing the work of prospecting a creek where he found such indications of gold as you found there at that time, as to whether or not he would be justified in doing so?

"A. The reasonableness? Well, it is looked upon as a business proposition that after a man gets surface indication such as you find down there—that it is looked upon as a business proposition that is sufficient to justify him in expending time and money in exploring it further. There is a large amount of money invested under those conditions."

1. It will be noticed from the foregoing statement of facts that prior to making the locations under consideration plaintiff did not actually discover gold in paying quantities upon the claim located; but he did find some small particles of gold therein. Was this sufficient to give to the plaintiff the right to locate as placer mining claims the lands upon which this gold was found?

The question as to what constitutes a sufficient discovery upon which to base a valid location of a vein or lode of quartz, or other rock bearing gold or silver deposits, has often been before the courts, and a few of the decisions in relation thereto will be referred to, as the rule which they declare concerning the quantity or the value of the precious metals necessary to be found in the vein or lode before it can be located is applicable in principle in determining whether there has been a sufficient discovery of mineral-bearing earth to authorize the location of a placer mining claim. In Book v. Justice Min. Co. (C. C.) 58 Fed. 106, Judge Hawley said:

"When the locator finds rock in place containing mineral, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim."

This view is repeated by the same learned judge, in delivering the opinion of this court, in Migeon v. Montana Cent. Ry. Co., 77 Fed. 249, 23 C. C. A. 156, in the following language:

"The question as to what constitutes a discovery of a vein or lode under the provisions of section 2320 of the Revised Statutes [U. S. Comp. St. 1901, p. 1424] has been decided by many courts. All the authorities cited by appellants are referred to in Book v. Mining Co. (C. C.) 58 Fed. 106, 121. The liberal rules therein announced are substantially to the effect that, when a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low, with this qualification: That the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found. It was never intended that in such a case the courts should weigh scales to determine the value of the mineral found as between a prior and subsequent locator of a mining claim on the same lode."

In Shoshone Min. Co. v. Rutter, 87 Fed. 807, 31 C. C. A. 223, this court again had occasion to consider what constitutes a discovery of a vein or lode, or quartz-bearing lode, in place; and, in sustaining the validity of the location in controversy in that case, said:

"The discovery was made in running a tunnel, where small seams of iron oxide, quartz, and small quantities of carbonate of lead were found, two or three inches wide. These indications were of such a character as miners in that district would follow in the expectation of finding ore, and such as would justify miners in working a claim for that purpose. The rock in these seams was different from the country rock, and was of such a character as is designated by the witnesses, who were practical miners, 'as a vein containing rock in place, bearing mineral.' These facts show that the location was made in good faith, and not 'simply upon a conjectural or imaginary existence of a vein or lode,' which cannot be permitted. King v. Mining Co., 152 U. S. 222, 227, 14 Sup. Ct. 510, 38 L. Ed. 419. The seams containing mineral-bearing earth and rock, which were discovered before the location was made, were similar in their character to the seams or veins of mineral matter that had induced other miners to locate claims in the same district, which by continued developments thereon had resulted in establishing the fact that the seams, as depth was obtained thereon, were found to be a part of a well-defined lode or vein containing ore of great value. The discovery made at the time of the Kirby location was, therefore, such as to justify a belief as to the existence of such a lode or vein within the limits of the ground located."

In Erhardt v. Boaro, 113 U. S. 536, 5 Sup. Ct. 564, 28 L. Ed. 1113, the Supreme Court say:

"A mere posting of a notice on a ridge of rocks cropping out of the earth, or on other ground, that the poster has located thereon a mining claim, without any discovery or knowledge on his part of the existence of metal there, or in its immediate vicinity, would be justly treated as a mere speculative proceeding, and would not itself initiate any right. There must be something beyond a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground, such as the discovery of the presence of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence."

In Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 673, the court, after citing with approval the rule above quoted from the opinion in Book v. Justice Min. Co. (C. C.) 58 Fed. 106, as to what is a sufficient discovery of lode or vein claims, said:

"So, in respect to placer claims, if a competent locator actually finds upon unappropriated public land petroleum or other mineral in or upon the ground, and so situated as to constitute a part of it, it is a sufficient discovery, within the meaning of the statute, to justify a location under the law, without waiting to ascertain by exploration whether the ground contains the mineral in sufficient quantities to pay."

We do not understand that any different rule is laid down in Chrisman v. Miller, 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770. On the contrary, the court in that case quotes with apparent approval the following language of the Land Department in the case of Castle v. Womble, 19 Land. Dec. Dep. Int. 455, 457:

"When minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby 'all valuable mineral deposit in lands belonging to the United States * * * are * * * declared to be free and open to the exploration and purchase.'"

And then as a result of all the authorities cited in its opinion, the court deduces the rule:

"That there must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or if it be claimed as placer ground that it is valuable for such mining."

The question of discovery is in every case one of fact for the court or jury. Iron Silver Co. v. Mike & Starr Co., 143 U. S. 394, 12 Sup. Ct. 543, 36 L. Ed. 201. There must be some gold found within the limits of the land located as a placer gold claim, but it cannot be said in advance as a matter of law how much must be found in order to warrant the court or jury in finding that there was in fact a discovery such as the law requires. The question must be decided, not only with reference to the gold actually found within the limits of the claim located, but also in view of its situation with reference to other lands known to contain valuable deposits of placer gold, and whether its rock and soil formation are such as is usually found where these deposits exist in paying quantities; and, further, in considering the evidence bearing upon the general question, it must not be forgotten that the object of the law in requiring the discovery to precede location is to insure good faith upon the part of the mineral locator, and to prevent frauds upon the government by persons, "attempting to acquire patents to land not mineral in its character." Shoshone Min. Co. v. Rutter, 87 Fed. 801, 31 C. C. A. 223. And where the controversy is, as in this case, between persons claiming the land as mineral, "the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority." Chrisman v. Miller, 197 U. S. 313-323, 25 Sup. Ct. 468, 49 L. Ed. 770.

Our conclusion is that, under the rule stated in the cases to which we have referred, the plaintiff and his grantors made a sufficient discovery of gold upon the lands in controversy to entitle them to make a valid location of the same as placer claims, under the laws of the United States. There was an actual discovery of gold upon each of the claims located. They are situated near other lands presenting the same surface indications, which at the date of the location of these claims were known to be valuable for the placer gold which they contained; and these facts, according to the uncontradicted testimony of the plaintiff and that of the witness Field, above quoted, were sufficient to justify the expenditure of money for the purpose of their exploration, with the reasonable expectation that, when developed, they would be found valuable as placer mining claims. This was in our opinion all that was necessary.

2. The action was brought under section 475 of the act of June 6, 1900, entitled, "An act making further provision for a civil government for Alaska, and for other purposes." Chapter 786, 31 Stat. 321. This section provides:

"Any person in possession, by himself or his tenant, of real property, may maintain an action of an equitable nature against another who claims an estate or interest therein adverse to him for the purpose of determining such claim, estate, or interest." Chapter 736, 31 Stat. 410.

It was incumbent upon the plaintiff, in order to maintain the action under this statute, to show an actual possession of the land in controversy, or some part thereof, at the date of the commencement of the action. Sepulveda v. Sepulveda, 39 Cal. 13; Durell v. Abbott et al. (Wyo.) 44 Pac. 647. The evidence shows that plaintiff was living upon claim No. 11, in a tent, at the time the action was commenced, and had also begun to sink a shaft thereon as a preliminary step in prospecting or developing the same as a mining claim. This constituted a sufficient possession of that particular mining claim under the statute; and we are also of the opinion that there was sufficient evidence to show plaintiff's possession of the other claims described in the complaint. These claims, as we hold, were properly located as mining claims, and in such case slight acts of dominion will constitute a sufficient possession to enable the locator to maintain an action under the section above quoted.

Judgment reversed, and cause remanded for a new trial.

CARTIER v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1906.)

No. 1,324.

1. COURTS—CIRCUIT COURT OF APPEALS—JURISDICTION.

Where a District Court for the District of Alaska, on dismissal of an appeal from a conviction in a justice court which has been superseded by the giving of an appeal bond, enters judgment "as it was given in the court below," as required by Code Cr. Proc. Alaska, § 450, the whole case may be taken for review by writ of error to the Circuit Court of Ap-

peals, even though the motion to dismiss was based on want of jurisdiction.

[Ed. Note.—Jurisdiction of Circuit Court of Appeals, see note to Lau Ow Bew v. United States, 1 C. C. A. 6; United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 475.]

2. SAME—TERRITORIAL COURTS—ALASKA—APPEAL FROM COMMISSIONER—TRIAL OF CASE ANEW.

Proceedings taken by a defendant convicted of a criminal offense before a commissioner in Alaska, as ex officio justice of the peace, for perfecting an appeal, *held* sufficient and to require the District Court to try the cause anew, under Code Cr. Proc. Alaska, §§ 445–449.

3. ADULTERY—SUFFICIENCY OF COMPLAINT—ALASKA STATUTE.

Under the Alaska Criminal Code (Act March 3, 1899, c. 429, § 119, 30 Stat. 1271), which defines the crime of adultery as voluntary sexual intercourse by a married person with a person other than the offender's husband or wife, a complaint charging the offense must aver that the accused was married at the date of its alleged commission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adultery, § 15.]

In Error to the District Court of the United States for the Second Division of the District of Alaska.

William A. Gilmore and James E. Fenton (W. E. Crews, of counsel), for plaintiff in error.

Henry M. Hoyt, U. S. Dist. Atty., for District of Alaska, Second Division (Edward E. Cushman, Special Assistant to Atty. Gen., of counsel), for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

DE HAVEN, District Judge. The plaintiff in error was convicted by a jury in the court of a commissioner and ex officio justice of the peace, in the district of Alaska, for a misdemeanor, and judgment was thereupon given in said court that he be imprisoned for three months in the federal jail at Council City, Alaska, and that he pay the costs of the action taxed at $410, and further imprisoned until such costs be paid, not exceeding 200 days. On the same day the plaintiff in error duly served and filed in the commissioner's court a notice of appeal from such judgment to the United States District Court for the District of Alaska, Second Division, at Nome, and also filed his undertaking on appeal. The notice of appeal was entitled in the proper court and correctly stated the title of the action, and was addressed to the commissioner and the attorney for the prosecution, and, omitting the formal part, is in the following words:

"You will please take notice that the defendant in the above-entitled action hereby appeals to the United States District Court in and for the District of Alaska, Second Division, at Nome, Alaska, from the judgment herein made and entered in the said U. S. Commissioner's Court on the 24th day of June, 1905, in which the said defendant was adjudged guilty of the crime of adultery, and from the whole thereof. Yours, etc., S. A. Keller, G. A. Adams, Attorneys for Defendant and Appellant. Dated June 24th, 1905."

When the case reached the District Court, the United States Attorney moved to dismiss the appeal, stating as the ground of said motion that the notice of appeal failed to specify with sufficient identity the

judgment appealed from, and upon the further ground "that said notice of appeal fails to state in whose favor said judgment was rendered or what judgment was rendered." The motion to dismiss was granted, and thereupon the court, in accordance with section 450 of the Code of Criminal Procedure for Alaska, which is a part of "An act to define and punish crimes in the district of Alaska and to provide a code of criminal procedure for said district" (Act March 3, 1899, c. 429, 30 Stat. 1253), rendered its judgment affirming the judgment of the commissioner. The case is brought here by the defendant on a writ of error. The attorneys representing the United States moved in this court to dismiss the writ of error upon the following grounds:

"(1) That the only question involved herein, or assigned as error upon the part of the court below, involves the jurisdiction of the court below, and that the Supreme Court of the United States is the only court having jurisdiction to consider such a question.

"(2) That the judgment of the lower court having been rendered without a jury trial, or the impaneling or intervention of a jury, this court could only acquire jurisdiction to review that decision by appeal and in no event by writ of error.

"(3) That the statutory provision for a review by the District Court of Alaska of the decision of the United States commissioner in a trial for misdemeanor is a special proceeding, and not according to the course of common law, and that therefore, where the District Court dismisses an appeal from the United States commissioner without a trial, there is no jurisdiction in this court to review such decision by writ of error."

1. We do not deem it necessary to discuss either of the grounds upon which the motion to dismiss the writ of error is based, except the first, namely, that the only error assigned upon the writ relates to the jurisdiction of the District Court to entertain the appeal which it dismissed, and that the Supreme Court is the only court having jurisdiction to review the action of the District Court in that matter.

Section 5 of the Act of March 3, 1891, c. 517, 26 Stat. 827 [U. S. Comp. St. 1901, p. 547], establishing the Circuit Courts of Appeals, provides that appeals or writs of error may be taken from a District or Circuit Court:

"(1) In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone should be certified to the Supreme Court from the court below for decision."

This law is by statute made applicable to appeals or writs of error from judgments of the District Court for the District of Alaska. 30 Stat. 1307.

If it should be conceded that the motion made in the District Court to dismiss the appeal from the judgment of the commissioner's court in the case of the United States against the plaintiff in error was one which necessarily involved the question of the jurisdiction of the District Court to hear and determine that appeal, it would not follow that the writ of error should be dismissed, because by that writ the final judgment of the District Court affirming the judgment of the commissioner, as ex officio justice of the peace, has been brought before this court for review, and this requires not only a consideration of the question of the jurisdiction of the District Court, but of the whole case

upon the merits, as shown by the record. The motion to dismiss the writ of error must therefore be denied, upon the authority of McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. 118, 35 L. Ed. 893; Crabtree v. Madden, 54 Fed. 426, 4 C. C. A. 408; Wirgman et al. v. Persons, 126 Fed. 449, 62 C. C. A. 63.

Speaking of the right of a defeated party, upon the entry of a judgment against him in the lower courts to have such judgment reviewed, the Supreme Court, in McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. 118, 35 L. Ed. 893, said:

"When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case. If the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question to this court."

But, in addition to this view, it may be said that, under sections 445, 446, 447, and 449 of the Code of Criminal Procedure for Alaska, the effect of an appeal by a defendant in a criminal action from judgment of conviction given in a justice's court, when the defendant gives an undertaking of bail on appeal as provided in that act, is to vacate the judgment appealed from, and the action must be tried anew in the District Court. If, however, the appeal is dismissed, section 450 of the same Code, provides that:

"The appellate court must give judgment as it was given in the court below, and against the appellant for the cost of disbursement for the cost of appeal."

The District Court proceeded under the authority conferred by this section and gave the judgment now under review. The jurisdiction of the court to render such judgment was not challenged at the time by either the United States or the plaintiff in error, nor is there any claim made in this court that the judgment so rendered by the District Court was beyond its jurisdiction.

This being so, it is clear to us that the jurisdiction of the District Court is not in issue within the meaning of section 5 of the Act of March 3, 1891, c. 517, 26 Stat. 827 [U. S. Comp. St. 1901, p. 488], establishing the Circuit Court of Appeals. The motion to dismiss the writ of error must therefore be denied.

2. The judgment cannot be sustained for two reasons: First, because the plaintiff in error duly perfected his appeal to the District Court from the judgment rendered against him in the commissioner's court; and, having done so, the District Court erred in dismissing that appeal, and giving judgment against him without a trial such as is contemplated by section 449 of the Code of Criminal Procedure for Alaska. Second, the complaint upon which the defendant was convicted does not sufficiently charge him with the offense of adultery under section 119 of the act "to define and punish crimes in the district of Alaska and to provide a Code of Criminal Procedure for said district." 30 Stat. 1271. That section declares that, "Whoever being married shall voluntarily have sexual intercourse with a person other than the offender's husband or wife is guilty of adultery." Only a married person can commit the offense defined in this section, and, in charging a defend-

ant with the crime of adultery as thus defined, it is necessary for the complaint to allege that the person charged was married at the date of the alleged commission of the offense. The complaint upon which the defendant was convicted fails to state this essential fact.

Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

CHENEY v. ALASKA TREADWELL GOLD MINING CO.

(Circuit Court of Appeals, Ninth Circuit. October 8, 1906.)

No. 1,325.

1. COURTS—PROBATE JURISDICTION IN ALASKA—EFFECT OF CONSOLIDATION OF PRECINCTS.

By Act June 6, 1900, c. 786, 31 Stat. 321, the judge of each division of the District Court of Alaska is required to divide his division into precincts and authorized to alter the same and establish new precincts from time to time, as public convenience may require; also to appoint commissioners who shall be ex officio probate judges with jurisdiction within their respective precincts, and to remove such commissioners at pleasure. Pursuant to such provisions, six precincts, including Douglas Island and Juneau precincts, were established in the first division, and a commissioner appointed in each. Subsequently, an order was entered by the judge of the division abolishing Douglas Island precinct, and providing that the territory embraced therein should become a part of the Juneau precinct. It also accepted the resignation of the commissioner and directed him to "deliver the record and property pertaining to his office" to the commissioner of the Juneau precinct. *Held*, that the effect of such order was to extend the limits of Juneau precinct, to constitute the commissioner thereof the successor in office of the former commissioner of Douglas Island precinct, and to transfer to him all the pending probate cases in said precinct, with power to proceed therein; that an order thereafter made by him removing an administrator appointed by the commissioner of Douglas Island precinct and appointing a new administrator of the estate was within his jurisdiction and valid.

In Error to the District Court of the United States for the First Division of the District of Alaska.

Lorenzo S. B. Sawyer, R. W. Jennings, and Z. R. Cheney, for plaintiff in error.

Malony & Cobb and John Flournoy, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

DE HAVEN, District Judge. This action was brought by the plaintiff, as administrator of the estate of Ole Linge, deceased, against the Alaska Treadwell Gold Mining Company, to recover damages; the plaintiff alleging that the deceased was killed by the actionable negligence of the defendant company. In addition to a denial of the allegations of the complaint, charging it with negligence, the defendant pleaded, as an affirmative defense:

"That the plaintiff has no capacity to have and maintain this suit against it for the cause of action alleged in said complaint, for that it is not true that the plaintiff, Z. R. Cheney, is the duly appointed, qualified, and acting administra-

tor of the estate of Ole Linge at the time of bringing this action or at any other time, but in truth and in fact, long prior to the pretended appointment of the plaintiff, Z. R. Cheney, as administrator, one Emery Valentine had been duly appointed and qualified as such administrator, and was such appointed, qualified and acting administrator at the time of the pretended appointment of plaintiff herein, and that said pretended appointment of plaintiff is null and void."

The action was tried in the United States District Court, District of Alaska, Division No. 1, and resulted in a verdict for the plaintiff in the sum of $10,000. The defendant moved for a new trial upon various grounds, and also for an arrest of judgment upon the ground that it was conclusively shown by the evidence that the appointment of the plaintiff as administrator of the estate of Ole Linge, deceased, was void. The motion for a new trial was denied, and the motion in arrest of judgment was granted. Judgment was thereupon rendered dismissing the action and in favor of the defendant for costs. The plaintiff has brought the case here upon writ of error.

In order to properly understand the questions presented by the writ of error, it may be stated that, under the act of June 6, 1900, "making further provisions for a civil government for Alaska, and for other purposes" (chapter 786, 31 Stat. 321), the judge of each division of the District Court of that territory is required to divide his division into precincts; and section 1 of the Civil Code, which forms a part of the statute just referred to, further provides that, after precincts have been established, the judge may "from time to time alter the same and establish new precincts as the public convenience may require." Section 6 of chapter 1 of title 1 of the same act (31 Stat. 323) provides that:

"The respective judges of the court shall appoint, and at pleasure remove clerks and commissioners in and for the district;" and "the commissioners shall be ex officio * * * probate judges."

Section 763 of the Code of Civil Procedure (31 Stat. 452)—same act—provides that the commissioners appointed in pursuance of that act, and other laws of the United States, "have jurisdiction within their respective precincts, subject to the supervision of the district judge, in all testamentary and probate matters; that is, first, to take proof of wills; second, to grant and revoke letters testamentary, of administration, and of guardianship"; and also to perform other acts in relation to probate matters, which are not material to the question under consideration, and therefore need not be stated.

On July 14, 1900, the judge of Division No. 1 of the District Court, by an order entered in the journal of the court, established six precincts, the precincts of Juneau and Douglas Island being among the number, and H. H. Folsom was appointed commissioner for the precinct of Juneau, and G. M. Irwin commissioner for the precinct of Douglas Island. On August 5, 1903, the deceased, Ole Linge, was killed at the Treadwell Mine, owned and operated by defendant, and situated in the territory of what was then Douglas Island precinct; and, on the 24th of the same month, G. M. Irwin, commissioner of Douglas Island precinct, made an order appointing one Emery Valentine as administrator of the estate of said deceased, Ole Linge, and Valentine duly qualified as such administrator. On the next day the judge of the District

Court, Division No. 1, caused to be entered in the journal of his court an order abolishing the Douglas Island precinct, and providing that "the territory within the boundaries of said precinct, as heretofore designated, shall become a part of the Juneau commissioner's precinct"; and it was further ordered that the resignation of George M. Irwin be accepted, and that he "deliver the records and property pertaining to his office to H. H. Folsom, United States commissioner and ex officio recorder of the Juneau recording district." On June 23, 1905, the father and mother of the deceased filed a petition with said Folsom, the commissioner of the Juneau precinct, asking for the removal of Valentine, and for the appointment of some other person as administrator of the estate of the deceased. Valentine appeared in response to the citation issued thereon, and, upon consideration of the evidence offered upon the hearing of the matters alleged in the petition for removal, the commissioner, Folsom, made an order on March 4, 1905, removing Valentine from his office as administrator of the estate of said deceased, and directed that he file his account as such administrator on a day named. On March 11, 1905, the plaintiff in error filed in the probate court of said commissioner's precinct of Juneau his petition asking to be appointed administrator de bonis non of the estate of said deceased, and on the same day he was so appointed by the court. On March 14, 1905, Valentine filed exceptions to the order removing him, and also appealed from such order to the District Court. This appeal was pending at the date of the trial of this action.

We are clearly of opinion that, upon the facts as we have stated them, the plaintiff in error was duly appointed as administrator of the estate of Ole Linge, deceased, and is therefore entitled to maintain this action.

The defendant in error insists that such appointment was void because the probate court of Juneau precinct had no jurisdiction over the case, or proceeding, pending before the commissioner for Douglas Island precinct, at the date of such order in the matter of the estate of Ole Linge, deceased. It is not disputed that by the consolidation of the Douglas Island and Juneau precincts the commissioner for Juneau precinct succeeded to probate jurisdiction over all matters in probate subsequently arising in the territory formerly embraced in Douglas Island precinct, but the contention of the defendant in error upon this point is that the order of the District Court consolidating these precincts did not have the effect of removing the proceeding in the matter of the estate of Ole Linge then pending before the probate court of Douglas Island precinct to the probate court of Juneau precinct—that the direction contained in such order "that the said George M. Irwin deliver the records and property pertaining to his office to H. H. Folsom, United States commissioner and ex officio recorder of the Juneau recording district," was not sufficient for this purpose. It is claimed that support of this contention is found in Hunt v. Paloa, 4 How. 589, 11 L. Ed. 1115. That was a motion in the Supreme Court for process to bring before that court the record of a case decided by the Territorial Court of Appeals of Florida, prior to the admission of Florida as a state. This Territorial Court ceased to exist upon the admission of

Florida as a state, and Congress had omitted to enact any law providing how the judgments rendered by that court might thereafter be reviewed. It was argued in support of the motion in that case that, as the state of Florida had passed a law directing that the records of the Territorial Court should be placed in the custody of the clerk of the Supreme Court of the state, the writ of error might be directed to that court. The motion was denied. The court, in the course of its opinion, said:

"The court which rendered the judgment in the case before us is no longer in existence. The proceedings are not in the possession of any court authorized to exercise judicial power over them, but are in the possession of the officer of another court merely for the purpose of safe-keeping."

The court then added that, if the law of Florida had placed the records under the control of the state court, "it would not have removed the difficulty, for the law of the state could not have made them records of that court nor authorized any proceedings upon them. The Territorial Court of Appeals was a court of the United States, and the control of these records therefore belongs to the general government, and not the state authorities, and it rests with Congress to declare to what tribunal these proceedings shall be transferred, and how these judgments shall be carried into execution or reviewed upon appeal or writ of error."

Manifestly, the question decided by the court in the case just cited is not applicable to the case we are now considering. The order of the District Court consolidating the precincts of Douglas Island and Juneau was authorized by the statute making provision for a civil government, and for other purposes. Chapter 386, 31 Stat. 321. The order extended the limits of Juneau precinct, and in legal effect constituted Commissioner Folsom the successor in office of Commissioner Irwin, and, if any order was necessary to transfer cases theretofore pending before the commissioner of Douglas Island precinct to the probate court of Juneau precinct, as enlarged, the order was sufficient for that purpose.

Judgment reversed, with directions to the District Court to enter judgment in favor of the plaintiff in error for the amount named in the verdict, with legal interest from the date of the rendition of the verdict.

In re KIRKPATRICK.

(Circuit Court of Appeals, Sixth Circuit. November 27, 1906.)

No. 1,549.

BANKRUPTCY—COMPENSATION OF RECEIVERS.

The compensation to be allowed a receiver appointed under Bankr. Act July 1, 1898, c. 541, § 2 (3), 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421], for taking charge of and preserving the estate until the appointment of a trustee, is left to the discretion of the court as in ordinary cases in courts of equity, and is not limited by subsection 5 as amended by Act Feb. 5, 1903, c. 487, § 1, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 682], which empowers the court to authorize the business of bankrupts to be con-

ducted for limited periods by receivers, the marshals, or trustees, and to "allow such officers additional compensation for such services, but not at a greater rate than in this act allowed trustees for similar services"; such amendment having reference only to services rendered in conducting the business of the bankrupt when so authorized.

Petition for Revision of Proceedings of the District Court of the United States for the Western District of Michigan.

Frank H. Scott and Redmond H. Stephens, for petitioner.

Frank N. Wheeler, Fred D. Silber, and Martin J. Isaacs, for Ederheimer, Stein & Co.

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

SEVERENS, Circuit Judge. This is a petition to review an order made by the district judge fixing the amount to be allowed to the receiver.

Upon the filing of the petition in bankruptcy, John C. Kirkpatrick was appointed receiver "of all the property of the bankrupts with all the usual powers of a receiver in such matter"; and by the terms of the order was specifically given "full power and authority to take possession of all the property and assets of said alleged bankrupts of every name and nature and to preserve, repair, care for and protect the same, and to demand, receive and collect any debts or demands which may be or become due to said alleged bankrupts." He qualified as receiver and took charge of the assets of the estate. Under his direction and with his co-operation, proceedings were taken by attorneys chosen by him, property of the bankrupts to the amount in value of $47,000 was recovered, which wholly or in large part might have been lost but for the efforts of the receiver and the attorneys. He applied for leave to carry on the business in which the bankrupts had been engaged, but this the court declined to grant. He was engaged in the duties of receiver from the date of his appointment, April 12, 1904, until August 18, 1904. Upon the filing of his petition for an allowance of $2,500, as compensation for the services thus rendered, it was referred to the referee, who, upon the objection of creditors, appointed a hearing thereon. A hearing was had, and the result was that the referee determined that the amount asked was a reasonable one and should be allowed. Exceptions were filed by creditors and the order proposed by the referee was taken to the district judge for review. The judge did not decide what a reasonable compensation would be if the question were one for the discretion of the court, for he held that the maximum allowance which could be given would be the maximum compensation fixed by the bankruptcy statutes for services rendered by trustees in carrying on the business of the bankrupt, which in the present case would amount to $623.32, and this amount he allowed. On this petition for a review of the order of the district judge made in conformity with his opinion as above stated, two questions are stated by counsel for petitioner. (1) Did the judge err in respect to the question of law touching the limitation of the receiver's compensation? And (2) if he did, and the amount allowable is not limited by the bankruptcy act as held by the judge, whether the sum allowed by the

referee was a reasonable sum? We shall have occasion to deal only with the first of these questions.

By the second clause of section 47, Act July 1, 1898, and by section 67e, c. 541, 30 Stat. 557, 565 [U. S. Comp. St. 1901, pp. 3438, 3449], by legal proceedings or otherwise, the trustee is required to collect and reduce to money the property of the estate for which he is trustee. By section 48 (30 Stat. 557, 558 [U. S. Comp. St. 1901, p. 3439]) a maximum compensation to the trustee was provided for. But the exigencies of some cases might require the appointment of a receiver to take charge of the assets until in due course a trustee should be appointed. And by subsection 3 of section 2 (30 Stat. 545, 546 [U. S. Comp. St. 1901, p. 3421]) such appointment was authorized. By subsection 5 of section 2 power was given to authorize the business of the bankrupt to be conducted for limited periods by the receiver, trustee, or marshal. No provision was made for the compensation of receivers for performing the duties required by subsection 3 of section 2. That was left to the discretion of the court, as in ordinary cases in courts of equity. But by Act Feb. 5, 1903, c. 487, § 1, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 682], subsection 5 of section 2 was amended by adding these words:

"And to allow such officers additional compensation for such services, but not at a greater rate than in this act allowed to trustees for similar services."

Evidently this provision and limitation has reference to services rendered by the receiver, marshal, or trustee in conducting the business of the bankrupt, and not to services required of receivers and marshals by subsection 3 of section 2 in taking charge of the estate pending the appointment of a trustee; and it evidently presupposes that some compensation is allowable for services rendered in taking charge of the property. If that be so, it would follow that this amendment is irrelevant to the present inquiry, which does not relate to services rendered in conducting the business of the bankrupt, and it becomes unimportant to inquire what is the effect of the reference in the amendment to the rate allowed trustees for similar services.

It is urged by counsel for the creditors that, unless the amendment to clause 5 of section 2 is construed to limit the compensation which can be allowed to receivers and marshals, it has no effect whatsoever. We do not say that it does not limit the compensation to those officers for services performed in conducting the business of the bankrupt. Nor is it correct to say that the amendment was unnecessary to the limiting of compensation to trustees for the kind of services mentioned in clause 5 of section 2, for the reason that that was done by the new section (72) added by Act Feb. 5, 1903, c. 487, § 18, 32 Stat. 800 [U. S. Comp. St. Supp. 1905, p. 691]. The bankrupt act, while providing that compensation for the other services, provided, not that the trustee should have therefor the rate or percentage mentioned, but only not to exceed that. If, therefore, in a given case, the court should allow for the trustee's other services a less rate than the maximum prescribed for them, it could under this amendment allow a further sum for these special services so as to make the entire compensation for all services come up to the maximum. The purpose to keep down the compensation of

the trustee to the maximum prescribed is emphasized by the language of subsection 72, which is:

"That neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act." Act Feb. 5, 1903, c. 487, 32 Stat. 800 [U. S. Comp. St. Supp. 1905, p. 691].

As is seen, this relates to referees and trustees. It is not improbable that Congress intended that the provisions made for continuing the business of the bankrupt should not be allowed to enlarge the maximum prescribed as the compensation of the trustee, and have considered that the trustee should find in the enhancement of the assets a larger basis on which to compute his compensation, and have further considered that it was desirable not to encourage the continuance of the business unless the prospect was such as to make it probable that there would be an increase of assets which would sufficiently reward the trustee for his trouble.

For the reason above stated, that the question here involved is not of compensation for carrying on the business, the cases of In re Richards (D. C.) 127 Fed. 772, and In re Cambridge Lumber Co. (D. C.) 136 Fed. 983, decided by Judge Lowell, which are cited, are not pertinent. Both were cases where the services were rendered in carrying on the bankrupt's business, and clause 5 of section 2 was the applicable provision. In the case of In re Sully (D. C.) 133 Fed. 997, decided by Judge Holt, a compensation much larger than that allowed to trustees was awarded to receivers who had rendered valuable services by collecting a large sum for the estate which the judge thought was due to the large experience and skill of the receivers. The provisions of the bankrupt act relating to compensation were not referred to, evidently because the learned judge considered that the case fell under clause 3 of section 2 of the original act and was subject to the exercise of the discretion of the court. And it was such a case. It follows that the order under review must be reversed.

Inasmuch as upon this petition we cannot find facts, but decide only questions of law, and the district judge did not consider the facts upon the proper legal basis, it seems the proper course to simply reverse the order, with a direction to proceed in conformity with this opinion. It was competent for the district judge to have ordered a further hearing before himself on additional evidence if he had not adopted the erroneous rule of law.

Order reversed, with direction as above, with costs.

In re SULLIVAN.

(Circuit Court of Appeals, Eighth Circuit. November 9, 1906.)

No. 61.

1. COURTS—DECISIONS OF STATE COURTS—EXEMPTIONS—FOLLOWING STATE DECISIONS IN BANKRUPTCY PROCEEDINGS.

In determining a bankrupt's rights of exemption, the construction placed by the highest court of the state on its exemption statutes is controlling on the court of bankruptcy; but such court is not bound to follow an obiter dictum.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 957; vol. 6, Bankruptcy, § 664.

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.]

2. BANKRUPTCY—HOMESTEAD EXEMPTION—MATURED CROPS GROWN ON HOMESTEAD.

Corn standing in the field on the homestead of a bankrupt, which had fully matured at the date of the bankruptcy, is not exempt under the homestead exemption statute of Iowa.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 664.]

Petition for Revision of Proceedings of the District Court of the United States for the Northern District of Iowa.

For opinion below, see 142 Fed. 620.

Roy A. Cook (J. E. Cook, on the brief), for petitioner.

E. E. Hasner, for respondent.

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

ADAMS, Circuit Judge. The question in this case is whether ripe corn grown on a homestead exempt by law to the head of a family is itself exempt from liability for payment of his debts. The case arose in bankruptcy proceedings in Iowa, where the statute (sections 2972, 2978, Code Iowa 1897) exempts, among other things, from judicial sale a homestead of 40 acres, if located outside of a city or town. The bankrupt was by section 6 of the bankruptcy act of July 1, 1898 (30 Stat. 548, c. 541 [U. S. Comp. St. 1901, p. 3424]), and section 70 (30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) as amended (Act Feb. 5, 1903, 32 Stat. 800, c. 487, § 16 [U. S. Comp. St. Supp. 1905, p. 690]), entitled to all the exemptions allowed by the law of the state in which he resided. After having the homestead and all other personal property declared to be exempt by section 4008 of the Code of Iowa set off to him by the trustee in bankruptcy as provided by section 47 of the act (30 Stat. 557 [U. S. Comp. St. 1901, p. 3438]), the bankrupt claimed the ripe corn which had grown on the homestead. This claim was denied by the District Court, and a petition to revise that action in matter of law is now presented to us. No statute of Iowa in terms conferred the right as claimed, but the contention is that the right is incident to the ownership of the homestead itself, that it has been so decided by the Supreme Court of Iowa, and that such construction of its statutes by the highest judicial tribunal of the state con-

trols us. The last proposition is undoubtedly sound. If the Supreme Court of Iowa, in construing its statute of exemption, has decided that the crops grown on an exempt homestead are, for that reason alone, exempt from liability to creditors of the owner of the homestead, we must follow that interpretation and hold likewise. Hartford Fire Ins. Co. v. Railroad Co., 157 U. S. 91, 100, 108, 20 Sup. Ct. 33, 44 L. Ed. 84; Page v. Edmunds, 187 U. S. 596, 602, 23 Sup. Ct. 200, 47 L. Ed. 318.

To show that it has so decided, reliance is placed by petitioner upon two cases. Morgan & Hunter v. Rountree, 88 Iowa, 249, 55 N. W. 65, 45 Am. St. Rep. 234; Haefer v. Mullison, 90 Iowa, 372, 57 N. W. 893, 48 Am. St. Rep. 451. In the first of these cases the question was whether the owner of a homestead could lease it and hold the rent reserved exempt from execution. The Supreme Court, in harmony with the courts of other states, held that the homestead is not a mere shelter, but an estate, which the owner may enjoy, and, if he cannot conveniently reside on it, may lease and have and enjoy the rent reserved with like immunity from the claims of his creditors as he did the estate itself. Hufschmidt v. Gross, 112 Mo. 649, 20 S. W. 679; Spratt v. Early, 169 Mo. 357, 69 S. W. 13; Adams v. Adams, 183 Mo. 396, 82 S. W. 66. That and nothing more was the question in judgment in the first-mentioned Iowa case. The court in its opinion decided it by saying:

"It is certainly the spirit and purpose to exempt, not only the homestead, but also the use thereof; for without the use the exemption would be valueless."

This conclusion fully disposed of the case, but the writer of the opinion took occasion to further remark as follows:

"We think it is in harmony with the evident spirit and purpose of our statute to hold that the head of a family owning a homestead has a right to hold as exempt, not only the homestead and its use, but also crops or money which he may derive from its use while the property continues to be his homestead."

If the last quotation means, as claimed by petitioner's counsel, that ripened crops raised by the owner of a homestead while residing on it are exempt from execution sale, it was obiter dictum. No such question was before the court, and any voluntary expression of opinion by the writer on that question is not authoritative. Cohens v. Virginia, 6 Wheat. 264, 398, 5 L. Ed. 257; Wabash R. Co. v. De Tar (C. C. A.) 141 Fed. 932, 938.

The case of Haefer v. Mullison is of no greater value. In it the only question in judgment was whether crops grown on land bought with money received by a pensioner from the United States, which by the Code of Iowa (sections 4009, 4010) was exempt from execution, were themselves exempt. The court held that they were not, but in writing the opinion the following language was employed:

"We cannot presume that it (the land) was his homestead at that time [there being no showing of that sort], and the rule announced in Morgan v. Rountree, 88 Iowa, 249, 55 N. W. 65, 45 Am. St. Rep. 234, is not shown to be applicable to this case."

That reference to the Morgan Case did not increase its force or fortify the dictum there referred to. The question did not arise in the Haefer Case, and any expression or assumption concerning it is also obiter dictum.

The reasoning employed in the Haefer Case, instead of favoring the petitioner's contention, is opposed to it. That case, like the one before us, concerned an exempt homestead. Whether exempt for one reason or another, the resulting incidents ought to be the same.

The court, by way of argument, after undertaking to distinguish it from the Morgan & Hunter Case, says:

"Section 4010 exempts the proceeds and accumulations [of money received as pension] when invested in a homestead. When the land was purchased and the money was paid for it, the investment was completed. The crops thereafter grown on the land were the products or proceeds of the land and of the seed planted, of the labor performed in raising them, and of the forces of nature which aided in their growth, and were not exempt as property in which the pension money had been invested."

In Diamond v. Palmer, 79 Iowa, 578, 44 N. W. 819, the Supreme Court of Iowa held that section 4009 might exempt animals in which the pension money was invested, but did not exempt the increase of such animals.

From these cases it seems that the Iowa Supreme Court, instead of giving such construction to its statute as authoritatively exempts the corn in question, has employed reasoning that well sustains the adverse contention, and we are clearly absolved from any obligation to decide this case in favor of the petitioner on any claim that the construction placed on its statute of exemption by its highest judicial tribunal requires it. The reason of the rule requiring national courts to follow decisions of the highest judicial tribunals of a state construing its own statutes rests, among other things, in the fact that such decisions enter into and form a part of the statute itself as intended by the legislative department. That department enacts laws subject to interpretation by the judicial department. When, therefore, the Supreme Court of a state does not so decide a question as to commit itself to it, it cannot be called an interpretation of the statute or any evidence of what it is, and necessarily does not bind the national courts to follow it. We are not bound to follow an obiter dictum. No interpretation having been placed on the homestead statute in its relation to the question before us, we are left to exercise our independent judgment.

The state of Iowa makes liberal exemptions to its citizens. Sections 2209, 2972, 2978, 3313, 4009, 4010, 4011, Code Iowa. From the many diverse and specific exemptions disclosed by those statutes and the liberality indicated by them, it is reasonable to conclude that the Legislature did not intend that any strained interpretation should be placed upon them in determining what is exempt by implication. A homestead of 40 acres is specifically exempt to the head of a family. The land as an alienable and inheritable estate, and its use, whether for shelter or rent reserved, are recognized in Iowa and elsewhere as the limit of what is exempt as the homestead. Difficult questions sometimes arise in determining what is included in "the use." Does it include ripe crops which have grown on the homestead? They

represent more than the actual use or rent reserved by lease. The later accurately measure the value of the homestead itself to the owner. The former (the crops) measure that use together with the brain, brawn, and money which the owner has put into raising them and the increase of value which favorable markets and other fortuitous advantages give them above the cost of production. This latter may be called their speculative value. All these things, which add much to their value, cannot, in our opinion, be exempt merely because the owner of the homestead on which they are grown is entitled to the use of the homestead. Much of the crops are exempt under some provisions of the statutes referred to, and such exemptions, we think, exhaust the legislative will concerning the subject. If all crops growing on an exempt homestead are ipso facto exempt, any one may secure a homestead near a large city, expend much money for seed, in fertilizing the ground, and in growing and harvesting the crops, and in that way secure large returns of vegetables and other products, sell them in a convenient and favorable market, accumulate a fortune, and successfully defy his creditors. Such possibility demonstrates that the theory of law which makes it possible is probably not sound, and induces us to give a construction to the statute, if the same can reasonably be done, which will not permit it. We think a reasonable construction conduces to the result reached by the learned trial court, namely, that ripe crops, because they were grown on an exempt homestead, are not for that reason alone exempt also. See In re Hoag (D. C.) 97 Fed. 543, and Horgan v. Amick, 62 Cal. 401.

The petition should be denied, and it is so ordered.

PHILADELPHIA & R. R. CO. v. KLUTT et al.

(Circuit Court of Appeals, Third Circuit. November 26, 1906.)

No. 21.

1. NEGLIGENCE—CARE REQUIRED AS AGAINST NEGLIGENCE OF ANOTHER.

No one will be relieved from liability for injury inflicted by him on another by reason of the fact that such other negligently exposed himself to the danger, if, when that situation was, or ought to have been, apparent to him, he omitted such reasonable precautions as would, if taken, have prevented the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 115.]

2. COLLISION—RUNNING DOWN OF ROWBOAT BY TUG.

The question whether a tug was liable for the death of the occupant of a rowboat, which was run down by the tug in the Delaware river opposite Philadelphia in the daytime, *held* properly submitted to the jury, even conceding the negligence of the deceased in attempting to cross ahead of the tug, on evidence showing that the tug had a loaded car float on each side, projecting ahead of it, which obstructed the view from it, and that no lookout was maintained on either tow, where there was also evidence tending to show that the boat of the deceased was caught by floating ice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 309.]

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

For opinion below, see 145 Fed. 965.

John G. Lamb, for plaintiff in error.
Francis Fisher Kane, for defendants in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. This was an action of trespass, brought in the court below by the widow of Andrew Klutt, on behalf of herself and her minor children, against the Philadelphia & Reading Railroad Company, to recover damages for the death of her husband, Andrew Klutt, caused by the alleged negligence of the defendant. On the morning of the 23d of December, 1903, a tug of the defendant company was proceeding up the Delaware river, on a course about midway between Petty's Island and the Pennsylvania shore, that portion of the river being about half a mile wide. The tug was towing two floats carrying coal cars and a box car, and was lashed between them so far back that the floats carrying the cars extended some distance beyond the bow of the tug. The day was clear, the tide was running down stream, and there was some floating ice. Andrew Klutt, the decedent, was a truckman on Petty's Island, and was accustomed to take his produce in a row boat across the river to Philadelphia. He was an experienced boatman, and at about 11 o'clock on the morning in question he started to cross the river in the rowboat from Petty's Island to Cramp's Shipyard, in Philadelphia. When he started, the tug, with her floats and 16 cars thereon, was some little distance down the river, and Klutt started to cross in front of them.

So much as to the uncontroverted facts. How far the tow was away when he started to cross its bow, and what were the probable chances of his clearing it in the then conditions of tide and ice, does not clearly appear from the evidence. The floats were wide, as each had upon it two parallel tracks, upon which were the cars. Their bows were square, and the evidence is uncontradicted that Klutt's boat was struck by the port corner of the barge nearest the Pennsylvania shore. There is conflicting evidence as to the presence of much ice in the river, and also as to whether Klutt was embarrassed thereby. Two disinterested witnesses, working on a boat tied to a pier in Cramp's Shipyard, testified that they saw Klutt some distance ahead of the tow, standing up in his boat, struggling to get out of the ice, in which they said he was caught. The captain of the tug, on the other hand, swears that he was in the pilot house and could see over the tops of the coal cars, Klutt's boat on his right hand coming across his course, and that no ice embarrassed him, and that he was not standing up in the boat. It is admitted that there were no lookouts on either of the floats, and the two witnesses who were working on the boat 20 feet above the water line, at Cramp's Yard say they could only see the roof of the pilot house across the cars on the float. There was also conflicting testimony as to whether sufficient signals were given, after Klutt's boat was discovered in front of the tow, and whether the engines of the tug could have been stopped and reversed sooner, so as to have saved the man's life, the fact being undisputed that he had almost cleared the further float when his boat was struck.

Upon these facts, the case was submitted to the jury, with a charge that we think was eminently fair to the defendant, if it should have

been submitted at all. The plaintiff had a verdict, and upon the rendering of the judgment thereon, this writ of error was taken. There are several assignments of error, but they all turn upon the refusal of the court to take the case from the jury. Such being the case, the question before us is, not what conclusion we would have reached from the evidence, but whether the facts were or were not such that reasonably minded men might draw different conclusions therefrom, as to the negligence of the defendant and the contributory negligence of the decedent, or whether there was such conflict of testimony as to material facts, as made submission to a jury necessary. In a former trial between the same parties, the case was taken from the jury by the trial judge at the conclusion of the plaintiff's testimony, on the ground that the contributory negligence of the decedent was so clear that, as a matter of law, no recovery could be had. Upon a writ of error to the judgment in that case, sued out by the plaintiff, this court reversed the judgment and remanded the cause to the circuit court, with instructions to grant a new trial. 142 Fed. 394. It is to the judgment had in this new trial that the present writ of error is taken. While in this second trial the evidence on the part of the defendant is new and contradicts some of that adduced by the plaintiff, it does not affect the question as to whether the case should have been submitted to the jury. So far as the question of the negligence of the decedent is concerned, the facts are the same, and we have already decided, when the case was before us before, that the contributory negligence of the decedent was not so clear, as a matter of law, as to justify peremptory instructions to the jury in favor of the defendant.

But, assuming the negligence of Klutt, in passing in front of the tow, the question remains, whether there was negligence on the part of the defendant, after the imminence of Klutt's danger was apparent, or should have been apparent, to those on board the tug. Under these circumstances, did the defendant do all that an ordinarily prudent man should have done to avoid the accident? No one should be relieved from liability for injury inflicted by him on another, by reason of the fact that that other has negligently exposed himself to the danger, if, when that situation was or ought to have been apparent to him, he omitted such reasonable precautions as would, if exercised, have avoided the accident. This is the doctrine of Davies v. Mann, 10 Mees. & W. 546, which declares it the duty of one person, under certain circumstances, to avoid the consequences of another's negligence. The negligence which is actionable, notwithstanding the negligence of plaintiff, must in a certain sense be subsequent thereto. In other words, the negligence of the defendant, which must be established, has relation solely to a certain situation produced by the prior negligence of the plaintiff.

In the case before us, Klutt may be admitted to have placed himself negligently in front of the advancing tow. The question, then, is, could the defendant have reasonably done anything, or omitted to do anything, which would have saved Klutt from the consequences of his own negligence. In this connection, the absence or presence of lookouts upon the forward end of the floats, becomes important. The tow was navigating a river in front of a populous city, where boats

of all sizes and descriptions crossing both to and fro, were to be expected. Was it a continuing negligence, which made it negligence committed at the very time of the accident, to have dispensed with such lookouts? This, with the other controverted questions bearing upon the negligence of the defendant, after Klutt's dangerous situation was discovered, were for the determination of the jury. We say "after Klutt's dangerous situation was discovered," and add as a corollary, "or should have been discovered" by the defendant, because, not to have discovered what should have been under all the circumstances discovered, was a part of defendant's negligence, subsequent to that of the plaintiff.

The so-called doctrine of Davies v. Mann, supra, has been the subject of much refinement by courts and text writers. We think, however, that Judge Acheson, speaking for this court in the former case, has laid down the true principle applicable to this case, as follows:

"It is a settled principle of law that, although a plaintiff, who sues for an injury inflicted by the defendant, might, by the observance of proper care, have avoided exposing himself to the injury, yet this will not prevent him recovering damages from the defendant, if the latter discovered, or by the exercise of ordinary care might have discovered, the exposed situation of the plaintiff in time, by the exercise of ordinary care and diligence, to have averted the effect of the plaintiff's negligence and avoided the injury which happened. * * * It was for the jury to say whether, by the employment of a proper lookout, 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 running down his rowboat."

To this principle, as applicable to the facts of this case, we adhere. The judgment below is affirmed.

BUTLER et ux. v. EVENING POST PUB. CO.

SAME v. NEWS & COURIER CO.

(Circuit Court of Appeals, Fourth Circuit. November 8, 1906.)

No. 631.

JURY—PEREMPTORY CHALLENGES—NUMBER WHEN CAUSES ARE CONSOLIDATED FOR TRIAL.

Where separate actions by the same plaintiff are consolidated for trial by order of the court, either on its own motion or on motion of counsel for the plaintiff, in order to avoid waste of time and unnecessary expense, but the causes of action are such that separate verdicts are required, plaintiff and defendants are each entitled to the same number of challenges to jurors as they would be if the cases had been tried separately.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 609.]

In Error to the Circuit Court of the United States for the District of South Carolina, at Charleston.

Augustine T. Smythe (Smythe, Lee & Frost and Joline, Larkin & Rathbone, on briefs), for plaintiffs in error.

H. A. M. Smith, for defendant in error News & Courier Co.

Wm. Henry Parker, Jr., for defendant in error Evening Post Pub. Co.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge. On the 8th of March, 1904, the plaintiffs, Frank E. Butler and Annie Butler, his wife, brought a suit in the Circuit Court of the United States for the District of South Carolina against the Evening Post Publishing Company. The plaintiffs are citizens and residents of the state of New Jersey, and the defendant a corporation under the laws of South Carolina with its principal business in the city of Charleston in said state. On the 6th of June, 1904, the plaintiffs filed their complaint and alleged, as their cause of action, the publication in a newspaper called the "Evening Post," published by the defendant, and circulated in the city of Charleston and elsewhere, a certain article which the plaintiffs allege was a libel upon the feme plaintiff; that it was malicious and untruthful and had greatly and permanently injured her in her good name and credit, had brought her into public scandal, infamy, disgrace, etc., and thereupon, for the said publication, the plaintiffs claimed damages in the sum of $10,000. At the same time plaintiffs brought another suit in the said court against the News & Courier Company, a corporation under the laws of South Carolina, with its principal place of business in Charleston, in said state, and in the complaint, filed on the 6th of June, 1904, it was alleged that this defendant had published in the News & Courier, a newspaper published in Charleston, and circulated in said city and state of South Carolina, and also elsewhere, the same article which was set forth as the cause of action against the Evening Post, alleging in the complaint in this case, as in the other, that the publication was malicious, etc., and that the good name of the feme plaintiff had been brought into public scandal, defamed, disgraced, etc. The plaintiffs sought $10,000 as damages for the alleged libelous publication in this suit. The defendants each filed answers in which the publication of the alleged libelous matter was admitted, but denied that the publication was made with malicious intent or with any knowledge or intimation that there was error in the facts stated. The answers of both defendants were substantially the same in another respect; that is to say, that the publication was made bona fide in the due course of business, that it came to each of the papers through reputable news sources, and that when published the defendant was warranted in the belief that it was true. The Evening Post, in its answer, states that its circulation is confined to the city of Charleston, except exchanges, and the News & Courier's answer states that its circulation is confined to the state of South Carolina, except exchanges.

When the cases came on for trial in the Circuit Court, the presiding judge ordered them to be consolidated and tried together. The order, however, was made, as appears of record, upon the motion of plaintiffs' counsel; but it further appears that the counsel was led to make the motion after correspondence with the judge and upon a suggestion that it would facilitate a trial of the causes. The reasons assigned for the order of consolidation by the court were, in substance, that the actions were practically similar, and that, owing to the crowded state of the dockets, numerous cases being pressed for trial, con-

venience and economy of time would be promoted. After the testimony was introduced, the court instructed the jury to return separate verdicts as to each defendant, which was done. In each of the cases the verdict of the jury was in favor of the defendant. The cases are brought here by writ of error sued out by the plaintiffs. There are several exceptions taken by the plaintiffs on the trial which are set out in the record and have been argued both in the briefs filed and orally. We do not deem it necessary, however, to consider any save the following: In the organization of the jury, after the order of consolidation, the plaintiffs insisted that they were entitled to six (6) peremptory challenges, and so likewise did the defendants. The presiding judge held that each of the defendants was entitled to three (3) peremptory challenges or six (6) in all, but that the plaintiffs were entitled to only three (3). To this ruling the plaintiffs duly excepted, and the case is before us to review this decision.

Under the South Carolina practice, which was adhered to in this case, the list of jurors is furnished to the counsel, and each party strikes therefrom the names of jurors challenged to the number allowed. In the organization of the jury in this case, the list of jurors contained twenty-one (21) names, and, under the ruling of the court, the plaintiffs were allowed to strike therefrom three (3) names and the defendants six (6) names, leaving twelve (12) names, which constituted the jury in the trial.

In Mutual Life Insurance Company v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706, one of the questions involved was as to the number of peremptory challenges defendants are entitled to where cases, in order to avoid unnecessary costs and delay in the administration of justice, have been consolidated for trial by order of the court. The Supreme Court, in passing upon this point, held:

"But, although the defendants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes of action remained distinct and required separate verdicts and judgments; and no defendant could be deprived, without its consent, of any right material to its defense, whether by way of challenge to jurors or objection to evidence, to which it would have been entitled if the cases had been tried separately. Section 819 of the Revised Statutes [U. S. Comp. St. 1901, p. 629] provides that in all civil cases 'each party shall be entitled to three peremptory challenges; and, in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of challenging under this section.' Under this provision, the defendants sued together upon one cause of action would be entitled to only three peremptory challenges in all. But defendants in different actions cannot be deprived of their several challenges, by order of the court, made for the prompt and convenient administration of justice, that the three cases shall be tried together. The denial of the right to challenge, secured to the defendant by the statute, entitled them to a new trial."

This case, which came up by writ of error from the Circuit Court for the District of Kansas, was subsequently tried again, and upon this trial the court permitted the plaintiff to have six (6) peremptory challenges when the jury was impaneled. To this the defendants excepted, and the case went to the Circuit Court of Appeals for the Eighth Circuit upon an exception, among others, to this ruling. Thayer, Circuit Judge, delivered the opinion of the court, and upon this point it is held:

"It is urged, however, by learned counsel for the defendant, that, as the two actions were consolidated for trial, the plaintiff was only entitled to three peremptory challenges. It is to be observed that when this case was before the Supreme Court, and was under consideration in the case last cited (145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706), that court held that, when actions are consolidated, such an order does not operate to deprive either defendant of the right to challenge as many jurors peremptorily as he would have been entitled to challenge if the cases had been tried separately; and the former judgment in favor of the plaintiff was reversed because each defendant to the consolidated cause was not allowed three peremptory challenges. If this rule is applied to the defendants—that is to say, if consolidated causes are treated separately, so far as the defendants are concerned, for the purpose of preserving to them their respective rights of challenge—we perceive no reason why the same rule should not be applied to the plaintiff so as to entitle her to the same number of challenges which she would have been entitled to had the cases been tried separately."

It may be noted that Circuit Judge Sanborn, who sat in this case with Circuit Judges Caldwell and Thayer, filed a dissenting opinion, but in it he discussed other propositions involved and made no reference to the challenges to jurors. We therefore infer that his views were in accord with the foregoing expression of the other two judges on this question.

As above stated, the order consolidating the two cases under consideration for trial was made upon the request of counsel for plaintiffs, but upon a suggestion that this course would facilitate the trial; and the reasons assigned by the court for the order of consolidation are very similar to those which constituted the bases of consolidation in the case of Insurance Company v. Hillmon, supra. We do not think that this action of the plaintiffs' counsel, under the circumstances, deprived them of their several rights of challenge; for it will be observed that, although the cases were tried together under the order of consolidation, there were, to all intents and purposes, two trials. The presiding judge appreciated this fact, for he instructed the jury to return a verdict in each case. Although the actions were for the publication of the same alleged libel, and the answers of the defendants as to good faith and absence of malice were in harmony, yet the basis of recovery, if had, might differ very materially. By the answers the circulation of the News & Courier is shown to be very much more extensive than that of the Evening Post. This fact would, if proven, establish a different basis of damages. In the one case, malice or knowledge of the falsity of the publication might be shown, and in the other not. Here would be another ground for difference as to liability. If malice was proven to the extent that punitive damages should be given, then the value of the property of defendant or the ability of the defendant to pay would enter into consideration in estimating damages. It is scarcely probable that the defendants, not being connected in any business way, would be conditioned alike, financially. Thus we see that a common verdict could not be rendered, because the causes of action, the line of defense, and the basis of damages, notwithstanding the consolidation, still remained distinct.

It is our conclusion that the decision of the Circuit Court of Appeals for the Eighth Circuit, above quoted, is the law. We hold, therefore, that the Circuit Court, in confining the plaintiff in the case here to

three (3) peremptory challenges, was in error. The judgment is reversed, and the case remanded, to the end that a venire de novo may be had.

Reversed.

BAIRD et al. v. PRATT et al.

(Circuit Court of Appeals, Eighth Circuit. November 9, 1906.)

No. 2,390.

SALE—CONTRACT—ORDER FOR GOODS REQUIRING ACCEPTANCE.

A written and signed order for goods, given to the traveling salesman of a wholesale house and by him sent to his employers, who had the right to accept or reject the same, until its acceptance, was merely an offer to purchase, binding on neither party, and the shipment of the goods alone, with an invoice making the terms of payment different from those stated in the order, did not constitute an acceptance, which converted it into an executed contract binding on the purchasers, who had the right to refuse to receive the shipment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 46, 47, 59.]

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 89 S. W. 648.

W. H. Kornegay, for plaintiffs in error.

Eugene B. Lawson and H. S. Montgomery, for defendants in error.

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

ADAMS, Circuit Judge. This suit was founded on an instrument of writing executed by plaintiffs in error, who were defendants below, in their firm name of Baird Bros., and claimed by defendants in error, who were plaintiffs below, to be an executory contract for the purchase of merchandise. Defendants contend that the writing is a mere proposition to purchase, which required acceptance by plaintiffs before it became a contract, and that it was never accepted by them. The case was tried in the United States Court for the Northern District of the Indian Territory and resulted in a judgment in favor of plaintiffs, which was afterwards appealed to the United States Court of Appeals in the Indian Territory, where it was affirmed, and is now brought here by writ of error. Other questions are presented in briefs of counsel, but the case will be effectually disposed of by deciding the contention just mentioned.

The instrument of writing is couched throughout in the language of an order or proposition to buy goods on terms stated in it, and no claim could be made that it was a contract of purchase, except for the fact that at the left hand of the signature of defendants' firm, signed at the bottom of the instrument, the signature of plaintiffs appears as follows: "Walter Pratt & Co., by P. W. Bouldin, Salesman." It is observed that there is no attendant explanatory word or words, like "Witness," or "Accepted," indicating the intent or purpose of the signature. The proof, however, clearly shows that its purpose was not to

accept the proposition of defendants. Bouldin was a traveling salesman for plaintiffs, who did business in Chicago under the firm name of Walter Pratt & Co., and was, at the time the order was signed, representing them in the Indian Territory. No claim is made in the proof that he was authorized to make binding contracts of sale for plaintiffs while on the road. On the contrary, his duty appears to have been to take orders and report them to his principals for their action. The testimony is undisputed and conclusive that the firm reserved the right to pass on the orders sent in by its traveling salesmen, and that such orders were not accepted until they reached defendants' place of business and were acted on by them. Walter I. Pratt, the managing partner of plaintiffs, testified that he had "direction of the correspondence and shipping of goods and O. K.'ing of orders." In view of this proof the signature of plaintiffs' firm by its salesman at the bottom of the order cannot be regarded as an acceptance. It was probably a memorandum, showing what salesman took the order, or it was placed there to witness the genuineness of defendants' signature.

The usual course of business was pursued in this case. Bouldin secured the order in question on April 24, 1903. On April 25th he wired it to his house, making use for that purpose of a private code. Plaintiffs did not write or otherwise communicate with defendants any acceptance of their order, other than by shipping the goods and sending to defendants by mail an invoice and bill therefor. On receipt of the invoice and bill, defendants wrote plaintiffs declining to receive the goods on the ground that they had not been shipped according to the terms of the order. The proposition contained in the order was to pay for the goods within thirty days, with a discount of 6 per cent. for cash; or to pay for the same in five notes, each for one-fifth of the purchase price, payable in two, four, six, eight, and ten months, respectively, without discount. The terms of the purchase contained in the invoice and bill sent defendants with the goods were to pay the purchase price within 15 days, with a discount of 5 per cent. for cash, or in four notes each for one-fourth of the purchase price, payable in two, four, six, and eight months, respectively, without a discount. This was a material departure from the terms of the order. It invalidated the order as made, and amounted to a counter proposition, which defendants were at liberty to accept or decline as they pleased. They exercised their right, and declined to accept, and peremptorily withdrew the original proposition. This they had the right to do. Beach on Modern Law of Contracts, vol. 1, § 51, and cases cited. In Minneapolis, etc., Ry. v. Columbus R'g Mill, 119 U. S. 149, 151, 7 Sup. Ct. 168, 169, 30 L. Ed. 376, Mr. Justice Gray states the well-settled law in the following words:

"As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has been neither accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party. The one may decline to accept, or the other may withdraw his offer; and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the orig-

inal offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it."

The record in this case shows no acceptance by plaintiffs of defendants' proposition, other than that involved in the shipment of the goods and the accompanying invoice and bill. They evince no mutual assent of the parties, and defendants had a right to decline to take the goods as they did.

The appellate court, in affirming the judgment of the trial court, made reference to the terms found in the invoice and bill as a mistake on the part of plaintiffs in billing them. We find no evidence in the record of any such mistake. The trial court and the appellate court erred in treating the offer as an executory contract. The former should have given the instruction to the jury, as requested by defendants' counsel, that on the pleadings and proof plaintiffs could not recover, and the latter should have reversed the judgment for its failure to do so.

The judgment is reversed, and the cause remanded to the United States Court for the Northern District of the Indian Territory, with directions to grant a new trial.

LEONARD v. MIAMI MIN. CO.

(Circuit Court of Appeals, Fourth Circuit. November 8, 1906.)

No. 657.

1. NEGLIGENCE—EVIDENCE TO ESTABLISH.
   An inference of negligence cannot be based on a presumption nor on speculation and conjecture.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 217.]

2. MASTER AND SERVANT—INJURY TO SERVANT—PROOF OF NEGLIGENCE.
   Plaintiff's intestate was employed as a miner in defendant's mine, which had a 600-foot shaft having two compartments; one used as a bucket way, and the other for a ladder. He had just come to the top in the bucket, when, while being lowered again for other miners, the bucket broke from the rope and stuck at one of the intermediate levels. In order to free it so that another bucket could be sent down, deceased went alone down the ladder. He reached the level where the bucket was and removed it from the shaft, and his body was afterward found at the foot of the shaft at a lower level. There was no evidence to show how or why he fell, and the ladder was in good condition. *Held*, that no inference of negligence on the part of defendant could be drawn from the fact of the accident, nor could liability be based on any defect in the bucket shaft, which may have caused the falling of the bucket, but had no connection with the subsequent accident to deceased, and that the court properly directed a verdict for defendant.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 881.]

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

Rufus E. Austin and Thomas J. Jerome (Adams, Jerome & Armfield, on the briefs), for plaintiff in error.

W. G. Means, for defendant in error.

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

GOFF, Circuit Judge. The intestate of the plaintiff in error was killed by falling down the shaft of a mine owned and operated by the defendant in error. The shaft was about 600 feet deep, with a number of levels connected with it. At the 520-foot level there was a telephone, while at the other levels the method of communication between those in the mine and those at the mine opening was by a gong attached to a wire rope which passed down the shaft. There were two compartments to the shaft; one used as a bucket way, and the other for a ladder. A large bucket used for hoisting ore and the parties working in the mine was run in one compartment, while the ladder was used by the workmen when the bucket was not in use. On the 5th day of January, 1905, Fred. A. Leonard, a laborer in the mine, had been with others hoisted in the bucket to the surface. The bucket was then again started down the mine for the purpose of bringing up others who were at the 520-foot level, when it became detached from the wire rope with which it was being lowered, and, tumbling down the way, which was built on an incline of about 45 degrees, lodged at the 250-foot level. Another bucket was then attached to the rope and lowered, but those in charge of the work were unable to get it below the 250-foot point. In order to open up the shaftway, so that the men at the lower level could be reached with the bucket, Leonard started down the ladderway for the purpose of removing from the shaft the detached bucket. Soon after he so started he was picked up by those at the 520-foot level, mangled and dead. The plaintiff below charged the defendant with negligence; the declaration alleging that the bucket way was improperly constructed, that the skids of the shaft on which the bucket ran were old, weak, and imperfectly fastened, that the hook to which the bail of the bucket was affixed was unsafe, dangerous, and defective, that the gong rope was improperly placed in the bucket way, and that the gong was rung with great difficulty. Every allegation of the complaint charging negligence was specifically denied. The case was tried to a jury, which by direction of the court below returned a verdict for the defendant, on which judgment was duly entered.

Did the court below err in so directing a verdict? Did the testimony offered to the jury show negligence on the part of the defendant? Can we find from the evidence what caused the accident by which Leonard lost his life? Was any fact established by the testimony from which negligence was directly attributable to the defendant, or could have been fairly inferred therefrom? An accident was shown to have occurred, most deplorable in its results, during which the deportment of the decedent was courageous and entitled to the high commendation it received; but such accident under the law raised no presumption of negligence on the part of the defendant. The burden of proof was on the plaintiff, who it seems lacked testimony relating to the material facts connected with the accident, and was driven to the necessity of asking the jury to infer negligence, because an accident had happened and death had resulted therefrom. But such is not the law, for the in-

ference of negligence cannot be drawn from a presumption, nor based on speculation and conjecture. In cases of this character, if the testimony is equally consistent with the existence or nonexistence of negligence, the trial judge should direct a verdict, and not submit the question to the jury. The plaintiff in error did not offer any evidence from which the jury could reasonably infer that the accident was caused by the negligence of defendant in error. Had such been the case, then, in the absence of explanatory testimony, the defendant in error might have been liable, and the jury should have been permitted to pass on the question. In order to sustain the contention of the plaintiff in error, we must presume that Leonard was, at the time the accident occurred, free from fault and exercising due care, and then, in addition, presume that he met his death because of some defect in the construction of the shaft or of the machinery used in it. A case should not be sustained when it depends upon a presumption that is itself founded upon conjecture.

It was Leonard's duty to work a machine located on one of the mine levels near the bottom of the shaft. His employment had no connection with the operation of the buckets; but he, when they were disarranged and the shaft was blocked, in order to relieve his fellow workmen, of his own volition, with good intent and most commendable purpose, went down the ladder to the level where the bucket blocked the way. That he reached that point safely is certain, for he removed the bucket, which was found in the level. He was then in a place of safety, at a point in the shaft where there was no defect either in the plan of construction or method of operation. What then happened? The shaft at that point was as usual, and the ladder was in a safe condition. He could have gone either up or down without additional or unusual risk. What did he attempt to do? The evidence does not show, and we do not know. He fell to the bottom of the shaft, taking with him the mystery of the accident that caused his death. Did he lose his balance and fall, did he become faint and weak, did he slip and fail to recover his grip, did he endeavor to ring the gong and fall when doing so? We search the evidence in vain for an answer to any of these questions. The suggestion that the shaft was improperly built, and that the timbers in some parts of it were weakened and defective is without force, for we find no connection between the mishap to the bucket when it became loose in the shaft, and the accident to Leonard which occurred some time thereafter. In the absence of testimony showing negligence, the defendant in error should not be held responsible for the deplorable and extraordinary circumstances transpiring in the shaft of this mine when Leonard lost his life.

We find no error.

Affirmed.

ROBINSON v. TERRITORY OF OKLAHOMA.

(Circuit Court of Appeals, Eighth Circuit. November 9, 1906.)

No. 2,416.

JURY—ELIGIBILITY OF JUROR—DEPUTY SHERIFF UNDER OKLAHOMA STATUTE.

Wilson's Rev. & Ann. St. Okl. 1903, § 3308, which disqualifies sheriffs from performing jury service, applies as well to deputies as to principal sheriffs, and such an officer, when challenged for such cause, is not eligible to sit on a jury in a criminal case.

In Error to the Supreme Court of the Territory of Oklahoma. For opinion below, see 85 Pac. 451.

The plaintiff in error was indicted in the district court of the territory of Oklahoma within and for Caddo county for the crime of manslaughter in the first degree. The case came on for trial, and resulted in his conviction and sentence to a term of eight years in the penitentiary. An appeal was prosecuted by him to the Supreme Court of the territory, where the judgment of the trial court was affirmed, and a writ of error brings the case here for a review of the proceedings resulting in that judgment.

Stillwell H. Russell, E. L. Fulton, and Henry H. Howard, for plaintiff in error.

Don. C. Smith (W. Cromwell, on the brief), for the Territory.

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

ADAMS, Circuit Judge. The only question argued by counsel, and one which they both admit is decisive of the case, is whether one McCracken, who was impaneled and sworn as one of the petit jurors to try the case, was a competent juror. The printed record on this question is in the following words:

"One R. A. McCracken was sworn as a juryman to answer questions touching his qualifications to sit and act as a juror in said cause. Said McCracken testified as follows, to wit: * * * 'Q. Are you a deputy sheriff in this county? A. I have a commission. I am not a regular working sheriff. Q. You hold a commission as a deputy sheriff? A. Yes, sir.' Defendant challenges juror for cause. Challenge is by the court overruled. Defendant excepts to ruling of court."

Did the court err in overruling the challenge? The Supreme Court assigned two reasons for sustaining the action of the trial conrt: First, that the record did not disclose that the foregoing constituted all the evidence taken on the question of the juror's incompetency; and, second, that, if it did, the challenge was too general to secure consideration. That court appears to have been mistaken about the facts pertaining to this matter. It is said in its opinion that:

"It is apparent that the record presented does not contain a complete record of the examination and testimony of the juror upon his voir dire."

It refers in its opinion to the certificate of the official stenographer, following the testimony of McCracken, to the effect that it constituted all the evidence, as its justification for the statement quoted. That

certificate is not the proper authentication of a record for the purpose of appeal; but, acting upon it, the court might well say it did not appear that all the evidence was preserved.

The court, in assigning as a reason for sustaining the ruling of the trial court that the challenge was too general, was also, we think, laboring under a misapprehension. While the challenge as it appears in connection with the examination of the juror is general, the record does not leave it in that form. After the certificate of the stenographer, there appears as a part of the bill of exceptions, signed by the trial judge, as disclosed by the original transcript, to which we have resorted, the following:

"That the above and foregoing is all the evidence and testimony given on the examination of said juror. That thereupon the said defendant challenged said juror for cause, and for the reason and on the ground that the said McCracken, being a deputy sheriff of Caddo county, Oklahoma Territory, was by reason thereof incompetent and disqualified to sit and act as a juror in said cause. Which said challenge was by the court overruled and denied. To which said ruling of the court the defendant at the time excepted."

From the foregoing it appears that the record is sufficient to secure a consideration of the question presented on its merits. The evidence is all here, and the challenge was not general, but highly specific and definite.

Counsel for the territory now contend that the testimony does not show that McCracken was in fact a deputy sheriff; that the holding of a commission by him does not establish that he had qualified under it. There is no merit in this refinement. The evidence was properly treated as prima facie proof that he was a deputy sheriff, and if it was susceptible of any doubtful meaning counsel for the territory and the trial court obviously did not so treat it. The language of the challenge as made interpreted the evidence to be sufficient for that purpose, and opposing counsel, by not objecting to that interpretation and by permitting the court to act upon it, cannot now be heard to say to the contrary. The court ruled that, although McCracken was a deputy sheriff of Caddo county he was competent and qualified to act as a juror in the case. Whether the court was right or wrong in that ruling is the only question before us.

Section 3308, Wilson's Rev. & Ann. St. Okl. 1903, disqualifies sheriffs from performing jury service. This disqualification is the expression of a wise public policy. The sheriff is a public officer. His emoluments consist of fees fixed by law for the performance of his official duties. Among these duties are serving process, collecting judgments, boarding prisoners, taking convicts to the penitentiary, and the like (section 2995), many of which and the fees receivable for performing them depend upon whether a judgment is recovered by the plaintiff or a conviction secured by the territory. It is so manifestly improper for a sheriff to be a juror, and thereby enabled to aid in securing judgments from which he could be possibly benefited, that the wisdom of the law in disqualifying him for that purpose is obvious. The sheriff may appoint deputies (section 2995) who, when qualified, are empowered to perform any acts which he may lawfully perform (section 4916), and may receive therefor 60 per cent. of the total fees

to which the sheriff is by law entitled (section 2995). Every reason of public policy which disqualifies a sheriff for jury service appertains to a deputy sheriff, and the latter falls, not only within the reason of the rule disqualifying the former, but within the letter of the statute disqualifying "sheriffs." Within the purview of this statute a deputy is no less a "sheriff" because he is not chief. We think the district court erred in overruling defendant's challenge to Juror McCracken, and that the Supreme Court of the territory erred in not reversing the judgment for that reason.

The judgment must be reversed, and the cause remanded to the district court within and for Caddo county, with instructions to grant a new trial.

In re T. E. HILL CO.

CONTRACTORS' SUPPLY & EQUIPMENT CO. et al. v. T. E. HILL CO. et al.

(Circuit Court of Appeals, Seventh Circuit. October 25, 1906.)

No. 1,276.

1. BANKRUPTCY—APPEALS—CITATION AND BOND.
   Neither citation nor bond are jurisdictional requisites to an appeal in bankruptcy, and defects therein may be cured after the time limited for appeal.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 923.

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

2. SAME—CORPORATIONS SUBJECT TO ADJUDICATION—CONSTRUCTION COMPANY.
   A construction company, whose business is the building by contract of piers and abutments for railroad bridges, made of concrete, which is mixed on the ground as the work progresses, with the necessary incidental work, is not a corporation engaged principally in manufacturing, within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], and is not subject to proceedings in involuntary bankruptcy.

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

Lloyd C. Whitman, for appellants.

Chas. C. Buell, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge. This is an appeal by creditors, petitioning for an adjudication of bankruptcy against T. E. Hill Company, a corporation, from an order of the District Court, sitting in bankruptcy, which dismisses their petition, upon report of a special master that such corporation was not subject to bankruptcy adjudication. In the record as brought up on the appeal the T. E. Hill Company is named as sole appellee, although it appears that one of its creditors, Wilke & Wiechen, also answered the petition and was heard in opposition, as authorized by section 59f of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3445]). For the omission to name this objecting creditor in the bond and citation on

appeal, the T. E. Hill Company challenges jurisdiction here and moves to dismiss the appeal. The appellants, without conceding the alleged defect, move for alias citation to bring in the omitted party. These motions were heard together, with the argument upon the merits, and jurisdiction of the appeal must be ascertained before inquiry is open as to the merits of the order.

1. The District Court approved the findings and dismissed the petition on February 10, 1906, and noted in the order that the petitioners "except and enter their motion for an appeal." The petition for appeal and assignment of errors were filed February 13th, and the appeal was allowed and the amount of bond fixed by an order of that date. On February 20th, the appellants filed their bond, running to the T. E. Hill Company alone, which was approved by the court, and citation was issued February 26th naming that company as sole appellee. The answering creditors, Wilke & Wiechen, were and are unquestionably entitled to be heard, upon appeal, in support of the order. Their answer and standing, however, as presented in the District Court, are identical with that of the alleged bankrupt. So, with no interest stated apart from representation of the estate involved in the proceeding and with that interest represented, their presence is not needful for the hearing, unless jurisdiction of the appeal fails through the omission to give them notice through citation. This appeal was allowed by the entry of an order, as "the judicial act of the court" (Edmonson v. Bloomshire, 7 Wall. 306, 311, 19 L. Ed. 91; Peugh v. Davis, 110 U. S. 227, 228, 4 Sup. Ct. 17, 28 L. Ed. 127), and the allowance was within the ten days limited (Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]) for taking appeal as well were the approval of the bond and issuance of the citation to the appellee, T. E. Hill Company, within such time. The general rule is established, as stated by this court in McNulta v. West Chicago Park Com'rs, 99 Fed. 328, 39 C. C. A. 545, that no citation is required "when an appeal is allowed in open court at the same term when the decree was rendered." In appeals in bankruptcy, however, this rule may not be applicable, for the reason that there are no stated terms of the bankruptcy court, as such, but the jurisdiction is exercised by the district courts throughout the proceedings (Act July 1, 1898, c. 541, § 2, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3420]), "in vacation, in chambers and during their respective terms." Thus each "proceeding in bankruptcy, from its commencement to its close upon the final settlement, is but one suit." Wiswell v. Campbell, 93 U. S. 347, 348, 23 L. Ed. 923.

The contention is that an appeal in such cases, not allowed instanter, is not "taken," within the meaning of section 25a, unless a citation issues and bond is filed within the ten days. Whether a citation is needful, by way of notice to the parties, in any appeal in bankruptcy, may not be clear under the authorities; and the cases cited for and against the present motions are not harmonious in reference to citation or bond, as requisites to confer jurisdiction of any appeal. In Jacobs v. George, 150 U. S. 415, 416, 14 Sup. Ct. 159, 37 L. Ed. 1127, and Mattingly v. N. W. Virginia R. R., 158 U. S. 53, 56, 15 Sup. Ct. 725, 39 L. Ed. 894, however, the general doctrine is established for

appeals in equity that "neither signing nor service of the citation is jurisdictional, its only office being to give notice to the appellees," and that failure or defects therein may be cured after the time limited for appeal. Like rule is applied to perfect the bond for appeal. Edmonson v. Bloomshire, 7 Wall. 306, 311, 19 L. Ed. 91; Peugh v. Davis, 110 U. S. 227, 228, 4 Sup. Ct. 17, 28 L. Ed. 127. Under these decisions, the Circuit Court of Appeals of the Sixth Circuit so ruled in reference to appeal in bankruptcy in Columbia Iron Works v. National Lead Co., 127 Fed. 99, 101, 62 C. C. A. 99, 64 L. R. A. 645; and as well the Circuit Court of Appeals of the Eighth Circuit in Lockman v. Lang, 132 Fed. 1, 3, 65 C. C. A. 621, and Gray v. Grand Forks Mercantile Co., 138 Fed. 344, 346, 70 C. C. A. 634. We concur in the view that bankruptcy appeals are within the rule thus stated, so that citation and bond are not jurisdictional requisites, and the motion to dismiss is overruled. Under our conclusion upon the merits, it is immaterial whether citation or bond should have run as well to the objecting creditor, and no order is needful upon the motion for alias citation or amendment of bond.

2. The single question involved in the appeal is whether the evidence establishes that the appellee corporation was "engaged principally in manufacturing" or other pursuit, required under the act (Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]) to be adjudged an involuntary bankrupt. The requirements for a corporation are that it be "engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits"; and the master's report rightly eliminates all of these from consideration, under the evidence, except the contention that the appellee's work was manufacturing. The proof is undisputed that the sole business of the appellee, from the time of its incorporation, was the construction, under contract, of piers and abutments, made of concrete, for railroad bridges, including the work of clearing the foundations, in some instances building cofferdams and driving piling for the work. In other words, it was of the class commonly known as "construction companies," and not within the usual definition of a manufacturer—namely, one "engaged in the manufacture for sale of articles of commerce." Columbia Iron Works v. National Lead Co., 62 C. C. A. 99, 127 Fed. 99, 102, 64 L. R. A. 645.

The contention that this work is manufacturing rests on the fact that the material of the structure is concrete, which is made by the appellee, upon the ground, as the work progresses, by the "assembling of sand, gravel, cement, and water." Machines are generally used for mixing this material, but it was sometimes "mixed by hand." The operation thus described is not manufacturing in the above-mentioned sense of that term; nor distinguishable, for the present inquiry, from other building operations. Without straining the term thus selected by the Congress in the careful enumeration of corporate pursuits made amenable to bankruptcy adjudication, it is not applicable to the appellee's work; and we are of the opinion that no construction is authorized which would so extend the import of the provision. If well-recognized business of the class carried on by the appellee is not to be excluded from the act, the correction is not for the courts to make by

way of strained interpretation. The recent opinion of the Circuit Court of Appeals of the Fourth Circuit, in Butt v. C. F. MacNichol Const. Co., 140 Fed. 840, 72 C. C. A. 252, is both in point and accords with the foregoing view. No other citations in the briefs call for reference or discussion.

The order of the District Court is affirmed.

CRILLY v. GALLICE et al.

(Circuit Court of Appeals, Third Circuit. December 3, 1906.)

No. 14.

1. EVIDENCE—PAROL EVIDENCE—EFFECT OF CONTEMPORANEOUS AGREEMENT.
   A contract created by the indorsement and delivery of a negotiable promissory note is a contract in writing, and is not open to contradiction or susceptible of annulment by a separate contemporaneous agreement, although also in writing, unless at least the terms of the latter plainly disclose that the parties so intended.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2030–2047.]

2. BILLS AND NOTES—COMPROMISE AND SETTLEMENT—CONSTRUCTION OF AGREEMENT—LIABILITY OF INDORSER OF SETTLEMENT NOTES.
   A conditional agreement for the compromise and settlement of an indebtedness, in pursuance of which the debtor contemporaneously delivered to the creditor notes indorsed by a third person, who was also a party to the agreement, and which provided for the execution of a release in full on the payment of the notes at maturity, but that on default in such payment the whole debt should at once become due and payable, less any payments made pursuant to the agreement and any collections made on the notes, cannot be construed to discharge the indorser from liability in case of such default by the maker, which would render the contract of indorsement wholly nugatory.
   Gray, Circuit Judge, dissenting.

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

For opinion below, see 143 Fed. 178.

John G. Johnson, for plaintiff in error.

James M. Beck, for defendants in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. An action was brought by Gallice & Co. against Francis J. Crilly upon seven overdue promissory notes, made by Du Vivier & Co. to the order of said Crilly, and by him indorsed to the order of said Gallice & Co. The defense was, that, by virtue of a certain written agreement, the failure of the makers to pay the notes had discharged the indorser. The agreement referred to related to these notes, and bore the same date. It was made by Du Vivier & Co., of the first part, Gallice & Co., of the second part, and Francis J. Crilly, of the third part; and, being in writing, it is to be taken and considered in connection with the indorsements. The two are to be construed together. Davis v. Brown, 94 U. S. 427, 24 L. Ed. 204. But the contract created by the indorsement and delivery of a negotiable note, even between

the immediate parties to it, is itself a complete and perfect contract. It is a contract in writing, and is not open to contradiction, or susceptible of annulment, by a separate cotemporaneous agreement, though likewise in writing, unless, at least, the terms of the latter plainly disclose that the parties so intended. Martin v. Cole, 104 U. S. 37, 26 L. Ed. 647.

The agreement set up in this case recited that Du Vivier & Co. were indebted to Gallice & Co. in the sum of $471,926, and that, at the request of Crilly, Gallice & Co. had agreed to compromise said indebtedness for the sum of $75,000, provided such sum should be paid in the manner thereinafter specified. Accordingly, Du Vivier & Co. paid to Gallice & Co. $2,500 in cash, and delivered to them 29 promissory notes, each for $2,500, to the order of Francis J. Crilly, "and by him indorsed to the parties of the second part," Gallice & Co.; and the contention is that, although the makers failed to pay these notes at maturity, and, indeed, because of such failure, Crilly, as indorser, was wholly relieved from liability. The final clause of the separate agreement, which is the one directly relied upon to support this contention, is as follows:

"(4) The parties of the second part hereby agree, upon the due payment by the parties of the first and third parts of all of the said notes and their due performance of the covenants and agreements herein contained, to make, execute, and deliver to the parties of the first part a general release of the said indebtedness of four hundred and seventy-one thousand nine hundred and twenty-six dollars ($471,926); but in case of default in the payment of any of the said notes, the whole of the said debt, with interest, less any payments made in pursuance of this agreement and any collections by legal proceedings or otherwise made upon any of the said notes, shall become due and payable forthwith."

We think that the construction given to this clause by the court below is the natural and only reasonable one. Gallice & Co., the indorsees, simply agreed that upon, and only upon, due payment of all the notes, the original indebtedness of Du Vivier & Co. would be released; but not a word was said to justify the inference that, upon the happening of the event which ordinarily would render an indorsement operative, these particular indorsements were to become wholly nugatory. It is true that "default in the payment of any of the said notes" did occur, and "the whole of said debt, with interest, less any payments," etc., did "become due and payable forthwith"; but as the contracts of indorsement were not abrogated, we concur in the opinion of the learned judge of the Circuit Court, that "under the terms of the agreement the nonpayment of the said notes of Du Vivier & Co. at the time of their maturity did not release the defendant from his liability as indorser."

The judgment is affirmed.

GRAY, Circuit Judge, dissents.

COASTWISE TRANSP. CO. v. BALTIMORE STEAM PACKET CO.

(Circuit Court of Appeals, Fourth Circuit. November 8, 1906.)

No. 649.

ADMIRALTY—REVIEW ON APPEAL—FINDING OF FACT.

A finding of fact by a court of admiralty on the conflicting testimony of witnesses examined in open court will not be reversed on appeal unless clearly erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Admiralty, § 770.]

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

For opinion below, see 139 Fed. 777.

Edward E. Blodgett (Floyd Hughes, on brief), for appellant.

Robert M. Hughes, for appellee.

Before GOFF and PRITCHARD, Circuit Judges.

PER CURIAM. The appellant's schooner, Henry W. Cramp, and the appellee's steamer, Georgia, were in collision on the morning of January 31, 1904, in the vicinity of Old Point Wharf. At the time of the collision the Cramp was at anchor, while the Georgia was on her way to Norfolk. The steamer was considerably injured by the collision, and this is a libel in personam against the owner of the Cramp to recover damages. The court below found that at the time of the collision there was a fog in that vicinity, that the Cramp was not ringing a fog bell, and that the navigation of the Georgia was free from fault. A decree in consonance with such finding was entered, and from it this appeal is prosecuted.

As to the condition of the weather at the time of the collision, there is a conflict in the testimony, and practically the only question at issue that the court below had to determine was whether or not fog signals should have been given by the Cramp. It is admitted that the Cramp did not sound any such signals. All of the libelant's witnesses were examined in open court, as was also the master of the respondent. The rule is well established, and no authorities are necessary to support it, that under such circumstances an appellate court will hesitate long before reversing a decree based on questions of fact so found. The opinion of the court, which has our approval, is found in (D. C.) 139 Fed. 777.

There is no error in the decree complained of, and the same is affirmed.

BROWN et al. v. LANYON et al.

(Circuit Court of Appeals, Eighth Circuit. November 9, 1906.)

No. 2,352.

PATENTS—INFRINGEMENT—ACTION AT LAW TO RECOVER PROFITS.

An action at law cannot be maintained for the sole purpose of recovering the profits which an infringer of a patent has made.

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

Douglas Dyrenforth and C. E. Cory, for plaintiffs in error.

C. E. Benton, for defendants in error.

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

ADAMS, Circuit Judge. This was an action at law to recover profits alleged to have been made by defendants in infringing letters patent of the United States, No. 471,264, for new and useful improvements in ore roasting furnaces belonging to complainants. We are relieved at the outset from a consideration of some minor questions by the frank admission of plaintiffs' counsel found in his brief that:

"The plaintiffs cannot prove any lost sales, or any established license fee, or any other form of direct damage. * * * If it be the law that plaintiffs have no right of recovery of defendants' profits, or of damages measured by defendants' profits, then the plaintiffs have no right of recovery in the present action, and the action of the lower court dismissing the petition is correct."

We are, accordingly, brought directly to the only question in the case, whether an action at law can be maintained for the sole purpose of recovering the profits which an infringer of a patent has made.

Under the early patent acts approved April 10, 1790 (1 Stat. 109, c. 7), February 21, 1793 (1 Stat. 318, c. 11), and April 17, 1800 (2 Stat. 37, c. 25) an action at law for damages was the only remedy provided by statute for the violation of the exclusive rights of a patentee. By the act of February 15, 1819 (3 Stat. 481, c. 19), a remedy in equity was first given a statutory warrant. It was there enacted that circuit courts should have original cognizance as well in equity as at law of all controversies arising under the patent laws. The only reference to the powers conferred upon the court sitting in equity was in the following language:

"Upon any bill in equity filed by any party aggrieved in any such cases," the Circuit Court "shall have authority to grant injunctions according to the course and principles of courts of equity to prevent the violation of the rights of any author or inventor secured to them by any laws of the United States, on such terms and conditions as the said courts may deem fit and reasonable."

By the act of July 4, 1836 (5 Stat. 117, c. 357), the remedies both at law and in equity were continued substantially as before and so remained until the passage of the consolidated patent act of July 8, 1870 (16 Stat. 198, c. 230). By the provisions of section 59 of that act, now section 4919 of the Revised Statutes [U. S. Comp. St. 1901, p. 3394], the damages recoverable in an action at law for the infringement of

a patent remained practically as before, namely, actual damages sustained as found by the verdict of the jury, with power in the court to increase the same not exceeding three times the amount of the verdict, according to the circumstances of the case; but by section 55 of the act, now section 4921 of the Revised Statutes [U. S. Comp. St. 1901, p. 3395], a change was made in the statutory provisions conferring jurisdiction upon the court in equity. Whereas by the acts of 1819 and 1836 general equitable jurisdiction in the language last quoted was conferred upon the courts, by the act of 1870 that jurisdiction was enlarged or particularly specified as follows:

The Circuit Courts "shall have power, upon bill in equity filed by any party aggrieved, to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction, and the court shall have the same powers to increase the same in its discretion that are given by this act to increase the damages found by verdicts in actions upon the case."

In this act is found for the first time a reference to profits made by an infringer as an element of recovery, and that reference appears in the section conferring jurisdiction in equity, and does not appear in the section providing for recovery of damages in actions at law. Prior to the act of 1870, and afterwards, the Supreme Court of the United States had occasion to consider the subject of damages recoverable by a patentee for infringement of his patent, and also to consider under what circumstances and to what extent profits made by an infringer could be recovered, either at law or in equity, under the general jurisdiction conferred by the acts passed prior to 1870. Some of the cases are referred to by counsel for complainants as authority for their contention in this case. They are Seymour v. McCormick, 16 How. 480, 14 L. Ed. 1024; Suffolk Mfg. Co. v. Hayden, 70 U. S. 315, 18 L. Ed. 76; Mowry v. Whitney, 81 U. S. 620, 20 L. Ed. 860; Philp v. Nock, 84 U. S. 460, 21 L. Ed. 679; Packet Co. v. Sickles, 86 U. S. 611, 22 L. Ed. 203; Burdell v. Denig, 92 U. S. 716, 23 L. Ed. 764.

These cases relate to actions accrued before the act of 1870 went into effect, and expressions are found in them apparently recognizing that profits made by an infringer are elements of damage recoverable in actions at law; but it is very generally recognized in them, as stated in the Burdell Case, that:

"Profits are not the primary or true criterion of damages for infringement in an action at law. That rule applies eminently and mainly to cases in equity, and is based upon the idea that the infringer shall be converted into a trustee, as to those profits, for the owner of the patent which he infringes—a principle which it is very difficult to apply in a trial before a jury, but quite appropriate on a reference to a master, who can examine defendant's books and papers, and examine him on oath, as well as all his clerks and employés. On the other hand, we have repeatedly held that sales of licenses of machines, or of a royalty established, constitute the primary and true criterion of damages in the action at law."

The act of 1870, which first dealt with the subject of profits as such, doubtless meant something. Congress saw fit to change the law from a conference of general jurisdiction in equity in patent cases, to be exercised conformably to ancient usages and practice, to a conference of jurisdiction to be exercised sub modo and with a special reference to "profits" embodied in a particular provision for ascertaining and awarding them "under its direction" and "upon a decree being rendered in any such case for an infringement." What did this change in the law mean? We cannot construe it otherwise than as a legislative declaration that, whatever may have been the rule before, or whatever doubt or uncertainties may have existed on the subject, profits made by an infringer should in the future be accounted for by him in equity as a fund held in trust for the use of the owner of the patent.

We are not, however, called upon for any original consideration of that question. It has, in our opinion, been authoritatively and conclusively answered by the Supreme Court. In the equity case of Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664, Mr. Justice Gray, speaking for the court, after referring generally to patent legislation and the foregoing cases, observes as follows:

"The principal question of law now presented is as to the general rule that should govern the amount to be recovered. * * * In an action at law for the infringement of a patent, the plaintiff can recover a verdict for only the actual damages which he has sustained; and the amount of such royalties or license fees as he has been accustomed to receive from third persons for the use of the invention, with interest thereon from the time when they should have been paid by the defendants, is generally, though not always, taken as the measure of his damages. * * * But, upon a bill in equity by the owner against infringers of a patent, the plaintiff is entitled to recover the amount of gains and profits that the defendants have made by the use of his invention. * * * The reasons that have led to the adoption of this rule are that it comes nearer than any other to doing complete justice between the parties; that in equity the profits made by the infringer of a patent belong to the patentee, and not to the infringer. * * * The rule in equity of requiring an infringer to account for the gains and profits which he has made from the use of a patented invention, instead of limiting the recovery to the amount of royalties paid to the patentee by third persons, has been constantly upheld under the provisions of the patent act of 1870, embodied in the Revised Statutes, which, besides re-enacting the grant of general equity jurisdiction in patent cases, further enacts that, upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction, * * * and thus expressly affirms the defendant's liability to account for profits," etc.

In the case of Coupe v. Royer, 155 U. S. 565, 15 Sup. Ct. 199, 39 L. Ed. 263, which was an action at law to recover damages for infringement of letters patent, the trial court instructed the jury on the measure of damages as follows:

"The course taken by the plaintiffs to show the amount of damages is a proper one. They undertake to show the advantage of this invention to any person using it, and the law deems it a fair inference that, whatever value has been received by the defendants through the use of this invention, so much has been taken from the plaintiffs, and they are entitled to have it restored to them."

There was a recovery of damages, and one of the errors assigned was that the instruction to the jury just quoted was erroneous. Mr. Justice Shiras, speaking for the court, says on this subject as follows:

"We cannot approve of this instruction, which we think overlooked the established law on the subject. The topic is one upon which there has been some confusion, and perhaps some variance, in the cases. But recent discussion has cleared the subject up, and the true rules have become well settled. There is a difference between the measure of recovery in equity and that applicable in an action at law. In equity, the complainant is entitled to recover such gains and profits as have been made by the infringer from the unlawful use of the invention, and, since the act of July 8, 1870, in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the defendant, the complainant is entitled to recover the damages he has sustained, in addition to the profits received. At law the plaintiff is entitled to recover, as damages, compensation for the pecuniary loss he has suffered from the infringement, without regard to the question whether the defendant has gained or lost by his unlawful acts; the measure of recovery in such cases being, not what the defendant has gained, but what plaintiff has lost. As the case in hand is one at law, it is not necessary to pursue the subject of the extent of the equitable remedy; but reference may be had to Tilghman v. Proctor, 125 U. S. 137, 8 Sup. Ct. 894, 31 L. Ed. 664, where the cases were elaborately considered and the rule above stated was declared to be established. * * * It is evident, therefore, that the learned judge applied the wrong standard in instructing the jury that they should find what the defendants might be shown to have gained from the use of the patented invention."

Learned counsel for plaintiff insist that neither Tilghman v. Proctor nor Coupe v. Royer concludes the question before us; that the announcements there made concerning the measure of recovery in actions at law were voluntary, and not necessary for the decision of the case. They say that the first is a case in equity, and contains an intimation that profits may be recovered either at law or in equity, and that no ruling was there required upon the question concerning the measure of damages in actions at law, and that the real question in the second case related to the sufficiency of the proof to establish the amount of profits. It is true the court in Coupe's Case, after announcing the rule that defendant's gains cannot enter into damages recoverable in an action at law, says:

"Nor, even if defendant's gains were the measure of their liability, did the evidence justify the instruction, because that evidence tended to show what Royer estimated that defendant's profits might have been, and not what they actually were."

The existence of this last-mentioned reason for condemning the instruction complained of does not render the first-mentioned reason irresponsive or unnecessary. The case had to be remanded for another trial, and it was the duty of the court to consider the error assigned on the instruction concerning the measure of damages, not only to respond to the assignment as made, but to properly instruct the court below for the next trial. The last reason given for condemning the instruction might more properly be said to be a voluntary statement than the first one. Whatever counsel or this court may think was decided in the Tilghman Case, or concerning its authority for the rule laid down in the Coupe Case, is quite immaterial. The Supreme Court, in the exercise of its undoubted right to construe its own decisions,

unanimously stated in the Coupe Case that the rule explicitly stated in that case "was declared to be established" in Tilghman v. Proctor.

We regard these two cases as direct and controlling authority on the question before us. They, and especially the Coupe Case, recognize that the subject of the measure of recovery in actions at law for infringement of patents had been one upon which "some confusion, and perhaps some variance," had appeared in former decisions, and the purpose, obviously, was to terminate that confusion and lay down an explicit rule for the future. The commendable research, zeal, and ingenuity of counsel for plaintiffs must, therefore, be first exercised upon the Supreme Court to induce it to change its view or to agree with him that we have misconceived its instruction before we can adopt his theory. After careful research we are unable to find any decision of the Supreme Court or of any of the United States Circuit Courts of Appeals, rendered since the decision of Coupe v. Royer, which give any support to complainants' contention. On the contrary, the measure of damages laid down in that case is recognized and approved in the following: Belknap v. Schild, 161 U. S. 10, 25, 16 Sup. Ct. 443, 40 L. Ed. 599; Houston, etc., Ry. Co. v. Stern, 20 C. C. A. 568, 74 Fed. 636, 639; City of Seattle v. McNamara, 26 C. C. A. 652, 81 Fed. 863; City of Boston v. Allen, 33 C. C. A. 485, 91 Fed. 248, 252.

There is no merit in the contention that the conformity act of 1872 (Act June 1, 1872, c. 255, § 5, 17 Stat. 197; section 914, Rev. St. [U. S. Comp. St. 1901, p. 684]) entitles plaintiffs to the remedies existing by the statutes of Kansas, and that, because they have abolished the distinction between legal and equitable remedies, we should also do so, and award the plaintiffs that recovery which the facts in any form of action would warrant. Boyle v. Zacharie, 6 Pet. 647, 8 L. Ed. 527; Scott v. Neely, 140 U. S. 106, 110, 11 Sup. Ct. 712, 35 L. Ed. 358.

The embarrassment in which plaintiffs find themselves is to be regretted. They, by reason of the fact that the infringement complained of had ceased before this suit was instituted, were unable to invoke equitable relief by injunction and secure an accounting of profits incident to the main relief sought, and by reason of the rule laid down in Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975, that equity affords no relief to secure an accounting for profits made, disconnected with some other head of equity jurisdiction, insist that unless this suit can be maintained they have a right without a remedy —a condition which is abhorrent and intolerable in the eye of the law. The fault is unfortunately theirs. They should have proceeded while the infringement was in progress, and secured their injunctive relief, and with it their desired accounting. Many a suitor has by laches or by the operation of statutes of limitation lost a remedy for the enforcement of his right. However that may be, the law of this case, in our opinion, is against the plaintiffs.

The judgment below dismissing their action was correct, and it is accordingly affirmed.

MILLOY ELECTRIC CO. et al. v. THOMPSON-HOUSTON ELECTRIC CO.

(Circuit Court of Appeals, Sixth Circuit. November 30, 1906.)

No. 1,547.

1. PATENTS—REISSUE—DELAY IN APPLICATION.

A patentee who is entitled to a reissue is required to exercise his right promptly upon the discovery of the error which renders such reissue necessary, and where he continues litigation for years in various courts on his original patent, after it has once been adjudged invalid, he will be deemed to have elected to stand upon such patent as the measure of his rights, and cannot thereafter obtain a valid reissue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 201–203.]

2. SAME—TRAVELING CONTACT FOR ELECTRIC RAILWAYS.

The Van Depoele reissue patent, No. 11,872 (original No. 495,443), for a traveling contact for electric railways, is void because of the delay in making application therefor, which was not until seven years after the issuance of the original, and more than three years after it had been declared invalid by a Circuit Court of Appeals, during which time the owner was prosecuting suits for infringement in other circuits.

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

E. L. Thurston and F. J. Wing, for appellants.

L. F. H. Betts and T. B. Kerr, for appellee.

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

SEVERENS, Circuit Judge. This is an appeal from an order granting a preliminary injunction in a suit brought by the appellee complaining of the infringement of reissued letters patent No. 11,872, granted to the appellee, as assignee of the administrators of Charles J. Van Depoele, November 13, 1900, upon an application filed September 28, 1900. The original patent was No. 495,443, granted April 11, 1893, to the appellee, as assignee of the administrators of Van Depoele, for an invention by him of a traveling contact for electric railways. The means devised by Van Depoele for the object intended consisted of an overhead conducting wire, suspended above and parallel with the track of the railway at an elevation above the top of the car; a trolley arm mounted upon the top of the car on a vertical pivot permitting the lateral swing of the arm and a horizontal pivot permitting it to swing vertically, and having at its free end a grooved wheel running underneath the overhead conducting wire and making contact therewith. A tension device was added to hold the wheel in contact with the wire.

The validity of the original patent was first assailed in a suit brought in the Circuit Court for the District of Connecticut by the Thompson-Houston Electric Company against the Winchester Avenue Railroad Company, a report of which is found in 71 Fed. 192. It was contended by the defendant, among other defenses, that the invention disclosed by the patent had already been patented to the same inventor by patent No. 424,695, issued in 1890, of which the other was a division. The objection was overruled, and the patent sustained. That decision was

rendered December 7, 1895. The Connecticut case was followed as a precedent by the Circuit Court for the Southern District of New York in May, 1896, in a suit by the appellee against the Union Railway Company, reported in 78 Fed. 363. But the validity of the patent was not then contested. These decisions were followed by the Circuit Court for the Northern District of Ohio in the case entitled Thompson-Houston Electric Co. v. Ohio Brass Co., 78 Fed. 139, on motion for a preliminary injunction. The case came to this court on appeal from an order granting it. We expressed a doubt concerning the validity of the patent, a doubt whether the invention had not been already patented, but chose to defer the decision of the question until final hearing, and affirmed the order. 80 Fed. 712. This question came before the Circuit Court of Appeals for the Second Circuit on an appeal from an order granting a preliminary injunction in Thompson-Houston Electric Co. v. Hoosick Ry. Co., 82 Fed. 461, 27 C. C. A. 419, and it was held that the claims of the patent there involved were void, because the invention had already been patented by No. 424,695. This decision was rendered July 21, 1897, and is reported in 82 Fed. 461. And in the case of the appellee against the Union Railway Company (86 Fed. 636) that court so held in respect to claims 2 and 4, which are the same as the two claims of the reissue, reversing the judgment in that case above mentioned. The question was again presented to this court on an appeal from a final decree dismissing the bill in a suit brought by the present appellee against the Jeffrey Manufacturing Company (101 Fed. 121, 41 C. C. A. 247), and the point in question, which we reserved in the case against the Ohio Brass Company, supra, was decided against the complainant, and the decree of the court below was affirmed. The date of that decision was March 15, 1900. On September 28, 1900, an application for a reissue of the patent was filed; the obvious purpose being to so shape the claims as to obviate the objection on which the Circuit Courts of Appeals for the Second Circuit and for this circuit had held the original patent invalid.

It is unnecessary for us now, in view of our proposed decision, to again institute a comparison of the original patent, No. 495,443, with the former patent, No. 424,695, which had been held to embody the same invention as that disclosed as the basis of the later patent, or to restate the grounds on which the decisions referred to were rested. These are stated in the reports above cited. Claims 2 and 4 of the original patent were two of those which had been held invalid by the Circuit Courts of Appeals for the Second and Sixth Circuits and were as follows:

"2. The combination of a car, an overhead conductor above the car, a contact device making underneath contact with the conductor, and an arm carried by the car and carrying the contact device, and pivoted so as to swing freely around a vertical axis.

"4. The combination of a car, an overhead conductor above the car, a contact device making underneath contact with the conductor, and an arm on the car movable on both a vertical and a transverse axis and carrying the contact device."

In the original patent of 1893 means were devised in the form of a spring and weight to hold the trolley wheel in contact with the wire,

and for causing the arm to assume a normally central position parallel with the longitudinal center of the car. But, as is seen, neither of these devises was included in the second or the fourth claim. In the application for reissue these means were disclaimed as follows:

"The combination with the contact-carrying arm of a weighted spring, or of a weight and spring, as the special means for holding the contact-arm pressed upward and of enabling the motorman to lower the contact wheel, are not claimed herein, because this special improvement has been already claimed in the patent No. 424,695, dated April 1, 1890, which was issued as a division of this application. Nor is there claimed herein the so arranging of a weight or spring (as by causing it to work through suitable grooves or rollers arranged in the car roof) as to tend to cause the arm to assume a normal central position, or one parallel with the longitudinal center of the car, as that has also been already claimed in said divisional patent, No. 424,695, being an arrangement which is of especial value only in connection with the switches to which said divisional patent more particularly relates. In the present application no special form or arrangement of tension device is essential to or a part of the invention claimed."

The original claims were omitted, and the two following substituted:

"1. In an electric railway, the combination of a car, and overhead conductor above the car, an upwardly-extending and laterally-swinging arm mounted on the roof of the car, and carrying a contact device at its free end and making underneath contact with the conductor, substantially as described.

"2. In an electric railway, the combination of a car, an electric overhead conductor above the car and parallel with the line of travel, an upwardly-extending trailing arm carrying a contact device at its free end, adapted to make underneath contact with the conductor, said arm being supported on the car on vertical and transverse axes, so as to permit said contact device to follow the position of the conductor, notwithstanding great variations of height and of lateral displacement thereof, substantially as described."

These claims seem indistinguishable from claims 2 and 4 of the original, and all that is accomplished in respect of these claims is the supposed effect upon the construction of them by the disclaimer of the devises for controlling the trolley arm. But as these claims were wholly independent of these devices, and might be used in connection with any suitable devices for accomplishing a like purpose, a question might arise how these claims of the reissue differ in legal effect from the claims referred to in the original patent. The Circuit Court of Appeals for the Second Circuit in Thompson-Houston Electric Co. v. Black River Traction Co., 135 Fed. 759, 68 C. C. A. 461, held that a change was effected in the meaning of the claims by the change in the specifications. The court noticed the delay in the application for reissue, but said that no question arising upon it was raised, and it was not considered. As we think the delay in applying for the reissue was too much prolonged to warrant its allowance, we do not pass upon any other question.

Section 4916 of the Revised Statutes [U. S. Comp. St. 1901, p. 3393] authorizes a reissue "whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident or mistake, and without any fraudulent or deceptive intention." But it has been held, on grounds of public policy, that this right must

be promptly exercised upon the discovery of the error. Miller v. Brass Co., 104 U. S. 350, 26 L. Ed. 783; Mahn v. Harwood, 112 U. S. 354, 6 Sup. Ct. 451, 28 L. Ed. 665; White v. Dunbar, 119 U. S. 47, 7 Sup. Ct. 72, 30 L. Ed. 303; Ives v. Sargent, 119 U. S. 652, 7 Sup. Ct. 436, 30 L. Ed. 544; Parker & Whipple Co. v. Yale Clock Co., 123 U. S. 87, 8 Sup. Ct. 38, 31 L. Ed. 100; Dobson v. Lees, 137 U. S. 258, 11 Sup. Ct. 71, 34 L. Ed. 652; Wollensak v. Sargent, 151 U. S. 221, 14 Sup. Ct. 291, 38 L. Ed. 137; Walker on Patents, § 227.

In Mahn v. Harwood, supra, it was declared that:

"By analogy to the rule as to the effect of public use before an application for a patent, a delay of more than two years would, in general, require special circumstances for its excuse."

And this general rule has been followed in later cases.

In this instance the original patent was granted April 11, 1893. The application for the reissue was filed September 28, 1900. In the meantime, as the record shows, various persons had been acting upon the supposed invalidity of the patent and upon the understanding that the patentee had correctly disclosed the invention he supposed he had made; and on July 22, 1897, the patent was declared invalid by the Circuit Court of Appeals for the Second Circuit, and no review of that decision was prosecuted. In the litigation which preceded that decision, commencing as early as 1895, the attention of the patentee was directly challenged to the specifications of the patent, and they were elaborately canvassed. If any error had been committed in the language employed or in claiming more than was new, it was as discoverable then as it ever became, unless, indeed, a patentee has the right to await the result which the courts may reach after prolonged litigation and examination of the subject. If he has such a right, notwithstanding he knows the grounds on which the error is predicated, it is pertinent to inquire how long and to what number of courts he can continue to submit the question for judicial determination. Here the patentee held its ground and insisted upon the patent as it stood. It carried its case to the highest court that it could without a certiorari to the Supreme Court, which it did not prosecute. This was more than three years before the application for reissue was filed. Instead of then applying for a reissue, it took its chances in another co-ordinate jurisdiction, and, failing there, resorted to the proceeding for reissuing the patent. The patent of 1890, No. 424,695, had been held valid in respect to the invention covered by claims 2 and 4 of the patent of 1893. But the appellee chose to take its chances of prolonging its monopoly by continuing its effort to establish the later patent, which the court had held to be invalid. We cannot think that a patentee may thus experiment with his patent. On the contrary, we think that, when the grounds are disclosed for thinking there may be an error or mistake, he is bound in duty to the public to correct it by obtaining a reissue or to adhere to his original patent; and, if he declines to correct it, he should be deemed to be standing upon it as the measure of his right. A different doctrine would go far to defeat the object of the rule which requires the patentee to define his invention with such distinctness that other inventors, and the public as well, may know its

scope and limitations. And it is not alone those persons who are shown to have taken action upon the faith that the patent defines the character of the invention who may raise the objection to a change in its claims which makes it cover other ground than that claimed before. The rule does not rest upon the ground of an estoppel in favor of particular persons. As was said by Mr. Justice Bradley in White v. Dunbar, 119 U. S. 47, 52, 7 Sup. Ct. 75, 30 L. Ed. 303:

"The circumstance that other improvements and inventions, made after the issue of a patent, are often sought to be suppressed or appropriated by an unauthorized reissue, has sometimes been referred to for the purpose of illustrating the evil consequences of granting such reissues; but it adds nothing to their illegality. That is deduced from general principles of law, as applied to the statutes authorizing reissues and affecting the rights of the government and the public."

Walker on Patents (4th Ed.) p. 210, § 226.

What we have here said is in deference to the opinion of the Circuit Court of Appeals for the Second Circuit that the claims of the reissue do not mean the same things as claims 2 and 4 in the patent of 1893, on account of the disclaimer in the application for reissue, and upon the assumption that the contention of counsel here in that regard is correct. If in fact the claims of the reissue are for the same things as the claims 2 and 4 of the original, the case falls directly under our decision in the Case of the Jeffery Mfg. Co., above mentioned. Besides, the reissue would unlawfully prolong the term of the original patent.

Without referring to other questions, we are of opinion that the order of the court below should be reversed, and the cause remanded. The appellant will recover costs in both counts.

VOIGTMANN et al. v. WEIS & RIDGE CORNICE CO. et al.

(Circuit Court of Appeals, Eighth Circuit. October 30, 1906.)

No. 2,235.

1. PATENTS—INVENTION.

It is not invention to merely extend the use of an old combination of elements, where no new result is produced and no new method of producing the old result.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 15, 41.]

2. SAME.

The utility, public acceptance, or magnitude of sales of a patented article can only be considered on the question of invention, when such question is otherwise doubtful.

3. SAME—FIREPROOF WINDOWS.

The Voightmann patent, No. 600,186, for an automatically closing fireproof window, covers a combination of old elements previously used, in some instances in the same combination, for analogous purposes, and is void for lack of patentable invention.

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

For opinion below, see 133 Fed. 298.

Albert H. Graves and Charles K. Offield (Charles C. Linthicum, on the brief), for appellants.

John G. Elliott, for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was a bill to enjoin the infringement of United States patent No. 600,186, granted complainant and appellant Voigtmann, March 8, 1898, for "a new and useful improvement in fireproof windows." The fifth, sixth, and seventh claims of the patent, alleged to have been infringed by defendants and appellees, are as follows:

"5. In a fireproof window, the herein described automatically closing sash, consisting of the combination of the fireproof casing, A, the fireproof sash, L, pivoted therein, the destructible retaining device, M, N, by which said sash is held open; all substantially as shown and described.

"6. In a fireproof window, the herein described automatically closing sash, consisting of the combination of the fireproof casing, A, the fireproof sash, L, pivoted therein, the retaining chain, M, having the fusible link, N, therein; all substantially as shown and described.

"7. In a fireproof window, the herein described automatically closing sash, consisting of the combination of the fireproof casing, A, the fireproof sash, L, pivoted therein at a pivot, P, above its middle, the retaining chain, M, having the fusible link, N, therein at a point opposite the opening; all substantially as shown and described."

The object of the invention involved in these claims, as described in the specification, is, generally speaking, to provide a fire proof window which would not be seriously injured by a fire and which would close automatically when struck by heat. The invention itself is described in the specification as follows:

"It consists, broadly, of a window having a sheet-metal casing with clenched joints at its corners and elsewhere, which require no solder, and a fireproof

glass set into the sash with metallic fastenings; one of the sash being hinged and held open by a retaining device which will be severed by the heat of a fire."

In describing the construction, principle, and use of the invention, and the best mode of applying the principle, the patentee says:

"The panes of glass are preferably of what is known as 'wire glass,' glass having a wire mesh running through it which makes it indestructible by ordinary fire; but other glass or different material may, of course, be used if capable of resisting heat. * * * The fusible link," in the language of the description, is "preferably made of two strips of metal soldered together by some fusible alloy, which melts on exposure to unusual heat and allows the parts to drop apart; but in place of this link any other destructible connection, which is inflammable or readily destroyed by heat or fire, may be used."

From the claims as elucidated by the description it is apparent that the invention of the patent was intended to broadly cover any fireproof window, made either of wire glass or any other indestructible material, in a metallic sash, with lugs adapted to turn down and secure the glass thereto, inclosed in a metallic case having its joints at the four corners clenched, preferably riveted together, with the sash pivoted to the casing above its middle, and held open by a chain attached to its upper edge, and made fast to a hook below; a fusible link or other easily destructible substance being inserted in the retaining chain, to the end that, when a fire occurs without or within a building, the destructible link will be quickly burned or disintegrated by the heat, the retaining chain lose its hold on the tilted window, and the part below the pivots, being heavier than the upper part, drop into a closed position by gravity, thereby preventing the spread of fire from without into the building, or from within to other buildings on the outside.

Wire glass, which the inventor preferably employed, was a well-known article of commerce, and had been used for purposes similar to that of the invention in suit. For that reason, doubtless, it is not specified as necessarily to be included as an element of either of the claims of the patent. This the experts for both sides concede. The metallic sash and casing, with lugs, and clutched or riveted joints, the pivoting of the sash into the casing above its center of gravity, the chain attached to the upper edge and fastened below with the intervening fusible or other combustible link, were all old and well recognized before the invention of the patent. They, in one form or another, had been the subjects of patent grants and had been employed in divers forms of mechanical constructions. Not to mention other patents, those to Frank Shuman, numbered 483,020, dated September 20, 1892, and to Edward Walsh, Jr., numbered 533,512, dated February 5, 1895, clearly show the process of manufacturing wire glass, and the proof abundantly shows its utility and actual use as a fire retardant some time before the invention of the patent in suit. The fusible link was also old in a variety of structures as a device for holding and releasing a cord or chain, permitting automatic closing of windows or other shutters. This is exemplified, among other patents not necessary to mention, in the Ashcroft patent, numbered 386,620, dated July 24, 1888, for "useful improvement in safety covers for elevator wells, hatchways, and other roof openings," and in the Moody patent, No.

563,394, dated July 7, 1896, "for new and useful improvement in fusible joints."

The clinching or riveting of the joints of the cases, instead of soldering, and the fastening of the glass into the sash with lugs turned down over it, were neither of them new. Both had been the subject of patents. Without mentioning others, in the Kern patent, No. 431,025, dated June 24, 1890, for certain "new and useful improvements in fireproof window casings and frames," the specification contains the following:

"The parts of the casing are united to each other in any suitable manner, preferably by folding and riveting, as it is desired to dispense with the use of screws and bolts and to avoid all soldering. * * * The glass is held in place by tabs or spurs, which are integral with the sash frame, and are formed by cutting the metal so that they may be bent to permit the glass to be put in place, and then bent to confine the glass against the ribs.

In the Rowland patent, No. 443,796, dated December 30, 1890, "for a new and useful improvement in sash lifters, closers, and locks," is shown the pivoting of a sash in the form substantially as done by the patentee in this case, so as to automatically close when released from a fixed position.

The foregoing patents disclose the use of the different elements of complainants' patent in different devices, but no one of them employed all. It is left to applied art to show the latter. The record discloses the daily and public use of a device in Milwaukee long antedating the application for the patent in this case, which, in our opinion, shows all the elements, or their mechanical equivalents, of the invention in question. It was a skylight over the stage in the Pabst Theater. The top of it was composed of two metallic sashes, incasing glass five-eighths of an inch in thickness, pivoted at their lower horizontal edges to the top of the well, inclining upwardly and obliquely on either side, one overlapping the other at the point of meeting, resulting in the general appearance of a common gable roof. Both sashes were weighted by rods projecting outwardly from their juncture with the upper edge of the well, forming counter-weights, so as to tilt the sashes open when not subject to an opposite force. These sashes were normally held together at the apex by a cord attached to the overlapping one extending down to the stage floor and there made fast. Somewhere in this cord and near to the sash was interposed a fusible link. The purpose of that device was two-fold—one to ventilate the theater, and the other to afford a means, in case of fire on the stage, of furnishing a draft up through the skylight, and thereby to avoid spreading of the fire into the auditorium. The operation of the device for ventilating purposes was to unfasten the cords below, when the counterweights extending over the side of the well at the top would tilt up and open the sashes, and in case of fire, when the heat became sufficient to melt the fusible metal of the link or otherwise to destroy the cord, the same effect would be produced. The counterweights would tilt open the sashes on their pivots and open up the skylight for the fire to escape without spreading.

The stables of the Union Club in Elizabeth, N. J., as early as 1870 showed the use of skylights held closed by a rope, inserted in which was a fusible link intended to melt in case of fire and by melting to au-

tomatically open the skylights and thus make an exit for smoke and flame, so that they would not permeate the stables and prevent the removal of horses.

The Haeussler Warehouse in St. Louis, in our opinion, disclosed in 1892 all the elements and combination of elements shown in the patent in suit. It had two turret skylights, one of which had 20 and the other 26 upright windows, with sash of sheet metal holding glass three-eighths of an inch thick pivoted above its center into frames of sheet metal, having their joints lapped and riveted together. Each window was held open by a small cord about 12 feet long, secured to the upper edge of each sash, and extending down to the upper floor of the warehouse, and there fastened to a rail. These cords each extended downwardly, so as to pass the opening of the window when in operation. This St. Louis structure responds accurately to claim 5 of the patent. It had its sash, casing, pivoting, and the destructible retaining device by which the sash is held open; and by treating the small cord as the mechanical equivalent of the fusible chain and link of the patent, the St. Louis structure also responds accurately to claims 6 and 7 of the patent. The patentee did not limit his invention to the use of the fusible link, but only made it the preferable construction, claiming in his specification any destructible connection which is inflammable or readily destroyed by heat. The St. Louis structure did not employ the wire glass, but instead thereof plate glass three-eighths of an inch in thickness.

So much for the patents and the physical devices showing the state of the art at the time of the invention of the patent. But the proof discloses more than this. There is satisfactory oral evidence of the use of sashes prior to the invention of the patent with joints made by folding the edges of the metal and lapping and riveting them together, and of the actual use in fireproof windows of wire glass as a fire retardant.

The foregoing phases of the art were certainly "known or used by others in this country," within the meaning of section 4886, Rev. St. [U. S. Comp. St. 1901, p. 3382], before Voigtmann's supposed invention or discovery, and, whatever the fact may be, he is chargeable with a knowledge of all pre-existing patents and devices. Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 493, 20 Sup. Ct. 708, 44 L. Ed. 856. If they, or any of them, constitute his invention or the mechanical equivalent of it, his patent is void for want of novelty. If the combination of elements disclosed in the claims had not been employed in the limited sphere of making and operating fireproof windows, claimed to be the special scope of the invention of the patent, they certainly had been employed in the same or closely allied art. They, or their mechanical equivalents, referred to and recognized in the description as such, were known and in actual use in the Pabst Theater, in the stables of the Union Club at Elizabeth, N. J., and in the Haeussler Warehouse at St. Louis. Other structures and some of the patents offered in evidence to illustrate the prior art, as well as the uncontradicted testimony of George Hayes, a widely known inventor and a man of extensive experience in the department of fireproof windows, likewise

disclose the use of the elements of the patent or their equivalents in some form or other and for some purpose or other; but the three structures already referred to afford evidence so satisfactory that we refrain from further comment upon other patents, structures, or uses to which, if necessary, reference might be made.

From a consideration of these structures it appears that the device of the patent had been known and used by others before Voigtmann entered the field of invention for at least two purposes: First, to automatically permit the escape of interior fires and prevent their spreading; and, second, to provide an automatic efficient method of ventilation. What more did the patentee in this case do? His counsel earnestly urge that he originally conceived and secured a patent, broadly speaking, for a new art—the automatically closing fireproof window art. Admitting that he employed old elements, they contend that he produced a transparent, in place of the old opaque iron, fireproof shutter. This particular virtue is claimed to reside, among other things, in the use of wire-enmeshed glass. But this, or its use as a fire retardant, we have already seen, did not originate with Voigtmann. Neither did Voigtmann make it a necessary element of any of his claims. Moreover, the other elements of his claims, or their combination with the wire glass or other mechanical equivalents to produce the window of the patent, were old and well understood in the manufacture of devices to accomplish other similar purposes. We cannot, therefore, treat the window of the patent as an independent art, or disassociate it with the prior art already disclosed. There is no new combination of old elements in it. It is at best an analogous use of old elements or their equivalents combined as before. The old mechanism formerly used to let out fire when originating within a building for the purpose of preventing its spreading was employed by Voigtmann either to confine it when originating within a building or to prevent it from gaining access into a building when originating without. His main purpose was to so control a conflagration as to prevent destruction to property. The former art, it may be conceded, had for its main purpose to so control the conflagration as to prevent loss of human or animal life. Both relate to controlling the ravages of a conflagration and belong to a subject which had been much exploited, both theoretically and practically, before Voigtmann entered the field. His patent, therefore, should be strictly construed and a clear demonstration made of the exercise of inventive genius. Potts v. Creager, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275. Mr. Justice Brown, delivering the opinion of the court in that case, says:

"As a result of the authorities upon this subject, it may be said that, if the new use be so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use."

Applying that test here, we cannot doubt that a skilled mechanic, with a full knowledge of the former art relating to the control of a fire originating within a building, including knowledge of the identical structure of the patent as disclosed in the Haeussler Warehouse, would readily perceive the advantage of applying the principles of that art

and structure to the control of a fire originating without a building. All he needed to discern was that the device found in the Pabst Theater, intended to hold the window normally closed, could be utilized to hold it normally open, or to discern that the elements and operation of the Haeussler device in St. Louis could be devoted to a new use. No patentable invention was involved in such discernment. It may readily be conceded that Voigtmann extended the use of an old combination of elements; but he produced no new result, or any improved method of producing the old result. He, at most, put an old and well-known combination of elements to a new use. "Carrying forward or more extended application of an original idea—a mere improvement in degree—is not invention." Smith v. Nichols, 21 Wall. 112, 22 L. Ed. 566; Burt v. Evory, 133 U. S. 349, 10 Sup. Ct. 394, 33 L. Ed. 647; Roberts v. Ryer, 91 U. S. 150, 23 L. Ed. 267. It is not invention to discover that the principle of an ice cream freezer can be employed to preserve fish. Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200. It is not invention to take a coffee mill and patent it as a mill for grinding spices. Potts v. Creager, supra. It is not invention to use the process of an ordinary winnowing mill to separate the silver skin from ground coffee. Baker v. Duncombe Mfg. Co. (recently decided by this court), 146 Fed. 744, and many cases there cited. It is not invention to adapt to an ordinary windmill the combination of an internal toothed spur wheel with an external toothed pinion, for the purpose of converting a revolving into a reciprocating motion. Mast, Foos & Co. v. Stover Mfg. Co. All that Martin, the patentee in that case did, in the language of the Supreme Court (177 U. S. 493, 20 Sup. Ct. 708, 44 L. Ed. 856) was "to apply it [the combination] to a new purpose in a machine where it had not before been used for that purpose." This, we think, well expresses the true meaning of Voigtmann's effort.

We have not overlooked the importance attached by plaintiffs' counsel to the location of the fusible link by Voigtmann "at a point opposite the opening" of the window. No one can doubt that its location at or near that point more quickly subjected it to the current of rising hot air than it would have been if it had been located further away from the opening, especially so if the fire came from outside the building; but such location of the fusible link, where it reasonably should be placed to insure the performance of its intended function, is so obviously proper as not to impress it with the inventive quality. Any one, arranging a device of the kind in question, at all familiar with the laws of physics, would instinctively place the link required to be speedily consumed where the fire would naturally reach it quickest.

The argument made by counsel for appellants in favor of patentability based on the utility, public acceptance, or magnitude of sales of the patented article is appropriate in cases of doubtful invention, and sometimes is sufficient to turn the scale; but as we are unable, in view of the prior art, to consider the question of invention doubtful, but, on the contrary, hold that the inventive faculty was not exercised by Voigtmann, the argument avails nothing to appellants. McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; Adams v. Bellaire Stamping Co., 141 U. S. 539, 12 Sup. Ct. 66, 35 L. Ed. 849;

Grant v. Walter, 148 U. S. 547, 13 Sup. Ct. 699, 37 L. Ed. 552; Duer v. Corbin Cabinet Lock Co., 149 U. S. 216, 13 Sup. Ct. 850, 37 L. Ed. 707; Union Biscuit Co. v. Peters, 125 Fed. 601, 60 C. C. A. 337; Mast, Foos & Co. v. Stover Mfg. Co., supra.

The question of patentable invention now under consideration has been heard and determined adversely to complainants by the Circuit Court of the Northern District of Illinois (133 Fed. 934), the Circuit Court of Appeals for the Seventh Circuit (Voigtmann v. Perkinson, 138 Fed. 56, 70 C. C. A. 482), and by the court below in this case (133 Fed. 298). These courts have differed somewhat in their reasons, but all have reached the same conclusion—that the patent is void for want of invention. Observing the principle announced in Mast, Foos & Co. v. Stover Mfg. Co., supra, we should at least give those prior adjudications, made upon substantially the same record as is now before us, the most serious consideration and persuasive force. This we have done; and having examined the question independently, and having reached a conclusion in harmony with them, we most justly feel the greater confidence in its correctness.

The decree of the Circuit Court, dismissing the bill, is affirmed.

FITZGERALD MEAT TREE CO. v. MORRIS et al.

(Circuit Court of Appeals, Seventh Circuit. October 24, 1906.)

No. 1,252.

PATENTS—INVENTION—MEAT TREE.

The Oehmen patent, No. 688,674, for a meat tree is void for lack of patentable invention, in view of the prior art and of prior devices used to display goods, practically the same in construction and mode of use.

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

For opinion below, see 142 Fed. 763.

The appeal is from a decree dismissing, for want of equity, appellant's bill to restrain the infringement of letters patent No. 688,674, issued to Peter Oehmen, December 10, 1901, for improvements in meat trees. No question is made that appellant's device is not a copy of the patented device. The claim in suit is this:

In a meat-tree, the combination of a suspendable tree body or bar, made of uniform size throughout its principal length, and provided at its upper end with means for detachably engaging a support, and a plurality of cross-trees or meat-supports mounted upon said tree-body, each comprising a cross-bar having sliding engagement with the tree-body, and provided at its opposite ends with supporting-bars arranged parallel with each other, a row or series of projections upon each supporting-bar, and means for securing said cross-trees in adjusted position upon the meat-tree body, substantially as described.

The patents cited on hearing are as follows:

No. 62,158, Feb. 19, 1867, W. M. & R. Savage.
No. 303,177, Aug. 5, 1884, W. H. Miller.
No. 331,758, Dec. 8, 1885, R. Barrett.
No. 336,123, Feb. 16, 1886, J. W. Leggitt.
No. 358,475, March 1, 1887, J. R. Palmenberg.
No. 361,245, April 12, 1887, F. A. Weber.

No. 405,257, June 18, 1889, C. R. Harris.
No. 436,382, Sept. 16, 1890, J. Schaub.
No. 485,975, Nov. 8, 1892, S. Newman.
No. 550,048, Nov. 19, 1895, W. L. Ketchum.
No. 554,717, Feb. 18, 1896, T. F. McGann.
No. 628,784, July 11, 1899, J. J. Fitzgerald.
No. 629,105, July 18, 1899, J. J. Fitzgerald.
Further facts are stated in the opinion.

Chas. C. Linthicum, for appellant.
A. H. Adams, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, delivered the opinion.

Prior to the patent in suit, the method of smoking meat, in packing houses, was to carry the cuts of meat to the smoke house in trucks, pass them in through a door where they were hung, one piece at a time, by means of a short stick or skewer passed through the loop of the string attached to the cut, the ends of the stick being laid on timbers supported by continuous ledges projecting from the side walls of the smoke house.

The Oehmen meat tree is a suitable tree body made of uniform diameter through its principal length, upon which are mounted a number of cross trees, each cross tree provided at its outer ends with suspension bars, arranged to extend parallel with each other, and preferably at right angles to the cross bar; the length of the cross bar being such that the parallel bars shall be far enough apart to insure that the cuts of meat shall hang out of contact with each other, but so close as to economize space. The cross trees are vertically adjusted by means of a hub arranged concentrically with the tree, and set by a set screw; and horizontally by means of rows of studs placed at intervals apart, throughout the length of the bar; the whole tree being mounted to a trolley rail by means of a hook or other support.

The advantages of this method over the old method are apparent. Under the new method, the trees are loaded before being run into the smoke house, and run out again before unloading; thus saving the repeated handling of the cuts—a sanitary improvement. In the same way time and labor is saved—a pecuniary improvement. Another advantage is that the capacity of the smoke house is increased through the adjustability, vertically, of the meat trees—the ledges in the old smoke house being stationary. Still another advantage: That under the new method, the smoking process is continuous, thus saving the time and expense of cooling off and refiring every time the meat is changed. Indeed, had Oehmen bridged, with his device, the whole of this improvement, and patented either the improved process or the mechanism that made the improved process practicable, the validity of his patent could not be easily questioned.

But the Oehmen patent does not bridge this improvement. It does not cover a process of any kind; nor did it give being to mechanism that for the first time transported meat to and fro upon meat trees. It did not, in any way, introduce the idea that distinguishes, as a unit, the new method from the old. Prior to the Oehmen patent, sausages

were carried into the smoking room in cages, and by means of trolleys. Prior to the Oehmen patent, Fitzgerald provided meat trees running on trolleys, differing only from the Oehmen meat tree in the arrangement of the hooks or cross bars on which the meat was hanged. Then, too, there were the McGann and Miller display trees, employing in substance, the parallel bars of the Oehmen tree, or radial bars almost technically their equivalent, vertically adjustable—display trees only, it is true, but containing all the mechanical arrangements that distinguish the Oehmen tree.

Here, then in the prior art are to be found the idea that differentiates the new method of smoking from the old, as well as the mechanical means through which the idea is made to work; so that Oehmen, at most, could have but a very narrow patent upon the specific construction described.

Even that we cannot allow him, for his construction differs from the display trees only in the adaptation of the parallel bars to hams and other cuts of meat—an adaptation that mechanical skill readily suggests.

But it is urged that though the Oehmen tree, employed as a display tree for the handling of articles of merchandise, would, in its specific construction be fully anticipated by the prior art, the fact that it was intended for the handling of hams in a smoke house, to be transported thereto and therefrom by means of a trolley, takes it out of the anticipation. We do not think so. Certainly it would not be taken out were it to be used for the handling of hams on exhibition in a meat shop; for the mere adaptation of the parallel bars to hams, instead of other articles of merchandise, does not evidence invention; and this is not affected by the fact that the tree is intended to be transported in and out of a smoke house; for transportation by trolley, in and out of meat houses, was already old in the art. Indeed the patent lays no claim to such conception as a thing new in the art.

The decree of the Circuit Court is affirmed.

WESTERN ELECTRIC CO. v. GALESBURG UNION TELEPHONE CO. et al.

(Circuit Court, N. D. Illinois, S. D. February 14, 1905.)

PATENTS—DOUBLE PATENTING—TELEPHONE SWITCHBOARDS.

The Scribner patent, No. 669,708, for apparatus for telephone switchboards, consisting essentially of a "visible test" system for indicating automatically whether a particular line is open or busy by means of electric lamps, discloses invention, although of narrow scope in view of the prior art, but is void for double patenting; patent No. 574,006, to the same patentee, applied for later, but granted prior to No. 669,708, although claimed to be for a "combination" of an audible and a visible test system of signals, disclosing the device of the later patent in its entirety, with neither elements nor functions modified or changed by the added feature for audible test. Also *held* not infringed, if conceded validity.

In Equity. On final hearing.

Affirmed on appeal, 144 Fed. 684.

This bill is for alleged infringement of letters patent No. 669,708, issued March 12, 1901 (on application filed February 28, 1895), to Charles E. Scribner, for "apparatus for telephone switchboards." The complainant is the owner of this patent, and manufactures and installs telephone switchboards, and has the invention in question embodied in several exchanges. The defendant Galesburg Union Telephone Company is a local exchange at Galesburg, Ill., and employs a form of signaling apparatus which is alleged to embody the patent invention. The specifications of the patent state that the "invention relates to the signaling and testing appliances of telephone switchboards," and then describes the invention in general terms as follows: "It comprises two cooperative features which concern, respectively, the transmission of signals from the substation of a telephone line to the telephone switchboard and the indication of the free or 'busy' condition of a line to an operator making connection with it. The objects of the first-mentioned feature are to effect the transmission of the signals for connection and disconnection at the telephone switchboard automatically in the use of the substation apparatus and to efface the call signal and substitute for this signaling instrument a different signaling device adapted to respond to the signal for disconnection. The object of the second feature is to indicate automatically to an operator establishing connection with a line at any section of the switchboard whether the line be free for use or not, in order that she may not interfere with a connection already existing."

The patent as issued contains seventeen claims, but infringement is predicated on four of these claims, the sixth, seventh, eighth, and eleventh, reading as follows:

"(6) The combination, with a telephone line, of a relay responding to currents in the line, a local circuit including a source of current, a resistance-coil, and a line-signal lamp, controlled by the relay, the line-signal being associated with a spring-jack of the line, a connecting-plug for use with the spring-jack, a clearing-out signal lamp associated with the connecting-plug, and switch-contacts adapted to close a shunt-circuit through the clearing-out signal lamp about the line-signal lamp and the contact-points of the relay when the plug is inserted into the spring-jack, substantially as described.

"(7) The combination with a telephone line, provided with a switch at the substation for closing the line-circuit while the telephone is in use, of a relay and a source of current in the line at the central station, a spring-jack connected with the line, a line-signal lamp associated with the spring-jack, a local circuit controlled by the relay including the line-signal lamp, a branch from one terminal of the signal-lamp to an insulated contact-piece in the spring-jack, a plug for making connection with the line, a conductor terminating in a contact piece in the plug adapted to register with the said insulated contact-piece in the spring-jack, forming the terminal of a conductor including a clearing-out signal lamp and connected with the remaining terminal of the signal-line lamp, substantially as described.

"(8) In combination, two telephone lines, each terminating in a spring-jack and each including a relay and a source of current adapted to respond to current in the line during the use of the substation instruments, a connecting-plug in each spring-jack, a device in each plug-circuit for permitting the transmission of telephonic current therein but preventing the passage of continuous current from one plug to the other, a line-signal associated with the spring-jack of each line, and a clearing-out signal associated with each connecting-plug, the line-signal of one line and the corresponding clearing-out signal being in parallel branches of a local circuit, the conductor including each line-signal being controlled by the corresponding line-relay, whereby clearing-out signals are substituted for the line signals and currents in the different lines are caused to give independent signals."

"(11) In a testing device for multiple switchboards, the combination with test-contacts in the different spring-jacks of a line, of a source of current permanently connected through a resistance-coil with the test-contacts, a connecting-plug, and a contact-piece therein adapted to register with said test-contacts and forming the terminal of a conductor connected with the free pole of said battery, another connecting-plug and a similar contact-piece therein, a signal-lamp in the conductor terminating in the said contact-piece, said lamp being adapted to be illuminated by the full current through the resistance-coil, whereby the presence of the existing connection is automatically indicated when the last-mentioned connecting-plug is inserted into the spring-jack."

Edward Rector, George P. Barton and De Witt C. Tanner, for appellant.

Charles A. Brown, for appellees.

SEAMAN, District Judge (after stating the facts). The great invention of the telephone was disclosed to the world within the past 30 years, but the devices for improvement in its use have so multiplied that thousands of patents have issued in this special art. For the development of usefulness in the present-day telephone exchange the value of the leading inventions in switchboards and signals cannot be overestimated, and the patents therefor may justly be entitled to liberal construction in so far as they pioneer the way for new and better uses in the new art. The improver, however, cannot be granted monopoly of well-known means and uses to bar others from the full benefit of pre-existing art. Hence the limitations which must be observed in the construction of patents, in so far as the means and uses are within the prior art. Each patent must rest on the character of the invention it discloses, in the light of the art—upon its merits alone—and for its interpretation the court can give no heed to suggestions which were made in this argument upon one and the other sides, either of many meritorious inventions by the patentee, or of the alleged monopolistic contract under which the complainant operates.

The patent in suit—No. 669,708, granted March 12, 1901—is one of a series of three patents granted to Scribner, on applications, respectively, in February and July, 1895, all relating to a signaling system for the telephone exchange. The first application resulted in patent No. 548,228, October 22, 1895, and is described in the brief for complainant as "the audible test system." The second, filed the same day as the first, is described as "the visible test system," but was not allowed until March 12, 1901, and is No. 669,708 in controversy. The third application, July 5, 1895 (as thus mentioned), "illustrated and described both systems, and claimed only the combination of the

two," and patent issued thereupon as No. 574,006, December 29, 1896. The other patents for signaling and exchange systems—No. 559,411, issued to Scribner and McBerty, May 5, 1896, on application of February 28, 1895, and No. 559,616, issued to Scribner May 5, 1896, on application filed January 8, 1895—are pertinent references in the briefs, the first mentioned being the patent in issue before Judge Hazel in the so-called "Rochester Case." The state of the art in signaling devices is disclosed in other patents in the record. Three defenses are urged: (1) Want of patentable novelty; (2) double patenting, on reference to No. 574,006; (3) noninfringement. The extended and interesting oral arguments and illustrations impressed me with the view that neither of these contentions on behalf of the defendant could be set aside as entirely without force, and that in any aspect of the evidence the scope of invention was narrowed so that infringement could not be found in the defendants' signaling means and system. Since the hearing I have not only read the elaborate printed arguments of counsel and much of the discussion by the experts, but have given particular re-examinations, as intervals of time have afforded opportunity, to the propositions and authorities discussed in both briefs on behalf of the complainant, and am sure that the various contentions have received consideration. My conclusions, however, will be stated without the extended discussion which an interesting case well presented would seem to justify, if time were available.

1. Upon the first defense of patentable novelty (apart from the question of double patenting), I am satisfied that sufficient invention appears to sustain the patent, though narrow in its scope. While it is true that Scribner and other inventors had theretofore furnished supervisory signals in the art which closely approached that of the patent in means and result, none at the date of the application were clear anticipations; and the simplicity of the signal-relay means and system disclosed by the patentee, as now viewed in the light of the earlier contributions, cannot serve to relegate this useful improvement to the bourn of "mere mechanical skill." Nor do I find the contention of inoperativeness tenable.

2. The second ground of defense is not free from difficulty in its solution under the authorities, but I am of opinion that the patent in suit cannot be upheld under the rule against double patenting, as exemplified in Miller v. Eagle Manuf. Co., 151 U. S. 186, 196, 14 Sup. Ct. 310, 38 L. Ed. 121, and cases there cited. As before mentioned, this singular condition arises out of the division of applications by the inventor and their allowance in reverse order by the Patent Office. One application was directed to the "audible test system," and another of like date to the "visible test system," while a third was filed four months later for a purported "combination of the two systems." The last-mentioned application for the so-called combinations, which described and covered fully the "visible test system" of the patent in suit, resulted in a patent (No. 574,006) which antedates some four years the "visible test" grant in patent No. 669,708. Can the later patent be upheld under such circumstances, when the specifications

and claims of the earlier patent are fairly analyzed? The rule against double patenting has long been recognized as inherent in the statutory authority for the grant, so that the invention disclosed by the applicant and embodied in the grant cannot be split up to thus obtain benefits therein beyond a single patent. Difficulty arises in the application of the doctrine, both through the divisional methods which have prevailed in the Patent Office and through the various definitions of the test of double patenting in the reported cases. I have examined the authorities cited in the reply brief of complainant upon this point, and the general line as well; and, while the question is interesting, review of their definitions and distinctions when applied to the unmistakable import of these patents is deemed unnecessary. As remarked in Miller v. Eagle Mfg. Co., 151 U. S. 201, 14 Sup. Ct. 316, 38 L. Ed. 121:

"It is not the result, effect, or purpose to be accomplished which constitutes invention, or entitles a party to a patent, but the mechanical means or instrumentalities by which the object sought is to be attained."

So the means and system embodied in the instant patent are identical with those shown and embodied in No. 574,006, aside from the additional circuit provided in the latter to make the "audible busy test" of the earlier patent. The fact that the specifications of No. 574,006 refer to the prior applications and state that the "present invention" has "effected a combination of these two test systems, making a composite test system which possesses special advantages," and that the patent is termed in the discussion a combination patent, is not determinative. Association of the alleged two test inventions in one is not per se another invention, and the name assumed for the system in the application cannot make it a true combination. The means and system of the patent in suit are plainly embodied as an entirety in No. 574,006, with neither elements nor functions modified or changed by the added feature for audible test; and I am constrained to the view that invention therein rests alone on the means for visible test. So considered, the invention disclosed is single, not separable, and none of the authorities referred to sanction a second grant of monopoly.

3. If, however, the foregoing view of the invalidity of the patent is erroneous, I am satisfied that the defense of noninfringement is well asserted, under the interpretation which must be given to the claims of the patent. The signaling and tests in the prior art had progressed to the extent of furnishing both audible and visible tests at the telephone exchange prior to the invention in controversy, and by means closely approaching it, plainly appears. The broad construction for the system of the patent which is claimed in support of the charge of infringement would bar means and uses which were clearly within the rights of the public when this inventor entered upon the improvement. Of course, the claims cannot be thus construed. As before stated the invention is of narrow scope, however beneficial for exchange operation, and must be limited accordingly so that the prior art remains free. The patent thus described the invention:

"My invention consists in arranging two such signals in parallel branches of a local circuit and in controlling the continuity of one of the branches by a

relay responding to currents in the telephone line. The signal in the branch controlled by the relay is designed to act as an individual signal and is permanently associated with a particular line. The other signal may be associated with one of the plug-circuits provided for uniting different telephone-lines, and the branch including it may be normally open, terminating in a contact-piece in the connecting-plug adapted to complete the branch while the plug is in use in a spring-jack."

The feature of the structure in which invention is found, in my understanding of it, is the introduction of the resistance coil, m, for its special function in the system—well known in the general art for like effect, but novel in this application for telephone signaling. As described in the brief for complainant it is "of such character as to limit the flow of current through the circuit, permitting a sufficient amount to flow to illuminate the lamp, but not sufficient to illuminate it if the flow of current be materially reduced." Thus signal lamps identical in kind—supervisory and line—are controlled and reciprocally control each other. When one lamp is alone connected in circuit the current will light it; but, when both are connected, in parallel both are extinguished, as the distributed current is then insufficient to light them—a resultant being the desirable so-called "visual busy test" of the patent. While the general shunting effect was old, the particular arrangement and shunting effect of one lamp on the other was novel. I am satisfied that this feature is absent from and foreign to the defendant's system and structure. While two resistance coils are used therein, they have a different function in the system; and the introduction of a resistance means by the patentee cannot exclude other uses of that well-known provision in the art. The supervisory lamp is not lighted by the opening of the line lamp circuit, and the lamps do not reciprocally control each other. The means set forth in the patent, which is the sole feature of novelty in the combination, is not thus used in the defendants' device for the control of the supervisory signal; nor does the defendants' structure furnish the "visual busy test" which is the distinguishing feature of the patent over the prior art. It was well demonstrated at the hearing, if not clear from the nature of the elements, that the supervisory lamp of the defendants' device was not adapted to be lighted by the full current through the resistance there provided, and was not so lighted. In other words, the particular function of the patentee's resistance coil is not performed by the resistance used by the defendants, and is not within the purview of its structure or system. The contention that the visual busy test was not only obtainable therein, but was in fact used in the operation of the defendants' exchange, is, in my opinion, not established by the testimony introduced to that end, and is inconsistent (for practical purposes) with the demonstrations and recognized principles of the structure.

Other and minor features of difference do not require mention, as the distinctions referred to are deemed sufficient. Analysis of the systems, respectively, is deemed unnecessary for this summary of views.

Decree will follow dismissing the bill for want of equity.

RUMFORD CHEMICAL WORKS v. HYGIENIC CHEMICAL CO.

(Circuit Court, D. New Jersey. December 7, 1906.)

1. JUDGMENT—PERSONS CONCLUDED—PRIVIES IN SUIT FOR INFRINGEMENT OF PATENT.

The rule that one not a party to a suit for the infringement of a patent may be bound as a privy by the judgment or decree therein applies only to cases where, by agreement, a joint defense is made or a principal defends his agent, or a licensor his licensee, or other like relation contractual or representative exists. One is not bound as a privy merely because he contributes to the defense, without having the right to control the proceedings or to appeal from the judgment or decree.

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

Operation and effect of decision in equitable suit for infringement of patent, see Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co., 68 C. C. A. 541.]

2. EVIDENCE—TESTIMONY OF DECEASED WITNESS—MODE OF PROOF.

The testimony of a deceased witness given in another case cannot be shown in a subsequent suit merely by producing a witness who testifies to the correctness of the printed transcript of such testimony as contained in the record in the prior suit, and then putting into the record such parts of such printed testimony as counsel may deem material or important to his case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2419–2422.]

3. PATENTS—CONTRIBUTORY INFRINGEMENT.

A defendant cannot be charged with contributory infringement of a patent for a baking powder merely because of the sale to an infringing manufacturer of an article which constitutes an element in the patented product, but which is also a common article of commerce, used for other purposes, without convincing proof that the article sold was used in the manufacture of the infringing product, and that defendant sold it knowing, or having reasonable cause to know, that it was to be so used.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 402.

Contributory infringement of patent, see Edison Electric Light Co. v. Peninsular Light, Power & Heat Co., 43 C. C. A. 485.]

In Equity. On final hearing.

C. A. L. Massie (Philip Mauro, of counsel), for complainant.

Whitridge, Butler & Rice (Willard Parker Butler and John French, of counsel), for defendant.

CROSS, District Judge. The bill of complaint seeks to hold the defendant liable for contributory infringement of letters patent No. 474,811, for a baking powder, dated May 17, 1892, issued to one Charles A. Catlin, and duly assigned to the complainant. The validity of the patent has been established by the Circuit Court of Appeals for the Second Circuit. Rumford Chemical Works v. New York Baking Powder Company et al., 134 Fed. 385, 67 C. C. A. 367. It appears in the case that there are two corporations bearing the name of Hygienic Chemical Company; that one is a New York corporation, and the other, the defendant, a corporation of this state; that the New Jersey corporation is a manufacturing corporation chiefly, and the New York corporation its selling agent, although it also sells the prod-

uct of other manufacturers. A suit was begun in the year 1904 in the Circuit Court of the United States for the Southern District of New York against both of said corporations and others, charging infringement of the above-mentioned patent, and a preliminary injunction was issued against all of the defendants, except the Hygienic Chemical Company of New Jersey, as to which defendant the bill was dismissed without prejudice, for the reason that no evidence of a sale of the infringing article made by that corporation within the Southern district of New York appeared in the case. In the case at bar the defendant has introduced no testimony, and claims that the evidence offered by the complainant is insufficient to support the material allegations of the bill.

The complainant insists, in the first place, that this defendant is bound by the decree entered in Rumford Chemical Works v. New York Baking Powder Company et al., supra, for the reason that the defendant herein contributed financially to, and otherwise aided in, the defense of that suit, and that consequently it was a privy thereto and is bound thereby. It is true that Mr. Heller, who is the president of and interested as a stockholder in both of the Hygienic Chemical Companies, gave testimony in that suit; but how, for what purpose, in what character, or under what circumstances does not appear. There is no evidence whatever that he sought to control, had the power to control, or did in any wise control that litigation. The mere fact that he was president of the Hygienic Chemical Company of New Jersey, and a witness in the suit, certainly shows no control over the suit, or any such interest as would make the corporation of which he was president a privy thereto. As to proof of any financial contribution by the defendant herein to the expenses of the New York litigation in which complainant's patent was sustained, I find none that is convincing. The weight of the testimony is that such contribution as was made was made, not by the defendant, but by the Hygienic Chemical Company of New York. Certainly the defendant herein cannot be concluded as a privy to that suit, without satisfactory evidence appears of such facts as the law deems necessary to establish privity. For the purpose obviously of showing that the contribution to the defense of the primary suit alleged to have been made by the New York corporation was to all intents and purposes made by the defendant herein, evidence was adduced intending to show that the defendant and the Hygienic Chemical Company of New York were one and the same corporation, and were practically controlled by the witness Heller, already referred to, and a Mr. Hirsh. It appears that these two men were largely instrumental in the organization of both corporations, and at that time controlled substantially all of the stock thereof, and this situation might have been presumed to continue, had not Heller, while under examination as a witness for the complainant, testified that it was not a fact that he and Hirsh at the time of the examination owned practically all of the stock of the two corporations. Later, in reply to a question asking what proportion of the capital shares of the Hygienic Chemical Company of New Jersey the witness and Mr. Hirsh owned, the witness replied that he could not answer without examination, whereupon complainant's counsel requested the information for a later session, and the

defendant's counsel expressed a willingness to produce the facts at a subsequent hearing. The matter, however, seems to have been dropped, as nothing further in that connection appears in the case. As already stated, the testimony shows that the New York corporation is the selling agent for the New Jersey corporation, but it also shows that the latter corporation does not own or control a single share of the stock of the former. The fact that the witness Heller is president of both corporations has already been adverted to. These are all the facts tending to show that the corporations are identical. At the time of their organization they seem to have been controlled by two men, but that situation was subsequently changed as appears from the testimony of Heller above given; but to what extent or when is not made clear, through the failure of the complainants to prosecute the examination of the witness to a definite result. I think the testimony insufficient to show the oneness of the two corporations. There is no evidence of any agreement between the defendant herein and the defendants in the New York litigation (which established complainant's patent) as to a joint defense of the suit; nor does it appear that this defendant, or, indeed, the New York corporation, had the right to control the proceedings, assume any active part therein, cross-examine the witnesses, or appeal from the judgment. I have found no case which goes to the length of saying that one who merely contributes to the defense of a suit is bound as a privy by the result thereof. Such a contribution might well be made from charitable or other good and sufficient reasons. The rule invoked is only applicable to cases where by agreement a joint defense is made or a principal defends his agent, or a licensor his licensee, or other like relations contractual or representative exist. As said by Hawley, J., in Theller v. Hershey (C. C.) 89 Fed. 575:

"The law is well settled that parties and privies include all who are directly interested in the subject-matter, and who had the right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment."

To the same effect is the case of Miller et al. v. Liggett & Myers Tobacco Company (C. C.) 7 Fed. 91. In Penfield v. C. & A. Potts & Co., 126 Fed. 475, 61 C. C. A. 371, it appears that earlier suits which were set up as a bar, had been defended by an agreement between the parties, to which they had contributed equally, under a stipulation that the same counsel should be employed in all the suits and a common agent appointed to assist the counsel, and that the evidence, so far as relevant, should be used in all the cases—manifestly a totally different situation from the one now presented. The case of David Bradley Manufacturing Company v. Eagle Manufacturing Company, 57 Fed. 980, 6 C. C. A. 661, was especially relied upon by counsel of complainant upon the argument, but the facts disclosed in that case are also totally unlike anything disclosed by the evidence in this case. The suit was brought for an infringement of a patent against a firm that was a branch of the company that manufactured the infringing devices, which manufacturing company conducted the defense to the suit and raised the question of the validity of the patent. It was held under those circumstances that the decree for the complainant, establishing the validity of the patent, bound the company conducting the defense. An

admission appears in the case substantially showing that the company held to be estopped by the decree therein employed counsel, took charge of, and conducted the defense in the name of the defendant, paid the expenses thereof, and that this was done by the company the same as it would have been done for any agent, branch house, or customer engaged in selling its manufactures. In the case of Morss v. Knapp et al. (C. C.) 37 Fed. 351, the defendants were held estopped by a prior decree because it appeared that they were the real defendants in the earlier suit, and that the nominal defendant was their agent. See, also, Australian Knitting Company v. Gormly (C. C.) 138 Fed. 92. I am compelled to conclude that the defendant herein was not a privy to the litigation in the Southern district of New York, and was consequently not concluded thereby.

Nor do I find any evidence of infringement of the complainant's patent by the defendant. The only evidence offered upon that point worthy of review was the introduction under objection of the evidence of a deceased witness, one Clotworthy, who was examined in Rumford Chemical Works v. New York Baking Powder Company, supra. Assuming that the issues in the two cases are substantially the same, although the record was not offered and there is no evidence that they are, still the evidence would only be admissible in a subsequent suit between the same parties or their privies—a situation which we have found does not exist—but, waiving that and assuming that my conclusion in that respect is unwarranted, the testimony was not admissible in the form in which it was offered. The witness produced to prove the testimony of the deceased witness did not attempt to give all of his testimony, or all of his testimony upon any given point. He testified that the printed record in the New York case which he had read or examined was a correct transcript of what the deceased witness testified to in his presence, whereupon counsel for the complainant, without offering the record, if, indeed, it were admissible, or having the witness testify to its contents at length, gave notice that he could print as a part of the complainant's record herein the deposition referred to, or at least so much thereof as related to the point at issue; and in the record herein two or three pages of the testimony of the deceased witness taken from the printed record appear. I think the introduction of the testimony into the record in this manner was improper; and, as objection was made thereto, it should be stricken out. The witness should himself have testified into the record what the deceased witness swore to, or the substance thereof, and it should not have been left to counsel to pick out and introduce such portions only as he might deem relevant or important to his case. It is for the court to say whether the testimony, or any part of it, was relevant. Counsel has evidently incorporated in this record, as appears by the numbered questions and cross-questions, only fragmentary and disjointed selections from the testimony of the deceased witness. Furthermore, if we consider the bill rendered for the alleged infringing article, which appears by the Clotworthy testimony to have been sold to his company, the receipt therefor, and the testimony of Heller pertinent thereto, it is not certainly shown whether the sale was made by the New York or the New Jersey corporation. A prima facie case has not been made.

Infringement must be proved, and cannot be based upon conjectural testimony.

The specific sale sought to be proven by the above testimony was of a barrel of acid phosphate, a constituent element in the manufacture of baking powder, and the claim is made that it was knowingly sold for the purpose of being used in the manufacture of baking powder, that it was designed and intended for that use solely, and that consequently the defendant by the sale became guilty of contributory infringement. Assuming that the article in question was sold by the defendant to Clotworthy or others, there is no evidence showing for what purpose it was sold or used, or that it was only useful when combined in the manner provided in the patent in suit. On the contrary, there is evidence that it was an article of commerce in general and common use for a number of specific purposes. It is true it could be combined and used as claimed in the patent, but it could likewise be used, and was sold and used for a variety of other purposes, and I find no evidence in the case to show that there was any agreement, knowledge, or understanding that any acid phosphate sold by the defendant was to be combined with other articles to infringe the complainant's patent. The complainant made Heller his own witness, and his testimony, corroborated by Wadman to some extent as to the variety of uses for which acid phosphate is manufactured, adapted, and sold, is uncontradicted. In order to establish contributory infringement, it should be convincingly shown that a granular acid phosphate manufactured by the defendant went into a baking powder, which infringed the patent in suit, and that the defendant manufactured and sold said phosphate knowing, or having reasonable cause to know, that it was to be used in an infringing baking powder. I find this doctrine supported by numerous cases. In Edison Electric Light Company et al. v. Peninsular Light, Power & Heat Co. et al. (C. C.) 95 Fed., at page 673, it is said:

"The doctrine of contributory infringement has never been applied to a case where the thing alleged to be contributed is one of general use, suitable to a great variety of other methods of use, and especially where there is no agreement or definite purpose that the thing sold shall be employed with other things so as to infringe a patent right. The cases which are cited (Thompson-Houston Electric Co. v. Kelsey Electric Ry. Specialty Co. [C. C.] 72 Fed. 1016; Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 25 C. C. A. 267, 77 Fed. 297, 35 L. R. A. 728), do not support the position taken; for in those cases not only was the thing furnished peculiarly adapted to the infringing use, but the court found as matter of fact that there was a wrongful purpose on the part of the contributing defendant that the article supplied should be so used. These are the characteristics of a case for making one liable as a contributory infringer."

In Bullock Electric & Mfg. Co. v. Westinghouse Electric & Mfg. Co., 129 Fed. 105, 111, 63 C. C. A. 607, the principle is laid down as follows:

"The intent and purpose that the element made and sold shall be used in a way that shall infringe the combination in which it is an element constitutes the necessary concert of action between him who furnished the single part and he who actually does the injury by the assembling and using of all the parts in such a way as to be an infringement"—citing cases.

See, also, Thompson-Houston Electric Company v. Ohio Brass Co., 80 Fed. 712, 721, 26 C. C. A. 107; Standard Computing Scale Company v. Computing Scale Co., 126 Fed. 639, 61 C. C. A. 541; Snyder et al. v. Bunnell et al. (C. C.) 29 Fed. 47.

Upon the evidence adduced it would be inequitable to hold the defendant guilty of contributory infringement. Taking into account all the competent evidence offered and giving to it full probative force and effect, it falls short of making a prima facie case against the defendant. I reach this decision with less hesitation, for the reason that, if the defendant were seriously encroaching upon the complainant's rights, it would seem reasonable to suppose that some evidence of the fact might have been produced other than that of an alleged sale made in 1901, supported only by incompetent or inconclusive proof.

The bill will be dismissed, with costs.

SCHNAUFFER v. ASTE.

(Circuit Court, S. D. New York. December 4, 1906.)

1. EQUITY—PLEADING—SETTING DOWN PLEA FOR ARGUMENT.
   By setting down a plea for argument, the complainant admits the facts pleaded therein.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 409; vol. 38, Patents, § 528.]

2. PATENTS—SUITS FOR INFRINGEMENT—PLEA.
   If a plea is to be allowed in a suit for infringement of a patent in any case, it should reduce the issue to a single point, so that, conceding the facts to be as settled by the bill and plea, a full and final determination may be had, and unless it does so, and fully meets the equities of the bill, it will be overruled.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 521, 523.]

In Equity. Argument on plea interposed by defendant to bill of complaint in a suit for infringement of a patent.

D. A. Usina and Arthur C. Fraser, for complainant.

Lindsay, Kalish & Palmer, for defendant.

RAY, District Judge. By setting down the plea for argument the complainant has admitted the facts pleaded therein. General Electric Company v. N. E. Electric Mfg. Co., 128 Fed. 738, 63 C. C. A. 448; Farley v. Kittson, 120 U. S. 303–314, 7 Sup. Ct. 534, 30 L. Ed. 684; Burrell v. Hackley (C. C.) 35 Fed. 833. If, however, the plea does not go to all the material allegations of the bill, and make a complete defense, and reduce the issue to a single point or question, the plea cannot be sustained. The plea in express terms refuses to confess or acknowledge the validity, or even the existence, of the letters patent alleged, or the assignment thereof. The bill of complaint alleges that defendant has made and sold, or caused to be made and sold, the infringing machine, and that defendant "is preparing yet more extensively to infringe said letters patent." The plea says:

"It never did manufacture any apparatus embodying the invention of the said patent. It is not threatening to and does not intend, now or at any time in the future, to manufacture, sell, or use any of the alleged infringing machines, and has finally and in good faith ceased to purchase, use, and sell the same, or any other embodiment of the Simis patent, and since May 21, 1906, has purchased machines which it has used and sold from the complainant."

This comes short of saying it has not caused any of such machines to be made, or of saying it is not preparing to cause them to be made. If a plea is to be allowed in a suit for the infringement of a patent in any case—and such practice is of doubtful propriety (Korn v. Wiebusch [C. C.] 33 Fed. 51; Hubbell v. De Land [C. C.] 14 Fed. 471–474; Thresher v. General Electric Co. [C. C.] 143 Fed. 337, 340–341, and cases there cited)—it should reduce the issue to a single point, so that, conceding the facts to be as settled by the bill of complaint and plea, a full and final determination may be had. Here defendant says, in substance:

"I do not admit you have any patent; nor, if you have, do I admit its validity. I do not deny that I have caused machines complained of as infringements to be made, or that I have made extensive preparations to infringe, if your letters patent are valid. I do not deny I am prepared to infringe in the future."

Defendant does say, however:

"Having no knowledge of the alleged patent, I did purchase and sell some of the alleged infringing machines. On receiving notice of the patent I returned the two remaining unsold. I have never made any. I am not threatening to and do not intend, now or in the future, to make, sell, or use any of them. I have in good faith ceased to use, purchase and sell."

Thereupon he says complainant is not entitled to further prosecute the suit for infringement or to a decree for an accounting or for an injunction. I do not see that the equities of the bill are fully met and answered by the plea. Facts are alleged in the bill and not met by the plea which, if proved, will entitle the complainant to an injunction and an accounting as an incident thereto. It seems plain the bill should be retained and a hearing had on full proofs, when the court can make such a decree as the proofs demand. See General Electric Co. v. New England Electric Mfg. Co. et al., 128 Fed. 738, 63 C. C. A. 448.

Defendant may have 30 days from entry of order herein in which to file answer to the bill.

STEINER v. SCHWARZ.

(Circuit Court, S. D. New York. November 30, 1906.)

1. PATENTS—VALIDITY AND INFRINGEMENT—DOLL.

The Steiner patent, No. 695,121, for a doll in which there is a combination of a walking mechanism and a sitting mechanism, with an apparatus making the legs rigidly perpendicular when walking and rigidly fixed at right angles to the body when sitting, was not anticipated, and discloses patentable invention; also *held* infringed.

2. SAME—ANTICIPATION—FOREIGN PATENT.

The instrument known under the German law as a "Gebrauchsmuster" is not one the filing of which charges any one with notice of its contents

or which has the effect of a foreign patent as an anticipation of a subsequent United States patent.

In Equity. On final hearing.

Charles Schloemann (George L. Wheelock, of counsel), for complainant.

Frank v. Briesen, for defendant.

HOLT, District Judge. This action is brought for the alleged infringement of letters patent 695,121, issued to the plaintiff, Steiner, on March 11, 1902. The patent relates to a doll constructed so that it can walk when led forward gently by the arms, and can also sit. It contains three claims, only one of which, claim 2, is relied on in this case. This claim is as follows:

"In a doll of the class described the combination of a frame mounted in the body, and having shanks pivotally connected therewith, plates mounted in the limbs of the figure and pivotally connected to the shanks, a spring-pressed detent carried by the plates and adapted to be engaged and disengaged from the shanks when it is desired to have the figure assume an upright or sitting position."

Walking dolls are old, and the walking mechanism used in this doll is old. Sitting dolls are old; the means of sitting being simply a joint at the hip. It is claimed that this patent is nothing but an aggregation of two old mechanisms, a walking mechanism and a sitting mechanism. But it is obvious that the mere aggregation of a walking mechanism and a sitting mechanism would not be sufficient to enable the doll both to walk and to sit, unless there was some additional mechanism making the legs of the doll perpendicular and rigid when walking, and bent when sitting. The only claim of novelty in this patent consists in the combination of the walking mechanism and the sitting mechanism, with an apparatus making the legs rigidly perpendicular when walking, and rigidly fixed at right angles to the body when sitting. This apparatus is described in the claim as a "spring-pressed detent carried by the plates, and adapted to be engaged and disengaged from the shanks when it is desired to have the figure assume an upright or sitting position." It consists in having two plates in each leg, pivotally connected, with a little opening in one and a little projection in the other, and a spring pressing them together, so that, when these plates are turned upon a pivot until the leg of the doll is vertical, the projection slips into the opening, constituting what is called in the claim a "spring-pressed detent." This arrangement holds the leg of the doll rigidly upright when walking. A gentle pressure, however, removes this detent from the opening, and enables the leg to be moved up at right angles with the body, so as to permit the doll to sit, and, when the leg is at right angles, it becomes locked in that position by the same spring, holding it securely, until by gentle pressure the leg is moved again. The use of such a detent in other implements, such as carpenters' rules, trunk attachments, pocketknives, and others, is familiar; and it is claimed, therefore, that the entire combination claimed has no novelty. But, although the invention is a narrow one, and should be strictly confined to exactly what is described in the claim,

I think that a doll constructed in the manner described in the second claim is a substantial improvement over any doll previously constructed which was arranged to walk and to sit at the wish of the child playing with it. The same result was substantially attained by the Simonot patent; but the rigidity of the leg when walking was accomplished by a rather elaborate system of rubber bands, which obviously would easily get out of order or break. I think that the method of constructing the doll described in the complainant's patent showed a substantial improvement in the simplicity and durability of the structure.

In my opinion, also, none of the prior patents cited shows the same combination, and there was nothing in the prior art to invalidate the patent. The Kaemmer & Reinhardt Gebrauchsmuster is strongly relied on as an anticipation. In the first place, on the evidence, I do not think that it was an anticipation in fact. The plaintiff's evidence satisfies me that he made his invention several years before he took out his patent in this country, and that Kaemmer & Reinhardt at first paid him a royalty upon his invention. I think, also, that the evidence shows that the instrument known under the German law as a "Gebrauchsmuster" is not one the filing of which charges any one with notice of its contents. All that is published is the title. Upon the evidence a "Gebrauchsmuster" is somewhat similar to a United States design patent, but it is not a patent. It protects a new construction, without relation to its technical effect. In distinction from a United States design patent, a German Gebrauchsmuster protects not only the outer appearance or shape or artistic design of the model, but also the construction of the inner parts thereof. In examining a Gebrauchsmuster in the German Patent Office, as to whether the same is to be registered or not, the title of the Gebrauchsmuster only is considered, since the latter only is made officially public by printing it in the proper German publication. I do not think, therefore, that the Kaemmer & Reinhardt Gebrauchsmuster has the effect of a foreign patent, or that it constitutes any defense in this action. The evidence is clear that the defendant sold dolls covered by the complainant's patent, and has infringed, if the complainant's patent is valid.

My conclusion is that there should be a decree for the complainant, with costs, and the usual reference to report upon the loss of profits and damage. The order should be settled on notice.

MOYER v. PEABODY et al.

(Circuit Court, D. Colorado. November 19, 1906.)

No. 4,707.

1. COURTS—JURISDICTION OF UNITED STATES COURTS—ACTIONS AGAINST STATE OFFICERS—USE OF MILITIA.

   Article 4, § 5, of the Constitution of Colorado, which makes the Governor the commander in chief of the militia of the state, and authorizes him to call out the militia to execute the laws, suppress insurrection and repel invasion, and Colo. Sess. Laws 1897, p. 204, c. 63, which provides more in detail for the exercise of such power, are not in conflict with the fourteenth amendment to the federal Constitution, as authorizing

any action in violation of personal rights, but are clearly within the powers of the state, and to give a federal court jurisdiction of an action against officers of the state to recover damages for acts done as claimed under authority of such provisions as in violation of constitutional rights defendants must be alleged to have been guilty of a wanton abuse of the power thereby conferred.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 13, Courts, §§ 820, 823.]

2. MILITIA—AUTHORITY TO USE—EXERCISE OF EXECUTIVE POWER—REVIEW BY THE COURTS.

Whether or not a state of insurrection exists in a locality requiring the use of the military of the state is a question to be determined by the executive department of the state, and when so determined its decision cannot be inquired into or reviewed by the courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Militia, § 6; vol. 10, Cent. Dig. Constitutional Law, § 133.]

3. SAME—LIABILITY OF MILITARY OFFICERS—DISCRETIONARY POWER IN CASE OF INSURRECTION.

Where a state of insurrection has been declared in a locality by the Governor of a state and the military authority is being used to restore and maintain order, officers engaged in the military service may lawfully arrest and detain any one who, from the information before them, they have reasonable ground to believe is engaged in such insurrection, and they cannot be made liable civilly for an unintentional error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Militia, § 44.]

At Law. On demurrer to complaint.

The plaintiff alleges in the declaration that he is a citizen of the United States, and a citizen and resident of the state of Colorado; that the defendants also are citizens of the United States, and citizens and residents of the state of Colorado; that he "brings this action in this court against said defendants under the Constitution of the United States, and under section 1979 of the Revised Statutes of the United States by reason of the fact, as will more fully appear hereinafter in this complaint, that the defendants, under color of the Constitution of Colorado, and the laws thereof, subjected this plaintiff to the deprivation of rights, privileges and immunities secured to him by the Constitution and laws of the United States"; that the defendant, Peabody, was elected Governor of said state in November, 1902, for a term of two years, beginning January 13, 1903; that the defendant, Bell, was appointed adjutant general of the National Guard of the state of Colorado, and the defendant, Wells, was appointed captain of a company in said guard by the defendant Peabody, as Governor; that the defendant Peabody, as commander-in-chief of the said militia, and the defendant Bell, as adjutant general, directed and caused a portion of the said National Guard of Colorado to assemble in the city of Telluride, San Miguel county, Colorado; that, while so assembled, said guard was under the direction, orders and control of the defendant Peabody, as commander-in-chief, and the defendant Bell, as adjutant general, and the defendant Wells, as captain; that on March 30, 1904, the defendants, acting as officers of said National Guard, gave directions to, and caused a squad of men, being a part of said National Guard, to arrest the plaintiff and imprison him in the city jail in the town of Telluride; that the plaintiff was confined and kept, forcibly and against his will, from March 30, 1904, until June 15, 1904, and with force and arms was restrained of his liberty and subjected to hardships, privations, humiliation, and disgrace; that the defendants claimed the right to arrest and detain the plaintiff by virtue of their being officers of the state of Colorado, and under the laws of Colorado, to wit, section 2 of article 4 of the Constitution of Colorado, which is as follows: "The supreme executive power of the state shall be vested in the Governor, who shall take care that the laws shall be faithfully executed." And section 5 of article 4 of said Constitution, as follows: "The Governor shall be commander-in-chief of the military forces of the state, except when they shall be called into

actual service of the United States. He shall have power to call out the militia to execute the laws, suppress insurrection and repel invasion"; that defendants claimed other statutes of Colorado gave them also the right to arrest, imprison, and detain the plaintiff, but that plaintiff is unable to find said statute; that after the arrest and detention of the plaintiff by the defendants he made application to the Supreme Court of the state of Colorado, the highest court and court of last resort in said state, for a writ of habeas corpus, in which application the plaintiff asserted that he was deprived of his liberty contrary to the laws of the state of Colorado, and of the laws of the United States, and said court allowed the writ to issue. That in their return to said writ Peabody, Bell, and Wells did not claim that the courts of said state, or in any part of said state, were overthrown and that a trial could not be had to determine any charge of crime made against the plaintiff; that Adjutant General Bell, in his return to the writ, asserted that he was the adjutant general of the National Guard of Colorado; that the Governor of Colorado had given him orders to arrest and detain the plaintiff, and not to release him under any circumstances until further orders from the Governor; that the said Wells was at the time a subordinate military officer under the direct command of said Bell, and the defendant Peabody certified to the correctness of said statement in Bell's return to the writ; and the said Peabody also stated that he was acting in his official capacity under the laws of Colorado relating to the arrest, detention, and imprisonment of the said Moyer; that the Supreme Court of the state of Colorado refused to admit Moyer to bail, and finally rendered a judgment in said habeas corpus proceedings to the effect that the Governor of the State, and the other respondents therein might, as officers of the state of Colorado, under the authority vested in them under the Constitution and the sections above quoted, and the statutes of said state, hold and detain said Moyer until, in their judgment, they saw fit to release him; that this was deprivation of liberty without due process of law; that by the acts and decisions of said Supreme Court plaintiff cannot obtain in the courts of Colorado any redress for the wrongs so inflicted upon him; that said decision is contrary to the provision of the Constitution and the laws of the United States relative to personal rights; that the arrest and imprisonment of the plaintiff was without probable cause and without legal process or color thereof, and not in due course of law; that the conduct of the defendants was in disregard of the rights of the plaintiff, guaranteed to him by the Constitution and the laws of the United States; that the plaintiff was a law-abiding citizen; that he was not a member of the National Guard of the state of Colorado; that at no time during his imprisonment was he accused of the commission of a crime, by complaint under oath lodged in any court of competent jurisdiction; that he was prevented from having access to the courts, and from the privilege of demanding in any court the nature of the cause of the accusation under which he was held. He asks damages.

To this declaration the defendants have filed demurrer, for that, because: (1) This court has no jurisdiction of the action; (2) the declaration does not state facts sufficient to constitute a cause of action against the defendants, or either of them; (3) that the matters in controversy herein are res adjudicata, and in aid thereof the demurrants crave oyer of the record and opinion of the Supreme Court of this state in the habeas corpus proceeding above referred to.

On argument of the demurrer it was agreed that the proceedings of the Supreme Court of Colorado in the habeas corpus case should be considered on the issue raised by the demurrer.

Record in habeas corpus case: The petition for the original writ of habeas corpus, filed in the Supreme Court of Colorado on April 15, 1904, sets forth a proclamation issued by the defendant, James H. Peabody, as Governor, on March 23, 1904, wherein it is proclaimed and declared that the county of San Miguel in the state of Colorado, is in a state of insurrection and rebellion, by reason of the fact, as therein recited, that armed bodies of men, both within and without said county, acting in conjunction, and about to unite, had threatened violence to the citizens of said county, and destruction of property. It further appears from the petition that said Governor, on the day of issuing said proclamation, by written order, directed the defendant Bell, as adjutant general, to order out such troops as, in his judgment, necessary, and to report

forthwith to the sheriff of said San Miguel county, and that he use such means as may be necessary, acting either in conjunction with or independent of the civil authorities, to restore peace and good order in said community, and to enforce obedience to the Constitution and laws of the state. It is then alleged that about three hundred men, constituting a portion of the National Guard, proceeded to occupy the city of Telluride.

The return to the writ of habeas corpus appears to have been filed on April 21, 1904. The adjutant general therein asserted that the insurrection and rebellion was at that time flagrant in San Miguel county; that ever since the National Guard had reached Telluride, it had been active in the attempt to suppress said state of insurrection, and to restore peace and good order in said county, and that it had acted independently of the civil authorities because said authorities were found to be wholly powerless to render any aid whatsoever in that behalf; that after arriving at Telluride, said adjutant general had good reason to believe, and did believe in good faith, and upon due inquiry in the premises became personally and officially fully satisfied and convinced, that the petitioner, Charles H. Moyer (plaintiff here), had been, and if discharged from arrest would continue to be an active participant in fomenting and keeping alive the said condition of insurrection and rebellion, and that he was a prominent leader of bands of lawless men engaged in the acts of insurrection and crimes mentioned in the Governor's proclamation, and that in order to accomplish the suppression of said state of insurrection it was necessary, in the judgment of the Governor and the adjutant general, to arrest, detain, and for some time to come, restrain the body of the said Charles H. Moyer, and that said Moyer was restrained solely for that purpose, and that he would be released from custody as soon as the same could safely be done, with reference to the suppression of the existing insurrection and rebellion.

Governor Peabody was permitted to interpose and file a confirmation of the facts set forth in the return of the adjutant general, and in addition thereto he disclosed to the Supreme Court a communication addressed to him as Governor, of date March 23, 1904, signed by county officials, including the sheriff of San Miguel county, city officials and a number of private citizens, wherein they represented to the Governor that a reign of riot and lawlessness was at that time imminent; that the mob was then arming itself, and that the persons who were in charge of said mob were the same persons who had theretofore within said county committed numerous acts of violence, some of which had resulted in murder and destruction of property; that the civil authorities were unable to suppress the same and provide safety to persons and property in said county; that great loss of life and sacrifice of property would likely result unless immediate and decisive action be taken, through the military authorities, to suppress it.

The petitioner filed a reply to the return to the writ in which he denied that a state of insurrection, or rebellion, existed in San Miguel county on March 23d, or at any other time, but he alleged that shortly before that time a certain organization, called the Citizens' Alliance, was perfected for the purpose of controlling the miners of that county, and that shortly before said March 23d, they organized a mob and deported about seventy men who had theretofore been miners; that these miners announced their intention of returning, and that they would resist any further interference with their persons or any attempts to redeport them; that those who signed the petition to the Governor aided in deporting said miners; that said acts were a part of a conspiracy entered into by the members of the Citizens' Alliance, as against the miners; denied that plaintiff took any part in fomenting said troubles; alleged that he was the then president of the Western Federation of Miners, and that he discountenanced all acts of lawlessness on the part of those belonging to said federation, and that said federation was a law-abiding, peaceable, conservative and law loving organization, existing for the purpose of bettering the social and financial condition of its members; that the civil authorities were amply able to deal with the situation.

The Colorado statutes (Sess. Laws 1897, c. 204, c. 63) empower and direct the Governor to use the National Guard to repel or suppress an invasion or insurrection when made or threatened, and the act further provides for calling out the Guard for that purpose, and the mode of putting it in operation.

Richardson & Hawkins, for plaintiff.
John M. Waldron, for defendants.

LEWIS, District Judge. There is nothing on the face of the above provisions of the Colorado Constitution which brings it in conflict with the fourteenth article of amendment to the Constitution of the United States, and the complaint here may be said to be against the manner of enforcing said provisions. It is true that if state officers, in the exercise of their official authority, deny to any citizen the guaranties found in said amendment, it is the state itself which does it, and such acts, therefore, come within the constitutional prohibitions. Ex parte Virginia, 100 U. S. 313, 25 L. Ed. 667; Railway Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; Reagan v. Trust Co., 154 U. S. 390, 14 Sup. Ct. 1047, 38 L. Ed. 1014. The officer, however, must claim to act under authority conferred upon him by the statute, and be guilty of an abuse of power, if the legislative act is not subject to the criticism.

It is obvious that the provisions above quoted from the Constitution of Colorado are but the enunciation of a sovereign power, a power founded on necessity and inherent in every government. It is sometimes likened to that of self-defense. "The life of governments is like that of a man; the latter has a right to kill, in case of natural defense; the former have the right to wage war for their own preservation." It is the declaration of the right of self preservation and finds recognition in every Constitution, both national and state. It is properly invoked in all governments to repel invasion by foes without, and to suppress rebellion or insurrection by enemies or powerful disturbers of the peace within. Unless this right and power exist, peace, good order, security—government itself—may be destroyed and obliterated by internal strife and lawlessness, when the domination of the mob becomes so powerful that it cannot be stayed by the civil authorities. This power in the state was recognized by the national government on receiving the state into the Union with the above provisions in its constitution. The provision in section 4 of article 4 of the U. S. Constitution guaranties every state against violence. The national government possesses the same right and power, as declared in section 8 of article 1 of its Constitution.

These fundamental principles were not seriously questioned on argument, but the contention was that the plaintiff has a right to go to the country on the issue of fact: Did insurrection exist?

1. Judicial tribunals presuppose the existence of a civil state, hence governmental integrity is, ex necessitate, a political question and not a judicial one. This principle was recognized and announced in Philips v. Hatch, 1 Dill. 571, Federal Cas. No. 11,094.

In U. S. v. 129 Packages, Federal Cas. No. 15,941, Judge Treat, in discussing the respective powers of the executive and judicial departments of the government in treating with and suppressing insurrection, said:

"The condition of peace or war, public or civil, in a legal sense, must be determined by the political department, not the judicial. The latter is bound

by the decision thus made. * * * The same doctrine has been uniformly maintained from the commencement of the government. The absurdity of any other rule is manifest. If, during the actual clash of arms, courts were rightfully hearing evidence as to the fact of war, either with or without the aid of juries determining the question, they should have power to enforce their decisions. In case of foreign conflicts neither belligerent would be likely to yield to the decision; and in case of insurrection, the insurgents already in arms against the Constitution and laws, would not cease their rebellion in obedience to a judicial decree. In short, the status of the country as to peace or war, is legally determined by the political and not the judicial department. When the decision is made the courts are concluded thereby, and bound to apply the legal rules which belong to that condition. The same power which determines the existence of war or insurrection, must also decide when hostilities have ceased—that is, when peace is restored. In a legal sense, the state of war or peace is not a question in pais for courts to determine. It is a legal fact ascertainable only from the decision of the political department."

In Keely v. Sanders, 99 U. S. 441, at page 446, 25 L. Ed. 327, Mr. Justice Strong, in delivering the opinion of the court said:

"Further than this, whether the military authority had been established in Shelby county before the commissioners entered upon the discharge of their duties, is a political question, to be answered by the executive branch of the government, and not by the courts. In its nature it was incapable of being determined by the latter. Successive juries might give to it different and contradictory answers."

In the noted case of Luther v. Borden, 7 How. 1, 12 L. Ed. 581, Mr. Justice Taney, after adverting to the principle that it is not a judicial but an executive function to determine when an insurrection exists, added:

"Yet if this right does not reside in the courts when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offenses and crimes the acts which it before recognized, and was bound to recognize, as lawful."

In re William Boyle (Idaho) 57 Pac. 706, 45 L. R. A. 832, it was held:

"On application for writ of habeas corpus, the truth of the recitals of alleged facts in a proclamation issued by the governor proclaiming a certain county to be in a state of insurrection and rebellion, will not be inquired into or reviewed."

I therefore conclude that the existence of insurrection, as declared in the Governor's proclamation, is not issuable.

2. Further, the plaintiff insists that he has a right to take the verdict of a jury on the issue of fact: Was the plaintiff's arrest and detention necessary in suppressing the insurrection?

It would seem to be in keeping with principle to hold the defendants responsible by civil action for a wanton abuse of power. In Luther v. Borden, supra, it is said:

"No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for purposes of oppression, or any injury willfully done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable."

But the chief justice there declared further:

"And unquestionably the state may use its military power to put down an insurrection, too strong to be controlled by the civil authorities. The power

is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the states of this Union as to any other government. The state itself must determine what degree of force the crisis demands and if the Governor of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the state, as to require the use of its military, and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things the officers engaged in its military service might lawfully arrest anyone, who, from the information before them, they had reasonable ground to believe was engaged in the insurrection."

So that, the plaintiff's arrest and detention was not dependent on his actual participation in the insurrection; and neither the Governor nor the military officers would be liable civilly for an unintentional error. Reasonable inquiry and care on their part under the circumstances as they then existed ought to relieve them from civil responsibility. The state Constitution enjoined the Governor, as such officer, to put down the insurrection. The situation must have been more or less desperate and required prompt action, effective of the purpose. Measures are sometimes necessary under the police power, that are severe, such as the summary destruction of property used for an unlawful purpose (Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385); such as treating property used in an unlawful traffic as a nuisance (Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346); such as the summary destruction of property to stay conflagration (Bowditch v. Boston, 101 U. S. 16, 25 L. Ed. 980); such as the summary destruction of obscene books and diseased cattle (Sentell v. Railroad Co., 166 U. S. 698, 17 Sup. Ct. 693, 41 L. Ed. 1169); such as the restraint of personal liberty in passing either into or out of an infected district, for the extermination of contagion (Compagnie Francaise, etc., v. Board, 186 U. S. 380, 22 Sup. Ct. 811, 46 L. Ed. 1209), and the prohibitions found in the fourteenth amendment have never been construed to be an encroachment on such a proper exercise of that power; neither is it believed that said prohibitions can be so construed as an encroachment upon the exercise of the military power within the lines here indicated—invoked to protect the very life of the social body. In both cases we find their right and justification in the maxim, "Salus populi, suprema lex."

Looking to the facts, it appears clear that the complaint here is not against an abuse of power, but the exercise of power. It is alleged that plaintiff was arrested without warrant issued on a written charge against him—that he was not taken into court. The very principle announced in the state Constitution is challenged in practical effectiveness by the declaration. The existence of the insurrection itself is denied. The right and power to use the necessary means to put it down is disputed; and beside this the reply to the return to the writ of habeas corpus gave some color to the reasonableness of the belief that the arrest of the plaintiff was not an abuse of power, for it is therein said that he was president of the Western Federation of Miners, whose members had been deported from San Miguel county, and who

intended to return, and whose return would likely be forcibly resisted. This condition alone threatened riot and bloodshed. On one side was a body of determined men of whom the plaintiff was the official head, and whose counsel and advice under the circumstances had been most likely taken. It may likewise be said that it would have also been the duty of those in authority of the military forces to have taken into custody those who occupied the position of leaders, if any, on the other side of the conflict. And beyond this, the procedings in habeas corpus presented to the Supreme Court the then situation in San Miguel county, and the reason for the arrest and detention of the plaintiff up to that time. These facts under the issues were weighed and considered by that court in the light of the constitutional provision and the principles of law controlling in such emergencies. The prisoner was remanded to the custody of the defendants. This was done, and could only have been done, on the conclusion that his arrest and detention were reasonable and proper means in the suppression of the insurrection. In rendering its opinion that court, among other things, said:

"To deny the right of the militia to detain those whom they arrest while engaged in suppressing acts of violence, until order is restored, would lead to the most absurd results. * * * His arrest and detention in such circumstances are merely to prevent him from taking part, or aiding in a continuation of the conditions which the Governor, in the discharge of his official duties, and in the exercise of the authority conferred by law, is endeavoring to suppress." In re Moyer (Colo.) 85 Pac. 190.

My learned predecessor, Judge Hallett, refused to discharge one Sherman Parker, on a like application, while he was held by the military authorities during the same unfortunate period in the state's history, and in discharging the writ in that case, he justified the arrest and detention of the prisoner as a proper means of suppressing the insurrection.

It follows that the facts disclosed do not show an abuse of power on the part of the defendants, and, hence, there was no violation of the prohibitions found in the fourteenth amendment. It results that this court has not jurisdiction. The demurrer ought to be sustained. It is so ordered.

In re HUDSON RIVER WATER POWER CO.

(District Court, N. D. New York. November 26, 1906.)

BANKRUPTCY—INVOLUNTARY PROCEEDING—CONSTRUCTION OF STIPULATION AND ORDER.

A petition in involuntary bankruptcy was filed against a corporation by another corporation which had obtained a judgment against the alleged bankrupt in a state court for breach of contract. Pending a hearing on the petition and also an appeal from such judgment, a stipulation was entered into by all the parties in interest pursuant to which the court of bankruptcy made an order requiring the alleged bankrupt to deposit, with trustees named, certain money and securities to be held as security for the petitioner's claim and any final judgment it might obtain thereon in the state court, the bankruptcy proceedings in the meantime being held in abeyance. *Held*, that such stipulation and order contemplated that the deposit should stand as security for petitioner's claim until its merits were finally passed upon and determined by the appellate courts of the state in

case the questions involved should be taken there, and that it would not be released to the alleged bankrupt because of a reversal of the petitioner's judgment by the appellate court and the rendition of a judgment against it on a new trial from which it had taken an appeal.

In Bankruptcy.

This is a motion on order to show cause why the above alleged bankrupt, Hudson River Water Power Company, and all the persons and property occupying the position of surety or security in the premises should not be relieved from the further performance of an order of this court, made July 19, 1905, as subsequently modified by stipulation and order, and also why all cash and bonds now in the hands of the special trustee or trust company pursuant to the said order of this court, and the stipulation and agreement upon which same was made, should not be paid over and delivered up to the said Hudson River Water Power Company, and also why the proceedings in bankruptcy now pending against the said Hudson River Water Power Company should not be dismissed and terminated. The motion on the order to show cause asks such other or further relief or both in the premises as shall be just and proper.

George B. Curtiss and Richard Lockhart Hand, for the motion.
Kellogg & Rose, opposed.

RAY, District Judge. Prior to the filing of the petition in bankruptcy, the National Contracting Company, the main petitioning creditor, entered into a written contract with the Hudson River Water Power Company whereby it agreed to construct for the latter company a masonry dam across the Hudson river at a designated point in consideration of certain compensation to be paid from time to time, and which was to be ascertained in certain ways with certain named prices for work as a basis.

The contracting company entered on the performance of the contract, and in all respects complied with its requirements down to a time when the Hudson River Company undertook to make certain changes in the form and material of the dam, viz., by substituting an earth dam with a masonry core for the masonry dam the contracting company had agreed to build. The officers of the Hudson River Company claimed and asserted to the contracting company that it had decided to make, and had made, the change, and demanded and required that the contracting company proceed with and complete the work in accordance with the changed or new plans and specifications. The contracting company denied the right of the Hudson River Company to make these changes or require it to proceed under and in accordance therewith, insisting that the changes were fundamental and made a new contract, one they had not assented to, one the parties had mutually agreed they would not make. The contracting company insisted that, while it had agreed to changes in form and material such as the Hudson River Company might from time to time determine upon, still, these were limited to changes, etc., and material in the construction of a masonry dam, and did not authorize the substitution of an earth dam with a mere core of masonry. The Hudson River Company insisting and demanding the new construction, and, in effect, forbidding the construction in any other way, the contracting company insisted the Hudson River Company had broken the contract, and thereupon aban-

doned the work and sued in the Supreme Court of the state of New York for damages for the alleged breach and for the amount due it for work done under the agreement.

The defendant, Hudson River Company, denied a breach on its part, and alleged a breach by the plaintiff, the contracting company, and counterclaimed its alleged damages. A trial of the action before Ex-Judge Bookstaver as referee resulted in a judgment in favor of the National Contracting Company against the Hudson River Water Power Company on the 12th day of April, 1905, for $547,696.40, of which $97,426.77 was for work done and not paid for.

After the referee had made his report and just before the entry of the judgment, the defendant, Hudson River Water Power Company, mortgaged all its property to certain other companies for about $7,000,000, a sum largely in excess of the value of all its property, real and personal, including all property rights and franchises of every kind and nature. This was not based on any new or present consideration and the contention was that the mortgages were without any consideration whatever. Execution was issued and returned unsatisfied and these proceedings in bankruptcy were then instituted. The mortgagees under the state law immediately procured the appointment of a receiver and purported to take possession of all the property. This court, on the filing of the petition in bankruptcy, duly appointed a receiver who took possession of all the property he could find, but same, including all rights and franchises, was evidently of insufficient value to satisfy any considerable part of the mortgages. A motion was made to dismiss the proceedings and an answer denying insolvency was interposed, and it was also denied that the petitioners were creditors, etc. This court appointed a special master to take evidence and report the facts. A large amount of evidence was taken and reported to the court, and the matter was about to be submitted on argument when the petitioning creditors and the alleged bankrupt and all directly interested in the proceeding entered into a stipulation and agreement, in substance that, pending the final adjudication and determination in the state courts of the claim of the National Contracting Company against the said Hudson River Water Power Company, certain moneys and securities should be placed and left with a designated person and trust company, appointed and approved by this court, as security for such claim and any judgment the contracting company might obtain against the Hudson River Company thereon. The money, etc., so deposited is to be applied to the payment of the claim or to the payment of such part of it, if any, as the contracting company may be adjudged entitled to. An appeal by the Hudson River Company from the judgment first mentioned establishing such claim was then pending, and the stipulation expressly covered the contingency of a reversal and the granting of a new trial and of a protracted litigation over the claim with possible varying results in the different appellate courts. It was expressly contemplated by the parties and by the court, in making its order ratifying and approving the stipulation and agreement, that the judgment might be reversed; that a result adverse to the National Contracting Company might be reached on a new trial in the trial court and that appeals might be necessary, and even a third trial had

and appeals taken from any judgment then obtained, before a final determination was arrived at. All these contingencies were considered and provided for by the general terms of the stipulation. The heart of the whole agreement was that the deposit should stand as security for the claim until its merits were finally passed upon and determined by the appellate courts in case the questions involved should be taken there. The National Contracting Company was not to be paid from the deposit in case a new or second trial, if granted, resulted in a judgment in its favor unless the appellate courts affirmed the judgment if taken there for review; nor was the deposit to be released in case a second or new trial, if granted, resulted in a decision adverse to the contracting company, unless such determination should be affirmed in case an appeal was taken. The obligations were mutual, and were intended to be, and the final determination of the litigation was to settle the question of either the release of the deposit or its appropriation to the payment of the claim. This is the only fair and logical construction and interpretation of the stipulation and order. Such was the understanding of this court after a full and fair hearing as to the stipulation and its purpose. On the making and filing of the stipulation and of the order of this court approving same, and, pursuant to its terms, the receiver appointed by this court was discharged and the Hudson River Company was restored to and resumed full control of its property and business, and the bankruptcy proceeding was and has been held in abeyance pending the final determination of such claim. On the appeal from the judgment, it was reversed, and a new trial ordered. On the new trial the referee, Hon. Alton B. Parker, has held that there was no breach of the contract by the Hudson River Company and that there was a breach by the National Contracting Company, and, on its counterclaim for damages, he has given the defendant, Hudson River Water Power Company, an affirmative judgment for damages to the amount of $383,352.60 besides costs. From this judgment the petitioning creditor and claimant, the National Contracting Company, has taken an appeal to the Appellate Division, First Department, and such appeal, prosecuted with due diligence, is pending and undetermined.

In the action between the construction company and the Hudson River Company the defendant denies breach of the contract by it, and alleges breach of the contract by plaintiff, and that the contract provided in express terms for a reference of all disputes between the two companies and of all questions arising under the contract to a referee or referees named, and that plaintiff has not sought, offered, or tendered a submission of the disputes and questions referred to such referees, and that such reference has not been refused, and hence plaintiff cannot maintain the action. To this last defense a demurrer was interposed by plaintiff, but it was overruled by the court of last resort, the Court of Appeals of the state of New York. Leave to withdraw the demurrer was not then given and the parties went to the trial of the action with that adjudication on the demurrer. It was contended by defendant that this adjudication determined the action as the demurrer, not withdrawn, admitted the facts stated in that defense and that the admission stood upon the record, and the judgment of the Court of Appeals was a final determination that the facts pleaded and

admitted by the demurrer were a complete defense to the action, and that, therefore, the trial court should dismiss the complaint. This contention finally prevailed, whereupon the plaintiff, National Contracting Company, obtained leave to withdraw the demurrer, which was done on payment of costs, and the parties went to trial before the referee, Hon. Alton B. Parker, on all the issues framed with the demurrer or admission out of the case. In passing on the question of the sufficiency of the defense as to the reference of disputed questions to the referee named, the Court of Appeals expressly stated that the whole contract was not before it, and therefore passed upon its effect in this respect from the standpoint of the pleadings alone, and has not passed on the question whether or not, taking into consideration the whole contract as it reads, the plaintiff cannot maintain this action but must resort to the reference provided for by the contract. Nor has this question been passed on adversely to the plaintiff by the Appellate Division. Nor, as the evidence now stands, and as the facts are found by the learned referee, has either the Appellate Division or the Court of Appeals adjudged or held that the National Contracting Company has been guilty of a breach of the contract either in not resorting to a reference of the questions to the referee or in abandoning the work under the circumstances or in doing both. Nor has either court held that, under the facts as they now appear and are found by the learned referee, the defendant Hudson River Water Power Company, the defendant in that suit and alleged bankrupt, was not guilty of a breach of the contract, or that the National Contracting Company has not a good and valid claim against the Hudson River Company.

Again, suppose the pending suit goes off on the proposition that the remedy of the contracting company is to resort to the reference, is it too late for it to avail itself of that remedy? There can be no claim that the stipulation and agreement was entered into, and the order of the court made, under any misapprehension of the law or of the facts. All were well known and fully considered, both by the parties and by this court. There was no fraud, coercion, or concealment. It was a voluntary stipulation and the Hudson River Water Power Company and the other parties were represented by able atttorneys of record and by eminent and able counsel. As the case stood, this court had full power to determine all the facts and adjudicate the questions of the validity or invalidity of the claim. The petitioner, National Contracting Company, accepted the stipulation and the remedies under it and took its security, which action changed its situation and it is impossible to restore the parties to their former status, rights, and remedies. Using a common expression, the fact that "the boot is on the other leg" at present is not a good reason for depriving the National Contracting Company of its security. Should it succeed in the suit, if that is done, its claim would be worthless or uncollectible.

If it clearly appeared now that the National Contracting Company has no claim I would relieve the Hudson River Company from the stipulation. But such is not the case. First, even should it be held the pending action cannot be maintained because resort was not had to the reference provided for in the contract, may not the contracting

company then resort to the reference? The action may be dismissed for the reason solely that such is the remedy, without passing on the question whether or not either party has broken the contract. Second, as the referee finds the facts, it is a close question whether or not a breach of contract by Hudson River Company is not shown. It is found, in substance, that the contracting company was required by one or more of defendant's officers and by its agents to go on and do the work in accordance with alleged or proposed amended and changed plans and specifications when they had not, in fact, been adopted by the defendant company. These proposed changes were objected to as not permissible, as constituting a fundamental change in the contract, as making a new contract, one the parties had agreed they would not make, and plaintiff claims the reference provided for in the contract has no application in any event to such a question. True, the contracting company did not know the Hudson River Company had not adopted the specifications, etc., it was required by the officers of the company to follow in completing the work. What effect this will have in determining the case is for the courts of the state to say. On the trial it was substantially conceded that the mode and manner of doing the work, and the material to be used, demanded by the alleged changed plans, had not in fact been adopted by the Hudson River Company. The learned referee finds that the work was completed by the Hudson River Company in accordance with the original plans and specifications named in the contract, for the reason the others were never adopted by the company. In fact, had the contracting company done the work as demanded, it would have done so in violation of the contract and would have been compelled to justify its action on the theory it had obeyed the unauthorized instructions and demands of the officers and agents of the Hudson River Company. It is sufficient to say that neither the Appellate Division nor the Court of Appeals has ever passed on any phase of the case as now presented. Without going further into the subject it is sufficient to say that the claimant and petitioner in the bankruptcy proceedings, plaintiff in such action, has the right, under the stipulation and order, to have a final determination and adjudication of the claim in the Supreme Court of the state of New York, at least, before the security is released.

The application is denied with leave to renew on the same papers and additional proceedings in the case when the Appellate Division has passed on the questions involved. In the meantime, further performance under the stipulation is suspended by continuing the order made in that regard in force until the decision of the Appellate Division is rendered.

JOHNSTON R. FROG & SWITCH CO. v. BUDA FOUNDRY & MFG. CO. et al.

(Circuit Court, E. D. Pennsylvania. November 23, 1906.)

No. 37.

REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—ARRANGEMENT OF PARTIES.

A suit between a corporation of one state and a corporation of another is removable by the latter, although there are joined with it as defendants a second corporation and two individuals, all citizens of the same state as the complainant, where such second corporation is a mere stakeholder, having no interest in the suit, and the individual defendants are, respectively, the president and treasurer of complainant and their interests are substantially identical.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 70.]

On Motion to Amend Petition for Removal, and Motion to Remand to State Court.

G. B. Lindsay and J. G. Johnson, for complainant.

George Q. Horwitz, for Buda Foundry & Mfg. Co. and West End Trust Co.

J. W. Bayard, for E. H. Johnston and Charles H. Johnston.

J. B. McPHERSON, District Judge. The real dispute in this case is between the Johnston Railroad Frog & Switch Company, a Pennsylvania corporation, and the Buda Foundry & Manufacturing Company, a corporation of the state of Illinois. Of the three defendants remaining, the West End Trust Company is a mere stakeholder, and the interest of Edward H. Johnston and Charles H. Johnston is substantially identical with the interest of the complainant. They are its president and treasurer, respectively, are members of the board of directors, control the stock of the corporation, and took part in the passage of a resolution directing this suit to be brought against the Buda Company. Moreover, the Johnstons have filed an answer admitting the truth of all the facts set out in the bill, and submitting themselves in all respects to the decree of the court; and the answer of the trust company is to the same effect. It is therefore clear, under the decisions, that no real dispute exists so far as these three defendants are concerned, and that a proper arrangement of the parties would disclose a controversy in which the Johnstons should be classed with the complainant, and that the trust company may be treated as a formal party, having no interest in the result of the litigation. As a consequence, the Circuit Court has jurisdiction to entertain the suit. Removal Cases, 100 U. S. 457, 25 L. Ed. 593; Hutton v. Bancroft Co. (C. C.) 77 Fed. 481.

The defendant is granted leave to amend the petition for removal as prayed.

The motion to remand is refused.

UNITED STATES v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, N. D. Iowa, E. D. December 4, 1906.)

No. 233.

1. PUBLIC LANDS—SWAMP LAND GRANT—SELECTION OF LANDS.

The swamp land grant to the states of September 28, 1850 (9 Stat. 519, c. 84), did not attach to any particular lands passing thereunder, until they had been identified as swamp lands by the Secretary of the Interior or other competent authority of the United States.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 186.]

2. SAME—RAILROAD GRANT—EXCEPTION OF LANDS RESERVED.

At the time of the passage of Act May 12, 1864, c. 84 (13 Stat. 72), granting lands to the state of Iowa to aid in the construction of the McGregor Western Railroad, and also at the time of the filing of the map of the definite location of the road, certain of the lands within the place limits of the grant as so fixed were embraced in lists of lands selected by agents of the state as swamp lands, under the swamp land grant of September 28, 1850 (9 Stat. 519, c. 84), which lists had been made and filed in the Interior Department for approval subsequent to the passage of Act March 3, 1857, c. 117, 11 Stat. 251, which approved all such selections previously made. At the time of the filing of the map of definite location such selections had not been acted upon, but they were subsequently disapproved by the Commissioner of the General Land Office, who held, after a hearing pursuant to law, that the lands were not swamp lands and did not pass under the act, which decision was not appealed from nor reversed. *Held*, that the mere selection and filing of the lists by the state agents did not operate to segregate such lands from the public lands of the United States nor prevent their passing under the railroad grant as within an exception of "lands reserved by the United States for any purpose whatever."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 186, 240.]

In Equity. On final hearing.

By this suit the United States seeks a discovery, an accounting, and to recover of the defendant under Act Cong. March 3, 1887, c. 376, 24 Stat. 556 [U. S. Comp. St. 1901, p. 1595], and Act March 2, 1896, c. 39, 29 Stat. 42 [U. S. Comp. St. 1901, p. 1603], the value of some 4,300 acres of public lands, which are particularly described in the bill of complaint, in Dickinson, Kossuth, and Palo Alto counties, in this state, which it is alleged were prior to said act of 1887, erroneously patented by the officers of the Interior Department to the state of Iowa for the benefit of the defendant railway company, and by said state patented to defendant, as inuring to it under the act of Congress approved May 12, 1864 (13 Stat. 72, c. 84), entitled, "An act for a grant of lands to the state of Iowa in alternate sections to aid in the construction of a railroad in said state," and prior to the act of March 2, 1896, sold by the defendant to numerous persons who were good faith purchasers thereof for value. By said act of May 12, 1864, it is provided that there is hereby granted to the state of Iowa, for the benefit of the McGregor Western Railroad Company, to aid in the construction of a railroad in said state from South McGregor, in a westerly direction on or near the forty-third parallel of north latitude until it shall intersect in O'Brien county, a railroad running from Sioux City to the Minnesota state line, every alternate section of land designated by odd numbers for 10 sections in width on each side of said road; but in case it shall appear, when the line of said road is definitely located, that the United States have sold any section or part thereof granted as aforesaid, or that the right of pre-emption, or homestead settlement has attached to any of said land, or that any of the same has been reserved by the United States for any purpose

whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid from the public lands of the United States, within specified limits, so much land in alternate sections designated by odd numbers as shall be equal to such land as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached, provided, that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be and the same are hereby reserved and excepted from the operation of this act. The act further provides that the lands granted shall be subject to the disposal of the Legislature of Iowa for the purpose aforesaid and no other; that, if said McGregor Western Railroad Company or assigns shall fail to construct such road, the state of Iowa may resume said grant and so dispose of the same as to secure the completion of a road on such line, upon such terms and within such time, not exceeding 15 years from the acceptance of the grant, as it shall determine; and that all lands which by said grant shall remain to the United States within 10 miles on each side of said road shall when sold be sold for not less than double the minimum price of public land. It is alleged in the bill that the defendant has succeeded to the rights of the McGregor Western Railroad Company under said grant, and that at the time of the definite location of said railroad the lands described, being within 10 miles of said road on either side thereof, were covered by existing claims of record in the office of the Commissioner of the General Land Office, consisting of homestead entries, pre-emption declaratory statements, warrant locations, or swamp selections which were all pending before the Department of the Interior for adjudication at the time of the attachment of rights under said railroad grant, and that said lands were therefore excepted from the operation of said grant. The answer admits that defendant has succeeded to the rights of the McGregor Western Railroad Company under said grant, and that the lands have been patented to it as such successor, but denies that said lands were covered by any such claims, or were excepted from the operation of the grant.

From the pleadings and stipulations of the parties it appears:

(1) That the McGregor Western Railroad Company duly accepted the terms of said grant, and on August 30, 1864, filed in the office of the Secretary of the Interior a map of definite location of the line of its railroad along the prescribed route to a point of intersection in O'Brien county, with said railroad running from Sioux City to the state line of Minnesota, and completed a part of said road, but it and its assigns failed to comply with all of the terms of said grant; that the Legislature of Iowa thereupon resumed the grant, and by chapter 21, p. 18, of the Acts of the 17th General Assembly of that state, approved February 27, 1878, conferred the same upon the Chicago, Milwaukee & St. Paul Railway Company, the defendant herein; that defendant accepted the grant and constructed the road to the point of intersection in O'Brien county, with said road running from Sioux City to the state line of Minnesota, within the time fixed therefor; that in 1880 the United States, by its proper officers, in recognition of the right of the defendant to the lands embraced in said grant, patented the same, including the lands described in the bill, except 200 acres thereof, to the state of Iowa for the benefit of the defendant; and that the state of Iowa in the years 1880 and 1881, in like recognition of defendant's right to said land, duly patented the same, except said 200 acres, to the defendant as inuring to it under said act of May 12, 1864.

(2) That about November 21, 1850, the Commissioner of the General Land Office duly instructed the United States Surveyor General for the state of Iowa to make out lists of all the lands granted to said state by the act of Congress of September 28, 1850 (9 Stat. 519, c. 84), the swamp land grant, and in his letter of instruction said: "The only reliable data in your possession from which these lists can be made are the field notes of the surveyors on file in your office, and, if the authorities of the state are willing to adopt these as the basis of these lists, you will so regard them. If not, and these authorities furnish you satisfactory evidence that any lands are of the character embraced in the grant, you will report them." On June 23, 1860, the Commissioner of the General Land Office sent to said Surveyor General for Iowa, a letter as

follows: "Sir: Referring to your letter of the 15th inst., asking to be advised as to your duty in reporting swamp selections in Iowa, and in view of the act of the 12th of March last, a copy of which was furnished you in my letter of the 21st ult., I will here set forth the principles which you are to apply to any selections now on your files and to all others, also, which may hereafter be reported to you by the agents of the state: (1) As the grant contemplates the inundation of extensive regions of country by such natural arteries as the Mississippi river, land evidently intended to be granted as swamps are those only which by reason of their swampy character and liability to overflow, are worthless in their natural condition, and whereon crops cannot be raised without reclamation by levees and drains. An overflow or inundation from casual cause merely temporary in its effects does not bring the land within the grant, and cannot be said in any proper sense to render them "unfit for cultivation." The law contemplates such long continued overflow or freshets only, as would totally destroy crops and prevent the raising of them without artificial means, by levees, etc., such as are found on the Mississippi river. (2) Bodies of land covered by shallow lakes or ponds which may become dry by evaporation or other natural causes do not come within the meaning of the swamp grant. (3) Testimony now, after the lapse of nine years, to be available, must be explicit, resting upon the personal and exact knowledge of the localities claimed, and must relate to each quarter, quarter section, or other equivalent legal subdivision. This testimony must be made by parties having no interest, present or prospective, direct or indirect, and must state the name of the river or water course whereby the lands are submerged and rendered useless for arable purposes in their natural condition. (4) I inclose herewith a blank form of proof which you will require from the state authorities, and if lists of lands of this class are furnished you, accompanied with such evidence, you will report them to this office, in the manner set forth in form 'B' herewith, after making careful examination of said proof, and rendering your own decision thereon, as to whether the several tracts are swamp or not within the meaning of the grant. (5) You will, as soon as your report is arranged and prepared for transmission to this office, send simultaneously a copy thereof to the local offices of the proper land districts, with instructions to them to enter the tracts in the usual form in their books, and to withhold them from sale or other disposition, unless otherwise especially directed by this office." The form of proof inclosed in the letter appears in the record. The Surveyor General made no further report to the Commissioner of the General Land Office as to swamp land selections in either of the said counties, and gave no directions to any of the local land offices to withhold any of said lands from sale or other disposition as required by said letter of the Commissioner.

(3) That prior to and on August 30, 1864, when the map of definite location of said road was filed in the office of the Secretary of the Interior, none of the lands described in the bill of complaint was covered by any homestead entry, pre-emption declaratory statements, warrant locations, or other existing claims of record in the office of the Commissioner of the General Land Office, save and except: (a) That on August 25, 1859, there was received and filed in that office, from the United States Surveyor General for Iowa, a certified transcript of a list of lands in Kossuth county on file in his office, including the lands described in the bill of complaint as being in that county, purporting to have been selected as swamp lands by Wm. H. Ingham and Geo. A. Lowe, acting under appointment of the county court of said county for that purpose. To the original list is attached the affidavit of said Ingham and Lowe sworn to November 11, 1858, before the county judge stating that they were surveyors appointed to select swamp lands in Kossuth county, and that the lands mentioned in said list were swamp lands. (b) That on April 3, 1860, there was received and filed in that office from the United States Surveyor General for Iowa a like list of lands in Palo Alto county, on file in his office, including those described in the bill of complaint, except 40 acres thereof, as being in that county, purporting to have been selected as swamp lands by Andrew Hood. The Surveyor General certifies that each of the foregoing lists transmitted by him is a correct transcript of the original list of swamp selec-

tions made by the county surveyor or the state locating agent and filed in his office. (c) That the records of said General Land Office further show that on March 23, 1872, there was on file in said office a list of lands in Dickinson county purporting to have been selected as swamp lands by Benjamin F. Parmenter, appointed by the county court of that county in 1857 to make such selections, which list is sworn to by Parmenter before the county judge of Dickinson county July 23, 1860, and is indorsed, "Posted in tract book May 28th, 1872," but no prior record of any kind appears in regard thereto, nor does it appear who transmitted the list to the General Land Office. That neither of said lists was ever adopted, ratified, or confirmed in any manner by the Interior or Land Department of the United States; but said counties continued to claim said lands as swamp and as having been selected as such by or for them under authority of an act of the General Assembly of Iowa approved January 13, 1853, and said McGregor Western Railroad Company and its successors in interest successively made claim to said lands as inuring to said companies, respectively, under said act of Congress of May 12, 1864. That on May 31 and October 21, 1876, the Commissioner of the General Land Office upon public hearings of the matter of such claims, after due notice to all parties interested, held and adjudged in writing that the lands described in said list were not, in fact, swamp lands, nor embraced in said act of Congress of September 28, 1850, and that the state of Iowa and said several counties were never entitled to said lands or any part thereof under said act. That said hearings were pursuant to the act of Congress of March 5, 1872 (17 Stat. 37, c. 39), and said findings and decisions of said Commissioner were never appealed from, reversed, or modified in any manner.

(4) That the lands described in the bill of complaint are of the alternate sections and parts thereof designated by odd numbers within 10 sections in width on each side of the line of the definite location of said McGregor Western Railroad, and were, except 200 acres thereof, prior to March 2, 1896, sold and duly conveyed by the defendant company to numerous persons who bought the same in good faith and for value; and on October 21, 1898, the Secretary of the Interior held in writing that the titles of all of the purchasers of said lands were confirmed in them, respectively, under the terms of the act of Congress approved March 2, 1896 (29 Stat. 42, c. 39 [U. S. Comp. St. 1901, p. 1603]). That due demands were made upon defendant, by direction of the Secretary of the Interior, that it reconvey to the United States all of the lands described in the bill of complaint, and that it pay to the United States the government price of $2.50 per acre for the said lands, and that defendant has failed to comply with either of said demands.

(5) That the defendant railway company did not receive from the United States, either directly or through the state of Iowa, the full quota of lands to which it was lawfully entitled under said grant of May 12, 1864, and that such deficiency is considerably more than the total acreage of all the lands in controversy in this suit.

H. G. McMillan, U. S. Atty., and George Crane, Asst. U. S. Atty.
Charles B. Keeler and W. J. Knight, for defendant.

REED, District Judge (after stating the facts). The principal question for determination is: Were the lands described in the bill of complaint and patented to the defendant reserved, or excepted from the operation of the grant of May 12, 1864? That grant is of every alternate section of land designated by odd numbers within 10 sections in width on each side of the line of road of the McGregor Western Railroad Company as it shall be definitely located; and three classes of lands are excepted from its operation, viz.: (1) Those which at the time of the definite location of the road have been sold by the United States; (2) those to which the right of pre-emption or homestead settlement has then attached; and (3) those which may then have been reserved to the United States by any act of Congress, or in any other manner

by competent authority for any other purpose whatever. The map of definite location of the road was filed August 30, 1864. The specific lands granted were then identified, and to them the title of the company attached as of May 12th of that year. Under the facts as stipulated by the parties none of the lands in question had been sold by the United States, nor had the right of pre-emption or homestead settlement attached to any of them at the time the road was located; and they are not, therefore, within the first or second classes of the exceptions.

It is also agreed that none of them was in fact of the character of lands embraced in the swamp land grant of September 28, 1850. This was finally determined by the Commissioner of the General Land Office in 1876. That finding was not appealed from, has never been modified in any way, and is not challenged by either of the parties to this suit, but is relied upon by both as sustaining their respective contentions. The contention of the government is that, as the lands were claimed to have been swamp lands by the several counties prior to the time the road was located, they were excepted from the operation of the grant, and that inasmuch as it was adjudged by the proper authority, after the location of the road, that they were not in fact swamp lands, they remained a part of the public domain and were, therefore, erroneously patented to the defendant. The contention of the defendant is that the lands were never selected as swamp by any competent authority of the United States, or reserved as such by any act of Congress, and therefore passed under the grant of May 12th, and were rightly patented to it.

The finding of the Land Department that the lands were not swamp is conclusive upon that question of fact, in the absence of fraud or mistake. But, if the lists filed by the respective counties were legally sufficient to segregate the lands from the public domain, the determination by the Land Department that they were not would be the determination of a legal question which would be subject to review by the courts. The various grants of public lands by Congress for railroad and other purposes, and the exceptions or reservations contained in such grants, have been the subject of frequent consideration by the Supreme Court of the United States; but in none of the cases does the precise question presented by this record, seem to have been determined. It is held by that court, however, that where lands within the limits of congressional grants similar to the one in question were at the time of the taking effect thereof covered by pre-emption or homestead entries under the land laws of the United States, or had been granted by other acts of Congress, or reserved by other competent authority for other purposes, such lands were excluded from the operation of the grant, though the entries may have been defective or invalid, or the grantees in other grants had failed to comply with the terms thereof, so that in each case the lands reverted to the United States subsequent to the location of the railroad, and again became a part of the public domain. But in all of these cases it appears that the pre-emption or homestead entry or other claim had been accepted or recognized by the proper officers of the Land Department as having attached to the lands, or that the lands were, in fact, embraced within

prior acts of Congress, or reserved for other purposes by other competent authority acting for or on behalf of the United States. Thus in Whitney v. Taylor, 158 U. S. 85, 15 Sup. Ct. 796, 39 L. Ed. 906, the map of definite location of a land grant railroad was filed in March, 1864, and the road completed in 1868. In May, 1857, a pre-emption claim upon the land in controversy was filed in the proper land office and duly entered upon its books, which entry so remained until 1885, when it was canceled by the Land Department. In 1888 the defendant entered the land as a homestead, subsequently commuted that entry, made final proofs, paid for the land, and received the usual government receipt therefor. The plaintiff claimed under mesne conveyance from the railroad company. The title of the defendant prevailed, for the reason that the pre-emption claim, having been accepted by the proper local land office prior to the location of the road, had thereby attached to the land and thus excluded it from the operation of the grant to the railroad company. In the opinion it is distinctly held that to have such effect the pre-emption or other claim must be one that is made under the authority of the laws of the United States and accepted or recognized by the proper land office, or other authority as being a valid one, though it may in fact have been defective or invalid. After reviewing its prior decisions, the court says:

"Although these cases are none of them exactly like the one before us, yet the principle to be deduced from them is that when, on the records of the local land office, there is an existing claim on the part of an individaul under the homestead or pre-emption law which has been recognized by the officers of the government, and has not been canceled or set aside, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clause, and this notwithstanding such claim may not be enforceable by the claimant, and is subject to cancellation by the government at its own suggestion, or upon the application of other parties. * * * In this respect notice may also be taken of the rule prevailing in the Land Department where the filing of the declaratory statement is recognized as the assertion of a pre-emption claim which excepts a tract from the scope of a railroad grant like this."

Railroad Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363, differs from the preceding case only in the fact that the entry accepted by the local land office was a homestead, instead of a pre-emption entry. After stating the essential requisites of a valid homestead entry, and that if it is defective in either of these essentials, the local land office is justified in rejecting it, the court says:

"But if, notwithstanding these defects, the application is allowed by the land officers, and a certificate of entry is delivered to the applicant, and the entry is made of record, such entry may be afterwards canceled on account of these defects. * * * But these defects, whether they be of form or substance, by no means render the entry a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants."

In Newhall v. Sanger, 92 U. S. 761, 23 L. Ed. 769, it is held that the existance of an alleged Mexican grant of lands, the validity of which was pending at the time of the definite location of a land grant railroad before the tribunal created by Congress to determine the va-

lidity of such grant, was sufficient to exclude lands within its boundaries from the operation of the railroad grant, such lands having been reserved by Congress from sale or other disposition pending the investigation of the Mexican grant, which was finally adjudged invalid shortly after the location of the railroad. In Leavenworth R. R. Co. v. United States, 92 U. S. 733, 23 L. Ed. 634, lands reserved to the Osage Indians by treaty made with them prior to a railroad grant, though not specifically reserved in said grant, were held to be reserved from its operation by force of a proviso excepting "the lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, * * * or for any other purpose whatever." In United States v. Southern Pacific Railroad Co., 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091, it is held that the filing of the map of definite location by the Atlantic & Pacific Company, under the act of July 27, 1866, granting lands to that company, when approved by the Secretary of the Interior, operated to withdraw the lands granted from the public lands of the United States, so that they did not pass under the subsequent grant of March 3, 1871, to the Southern Pacific Company, though the Atlantic & Pacific Company failed to comply with its grant, and it was forfeited and the lands restored to the United States by Congress in 1886, after the grant to the Southern Pacific Company had taken effect.

In Railway Company v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122, it is said:

"The reasonable purpose of the government undoubtedly is that which is expressed, namely, while we are giving liberally to the railroad company, we do not give any lands which we have already sold, or to which, according to our laws, we have permitted a pre-emption or homestead right to attach."

The rule is again announced in the recent case of the Southern Pacific Company v. United States (No. 2) 200 U. S. 354, 26 Sup. Ct. 298, 50 L. Ed. 512.

It is thus settled that to segregate lands from the public domain, so that they may not pass under subsequent grants by Congress, they must have been previously reserved or withdrawn from sale by competent authority acting for or on behalf of the United States. Were the lands in question so reserved or withdrawn as being swamp lands? By the swamp land grant the Secretary of the Interior is charged with the duty of selecting and making lists of all lands embraced within the grant, and causing patents to be issued therefor to the several states in which they are located, and on the issuance of such patents the title to the lands vests in the state. On November 21, 1850, the Commissioner of the General Land Office directed the Surveyor General for Iowa to make out a list of all the lands so granted to the state of Iowa, and in his letter said:

"The only reliable data in your possession from which these lists can be made are the field notes of the surveyors on file in your office, and, if the authorities of the state are willing to adopt these as a basis of the lists, you will so regard them. If not, and they furnish you satisfactory evidence that any lands are of the character embraced in the grant, you will report them."

This is an explicit direction by the Land Department to select in the first instance as swamp the lands which the field notes of the surveyors

show to be of that character, and, if the state authorities are unwilling to adopt these as the basis of the selection and will furnish satisfactory evidence that any other lands are embraced in the grant, the evidence so furnished is to be reported by the Surveyor General to the Land Department, thus making any selections that might be made by the state authorities subject to the approval of the Land Department. It does not appear what the field notes show as to the character of the lands in question further than is to be inferred from the final determination that the lands were not, in fact, swamp.

In 1853 the state of Iowa, by act of its General Assembly, granted to the several counties of the state the swamp lands in said counties embraced in the swamp land grant, and authorized the county courts of each of the counties to appoint competent persons to examine the lands and make due report and plats of the swamp lands therein to such court, which courts were required to transmit to the proper officers lists of the lands so selected in order to procure the proper recognition of the same on the part of the United States. Laws Iowa 1852–53, p. 29, c. 13. It would thus appear that the state authorities were unwilling to adopt the field notes of the surveyors as the proper basis for the selection of the swamp lands in that state, and undertook themselves to make and furnish lists of such lands. But it is plain that the lists furnished by the state authorities would be without effect to withdraw or segregate the lands therein described from the public lands of the United States, unless they were approved by the Secretary of the Interior, or other competent authority of the United States. Railroad Co. v. Price Co., 133 U. S. 496–511, 512, 10 Sup. Ct. 341, 33 L. Ed. 687; Humbird v. Avery, 195 U. S. 480, 507–508, 25 Sup. Ct. 123, 49 L. Ed. 286; Sjoli v. Dreschel, 199 U. S. 564–569, 26 Sup. Ct. 154, 50 L. Ed. 311. The fact that these lists were presented to the Surveyor General and transmitted to the General Land Office by him is not important; for his authority was expressly limited by his instructions to making lists from the field notes of the surveyors, and to reporting any evidence that might be furnished by the state authorities as to the character of the lands. The Secretary of the Interior only was authorized primarily to identify what lands were embraced within the swamp land grant. French v. Fyan, 93 U. S. 169, 23 L. Ed. 812; Barden v. Northern Pacific Ry. Co., 154 U. S. 288–320, 14 Sup. Ct. 1030, 38 L. Ed. 992; Rogers Locomotive Works v. American Emigrant Co., 164 U. S. 559–574, 17 Sup. Ct. 188, 41 L. Ed. 552. In the last-named case the locomotive works claimed certain lands in Calhoun county, this state, under the railroad grant of 1856; and the emigrant company claimed the same lands under conveyance from Calhoun county as swamp lands. In holding that the title passed under the railroad grant the court, among other things, said:

"In French v. Fyan, 93 U. S. 169, 23 L. Ed. 812, this court decided that by the second section of the swamp land act the power and duty devolved upon the Secretary of the Interior as the head of the Land Department of determining what lands were of the description granted by that act and made his office the tribunal whose decision on that subject was to be controlling. The identification of lands as lands embraced by the swamp land act was therefore necessary before the state could claim a patent, or exercise absolute control of them. * * * The emigrant company lays much stress upon that clause of

the railroad act of 1856 exempting from its operation all lands previously reserved by the United States for any purpose. And upon this foundation it rests the contention that no lands embraced by the swamp land act of 1850 could, under any circumstances, be withdrawn by the Land Department from its operation, and certified to the state under the railroad act of 1856. This contention assumes that the lands in controversy were, within the meaning of the act of 1850, swamp and overflowed lands. But that fact was to be determined in the first instance by the Secretary of the Interior. It belonged to him primarily to identify all lands that were to go to the state under the act of 1850. When he made such identification, then, and not before, the state was entitled to a patent.

By the act of March 3, 1857 (11 Stat. 251, c. 117), it is provided:

"That the selection of swamp and overflowed lands granted to the several states by the act of September 28th, 1850, heretofore made and reported to the Commissioner of the General Land Office so far as the same shall remain vacant and unappropriated, be and are hereby confirmed, and shall be approved and patented to the several states in conformity with the provisions of the act aforesaid."

This act is expressly limited to such selections as had theretofore been made, and is a recognition by Congress of the necessity of the approval of such selections by competent authority of the United States before they are of any effect. No other act of Congress prior to August 30, 1864, refers to or recognizes in any manner any lists furnished by state authority, and from the stipulation of facts it appears that none of the lists filed by the respective counties in this case was ever adopted, ratified, or confirmed in any manner by the Interior or Land Departments of the United States. These lists were not, therefore, prior to August 30, 1864, accepted or recognized for any purpose by any competent authority acting for or on behalf of the United States.

But it also appears from the stipulation of facts that the Kossuth county list was filed in the General Land Office August 25, 1859, that of Palo Alto county April 3, 1860, and that of Dickinson county was sworn to before the county judge of that county July 23, 1860, but it does not appear when or how it reached the Land Department. On June 23, 1860, the Commissioner of the General Land Office transmitted to the Surveyor General of Iowa a letter in which, among other things, he said:

"Referring to your letter of the 15th inst., asking to be advised as to your duty in reporting swamp land selections in Iowa, and in view of the act of the 12th of March last, a copy of which was furnished you in my letter of the 21st ult., I will here set forth the principles which you are to apply to any selections now on your files and to all others, also, which may hereafter be reported to you by agents of the state. Testimony now, after the lapse of nine years, to be available, must be explicit, resting upon the personal and exact knowledge of the localities claimed, and must relate to each quarter, quarter section, or other equivalent legal subdivision. This testimony must be made by parties having no interest, present or prospective, direct or indirect, and must state the name of the river or water course whereby the lands are submerged and rendered useless for arable purposes in their natural condition. * * * You will, as soon as your report is arranged and prepared for transmission to this office, send simultaneously a copy thereof to the local offices of the proper land districts, with instructions to them to enter the tracts in the usual form in their books, and withhold them from sale or other disposition, unless otherwise especially directed by this office."

The act of March 12th, to which reference is made in this letter, fixes the time within which the selections shall be made (12 Stat. 3, c. 5), and no doubt prompted the letter of the 21st ult., referred to. A form of the proofs required of the state authorities is inclosed with the letter of June 23, 1860, but the lists furnished by the respective counties wholly fail to comply with its requirements. This letter is a plain disapproval by the Commissioner of the lists of two of the counties then on file in the General Land Office, and a determination by him that other lists of like character would not be recognized. This letter is also the first direction from the Land Department to enter any selection of lands made by the state authorities upon the books of the Land Office, or to withhold them from sale or other disposition, and the stipulation of facts shows that the Surveyor General made no further report of swamp-land selections in either of the counties, and gave no direction to any of the local land offices to withhold any of the lands in question from sale or other disposition, as required by this letter.

Such was the status of the lands in question on August 30, 1864, when the map of definite location of the McGregor Western Railroad was filed, and the lands within the limits of the grant to that road withdrawn from the market, and it so remained until the passage of the act of March 5, 1872, entitled, "An act for the relief of Lucas and other counties in the state of Iowa," wherein it is provided:

"That the Commissioner of the General Land Office is hereby authorized and required to receive and examine the selections of swamp lands in Lucas, Dickinson, and such other counties in the state of Iowa as formerly presented their selections to the Surveyor General of the district including that state, and allow or disallow said selections and the indemnity provided for according to the acts of Congress in force touching the same at the time such selections were made." 17 Stat. 37, c. 39.

This is the first recognition by Congress of selections made by state authorities, and this only to the extent of requiring the Commissioner of the General Land Office to receive and examine and allow or disallow them and the indemnity provided for according to the acts of Congress in force when the selections were made. Whatever the purpose of this act, it was some eight years after the rights of the McGregor Western Railroad Company under the grant of May 12, 1864, had attached, and does not operate retrospectively to affect that grant.

In Railroad Co. v. United States, 92 U. S. 733, 23 L. Ed. 634, above, it is held that congressional grants of public lands are confined to those the title of which is complete in the United States; and in Newhall v. Sanger, 92 U. S. 761, 23 L. Ed. 769, it is said:

"The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

The title of the United States to the lands in question was complete on May 12, 1864, and at the time of the definite location of the road under the provisions of the act of that date no claims or rights of any kind to any of said lands had been previously recognized by any authority of the United States, save under said act. The lands, therefore, might have been sold by the United States, or the right of preemption of homestead entry might have attached to them at any time

before the definite location of the road, and the complete title thereto would have passed under such sale, or under such entries, if they were subsequently perfected.

Some stress is laid by counsel for the government upon an admission in paragraph 17 of the answer:

"That at the date of the definite location of the McGregor Western Railroad, all the lands mentioned in the complainants' Exhibit 'A' [the lands in question] purported to have been selected and claimed on behalf of the state of Iowa as swamp and overflowed lands."

But this is only an admission that the lands were "purported to have been so selected and claimed by the state authorities," and not that they had been approved by any authority of the United States. The admission must be construed in connection with the other parts of the answer, which explicitly controvert the allegations of the bill, that these lands were excluded from the operation of the grant of May 12th.

The conclusion, therefore, is that the lands in question were not on August 30, 1864, segregated from the public domain, and that they passed under the grant of May 12th of that year, and were rightly patented to the defendant. This renders it unnecessary to consider the other question presented. The bill should therefore be dismissed, and it is so ordered.

CRESCENT LIQUOR CO. et al. v. PLATT.

(Circuit Court, N. D. West Virginia. October 24, 1906.)

1. COMMERCE—REGULATION OF INTERSTATE COMMERCE—WEST VIRGINIA STATUTE RELATING TO CARRIAGE OF LIQUORS—CONSTITUTIONALITY—DUE PROCESS OF LAW.

Acts W. Va. 1903, p. 130, c. 40, being "An act regulating the shipment and sale of intoxicating liquors contrary to law and providing a remedy therefor," and which provides inter alia that any agent or employé of a common carrier who shall deliver to any person, firm, or corporation any package containing intoxicating liquors, except to a person having a state license to sell the same, or to the bona fide consignee thereof who has in good faith ordered the same for his own use, shall be deemed to have made a sale thereof contrary to law, and be subject to criminal prosecution, in so far as it endeavors to impose criminal liability upon a carrier or its agents because of the delivery of liquors transported by it to the consignee thereof in the usual course of business, in case such consignee shall not have a license or shall not have ordered the liquors for his own use, is unconstitutional and void, as an attempt to regulate interstate commerce as applied to interstate shipments and in all cases as depriving the carrier and its agents of their liberty and property without due process of law and as denying to them the equal protection of the laws.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 711.]

2. SAME—INTERSTATE COMMERCE—INTOXICATING LIQUORS.

The Wilson Act (Act Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177]), which provides that intoxicating liquors transported into a state or territory for use, consumption, or sale therein shall upon their arrival be subject to the police laws of such state or territory, does not authorize the enactment by a state of a law restricting the right of an interstate carrier to deliver the imported package to its consignee.

3. CARRIERS—UNLAWFUL DISCRIMINATION—REFUSAL TO CARRY LIQUORS.
It is the duty of an express company doing business as a common carrier to serve the public impartially, and it has no right to refuse to receive and carry packages of liquors from lawful dealers therein in one state, while it receives and carries the same in other states, nor to refuse to carry the same C. O. D. and to collect and return the purchase money from the consignee in accordance with the general custom of the business, where it follows such custom with respect to other commodities; nor can it require a consignee of such liquors before delivery to furnish a certificate or affidavit that he is a bona fide purchaser of the same for his own personal use or has a state license to sell liquors.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 901.]

In Equity. On motion for preliminary injunction.

Charles B. Johnson and George M. Hoffheimer, for complainants.
Frank H. Platt and Ira E. Robinson, for defendant.

GOFF, Circuit Judge. The Crescent Liquor Company, a corporation organized under the laws of the state of West Virginia, having its principal office and place of business at Clarksburg in that state, a resident and citizen thereof; the Schmulbach Brewing Company, a corporation organized under the laws of the state of West Virginia, having its principal office at Wheeling in said state, a resident and citizen thereof; and the Hoster-Columbus Associated Breweries Company, a corporation organized under the laws of the state of Ohio, and having its principal offices at Columbus in that state, a resident and citizen of the state of Ohio—have instituted this suit, and filed their original and supplemental bills, against Thomas C. Platt, of the state of New York, a resident and citizen of the state of New York, as president of the United States Express Company. The complainants are retail liquor dealers, engaged in business at Clarksburg, W. Va., who have complied with the requirements of the laws of the United States and of the state of West Virginia, relating to that business. The defendant, the president of the United States Express Company, an association organized under the laws of the state of New York, entitled to the rights and privileges of a corporation, is a common carrier doing business in the state of West Virginia, and in the Northern District thereof.

The complainants charge the United States Express Company with unjust discrimination, and with uniawful interference with their business. They allege that said company has for years past received and transported, under established rules and regulations, packages of liquors shipped by them to various persons with whom they have had dealings, at different points in West Virginia, where that company has agents and offices; that no controversy has arisen, or now exists, between the complainants and the express company, relative to the reasonableness of the charges made by the company for the transporting and delivering of such packages, or in regard to the regulations that have existed concerning the system of receiving, forwarding, and delivering the same. The complainants charge that the express company, without assigning any reason therefor justified by usage, fair dealing, and law, has lately arbitrarily and illegally, to the injury of complainants' business, to the detriment of their customers' interests, and to the prejudice of business affairs in the locality where they so

conduct their business, refused to receive from them, and transport to the parties in West Virginia to whom the same are directed, any packages containing liquors of any character, and that they have so refused, although complainants have offered to comply with all reasonable regulations concerning the same, and to pay either themselves, or by their vendees, the full charges as announced by such company for the transporting and delivering of such commodities. It is also charged that the express company, while so refusing, nevertheless will receive similar packages from like dealers in the adjoining and other states, for transportation and delivery to consignees at its offices in the state of West Virginia; and that such company declines to receive from the complainants, and from all other persons, whether located in West Virginia or elsewhere, all packages of liquor for transportation and delivery to any point in the state of West Virginia, when such packages are offered C. O. D., what is commonly known as collect on delivery shipments. Complainants, insisting that because of such conduct their business has been unlawfully interfered with by the defendant, pray for the relief found only in a court of equity, and ask that said express company be required by the order of this court to cease such discrimination, and to properly discharge its duty as a common carrier, and that pending the final disposition of this cause a preliminary mandatory injunction may issue.

With the business carried on by complainants, it is not the duty of this court to inquire, other than to determine that it is lawfully conducted, and such I find it to be. It is an avocation provided for and protected by law, one recognized by the statutes of the state of West Virginia, as well as by the laws of the United States. It is not the duty of the judiciary to philosophize concerning the moral questions involved in this business, for that under our system of laws devolves upon another branch of our government. The Supreme Court of the United States, in Scott v. Donald, 165 U. S. 58, 91, 17 Sup. Ct. 265, 269, 41 L. Ed. 632, speaking through Mr. Justice Shiras, says:

"The evils attending the vice of intemperance in the use of spirituous liquors are so great that a natural reluctance is felt in appearing to interfere, even on constitutional grounds, with any law whose avowed purpose is to restrict or prevent the mischief. So long, however, as state legislation continues to recognize wines, beer, and spirituous liquors as articles of lawful consumption and commerce, so long must continue the duty of the federal courts to afford to such use and commerce the same measure of protection, under the Constitution and laws of the United States, as is given to other articles."

Being engaged in a legitimate business, complainants are entitled to the protection of the law, and should be dealt with by the express company as it deals with its other customers. The company is a common carrier for hire, and it is its duty to receive from and transport for complainants, to such points as can be conveniently reached by its lines, for a reasonable compensation to be paid it either by complainants or their consignees, all packages of lawful merchandise, duly consigned under the usual regulations. As a common carrier it owes obligations to the public, in fact to a great degree discharges the duties of a public office, and it should not be permitted to disregard them. Such obligations and duties are not dependent upon contract, but are imposed by

the law because of public policy. The express company, recognizing its duties as a common carrier, and respecting in other states than West Virginia its obligations to the public, offers to receive from its customers in those states such packages of liquors, other than C. O. D. packages—as it refuses to receive from complainants, and to transport and deliver the same to points in West Virginia. Such discrimination is reprehensible, is detrimental to the interests represented by complainants, and unfair to the localities in which their business is conducted.

The express company admits that it refuses to handle the packages of liquor offered to it by complainants, as charged in their bills, and it also admits that its agents have been instructed to observe the provisions of the following order, to wit:

"United States Express Company.

"No. 49 Broadway, New York, Sept. 28, 1906.

"Liquor Shipments State of West Virginia.

"Agents All Points, West Virginia: By order of the vice president and gen'l. manager, effective at once, you are instructed that shipments of intoxicating liquors not C. O. D. from one point in West Virginia to another point in West Virginia, must not be received, and that shipments of intoxicating liquors C. O. D. from points within, or from points without the state to points within the state must be refused. This order must be enforced regardless of the regulations or orders of any other express company, and these orders supersede instructions to the contrary in joint circular 119 dated August 20th, second page, under paragraph headed 'West Virginia:' Your particular attention is called to the fact in the handling of interstate shipments of liquor not C. O. D., which shipments you are still permitted to handle, you must continue to demand from the the consignee the certificate to the effect that he has ordered the shipments in good faith for his own personal use, or that he has a license to sell, or in other words that he is a bona fide consignee. Immediately upon receipt of these instructions you will acknowledge receipt thereof.

"The orders above are positive and must be obeyed to the letter.

"C. E. Topping, Gen'l. Supt."

The express company says that it has found it necessary to issue this order, because of the construction that has been placed upon chapter 40, p. 130, of the Acts of 1903, West Virginia Legislature, by the courts of that state. Such legislation reads as follows, to wit:

"An act regulating the shipment and sale of intoxicating liquors contrary to law, and providing a remedy therefor.

"Be it enacted by the Legislature of West Virginia:

"Section 1. That any agent or employé of any person, firm or corporation, carrying on the business of a common carrier, or any other person, who, without a state license for dealing in intoxicating liquors, shall engage in the traffic or sale of such liquors, or be interested for profit in the sale thereof, or act as the agent or employé or consignor or consignee of the same, or who shall solicit or receive any order for the sale of any intoxicating liquors, or deliver to any person, firm or corporation, any package containing such intoxicating liquors, shipped 'Collect on Delivery' or otherwise, except to a person having a State license to sell the same, or to the bona fide consignee thereof who has in good faith ordered the same for his personal use, shall be deemed to have made a sale thereof contrary to law, and guilty of a misdemeanor; and, upon conviction thereof, shall be fined not less than ten, nor more than one hundred dollars, and may, at the discretion of the court, be imprisoned in the county jail not exceeding six months.

"Sec. 2. If any person shall make affidavit before any justice of the peace that he has cause to believe and does believe, any spirituous liquors, wines, porter, ale, beer or drink of like nature, are being held, sold or delivered in violation of the provisions of this act, such justice shall issue his warrant as provided in section twenty-three of chapter thirty-two of the code, and like proceedings shall thereupon be had as provided therein."

I do not see how the provisions of this act can justify the express company in its refusal to discharge its duties as a common carrier. The insistence that under this act a common carrier engaged in either interstate or state commerce could be convicted for a violation of the state license laws, in delivering packages of liquor consigned by regular dealers and received by actual consignees in the due course of business, is without merit. In such cases it is not necessary for the common carrier to take out a state license for dealing in intoxicating liquors. As a matter of course, if the agent of the carrier at any of its stations should also be engaged as a retail liquor dealer, he should protect himself by complying with the provisions of the state license law; but he incurs no liability as such dealer when he delivers to the parties to whom they are consigned packages of liquor regularly transported by the carrier. In such cases the express company does not sell the liquor. It is acting as a common carrier, delivering liquor theretofore sold, and its agreement not to deliver until charges are paid, and then to return the money to the shipper, has nothing to do with the sale, and relates only to the usage connected with its duties as a common carrier.

The express business has become a public necessity, equally so with the mails, telegraph, and telephone. It is used for public purposes by the national, state, and municipal governments, and it would materially interfere with our commercial interests as well as with our social comfort if its efficiency were crippled by either crude regulations, or ill advised legislation. The duty of the express company to receive packages from consignors in states other than West Virginia, for delivery to consignees within that state, cannot be interfered with, nor such shipments prohibited by any enactment of the Legislature of that state. An effort by state legislation to make a common carrier discharging such duty a dealer in the article so transported would necessarily fail, for, whether so intended or not, it would be held as pertaining to the regulation of commerce, and not being authorized under the police power of the state would be void. No right or privilege granted or secured by the Constitution of the United States can be withdrawn or impaired by the statute of any state, even though enacted in the exercise of its police powers. Mr. Justice Day, speaking for the Supreme Court in Dobbins v. Los Angeles, 195 U. S. 223, 237, 25 Sup. Ct. 18, 20, 49 L. Ed. 169, says:

"The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 210, 6 L. Ed. 23; Sinnot v. Davenport, 22 How. (U. S.) 227, 243, 16 L. Ed. 243; Missouri, Kansas & Texas Ry. v. Haber, 169 U. S. 613, 626, 18 Sup. Ct. 488, 42 L. Ed. 878."

We cannot consider the decisions of the Supreme Court of the United States relating to matters of interstate commerce, without being impelled to the conclusion that a state cannot, even for what many may consider a laudable purpose—such as protecting its citizens against the evils of intemperance—enact laws which regulate commerce between its citizens and those of other states; the consent of Congress not having first been obtained. The suggestion that, under the terms of what is known as the "Wilson Act" (Act Aug. 8, 1890, c. 728, 26 Stat. 313, [U. S. Comp. St. 1901, p. 3177]), all fermented, distilled, or other intoxicating liquors transported into the state of West Virginia became upon their arrival subject to the application of the West Virginia statute referred to, is without force, for the Wilson act expressly recognizes the right to transport such articles into the state, and then makes them subject to the operation of the police power laws of the state. But, as we have already seen, laws enacted under the police powers of the state cannot in any way interfere with or regulate commerce between states, and cannot prevent the delivery of the imported package to its consignee. The Wilson act limits the regulations of interstate commerce, but it creates no new power in the state. Surely it was not intended by that enactment to permit the state, under the shield of police power, to prosecute and punish the agents of interstate commerce for acts done by them in the lawful discharge of their duties as such agents.

The West Virginia statute so quoted is not intended solely as a police regulation, for its object is to regulate the shipment and sale of intoxicating liquors, including packages imported into West Virginia from other states or foreign countries, and surely in so far as it attempts to control such interstate commerce it must be invalid. The decisions of the federal courts relating to interstate trade are based on the absolute freedom of commerce between the states. They demonstrate the right of the citizens of one state to contract to sell and purchase merchandise in another state, and they show the lack of power on the part of the state to render invalid contracts relating to interstate commerce binding in the state where made. The Supreme Court has held that a package of intoxicating liquor received by an express company in one state to be carried to another state, and there delivered to the consignee, C. O. D. for price of the package and the expressage, is interstate commerce under the protection of the commerce clause of the federal Constitution. American Express Co. v. Iowa, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. Ed. 417. In the opinion of the court in that case, it is said:

"When it is considered that the necessary result of the ruling below was to hold that, wherever merchandise shipped from one state to another is not completely delivered to the buyer at the point of shipment so as to be at his risk from that moment, the movement of such merchandise is not interstate commerce, it becomes apparent that the principle, if sustained, would operate materially to cripple, if not destroy, that freedom of commerce between the states which it was the great purpose of the Constitution to promote. If upheld, the doctrine would deprive a citizen of one state of his right to order merchandise from another state at the risk of the seller as to delivery. It would prevent the citizen of one state from shipping into another, unless he assumed the risk. It would subject contracts made by common carriers and

valid by the laws of the state where made to the laws of another state, and it would remove from the protection of the interstate commerce clause all goods on consignment upon any condition as to delivery, express or implied. Besides, it would also render the commerce clause of the Constitution inoperative as to all that vast body of transactions by which the products of the country move in the channels of interstate commerce by means of bills of lading to the shipper's order with drafts for the purchase price attached, and many other transactions essential to the freedom of commerce, by which the complete title to merchandise is postponed to the delivery thereof."

The statute referred to as the foundation of the orders issued by the express company to its agents being for the reasons mentioned invalid, it follows that said company is without justification in its refusal to accept packages of liquor for transportation and delivery C. O. D. in states other than West Virginia, and it follows that the order of the express company requiring from the consignee a certificate to the effect that he has ordered the liquors in good faith for his personal use, or that he has a license to sell, or in other words that he is a bona fide consignee, is an unwarranted interference with interstate commerce, and the exercise of a power not possessed by that company.

We come now to the consideration of the unjust discriminations against them, alleged by complainants, as made by the express company in connection with the packages offered for transportation by complainants at Clarksburg, intended for delivery at other points in West Virginia. The discussion of matters pertaining to interstate commerce was rendered necessary in disposing of the questions raised by the consideration of the West Virginia statute before mentioned. As I have stated, the express company is a common carrier, and it is the duty of that company to serve the public impartially, without fear and without favor, but with even-handed justice to all. A carrier is not discharging its duty, when by its rules, regulations, and conduct it discriminates in favor of one citizen against another, of one business at the expense of another, or of one locality to the detriment of another. Such preferences are unjust, and they result in the destruction of individual interests, and the impairment of rights that should be enjoyed by all. Complainants have the same right to ship their packages, and to conduct in the usual and regular way the business they are engaged in, that other shippers representing other avocations receive and enjoy.

The express company, admitting its duty as to interstate open packages, insists that as to all C. O. D. packages, whether offered for shipment within or without the state, it has the right in the exercise of its business discretion—suggested by both personal and public policy—to decline to receive them for transportation, and that it may refuse, should it deem it best, to enter into such contracts, involving as they do, not only the duty to transport, but also that of collecting and returning the purchase price. It is insisted that, so far as the obligations of the company as a common carrier are concerned, a difference exists between the open and the C. O. D. shipments. This may to a limited extent be conceded, and because thereof the terms of such shipments and the regulations governing them may well differ, but that does not justify the absolute refusal of the carrier to receive, transport, and deliver the C. O. D. packages. Common carriers, the defendant included, through

many years of trade and traffic, have established and built up this custom, until now, by long continued usage, it has become part of the system under which our commerce is conducted; and it is still recognized by this defendant as applicable to all persons and all packages, save only dealers in liquors and their shipments. Here again appears the discrimination against liquor dealers set forth in the bills and protested against by the complainants.

The C. O. D. package is in many respects similar to the open package. The consignee generally pays the express charges in both cases, and in neither instance is the package delivered unless such charges are paid; the same not having been prepaid by the consignor. In addition, in the C. O. D. package, the consignee pays the price of the article shipped, and the carrier transports the cash so received to the consignor, taking pay therefor. In substance, it is the same as if the consignee should send by the express company the sum of money he owes the consignor, paying the company for its services. Can the carrier decline to accept such sum and refuse to transport it? The difference in the shipments mentioned, when anaylzed, is so slight that the law has trouble so far as the carrier is concerned in seeing the distinction. Should not the consignee have the right to contract with the consignor that he will send the price of the consignment by the carrier who delivers the package? If not, why not? The carrier is for the use of the public, and the public should not be deprived of such use by unreasonable regulations. Why should the express company complain, for it receives its toll for returning the price of the shipment, as well as for transporting the package?

The express company, while recognizing its duty as a common carrier to all other shippers in West Virginia, declines to receive from complainants, and from all other retail liquor dealers in that state, any consignments of liquor for delivery to consignees at any West Virginia point, on any terms or under any conditions. Dealers in all other articles may ship their merchandise, in either open or C. O. D. packages, and the shipments are eagerly accepted and promptly delivered. The avocation discriminated against is that of the liquor dealer, and the only reason assigned for such discrimination is the statute heretofore mentioned. This character of discrimination is far more destructive of trade, and ruinous of the rights of merchants and localities, than is the discrimination that shows favoritism between the individual shippers of the same class or avocation, and if permitted will enable the common carrier at its own will and pleasure, and for purposes of its own, to destroy any industry depending upon such carrier for the transportation of its product. This character of discrimination, if it can be established and continued, will place under the control of the common carriers the industries of the public, and will indirectly give to them the regulation of all traffic, both state and interstate. The power prohibited to the states would in effect be conceded to and exercised by the common carriers. If to-day they decline to accept packages from liquor dealers, to-morrow or next day the products of our mills, factories, storerooms, and farms may for some reason satisfactory to the carrier be placed under a like ban. The avocation favored to-day, may

to-morrow find that by an order of the carrier it is in the disfavored list. Doubt and uncertainty would everywhere exist—elements fearfully antagonistic to commercial prosperity. The better rule is, equal rights to all, and special favors to none.

No man, no company, no state, not even the nation, should have the power to issue an order, or enact a law, by virtue of which any one can be deprived of his right to labor that he may live, of his right to follow such lawful calling as to him seems best, of his right to the privileges and immunities by which only can real freedom be enjoyed, which rights are inalienable, and constitute the important elements in the civil liberty of every citizen of the United States.

Article 14, of the amendments to the Constitution of the United States provides that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It appears that said statute, when it delegates to the common carrier, or the agent of the carrier the right to determine who are bona fide consignees, and authorizes a refusal to deliver the packages to such consignees as fail to furnish what the carrier or the agent considers satisfactory evidence of bona fides, deprives those shippers who desire to have liquor sent by express of the equal protection of the laws, and abridges their privileges and immunities as citizens of the United States. The Supreme Court of the United States, in Allgeyer v. Louisiana, 165 U. S. 578, 589, 17 Sup. Ct. 427, 431, 41 L. Ed. 832, referring to a statute of the state of Louisiana says:

"As so construed, we think the statute is a violation of the fourteenth amendment of the federal Constitution, in that it deprives the defendants of their liberty without due process of law. The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

And when said statute endeavors to subject the common carrier and its agents to penalties in connection with the delivery of liquors to persons who may not be bona fide consignees, such carrier and such agents having no knowledge and no opportunity to obtain information of the unlawful intent of the consignee, it is void, because it not only interferes with and attempts to regulate interstate commerce, but it also deprives the carrier and its agents of their liberty and of their property without due process of law, and denies them the equal protection of the laws.

I am not unmindful of the elementary principal that an act of the Legislature must be presumed to fairly express the people's will, that every intendment should be made in its favor, and that its conflict with

constitutional provisions must clearly appear before the court is justified in declaring its invalidity, and still, nevertheless, I read in vain the statute referred to, in an effort to find some portion of it that can be saved from judicial condemnation, so far as it relates to common carriers lawfully engaged in the discharge of their duties.

The case is now before me on a motion for a preliminary injunction, in connection with which I have considered the verified bills, the affidavits filed by the complainants and the defendant relating thereto, and the argument of counsel.

I reach the conclusion that it is my duty to direct that the injunction prayed for, concerning both open and C. O. D. packages, do issue pendente lite, enjoining the United States Express Company from refusing to receive and transport such packages, when duly presented by complainants, under the usual rules pertaining to the receipt, forwarding, and delivery of packages of merchandise.

THE JOHN BOSSERT.

(District Court, S. D. New York. November 23, 1906.)

COLLISION—SCHOONER LYING TO AND OVERTAKING SCHOONER—LIGHTS—NEGLIGENT LOOKOUT.

The schooners Charles A. Witler and John Bossert, each laden with lumber, were sailing northward off cape Hatteras when the Witler, which had passed the Bossert during the day and was leading, lay to on the port tack at about 8 in the evening. Shortly thereafter she was struck by the Bossert which approached on the same tack at a speed of about 4 knots. For 15 or 20 minutes prior to the collision the Witler had exhibited at her stern a white light consisting of a globe lantern, unscreened, but such light was not seen by the lookout of the Bossert until too late to avoid the collision. *Held*, that such light was a sufficient compliance with article 10 of the international navigation rules (Act Aug. 19, 1890, c. 802, 26 Stat. 320 [U. S. Comp. St. 1901, p. 2866]), and that the collision was solely the fault of the Bossert in failing to maintain an efficient lookout.

In Admiralty. Suits for collision.

Hyland & Zabriskie, for libellant Bromwell.

Horace L. Cheyney, for Insurance Company of North America, underwriter on hull of Witler, intervening libellant.

Butler, Notman & Mynderse, for Eddy Lake Cypress Co.

James J. Macklin, for the Bossert.

ADAMS, District Judge. This action was brought by Charles A. Bromwell, the master of the lumber laden schooner Charles A. Witler, to recover from the schooner John Bossert, the loss occasioned to his vessel, including the freight, and to himself and the crew, from a loss of their personal effects, by a collision with the Bossert about 25 or 30 miles from the Diamond Shoals Lightship, off Cape Hatteras, about 8 o'clock P. M. on the 29th of August, 1905. The Insurance Company of North America, an underwriter on the hull of the Witler to the extent of $7,500, intervened to protect its interest. The Eddy Lake Cypress Company filed a libel to recover the value of the lost lumber. The total claims amounted to about $30,000.

The Witler was a new 3 masted schooner 117 feet long. She took in her cargo of about 250,000 feet on the Waccamaw River, South Carolina, for delivery in Baltimore, Maryland. About 100,000 feet were loaded on and the remainder under deck. She overtook the Bossert about 10 or 11 o'clock in the morning of the day in question and they continued in company during the day, the Witler passing ahead about noon. She thereafter, up to the time of collision, kept in the lead. As night came on, the Witler gradually reduced sail and about 7 o'clock began taking in the last of the sails and at a quarter before 8 she hove to on the port tack under a reefed spanker. While so lying, the Bossert came on and struck her on the port side, causing such injuries that all the crew of the Witler took to a small boat, in which they remained during the night, and in the morning went aboard of the Bossert, which had furled her sails after the collision and remained near at hand.

The Bossert was also a new schooner, but had 4 masts. She was about 180 feet long. She took in her cargo of lumber, under and on deck, at Georgetown, South Carolina, and was bound to New York. She admits that the Witler passed her in the afternoon and that the collision took place as stated. The wind at the time of collision was northerly, of a velocity of 25 or 30 miles an hour. The Witler as she was lying to was headed north-east by east or east north-east. The Bossert was headed north-east by east and making an east north-east course. She was going at the rate of 4 to 5 miles an hour under a reefed spanker, mizzen, mainsail, foresail, jib and staysail.

The questions in the case are: (1) whether the Witler exhibited a proper light astern and (2) whether the Bossert maintained a proper lookout.

The provisions of law with respect to the subjects in controversy are:

"Art. 10. A vessel which is being overtaken by another shall show from her stern to such last-mentioned vessel a white light or a flare-up light.

"The white light required to be shown by this article may be fixed and carried in a lantern, but in such case the lantern shall be so constructed, fitted, and screened that it shall throw an unbroken light over an arc of the horizon of twelve points of the compass, namely, for six points from right aft on each side of the vessel, so as to be visible at a distance of at least one mile. Such light shall be carried as nearly as practicable on the same level as the side-lights." Act Aug. 19, 1890, c. 802, 26 Stat. 320 [U. S. Comp. St. 1901, p. 2866].

"Art. 29. Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." 20 Stat. 320 [U. S. Comp. St. 1901, p. 2871].

With regard to light, the Witler alleges in her libel as follows:

"Fourth: That the schooner 'Charles A. Witler' had both her side lights properly set and brightly burning and exhibited to the schooner 'John Bossert,' from her stern a white light in a lantern throwing an unbroken light over an arc of the horizon of at least twelve points of the compass, that is to say, for at least six points from right aft on each side of said vessel, so as to be visible for at least for a distance of a mile, and your libellant's said schooner also exhibited to the said schooner 'John Bossert' an electric flare-up or flash light from her stern and in addition thereto the captain and crew of your libellant's

said vessel also called out to those in charge of the said schooner 'John Bossert' to keep clear of the 'Charles A. Witler.' "

The allegation of cries from the Witler, is stoutly denied by the Bossert. It is certain that, if given, they did not reach those in charge of the Bossert's navigation in time to be of any avail and may be disregarded.

There is some testimony as to the exhibition of an electric light but it was not seen on the Bossert. It appears that it was a small light principally used about the deck for seeing the log or other objects near at hand, and was not at all in compliance with the law above quoted. Even if used to throw a light on the spanker, as stated by the witnesses for the Witler, the light was not seen on the Bossert and it gave her no notice of the presence of the Witler in her path. It may also be disregarded.

The question then turns upon the effect of an exhibition of a light from a globe lantern. This light was seen on the Bossert. It is claimed by the Witler that it was exhibited 15 or 20 minutes before the collision by the master of the Witler holding it in his hand, sometimes at an elevation of several feet, and by being placed upon the top of the cabin. It was an ordinary globe lantern showing a light all around the horizon. It is claimed on the Bossert that it was not exhibited until the collision was imminent.

The light may be considered, for the purposes of this case, as complying with the provisions of Article 10 regarding the duty of the Witler to exhibit a white light to an overtaking vessel. This light was not strictly within the terms of the law, as it was not obscured from forward but that seems immaterial. There was not in any sense a flare-up light.

At the time of the approach of the Bossert, about 8 bells, she was changing her watch. The lookout, who was on duty until 8 o'clock, testified that he went on watch at 6 o'clock P. M. and at 8 o'clock was relieved; that at 10 minutes to 8, he went to the toilet room about 3 yards from the forecastle head and returned there; that before he left for the toilet room and after his return therefrom he was quite alone on the forecastle head; that at 8 o'clock or 10 minutes before 8, he went below and called the men of the watch who were to come on duty at 8 o'clock; that he sounded the bell, due at 10 minutes before 8, and immediately afterwards, went and called the men. It is somewhat uncertain just what he did but in any event there is no claim that he gave any warning of the Witler's presence. It may be that he did not see her light owing, possibly, to defective eyesight. He was closely examined in this connection with the aid of a standard optician's chart and made several mistakes with respect to the letters contained on the chart. His testimony, as it reads, is not at all satisfactory with respect to the performance of the important duty with which he was intrusted and it is probable that he failed to notice the light by reason of inattention, even if he were able to see it.

The testimony from several witnesses on the Witler shows that the light was exhibited by her for a considerable space of time, estimated at from 15 to 20 minutes. The approach of the Bossert was observed

by those on the Witler's deck and it is incredible that they would have supinely waited until the Bossert was in dangerous proximity before they exhibited a light to warn her of the presence of the Witler in her path and yet that is what the Bossert would have the court believe.

That the light on the Witler was seen from the Bossert just before the collision is admitted but the latter claims it was supposed to be a steamer's light and that there was no necessity for action on the Bossert's part because a steamer could take care of herself. This was a wrong supposition and does not afford any excuse for the Bossert's neglect. There was nothing to indicate that the light came from a steamer and more careful observation would have shown that such an assumption was erroneous.

The lack of a careful lookout on the Bossert before 8 o'clock sufficiently accounts for this collision. The Witler's light was first seen by the mate in his watch from aft when he accidently looked under the sail by stooping. He then went forward but even when he reached the forecastle, received no report. The first lookout admits that he never saw the light and says that when he was relieved by the lookout coming on duty at 8 o'clock, told him every thing was clear. The new lookout testifies that he did not see any light at the time but did about half a minute later, two or three ship's lengths away, and says he told the mate, who was standing on the forecastle head a yard away. As mentioned above, the mate said that he first saw the light by looking under the spanker sail when he was aft and then went forward. There is no way of reconciling the discrepancy. If the mate's account be deemed correct, and it seems to be entitled to more credence than the lookout's, it tends to confirm the absence of proper observation on the second lookout's part and reinforce the contention of the Bossert's fault in this respect.

It is said by the witnesses from the Witler that the Bossert's approach was observed for several minutes, said to be 15 or 20, before the collision and the Witler's light was exhibited during that time. The Bossert was sailing probably at the rate of 4 knots an hour, or 400 feet per minute and she must have been at least a knot away when her lights were first observed by the Witler. There can scarcely be a doubt that considerable time elapsed during which the Witler's light was visible and that there was ample time for the Bossert to have steered clear. When the light was first noticed on the Bossert, she was too near for effective measures of avoidance and the collision occurred through her fault in failing to see in due time a properly exhibited light.

The abandonment of the Witler after the collision was justified by her condition from the blow. Although she survived for several days, she was not in a condition to be navigated and the crew cannot justly be criticised for leaving her.

There will be decrees for the libellants, with orders of reference.

In re WILLIAM F. FISHER & CO.

(District Court, D. New Jersey. September 13, 1906.)

1. BANKRUPTCY—RESALE OF PROPERTY—CONSTRUCTION OF ORDER.
   Orders of a court of bankruptcy setting aside a private sale of a bankrupt's real estate, and requiring the petitioner therefor to enter into a contract with the trustees to bid a stated sum at a resale, and also sufficient in addition to pay whatever sum should be awarded by the court to the former purchaser for improvements made on the property, construed, and *held* to require such award to be paid by the trustees where at the resale the petitioner purchased the property at a price largely in excess of that which it was required to bid by the order.
2. SAME—ALLOWANCE TO FIRST PURCHASER FOR IMPROVEMENTS MADE—COSTS OF TAKING ACCOUNT.
   Where a private sale of real estate of a bankrupt was set aside by the court on an offer of a better price after the purchaser had made improvements thereon by an order which provided that he should be repaid the amount expended in making such improvements, he should not be charged with the costs of the proceedings for ascertaining the amount so expended, but such costs should be paid by the estate which benefited by the resale.
3. SAME—TAXES ON PROPERTY PENDING ADMINISTRATION.
   It is the duty of a trustee in bankruptcy under Bankr. Act July 1, 1898, c. 541, § 64a, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], to pay the taxes assessed or becoming due on the property of the bankrupt while in his hands for administration, and he is not relieved from such duty by the fact that the taxes were allowed to remain unpaid until the property was sold, by consent of the court of bankruptcy, under a decree of foreclosure in a state court; but there is no provision of the law requiring or authorizing him to pay interest thereon.

In Bankruptcy. On petition of the Sayre & Fisher Company. See 135 Fed. 223.

J. K. Rice and W. R. Schenck, for the Sayre & Fisher Company.
George Silzer, for Joseph Allgair.
Robert Adrain, for bankrupt's trustees.

LANNING, District Judge. This proceeding brings before the court three questions: First, who shall pay to Joseph Allgair the amount due to him for the cost of improvements upon the lands of the bankrupt; second, who shall pay the costs incurred in the proceedings for ascertaining the amount due to Joseph Allgair; and, third, who shall pay the taxes assessed against the bankrupt's real estate for the years 1902, 1903, and 1904.

On July 7, 1905, the Sayre & Fisher Company filed its petition, praying that the private sale of the bankrupt's real estate made by the bankrupt's trustees to Joseph Allgair on June 15, 1905, for $55,000, be set aside, and offering, if an order to that effect should be made, to deposit security that it would at a public sale offer $60,000 therefor. On July 8th the Sayre & Fisher Company filed a supplemental petition, stating that, if the private sale should be set aside, it, "in addition to its bid of $60,000 for the said property and plant, will repay to the said purchaser of the said property, if the Sayre & Fisher Company shall be the successful bidder for the same, the moneys actually expended by him in improvements placed upon said plant since he became

the purchaser thereof at the private sale heretofore made by the trustees of the said bankrupt as shall be decided by the court." On July 24, 1905, the Sayre & Fisher Company having deposited security in the sum of $60,000, this court, for the reasons in its order of that date stated, set aside the private sale to Joseph Allgair and directed the trustees to resell the property "at public auction to the highest bidder, free and discharged of and from all incumbrances, at a price not less than the sum of $60,000, and, in addition thereto, such sum of money as a judge of this court shall determine that the said Joseph Allgair is lawfully and equitably entitled to have refunded to him, if any, for disbursements made by him on account of or by reason of his said purchase, and also for moneys actually expended by him in making improvements, if any, to the said property since he obtained the possession thereof under and by virtue of the sale of said property to him by said trustees, which sale is, upon review, now by this court vacated, set aside, and for nothing holden, due allowance in estimating said amount to be paid said Joseph Allgair as aforesaid first being made for any waste or depreciation of or to said property, land, and premises, made or done by said Joseph Allgair, his servants, agents or employés, since he, said Joseph Allgair, took possession thereof as aforesaid, until he, said Joseph Allgair, shall surrender, as herein ordered, to said trustees all the said lands, property and estate which so came into his possession as aforesaid."

Immediately after the making of the above order Joseph Allgair took an appeal therefrom to the Circuit Court of Appeals, and on July 31, 1905, he appeared in this court, and offered to place the property in the possession of the bankrupt's trustees, on terms not necessary now to be stated, to be held by the trustees pending the appeal, which offer was accepted. There were at that time two mortgage incumbrances upon the bankrupt's property, the first for $24,000, with accrued interest, and the second, which had been foreclosed in the New Jersey Court of Chancery and merged into a final decree, for something over $15,000. Sale under the execution issued upon this decree had long been stayed by this court. Feeling that the stay ought not to be continued during the pendency of the appeal above mentioned, an order vacating the stay was signed on August 14, 1905. As the making of this order rendered it possible for the complainant in the foreclosure case to sell the property under the execution issued in that case, and thereby defeat the purpose of the order of July 24, 1905, which was to secure a sale of the property for a larger sum than $55,000, another order, dated back to July 31, 1905, the terms of which were agreed to by the Sayre & Fisher Company, was made, containing the following provisions:

"And it is further ordered that the Sayre & Fisher Company shall enter into an agreement to and with said trustees in bankruptcy herein, said corporation having been duly authorized by resolution of its board of directors, therein and thereby agreeing and undertaking to bid for said property the sum of at least sixty thousand dollars and, in addition thereto, such sum of money as this court shall determine that the said Joseph Allgair is lawfully and equitably entitled to have refunded to him, if any, for disbursements made by him on account of or by reason of his purchase, and for moneys actually expended by him in making permanent improvements to the said property

since he obtained the possession thereof under and by virtue of the sale of said property to him by said trustees, and also, in addition thereto, the interest upon two mortgages, one now or lately held by the National Bank of New Jersey of New Brunswick, in the sum of twenty-four thousand dollars, and the other now or lately held by the Empire State Trust Company in the amount secured to that company by the final decree of the Court of Chancery in foreclosure proceedings, wherein said company was complainant and the bankrupt herein and others were defendants, which interest is to be calculated from the day of the date of the sale to said Joseph Allgair, to wit, the 15th day of June, 1905, up to the day when the deed shall be delivered to the purchaser on a sale of said plant under any writ of execution heretofore issued or that may hereafter be issued upon said final decree, provided such sale shall take place prior to a resale of the said property and estate by the trustees in bankruptcy herein, and prior to the final determination by a superior court of the petition of review heretofore filed as aforesaid by said Joseph Allgair. Said bid shall be subject to the lien of a first mortgage dated October 17, 1901, for the sum of $24,000, now or lately held by the National Bank of New Jersey, the principal sum of which with accrued interest shall be credited upon said bid and the balance of said bid shall be paid in cash. And it is further ordered that said Sayre & Fisher Company shall in and by their agreement so to be made with the said trustees as aforesaid undertake and agree in like manner to bid for said property the sum of at least $60,000, and such additional sums, if any, to be determined by this court as aforesaid, together with the interest on said two mortgages respectively, for the aforesaid property if and when the same shall be sold at a valid sale under and by virtue of a valid final decree or judgment of any court of competent jurisdiction under any proceedings had and taken in any such court by any lienor other than the Empire State Trust Company, having a valid and subsisting lien on the aforesaid property and estate, provided such last-mentioned sale shall take place prior to a resale of the said property and estate by the trustees in bankruptcy herein. And it is further ordered that if, before said Allgair's said petition of review shall have been finally determined by the said superior court, a sale of said bankrupt's estate shall be had or made under any execution issued upon the aforesaid final decree of the Court of Chancery of New Jersey, or if a sale thereof be had or made by virtue of a suit instituted by any other lienor as last aforesaid, and if at any such sale the said Sayre & Fisher Company or any other party should be the purchaser thereof upon a bid of $60,000, including the additional sums as aforesaid, determined by this court as aforesaid, and the interest on said first mortgage and on said decree as aforesaid, then and in such case and upon said additional sum so paid coming into the hands of the said trustees herein, the said trustees shall, in the event of the superior court vacating the petition of review had and taken by the said Joseph Allgair and affirming the order of the judge of this court heretofore made on the 24th day of July, 1905, pay to the said Joseph Allgair such sum as shall have been received upon said bid from the purchaser thereof for the improvements and other moneys expended by the said Joseph Allgair upon the said plant, allowance having been made for waste, as determined by a judge of this court as hereinbefore provided. The moneys which the said trustees shall have received from such successful bidder as and for the interest upon the first mortgage upon said property, and as and for the interest upon the decree of foreclosure of the mortgage now or lately held by the Empire State Trust Company, they shall pay to the respective mortgagees or the assigns of such mortgagees, the amount of interest due each of them upon the said mortgages, so far as the said moneys paid to them as interest will permit them to do."

On September 5, 1905, the Sayre & Fisher Company entered into a written agreement with the trustees of the bankrupt, substantially in the form prescribed by the order of July 31, 1905, which agreement was accepted by the trustees.

The appeal taken by Joseph Allgair has now been disposed of and the order of July 24, 1905, affirmed. While the appeal was pending,

the property was sold under the execution issued upon the final decree of the Empire State Trust Company to the Sayre & Fisher Company for $54,000, subject to the lien of the first mortgage. The resale was a highly advantageous one for the creditors of the bankrupt. The trustees are now in possession of all of the purchase money to which they are entitled or which they claim; but their counsel insists that it is the duty of the Sayre & Fisher Company, the purchasers of the property at the resale, and not of the trustees, to pay to Joseph Allgair the sum due to him, which prior to the resale had been judicially ascertained to be the sum of $3,553.41. The counsel for the Sayre & Fisher Company, on the other hand, insist that the payment should be made by the trustees. The decision of the question rests wholly upon the construction that should be given to the two orders of July 24 and July 31, 1905. These orders are not expressed in very elegant English, but their meaning is clear. By the first order the trustees were directed to resell the property for not less than $60,000, plus such sum as this court should thereafter decide Joseph Allgair should have for the improvements put upon the property by him. This order contemplated a sale by the trustees only. If a sale had been made under it, the whole of the purchase money would have been paid to the trustees, and it would have been their duty to pay to Joseph Allgair, out of the purchase money received by them, the amount awarded to him. By the second order (the one of July 31st) the Sayre & Fisher Company was required to enter into an agreement with the bankrupt's trustees (1) "to bid," at any sale of the property made while the above-mentioned appeal should be pending and before the bankrupt's trustees could sell, the sum of at least $60,000, plus whatever this court should thereafter decide Joseph Allgair should have for his improvements, and plus, also, the interest on the two mortgages from June 15, 1905, to the date of the delivery of the deed; (2) "to bid," at any sale of the property, under proceedings by any lienor other than the holder of the second mortgage, and before the bankrupt's trustees could sell, at least $60,000, plus the amount that might be awarded to Joseph Allgair, and plus, also, the interest on the two mortgages as above mentioned; and (3) that if it, the Sayre & Fisher Company, should become the purchaser under either of these two conditions, the bankrupt's trustees should pay to Joseph Allgair the amount due to him, and to the holders of the two mortgages the sums due to them for interest for the specified periods. The primary object of the agreement of September 5th was not to secure a fulfillment of the terms of the order of July 24th, the fulfillment of which had already been secured by a deposit by the Sayre & Fisher Company of their certified check for $60,000, but to secure the fulfillment of the terms of the order of July 31st. While the language of the agreement is in some respects somewhat obscure, its meaning is made clear by its express declaration that it shall be construed in connection with the two orders of July 24th and July 31st. The first of these orders, as already stated, deals with a sale by the bankrupt's trustees, while the second deals with a sale during the pendency of the appeal, when the trustees could not sell, under the foreclosure or other judicial proceedings. The agreement must, therefore, be read in the

light of these facts. If the sale should be made by the trustees under the provisions of the first order, the trustees were to pay to Joseph Allgair out of the purchase money the amount awarded to him. And, if it should be made in some other judicial proceeding during the pendency of Allgair's appeal, and before the trustees should have the right to sell, the trustees were to pay out of the surplus moneys coming to them the amount awarded to Joseph Allgair. The conclusion, therefore, is that the bankrupt's trustees should now pay to Joseph Allgair the amount due to him. That amount is $3,553.41. He is also entitled to interest thereon from October 23, 1905, being the date of the adjudication of the amount due.

A second question is, Who shall pay the costs of the proceedings for ascertaining the amount due to Joseph Allgair? The order of July 31st provided, as did the order of July 24th setting aside the sale to Allgair, that he should have repaid to him his expenses for improvements, and the Circuit Court of Appeals (see Allgair v. Fisher & Co., 143 Fed. 964) declared that this provision was not in any respect erroneous. In my judgment, therefore, the purpose of that order should not be impaired by imposing upon Allgair any part of the costs of the proceedings for ascertaining the amount of those expenses, except that he should pay for the copy of the testimony furnished to his counsel. The Sayre & Fisher Company was successful on its petition to have the sale to Allgair set aside. It agreed to bid for the property on a resale the sum of at least $60,000, plus the amount that should be awarded to Allgair. It did so. In fact, it bid for the property a sum much in excess of what it was bound to do by its agreement entered into with the court when the order of July 31st was made. As the proceedings for determining the amount due to Allgair were had before the resale at which the Sayre & Fisher Company became the purchasers of the property, that company was interested in the question as to what the adjudication in favor of Allgair should be. It was therefore properly represented by counsel in those proceedings, and ought not to be charged with any of the costs of the proceedings, except for the cost of a copy of the testimony furnished to its counsel. In those proceedings Medora Fisher and other creditors, who had joined in the prayer that the private sale to Allgair should be set aside, were also represented by counsel. They should not be charged with any part of the costs of the proceedings, except the cost of the copy of the testimony furnished to their counsel. The residue of the costs should be paid by the bankrupt's trustees, who, as the representatives of the bankrupt's creditors, have so greatly profited by the resale.

The third question is, Who shall pay the taxes for the years 1902, 1903, and 1904? If the sale had been made under the terms of the order of July 24th, it is not disputed that they would have been paid by the bankrupt's trustees; for that order required the sale to be made "free and discharged of and from all incumbrances." But it was not made under that order nor under any other order of this court. It was made under an execution issued out of the Court of Chancery of New Jersey in the foreclosure proceedings instituted by the Empire State Trust Company. The purchase price, in the event of a sale under such execution, it was known would be paid to the sheriff of

the county of Middlesex, and become subject to the order of the Court of Chancery of New Jersey, and that only the surplus remaining in the sheriff's hands after satisfying the complainants in the foreclosure proceedings would be paid over to the bankrupt's trustees. By the order of July 31st the trustees were therefore expressly authorized and directed to pay out of such surplus moneys the amount that should thereafter be awarded to Allgair and the interest that should accrue on the two mortgages, or, rather, on the first mortgage and the Empire State Trust Company's final decree, from June 15, 1905, until the delivery of the sheriff's deed. Nothing was said in this order about the payment of taxes. But the petition against the William F. Fisher Company praying that it might be adjudicated bankrupt was filed in this court on October 7, 1902. The taxes assessed for that year did not become demandable by the township authorities until December 20th, more than two months after the institution of the bankruptcy proceedings. It follows, then, that the taxes for the three years in question became due and payable, and for 1903 and 1904 were assessed, after the beginning of the bankruptcy proceedings. There was no method by which the township authorities could enforce collection of these taxes by a sale of the property, for that property was in custodia legis. While taxes are not, in a strict sense, debts, they are so denominated in the bankruptcy act. Section 17 of that act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]) is as follows:

"Debts Not Affected by a Discharge.—A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as (1) are due as a tax levied by the United States, the state, county, district or municipality in which he resides," etc.

Section 64, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], is as follows:

"Debts Which Have Priority.—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," etc.

And section 1, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419], declares that the word "debt" shall include any debt, demand, or claim provable in bankruptcy. Of course, a tax is provable in bankruptcy. It thus appears that taxes legally due and owing by the bankrupt must be paid before distribution to creditors, and the injunction of section 64 is that the court "shall order" the trustee to pay them. It seems to be the duty of the court to require such payment, even though no claim for the same shall have been presented in the manner or within the time prescribed by the bankruptcy act for the filing of claims. It is true that section 64 does not, in express words, refer to taxes assessed or becoming due after the institution of bankruptcy proceedings. But it is settled law that the bankrupt's estate is taxable while it is in the hands of the bankrupt's trustees. In Swarts v. Hammer, 120 Fed. 256, 56 C. C. A. 92, the Circuit Court of Appeals for the Eighth Circuit held that a federal court will always order and direct the payment of taxes duly assessed on property in the possession of its officers, and treat the same as a preferred claim against the estate or fund which

is in process of administration. And this cause was affirmed by the United States Supreme Court, which declared that, where Congress has the power to exempt property from taxation, the intention must be clearly expressed, and that no such intention is discoverable in our present bankruptcy act. See 194 U. S. 441, 24 Sup. Ct. 695, 48 L. Ed. 1060. It thus appears that it was the duty of the bankrupt's trustees to pay the taxes assessed for each of the years 1902, 1903, and 1904. If they had paid these taxes, the court could not have denied them credit in their accounts, even though the property were afterwards sold under an execution issued out of a state court, nor even if it had been sold for a sum insufficient to repay them for the disbursements thus made. The fact is, however, that no such condition exists. The trustees have ample funds out of which to pay the taxes. The legal duty to do so was not discharged when this court merely withdrew its injunction staying sale in the foreclosure proceedings, nor were they relieved from that liability by the mere fact that the order of July 31st was silent on the subject of the payment of the taxes. The duty of payment being fixed on them by law, they can only be discharged by actual payment or by a legal agreement with the purchaser of the property at the sheriff's sale by which that purchaser assumed payment. There is no such agreement, and this court is without the power to relieve the trustees from the obligation imposed on them. They must therefore pay the taxes. It should be noted, however, that section 64 of the bankruptcy act does not provide for the payment of interest on taxes, and the order will therefore be simply that the trustees pay the amount of the taxes without interest.

A fourth question has also been presented. Shortly after the purchase of the property by the Sayre & Fisher Company its certified check for $60,000 was delivered up to it, and another certified check for $5,000 was deposited by it with George T. Cranmer as security for any sums that this court should, in deciding the questions above mentioned, conclude were chargeable against it. As by the decision above stated it is charged only with the cost of a copy of the testimony furnished to its counsel, the check for $5,000 should be returned to the Sayre & Fisher Company upon the payment of the amount due for the copy of the testimony delivered to its counsel, and upon the expiration of the time limited for the bankrupt's trustees to take an appeal from the order made hereon, or, if an appeal be taken by said trustees, then upon the determination of that appeal, and the payment to Allgair of all moneys that the appellate court may require the Sayre & Fisher Company to pay.

It may also be returned at any time within the period limited for taking an appeal, provided the bankrupt's trustees shall deliver to George T. Cranmer a written statement that they do not intend to prosecute any appeal, and provided that the Sayre & Fisher Company shall first pay the cost of the copy of the testimony delivered to its counsel.

THE CUZCO.

(District Court, E. D. New York. June 25, 1906.)

1. SEAMAN—INJURY IN SERVICE—LIABILITY OF SHIP.

The injury of a seaman by falling through a partially uncovered hatchway on a steamship in the dark *held* due to his own negligence, and one for which the ship was not liable; it appearing that he knew that the hatch was usually kept open at least in the daytime and that there was a light burning within a few feet of it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seamen, §§ 189, 190.]

2. SAME—FAILURE OF VESSEL TO PROCURE MEDICAL ATTENTION.

A steamship *held* liable in damages to a seaman whose shoulder was dislocated by an accident on the voyage, where neither the master nor any one else on board had sufficient medical knowledge to determine whether or not there was a dislocation, and there was a port with medical facilities 70 miles distant which they had passed, but, instead of going there to procure the service of a physician, the master proceeded on the voyage to the next port, 1,100 miles distant, which in good weather required five days, and in fact took eight days.

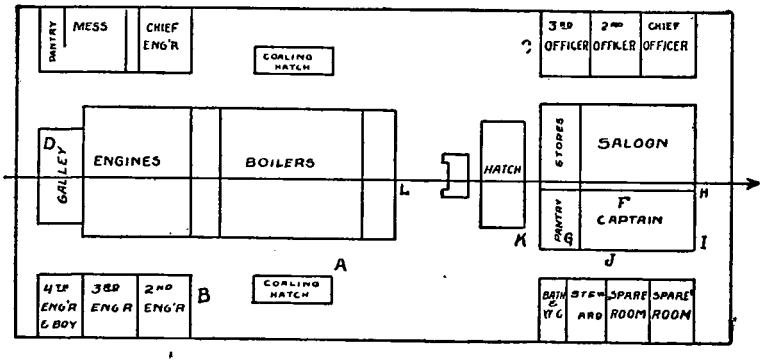
[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seamen, § 187.]

In Admiralty. Action by seaman for personal injury.

Abbott & Coyne (B. B. Coyne, of counsel), for libelant.

Convers & Kirlin (J. Parker Kirlin and Charles Hickox, of counsel), for claimant.

THOMAS, District Judge. The libelant, a chief cook, was injured, while in the Straits of Magellan, by falling through a hatchway on the bridge deck, when the ship was at anchor at Fortescue Bay on account of bad weather. At about 4:30 o'clock, on August 24th, while it was snowing and yet dark, the libelant went to get the key of the galley from the officer on the bridge, making his way forward on the port side, and returning by the starboard side. The following Exhibit 2 is a plan of the bridge deck:



From the hatch in question, marked "A," two covers had been removed, leaving an open space fore and aft of 3 feet 4 inches. The distance between the house and the nearest side of the hatch at the for-

ward corner is 4 feet 11 inches. The distance from the rail to the starboard side of the hatch is 4 feet 8 inches, a portion of which space is taken by the rail space or stanchion, leaving a clear space of 3 feet 6 inches. The hatch was 12 feet long, by 4 feet wide, and was surrounded by a coaming 11½ inches high. The after end of the hatch was 8 feet from the front of the house, marked "2nd Eng'r," whereon at B was a bulb for an electric light, 5 feet 4 inches above the deck. There was a similar arrangement on the port side of the ship. There was also provision for an electric light at the point marked "L," but the light at L did not light the hatch.

The libelant describes the accident as follows:

"I turned out in the morning on the 24th of August, 1903, I think about 20 minutes or half past 4 in the morning. I went up on the bridge deck, and went around the galley on the port side to go to the bridge deck to the officer to get a key from the officer. By arriving there the second mate had gone below already, and the chief mate called him back again for to bring me the key, which he brought in about 5 minutes afterwards—letting me stand that long there. I got the key and went along back again on the starboard side, and I came on this part, just passing the bridge, and went to the rail, and by coming back I fell into the hatch and from that time I remember no more until the steward came to my room and washed me, and I came to my senses again."

The captain saw the libelant at 7 o'clock, after the accident, and testified:

"He told me he went to get the key from the officers on the bridge; and, walking backwards, he went out to the rail, and when he stepped backwards he forgot about the hatch. That is what he told me."

The captain further states that, unless bad weather prevented, the hatch on the starboard side was kept open during the day and at night to allow access to the coal bunkers, as there was no other entrance thereto except on the main deck through the boiler room, through doors which were water tight and kept closed, but could be opened unless the coal placed in that locality prevented, and that the coal was not sufficiently low at the time of the accident to permit such entrance.

Williams, the second cook, testified that for the purpose of removing the libelant from the main deck, where he lay after the fall, he went into the bunker from the main deck, and took the libelant out through the door into the passageway. According to this evidence, there was a clear entrance to the bunker without going through the hatch. Nevertheless, the captain of the vessel had a right to keep the hatches off, provided the libelant was treated fairly with reference to them. The libelant knew that the covers were off in fair weather during the day, but denies that he had such knowledge that the removal continued at night, as he says that previous to the morning in question he had not been forward in the dark. According to his statement, the hatch was 18 or 20 feet forward of his galley door and in sight of it. The libelant's knowledge that the hatch was usually kept open in the daytime was a warning which he should have heeded. Hence he should have used more care in approaching it.

The claimant's evidence tends to show that the electric light was burning at the point, B, on the starboard side, and that there was a similar light in front of the chief engineer's room on the port side.

The libelant does not deny that there was an operative light on the port side, but insists that is was shut off on the morning in question, and in this he is corroborated by the second cook, Williams, and the seaman Bill. These three men also state that the light was not going at B, and had not been during the voyage. Indeed, the libelant states that there was a place for an electric light, but that the outside glass was boarded over, so that "it was closed up; there was no light around there; it was always dark on that side," Williams, the second cook, testified that there was no bulb, and then:

"There was only a frame,—one of these round glasses that is used to keep the bulb. There was just the iron frame and no glass at all. Q. You could look right through the iron frame and see there was no bulb there? A. Yes, sir."

Bill testified as follows:

"Q. Will you state whether there was an electric light bulb in the place shown in Exhibit No. 6? A. No, sir; there was no bulb there. I am sure of that. Q. Did you ever see that light going behind the third engineer's room from the time you left NewYork until the accident happened? A. No; that light was never going. Q. Those lights were never going on that deck? A. On the port side from the chief engineer's room when he had a light burning in his room, that showed a light on the deck. Q. On which side of the deck? A. Port side."

This witness further testifies:

"Q. Were the dynamos going on the vessel on this day? A. Yes; when I commenced at 4 o'clock, I tried to switch the light on, but there were no dynamos and the light would not burn. Q. Were they going on August 24th? A. Not at 4 o'clock. When the accident happened, they were not going, and that was about a quarter after 4. The captain did not come up until after 5. At 5 we called all hands. Then the captain was called and he came up."

So that the libelant and his two witnesses not only testify that there was no light near the hatch, but also that there was no opportunity for a light. The master, Dexter, Crieg, the chief engineer, Morse, the steward, Gibson, the chief officer, Williamson, the second officer, testified with reference to the lights. The evidence of these witnesses establishes that the starboard light was in an operative condition; that it had been so during the voyage; that it had usually been lit when the vessel was in port, and had not been used when the vessel was at sea; that the light had been in operation on the night in question before the accident, and was in operation after the accident. It is true that none of these witnesses saw the light at the immediate time of the accident, and because no one of them can speak with precision as to the condition at that exact moment it is urged that the statements of the libelant and his witnesses should be adopted. But it is thought that the libelant and his witnesses are so clearly wrong in their statement as to the inoperative condition of the light that their evidence should not be preferred to that of the claimant's witnesses, who showed conditions before and after the accident indicating that the light was in operation at the time the accident happened. This conclusion is strengthened by the fact that the vessel went to sea at about 6 o'clock, and it is highly improbable that between 4 and 5 o'clock the lights were not in operation, especially as the mast and side lights were electric. As to this the master testified:

"Q. A man named Bill has been examined, who states that he went up on the bridge about or shortly after 4 o'clock, and that your side lights were then burning, but that the kerosene lights were lit, instead of the electric lights. What is the fact about that? A. That is rot, that is. Q. Why do you say it is rot? A. Well, there was no necessity for it. The ship was at anchor, and there would be no necessity for the kerosene lights unless the dynamo was completely broken down, or unless the whole switch was blown out in the section. Q. If you were getting ready to go to sea with immediate side lights, what lights would you use? A. Electric lights. Q. Unless the dynamo was broken down? A. Unless the dynamo was broken down."

At 7 o'clock, when the ship was under way, the captain went to see the libelant, and, although the latter's arm was much swollen, made an examination and concluded that the shoulder was not dislocated, because there was no downward projection. The dislocation was upward, which accounted for the absence of the symptom for which the captain was looking. The ship was then 70 miles from Punta Arenas, whence she had sailed on August 23d, anchoring at Fortescue Bay, where the accident happened. The distance from Fortescue Bay to Coronel is about 1,100 miles, which should, under favorable circumstances, be made in five days; but, on account of adverse conditions, the ship was seven or eight days in arriving at that point. The dislocation was then reduced by a doctor, and the ship proceeded to Valparaiso, where a physician came on board and remained until October 1st, furnishing the libelant with proper attention. Although the libelant before that time aided somewhat in the galley, he did not do full work until October 16th, when he took full charge, and so continued until the vessel reached New York on January 6th or 7th. The accident happened before 5 a. m. The ship was not under way until 6 a. m. The cargo was not perishable. The distance to Punta Arenas, a place of 5,000 inhabitants and supplied with medical facilities, was 70 miles. The injury was obviously serious and painful. The master and steward did not have capacity to discover the nature of the injury. The distance to the next port was at least five days, and adverse weather, not unexpectable, would prolong it. Taking all this into consideration, the master should have used a few hours to reach a known port where there was medical aid. It is urged that the master did not know how serious the injury was or the danger of delay; but he was conscious of his own ignorance, and had no right to imperil the libelant. He should have gone to the port he had just left to gain the medical knowledge.

If the matter involved seamanship, the master's judgment would be entitled to great respect. But of the matter in hand he knew that he did not know, and that none aboard knew. But he did know that a man had fallen through a hatch, and that he had received substantial injury. It was his duty to secure advice at the neighboring port. His failure to do so probably aided the resulting abnormal condition of the libelant's arm, and added to his pain and discomfort, and it is thought that the sum of $1,500 is a proper compensation for the claimant to make therefor.

THE FROLIC.

(District Court, D. Rhode Island. November 15, 1906.)

No. 1,132.

ALIENS—VIOLATION OF CHINESE EXCLUSION ACT—FORFEITURE OF VESSEL.

An agreement by the owner to sell a schooner, to be paid for in installments, under which he put the purchaser in possession and appointed him master, with the right to use the vessel and receive her earnings, although retaining title until full payment of the purchase price, was sufficient to authorize the purchaser to appoint another master and to render her subject to condemnation and sale, under Chinese Exclusion Act May 6, 1882, c. 126, § 10, 22 Stat. 61 [U. S. Comp. St. 1901, p. 1309], for the knowing and willful violation of the provisions of such act by the new master so appointed.

In Admiralty.

This is a libel against the schooner Frolic, her boats, tackle, apparel, and furniture, based upon provisions of the Chinese exclusion acts. Condemnation is sought "for the causes following, to wit, for that, to wit, on said 11th day of October, 1906, one Edward H. Junkins, was then and there the master of said schooner, and, then and there being such master, did bring and aid in bringing and land by and from said schooner Frolic within the United States of America, to wit, at the port of Providence, within said district of Rhode Island * * * forty Chinese persons, to wit, Chinese laborers, the same then and there not being entitled to enter the United States, and contrary to the statutes in such case made and provided."

The United States relies on the following provision of the statutes:

"Sec. 10. That every vessel whose master shall knowingly violate any of the provisions of this act shall be deemed forfeited to the United States, and shall be liable to seizure and condemnation in any district of the United States into which such vessel may enter or in which she may be found." Act May 6, 1882, c. 126, 22 Stat. 61; Act July 5, 1884, c. 220, 23 Stat. 117; Act Sept. 13, 1888, c. 1015, 25 Stat. 476; Act May 5, 1892, c. 60, 27 Stat. 25; Act April 29, 1902, c. 641, 32 Stat. 176. See U. S. Comp. St. 1901, pp. 1309, 1312, 1319, and U. S. Comp. St. Supp. 1905, p. 295.

Herbert H. White, of Brookline, Mass., appears as claimant of the Frolic, and denies that on said 11th day of October, 1906, one Edward H. Junkins was then and there the master of said schooner. White alleges that he was the owner of said schooner, and had never appointed said Edward H. Junkins as master, and denies that said Junkins had ever been lawfully appointed master by any one having authority to so appoint him. The claim of White was heard upon an agreed statement of facts, supplemented by certain documentary evidence and by the oral testimony of said White. The agreed statement of facts is as follows:

"First. In this case it is agreed that Herbert H. White, of Brookline, Mass., is the owner of said schooner, subject to such rights as one Herbert F. Colby, of Boston, has under and by virtue of an agreement made between said White and said Colby, dated the 12th day of December, 1902.

"Second. It is agreed that said Herbert F. Colby has had possession of said schooner since said 12th day of December, 1902, under and by virtue of said agreement, a copy of which is made a part of this agreement.

"Third. A certified copy of the certificate of enrollment of said schooner Frolic, marked 'No. 146' and issued at Boston, with the indorsements of the change of master thereon, is made a part of this agreement.

"Fourth. It is agreed that on or about the 11th day of October said schooner, with one E. A. Junkins acting as master, entered the port of Providence in this district, and the crew, aided and abetted by said Junkins, unlawfully, knowingly, and in violation of the Chinese exclusion acts of Congress, landed certain Chinese persons, to wit, about 42 such persons, at the port of Providence.

"Fifth. That said schooner, with said E. A. Junkins acting as master, made a voyage to the island of Newfoundland, within the Dominion of Canada, for the purpose of unlawfully bringing into and landing said Chinese persons within the United States of America.

"Sixth. It is agreed that said schooner made said voyage and committed the unlawful acts hereinbefore set forth without the knowledge or consent of the said Herbert H. White, and in violation of the terms of said agreement between said White and said Colby hereinbefore referred to.

"Seventh. A certified copy of a license to said schooner, dated at Boston July 24, 1906, is made a part of this agreement."

The agreement between said White and said Colby, above referred to, is as follows:

"Memorandum of an Agreement by and between Herbert H. White, of Brookline, Massachusetts, and Herbert F. Colby, of Boston, Massachusetts.

"Witnesseth, that said White, in consideration of one dollar and the following agreement on the part of said Colby, to be done and performed as hereinafter set forth, agrees to allow said Colby to use the schooner yacht Frolic, and to sell said Frolic to said Colby upon the terms and conditions hereinafter set forth. And in consideration of one dollar and the following agreement, said Colby agrees to purchase said Frolic, as follows: That in the spring of 1903 said Colby will put said schooner yacht Frolic in commission and in condition satisfactory to said White, to use said Frolic as a party boat during the term of this contract, and said Colby shall pay for such use, or towards the purchase price of said Frolic, if said Colby shall fully perform the provisions of this contract, as follows: The sum of $1,500 (fifteen hundred dollars), with interest at six per cent. (6%) per annum upon all deferred payments, payable $60 (sixty dollars) on or before July 9, 1903, $60 (sixty dollars) on or before August 9, 1903, $60 (sixty dollars) on or before September 9, 1903, and $60 (sixty dollars) on or before October 1, 1903, and as much more during the season of 1903 as the earnings of said yacht Frolic will warrant; and like sums shall be paid on the same dates during the years 1904, 1905, 1906, and so on, until said Colby shall have paid said White in full said purchase price of fifteen hundred dollars and interest.

"Said Colby also agrees to pay to said White in each of the years during the life of this contract a sum not to exceed $60 (sixty dollars) for the premium on insurance of said yacht Frolic, for the benefit of said White and payable to said White in case of loss. Said Colby moreover agrees to pay for such damages as the insurance policy does not cover.

"Said Colby also agrees to have personal charge of said yacht Frolic, and to keep her at all times in a condition satisfactory to said White, and shall not let said Frolic to rough or disorderly parties, and shall allow said White to use said Frolic whenever such use will not conflict with the renting of said Frolic to third parties, and shall keep full and accurate account of all expenses occasioned by the operation of said yacht as aforesaid, which accounts shall be open at all times to the inspection of said White, and shall be subject to his approval or disapproval. Said Colby is to be allowed $2 (two dollars) for each day that he shall be obliged to absent himself from his employment at the W. G. Bell Company, of Boston, in order to operate said Frolic as aforesaid, and said Colby shall allow said White to retain towards the sum aforesaid all money derived from parties which said White shall obtain.

"In case said Colby shall fail to perform any part of his agreement as herein set forth, said White can then take immediate possession of said yacht Frolic, and said Colby shall immediately return her to such place as said White may designate, and shall put her out of commission, properly covering her, and shall surrender to said White all such new fittings and furnishings, including any new tender, that he may purchase; and said Colby shall recompense said White for all such damages as may be occasioned by his act or neglect, reasonable use, wear and tear, and unavoidable casualty excepted, and to forfeit all such payments as he, the said Colby, shall have made previously.

"It is understood and agreed that said Colby, his heirs or assigns, shall have the right and option at any time to demand from said White, his heirs of

assigns, a full and complete title to said yacht Frolic upon the payment of any balance of said purchase price, with interest, which may at that time remain due to said White.

"It is agreed that, in the event of the loss of said yacht Frolic before the completion of this contract, said White, his heirs or assigns, shall pay to said Colby, his heirs or assigns, from the money received from the insurance, the full amount of money, with interest at six per cent. (6%) from the date of payment thereof, which said Colby shall have paid said White on account of the purchase price of said yacht Frolic; provided, however, that if for any reason the insurance should be void or should have lapsed, or should in any way be less than a sum sufficient to pay said White the balance of the purchase price, with interest, due him, said White and said Colby, their heirs or assigns, shall share the money received from insurance in proportion as their interests may appear.

"In witness whereof, we have hereunto and to an instrument of like tenor and date set our hands and seals this twelfth day of December, A. D. 1902.

"Herbert H. White.
"Herbert F. Colby.

"In presence of Warren A. Chase."

Upon the certificate of enrollment appear the following "Indorsements of Change of Master":

"District of Boston & Charlestown, Port of Boston,
"July 18th, 1905.

"Herbert F. Colby, having taken the oath required by law, is at present master of the within-named vessel, in lieu of Herbert H. White, late master.
"J. E. Hesseltine, Deputy Collector of Customs."

"District of Boston & Charlestown, Port of Boston,
"July 21st, 1905.

"Byron A. Miller, having taken the oath required by law, is at present master of the within-named vessel, in lieu of Herbert F. Colby, late master.
"Wm. F. Jones, Deputy Collector of Customs."

"District of Boston & Charlestown, Port of Boston.
"August 22d, 1905.

"E. A. Junkins, having taken the oath required by law, is at present master of the within-named vessel, in lieu of Byron A. Miller, late master.
"Wm. F. Jones, Deputy Collector of Customs."

In the license dated July 24, 1906, Herbert H. White appears as sole owner, and E. A. Junkins as master. White testified that, subsequent to the written agreement with Colby, he appointed Colby master, and had not since that time visited the custom house, and had no knowledge that any person other than Colby had been appointed master; also that but $387 had been paid Colby, against whom there were some counter charges.

Charles A. Wilson, U. S. Atty.
Bingham, Smith & Hill, for claimant.

BROWN, District Judge. Upon the foregoing facts I am of the opinion that, while the title to the vessel did not pass to Colby and remained in White, Colby had such possession and control of the vessel as to authorize him to appoint E. A. Junkins as master. As it is agreed that said Junkins knowingly and in violation of the statutes landed certain Chinese persons at the port of Providence, the schooner Frolic is subject to condemnation.

The claim of Herbert H. White will be dismissed, and a decree of condemnation may be entered.

THE FROLIC.

(District Court, D. Rhode Island. December 7, 1906.)

No. 1,132.

1. ALIENS—FORFEITURE OF VESSEL FOR VIOLATION OF CHINESE EXCLUSION ACT—APPURTENANCES.

   In Chinese Exclusion Act May 6, 1882, c. 126, § 10, 22 Stat. 61 [U. S. Comp. St. 1901, p. 1309], which provides that "every vessel whose master shall knowingly violate any provisions of this act shall be deemed forfeited to the United States and shall be liable to seizure and condemnation," etc., the word "vessel" is broad enough to include the vessel's tackle, apparel, furniture, and appurtenances.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Aliens, § 97.]

2. SHIPPING—APPURTENANCES OF VESSEL.

   A chronometer supplied on account of the owners of a schooner as a necessary part of her equipment for a special service, although not in general a necessary part of her equipment, is to be regarded as appurtenant to the ship, and as included in the term "ship" or "vessel."

3. ALIENS—FORFEITURE OF VESSEL FOR VIOLATION OF CHINESE EXCLUSION ACT—OWNERSHIP OF APPURTENANCES.

   A chronometer, which is one of the appurtenances of a vessel seized under Chinese Exclusion Act May 6, 1882, c. 126, § 10, 22 Stat. 61 [U. S. Comp. St. 1901, p. 1309], for a willful violation of such act by the master, is not exempt from forfeiture because of the fact that it is not the property of the owners of the vessel, but was leased to them by the owner to be used as a necessary part of the vessel's equipment.

In Admiralty. In re claim of William Bond & Son.

Chas. A. Wikon, U. S. Atty.

Henry G. Vaughan, for claimants.

BROWN, District Judge. The chronometer claimed as their property by William Bond & Son was on the schooner Frolic when seized for violation of the Chinese exclusion acts. The Frolic, her boats, tackle, apparel and furniture, were condemned under the following provision of the statutes:

"Sec. 10. That every vessel whose master shall knowingly violate any of the provisions of this act shall be deemed forfeited to the United States, and shall be liable to seizure and condemnation in any district of the United States into which such vessel may enter or in which she may be found." Act May 6, 1882, c. 126, 22 Stat. 61; Act July 5, 1884, c. 220, 23 Stat. 117; Act Sept. 13, 1888, c. 1015, 25 Stat. 476; Act May 5, 1892, c. 60, 27 Stat. 25. See U. S. Comp. St. 1901, pp. 1309, 1312, 1319; Act April 29, 1902, c. 641, 32 Stat. 176 [U. S. Comp. St. Supp. 1905, p. 295].

The term "vessel," in said act, is broad enough to include the schooner's tackle, apparel, furniture, and appurtenances. The Manilla Prize Cases, 188 U. S. 254, 268, 269, 270, 23 Sup. Ct. 415, 47 L. Ed. 463.

The claimants contend that vessels of the size of the Frolic (48.5 feet long over all) do not usually carry chronometers; that a chronometer was not a part of the Frolic's usual equipment; and "that the determination of what are fittings, tackle, and appurtenances of a vessel depends on the vessel itself, its size, type and design, and what

such a vessel, per se, calls for to make her complete in fittings, tackle, and appurtenances, and does not depend and is not determined by what may be found aboard, or what her officers may use or provide themselves with, however much and whatever their convenience or the performance of their duties may require."

In Abbott's Merchant Ships and Seamen (14th Ed.), p. 33, Lord Stowell's remarks in The Dundee, 1 Hag. Adm. 109, are quoted:

"'It may not be a simple matter to define what is, and what is not, an appurtenance of a ship. There are some things that are universally so—things which must be appurtenant to every ship, qua ship, be its occupation what it may. But I think it is rather gratuitously assumed that particular things may not become so from their immediate and indispensable connection with a ship in the particular occupation to which she is destined and in which she is engaged.' And again: 'The word "appurtenances" must not be construed with a mere reference to the abstract naked idea of a ship, for that which would be an incumbrance to a ship one way employed would be an indispensable equipment in another; and it would be a preposterous abuse to consider them alike in such different positions. You must look to the relation they bear to the actual service of the vessel.'"

If we are to look to the relation which this chronometer was intended by its owners, William Bond & Son, to bear to the actual service of the vessel, the terms of hiring as set forth in the following document are significant:

"Received of Wm. Bond & Son, on account of vessel and owners, in good order, a chronometer, name, Bliss & Creighton, No. 1234, value one hundred dollars, on hire, for the use of which we jointly and severally promise to pay to them at and after the rate of five dollars per 6 weeks, without any deduction, for any cause whatever, until the said chronometer shall be returned to them, or until they shall be served with a protest of the loss, if any, of the same.

"The said chronometer is to be used on board the good and seaworthy Sch. called the Frolic, registered in Boston, whereof H. F. Colby is master and H. F. Colby and others are owners, and bound for Labrador, and is to be returned to the same Wm. Bond & Son, without expense to them, and without charge or claim for salvage or general average, at the expiration of the present voyage, or within 2 months from the date hereof, in the same good order as received. Insured by Sch. Frolic and owners, against unavoidable damage or total loss by fire or water, while on said vessel at sea. All and every other risk or risks whatever are taken by the undersigned.

"Sch. Frolic and Owners, by Herbert F. Colby,
"Boston, Aug. 27, 1906. Individually and as Master."

It hardly can be doubted that for a voyage to Labrador a chronometer was essential, and that it was supplied by the claimants on account of vessel and owners.

Under some circumstances a chronometer may be regarded as "appropriate to the service of the master to aid him in navigating the vessel, as much as his quadrant, or watch, or scale, or divider." Richardson v. Clark, 15 Me. 421. Were a case presented where the master of a vessel took aboard his own chronometer and his own nautical instruments, it might, perhaps, be held that they did not become appurtenances of the ship, but rather appertained to the master and his service to the ship. In such a case I should hesitate long before declaring such personal possessions used in the performance of a personal service to be appurtenances of a ship. But where such instruments

are supplied on account of the owners of a vessel, as a necessary part of her equipment for a special service, then it seems to me that they should be regarded as appurtenant to the ship, and as included in the term "ship" or "vessel." Abbott's Merchant Ships and Seamen (14th Ed.) 34, 280.

Nor does it seem essential that the absolute title to the articles furnished as a part of the equipment of the vessel for the particular service should be in the owners of the vessel. I am aware that, in some of the definitions of the term "appurtenances," the words "belonging to the owners" are used. Doubtless the question of title may be of importance in determining whether an article has become an appurtenance of a ship, just as in the law of fixtures it may be important in determining the real or constructive annexation of articles to a freehold. But the reservation of title is not necessarily inconsistent with the grant of such rights of use in furtherance of the service of the vessel as makes an article an appurtenance of the ship, as distinguished from an instrument appertaining to the personal service of the navigating officer.

In The Witch Queen, 3 Sawy. 201, Fed. Cas. No. 17,916, it was held that a lien of materialmen extended to a diving bell, air pump, and other apparatus belonging to the owners, not required for nor used in navigating the ship, but indispensable for the accomplishment of the particular voyage she was about to enter upon. Assuming that, had the owners hired a diver to furnish his personal services and his own diving apparatus, such apparatus might not be considered an appurtenance of the vessel, but rather as appertaining to the personal service of the diver, yet a still different question would be presented if the owners themselves supplied for the enterprise diving apparatus hired by them from its owner, who consented to its use as a part of the vessel's general outfit.

In United States v. 220 Patented Machines, (D. C.) 99 Fed. 559, machinery leased to a cigar manufacturer was forfeited to the United States, and it was said of the lessor:

"He takes the risk, therefore, that the manufacturer will conduct the business according to law; and, if the risk falls out against him, he cannot be heard to set up his own ignorance of the manufacturer's illegal conduct, or his own ignorance of unlawful intent."

It is well settled that, under forfeiture statutes like the one in question, the guilt or innocence of the owners of the property is immaterial. Dobbin's Distillery v. U. S., 96 U. S. 395, 24 L. Ed. 637; U. S. v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555; U. S. v. One Black Horse (D. C.) 129 Fed. 167. There is no greater hardship in a forfeiture of an appurtenance belonging to an innocent owner than in the forfeiture of the body of a ship belonging to an innocent owner.

The question before us is whether the claimants have shown that this chronometer, found aboard the Frolic, was not a part of her appurtenances. The claim alleges merely that they are the owners of the chronometer. This is not enough to avoid a forfeiture; for the question of title becomes immaterial, if they have in fact consented

to its use as an appurtenance of the vessel. Such consent sufficiently appears, and makes the chronometer part of the vessel for the purposes of forfeiture.

The claim of William Bond & Son is denied and dismissed.

LOEWE et al. v. LAWLOR et al.

(Circuit Court, D. Connecticut. December 7, 1906.)

No. 538.

MONOPOLIES—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—BOYCOTT—TRADE UNIONS.

The action of the members of a labor union in attempting to compel a hat manufacturer to unionize his factory by leaving his employment and preventing others from taking employment therein, and also, with the assistance of the members of affiliated organizations, by declaring a boycott upon his goods in other states into which such goods have been shipped for sale at retail, does not have such relation to interstate commerce as to constitute a combination or conspiracy in restraint of such commerce in violation of the Sherman anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]).

At Law. On demurrer to complaint.

See 142 Fed. 216.

Davenport & Banks, for plaintiffs.

John K. Beach, John H. Light, De Forest & Klein and Howard W. Taylor, for defendants.

PLATT, District Judge. Some of the grounds of demurrer are general, attacking the entire complaint, and others are special, affecting only certain portions which are said to be irrelevant or evidential. It is with the former class that we are at this moment particularly concerned.

The complaint, stripped to the bone, sets forth, in substance, the following situation: The defendants are members of a local union in Danbury, Conn., which is a subordinate branch of the United Hatters of North America, which embraces several states and many members, and is, in its turn, subordinate to the American Federation of Labor, which embraces more states and more members. The defendants, by reason of such membership, were enabled to put into operation certain means to accomplish their purpose, and to such means they resorted with vigor and effect. They undertook thereby to compel the plaintiffs, against their will, to unionize their factory. Their associates, with their assistance, had prior thereto employed similar means toward divers factories in other states, and had succeeded. The defendants paraded such successes before the plaintiffs, and a threat to treat them in the same way was one of the means which they employed to coerce the plaintiffs into yielding to their demands. They then withdrew from plaintiffs' employment, and tried with considerable success to prevent others from working for them. With the help of their associates in the larger bodies to which they were affiliated, they declared a boycott upon hats

made by plaintiffs which were found in the hands of plaintiffs' customers in other states, notably in California and Virginia. In such action they took advantage of the absence from plaintiffs' hats of the union label, which by the state law of Connecticut the United Hatters were authorized to affix to hats made under the supervision of their members. In these ways they caused the plaintiffs a great deal of damage, and (according to the complaint) limited and restrained plaintiffs' interstate trade in hats.

It must be obvious from the foregoing recital that the defendants by the means therein described sought to curtail, and, if possible, destroy, the plaintiffs' production of hats at home, and, with the assistance of their friends, to curtail, and, if possible, destroy, the distribution of such product after it had become settled into the stock of goods in the hands of plaintiffs' customers in other states. There is no allegation which suggests that the means of transporting plaintiffs' product, or the product itself while being transported, were touched, handled, obstructed, or in any manner actually interferred with. There is no allegation that the defendants are in any way engaged in interstate commerce.

The argument for the plaintiffs is that by entering into a scheme to curtail the production at home, and the distribution by customers abroad, the defendants have formed a combination to limit and restrain plaintiffs' trade between the two points, which is interstate trade, and that such restraint is the direct, positive, and inevitable result of the general scheme. The manufacture of the hats before they leave the factory in Danbury is not interstate commerce, nor are the hats themselves up to that time the subject of interstate commerce. The distribution of the hats from the hands of the customers in other states to the ultimate consumer is not interstate commerce, nor are the hats themselves during such distribution the subject of interstate commerce.

The real question is whether a combination which undertakes to interfere simultaneously with both actions is one which directly affects the transportation of the hats from the place of manufacture to the place of sale. It is not perceived that the Supreme Court has as yet so broadened the interpretation of the Sherman act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) that it will fit such an order of facts as this complaint presents. What it may do, if the matter comes before it, is, in my judgment, very uncertain. If the demurrer, in so far as it attacks the complaint as a whole, shall be overruled and the defendants put to their answer, a jury trial must follow in orderly sequence, and after a verdict the end would still be far away. A contested trial might consume weeks of time, and the expense, both to court and parties, would be enormous. It is deemed wise, for these reasons, to sustain the demurrer, and in this situation it is hoped that the court may be pardoned for not entering into an analysis of the contentions put forth by the opposing parties. Such contentions and the independent thoughts which they aroused were necessarily examined with care, in order that this present conclusion could be reached, and if, in making such examination, a further and final conclusion was reached, it would serve no useful purpose to make

it known at this juncture. If the matter shall come back to me for further action, observations upon the questions advanced by the special grounds of demurrer would be gratefully read, and might tend to avoid unreasonable delay and expense at a later stage of the proceedings.

Let the complaint be dismissed.

Ex parte OW GUEN.

(District Court, D. Vermont. June 20, 1906.)

1. ALIENS—CHINESE—UNREGISTERED LABORERS—MERCHANTS.

Chinese Exclusion Act May 5, 1892, c. 60, § 6, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1321], provides that an unregistered Chinese laborer, if found in the United States by certain officers, shall be adjudged to be unlawfully there, and may be taken before a judge and ordered to be deported. *Held*, that such section did not prohibit an unregistered laborer from remaining in the United States until proceeded against, and hence, prior to the taking of such proceedings, he was entitled to become a merchant and to the immunities accorded to them.

[Ed. Note.—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—PROCEEDINGS—INVESTIGATION.

Where, on the return of a Chinese person to the United States, his claim that he was a merchant at L. was not investigated by the immigration officers, but he was deported, because of his former status as an unregistered laborer, such decision was not conclusive against his right to again enter the United States by virtue of his being a merchant in L., established by two credible witnesses other than Chinese, as provided by Chinese Exclusion Act May 5, 1892, c. 60, § 6, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1321.]

3. SAME—WAIVER.

Where a Chinese person was entitled to re-enter the country by virtue of his being a merchant at L., the fact that, on his attempting to enter a second time after being deported, he put forward the unfounded claim that he was entitled to enter as a merchant at B., did not constitute a waiver of his rights based on the facts that he had been a merchant at L.

On Habeas Corpus.

Fuller C. Smith, for relator.

James L. Martin, U. S. Atty.

WHEELER, District Judge. The relator is a Chinaman, and came to the United States about 1885, and in 1893 appears to have some interest with his uncle as a merchant in Boston, and for that reason did not become registered as a laborer. Afterwards he was for several years a laundryman at Lowell, till 1901, when he became a merchant there and was engaged wholly in that business, having over $1,500 capital of his own therein and three partners having in it $800, $700, and $500, respectively. In 1903 he went to China, leaving affidavits of two white witnesses as to his being a merchant at Lowell, and returned there for admission, and was refused on examination and appeal, and deported to China, because, although a merchant in fact, he was said not to be in law, as he had been a laborer and remained

unregistered. He now came here again and applied for admission as a merchant in Boston under a different arrangement of his names, and, being recognized, at first denied, and then acknowledged, his former application. His claim as to being a merchant in Boston was investigated and found wanting, but not that as to being a merchant in Lowell, and he was ordered to be deported because he had been an unregistered laborer, as before, and this decision was affirmed by the Secretary of Commerce and Labor on appeal, and he applied for this writ.

The relator insists that, being a merchant in fact in the United States, he had a right to return on compliance with the law, and that the decision of the immigration officers that his former status as a laborer excluded him is not final. The Government insists that while he was an unregistered laborer he could not lawfully remain here and become a domiciled merchant, under section 6 of Act May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1321], and that the decision of these officers is final here. This section 6, however, does not provide that an unregistered laborer should not remain in the United States, but only if found there by certain officers, he should be adjudged to be unlawfully there and might be taken before a judge and ordered to be deported. He would in fact be here and be entitled to all the rights of a resident alien till so proceeded against, adjudged, and ordered. He would have, among others, the right to become a merchant, and when he did so he had all the rights under the law, of a merchant.

His right to return to this country was not investigated at all, as is now shown by the testimony of the inspector in charge of the case, but admission was denied because of his former status as a laborer. He was thereby restrained of his liberty as to this country until he appeared again, and then his claim of being a merchant at Lowell finally remained before the immigration officers and was ignored, although that of being a merchant in Boston was looked into. These rights were not so inconsistent that putting forward one would waive the other. He was still entitled to return on his right as a merchant of Lowell established by two credible witnesses other than Chinese, in full accordance with this section 6 of the Act of 1892 in question.

The decision of the immigration officers is made and held to be final and conclusive of the right of a Chinese person to come into this country, but it is understood that the right must be passed upon to have the decision become so. U. S. v. Sing Tuck, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917; United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040. Judgments of courts having jurisdiction generally draw in and conclude all questions necessary to their determination, but not others; and that others were not passed upon may be shown. Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195. The effect of the decision of these executive tribunals would seem to be more limited, and their grounds more provable, especially in the broad inquiry provided for in habeas corpus proceedings. The relator has shown clearly by the same witnesses to his merchant papers

of Lowell that he was and is entitled to return to the United States as such merchant, and that not this right, but only that of an unregistered laborer, has been passed upon. He therefore seems to be unlawfully restrained of his liberty for the purpose of deportation, and entitled to be discharged.

Relator discharged.

In re TUCKER.

Ex parte NEW YORK COTTON EXCHANGE.

(District Court, D. Massachusetts. March 3, 1905.)

BANKRUPTCY—PROVABLE DEBTS—LOAN BY WIFE.

A loan by a wife to her husband of stocks previously received by her from him as a direct gift, which gift was invalid under the law of the state and passed no title, does not afford basis for a claim against his estate in bankruptcy.

In Bankruptcy. On reargument. For former opinion, see 131 Fed. 647.

I. R. Clark, and John H. Sherburne, Jr., for appellant.

Robert H. Dickerman, for appellee.

LOWELL, Circuit Judge. A rehearing was granted, as suggested in the opinion heretofore filed, solely to permit Mrs. Tucker to urge that this case is governed by James v. Gray, 131 Fed. 401, 65 C. C. A. 385, 1 L. R. A. (N. S.) 321. In that case the Court of Appeals permitted a wife to prove in bankruptcy a debt which was unenforceable in the courts of Massachusetts at law, in equity, or in insolvency. The debt was based on a valuable consideration. In the case at bar counsel for Mrs. Tucker have argued that a court of bankruptcy, which does equity, should recognize the validity of a gift of personal property made directly from husband to wife, although the courts of Massachusetts treat the gift as invalid, both at law and in equity. That the English courts of equity recognize the validity of a gift like this appears probable, see Lucas v. Lucas, 1 Atk. 270; Mews v. Mews, 15 Beav. 529; Grant v. Grant, 32 Beav. 623. And it must be admitted that the reasoning of James v. Gray goes far to assert the binding force of these authorities upon a federal court of equity. Nevertheless, as a decision in favor of Mrs. Tucker would make altogether inoperative in the federal courts the law of Massachusetts governing the relations of husband and wife, I am not disposed to extend the reasoning of James v. Gray beyond cases in which the wife's claim is based upon a valuable consideration. The extension, if any is to be made, must be left to the Court of Appeals.

TUCKER v. CURTIN. In re TUCKER et al. Ex parte TUCKER.

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

No. 594.

1. HUSBAND AND WIFE—GIFT FROM HUSBAND TO WIFE—MASSACHUSETTS STATUTE.

Under Rev. Laws Mass. 1902, c. 153, §§ 1, 3, relating to transfers between husband and wife and the decisions of the Supreme Judicial Court of the state thereunder, a transfer of corporate stocks by a husband to his wife as a gift by surrendering certificates held by him to the corporation which by his direction issues new certificates to the wife is a transfer through a third person, and constitutes a perfect gift, good as against the husband and his subsequent creditors, in the absence of an actual intention to defraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 250–252.]

2. BANKRUPTCY—LOAN BY WIFE—PROPERTY RECEIVED FROM HUSBAND AS GIFT.

A member of a partnership, while solvent, transferred certain corporate stocks to his wife by way of gift, and she subsequently lent such stocks to his partner, who assigned her as security for their return a seat in an exchange which was in his name. Her husband witnessed the formal instrument executed by his wife and his partner covering the transaction, and in other ways indicated his assent to the loan of the securities by his wife, which loan was throughout in such form as to indicate that they were her absolute property. The stocks were used by the firm, which afterward became bankrupt, and the seat was sold by the trustee. *Held* that, even if the gift had not been originally perfect, it was rendered so by the transfer of the stocks to the partner and the substitution therefor of his obligation and security directly to the wife, under the circumstances described.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 286, 291, 295.]

Aldrich, District, Judge, dissenting.

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

For opinion below, see 131 Fed. 647.

John H. Sherburne, Jr. (I. R. Clark on brief), for appellant.
Robert K. Dickerman and John A. Curtin, for appellee.

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

PUTNAM, Circuit Judge. This is an appeal against a decree of the District Court for the District of Massachusetts sitting in bankruptcy. The bankrupts constituted a partnership known as "Frederick M. Tucker & Co.," stockbrokers, doing business at Boston, in the state of Massachusetts. Tracy H. Tucker, one of the bankrupt copartners, is the husband of Gertrude F. Tucker, the appellant. All parties resided in Massachusetts during the entire period to which this appeal relates, and the transactions involved were also within that state. There was one other bankrupt copartner, namely, Frederick M. Tucker, also of Boston, the two gentlemen named constituting the bankrupt partnership, which made an assignment for the benefit of its creditors

on May 21, 1903, and was subsequently petitioned into bankruptcy. The record contains no suggestion of insolvency previous to the assignment.

On November 18, 1902, Frederick M. Tucker borrowed of the appellant, Gertrude F. Tucker, certain corporate stocks, which will be referred to more particularly later, and assigned to her a seat in the New York Cotton Exchange as security for the return thereof. The assignment was formal in its nature, and described him as the borrower as well as the owner of the seat in the Exchange. It is very specific in declaring the sole individual obligation of Frederick M. Tucker. The record suggests that the Exchange seat was equitably the property of the partnership, and these proceedings seem to be based on that theory. There is, however, not the slightest indication that at the time of the transaction Mrs. Tucker knew that fact, or had any reason to know it, and she stands unprejudiced by it, and, on the face of the papers, Frederick M. Tucker dealt with it as his own property. Also, the only evidence which we find in regard to the party to whom the shares were loaned is what appears by the assignment itself, and by the testimony of Frederick M. Tucker that Mrs. Tucker loaned them to him, and he "put them into the concern." Therefore the transaction, on the proofs so far as brought to our attention, was a loan of the corporate stocks from Mrs. Tucker to Frederick M. Tucker. Mrs. Tucker's husband, Tracy H. Tucker, witnessed the assignment to her of the Exchange seat. Frederick M. Tucker testifies, and he is not contradicted, that Tracy H. Tucker procured the certificates of the various shares of stock from his wife, and delivered them to him, Frederick, and this at the time the assignment was executed. Thus the husband effectually assented to the transaction.

The present question arises out of the facts that the trustee in bankruptcy sold the Exchange seat free from all liens by an order of court, and that Mrs. Tucker filed a claim to be allowed out of the proceeds thereof the value of the corporate shares which she loaned as we have described. There is no claim, either pro or con, that any objection was made to the sale, or that Mrs. Tucker is not entitled to the same equity against the proceeds thereof that she had against the seat itself. Her claim was disallowed by the referee, on the ground that the corporate shares were given her by her husband in Massachusetts, so that, as was decided by him, the gift or gifts, as the case may be, were ineffectual as against creditors. The District Court affirmed the order of the referee, so that Mrs. Tucker appealed to us. It may well be observed that the case is not one of a proof of debt by a married woman against the estate of either her husband or his copartnership, but merely an assertion of title to her own separate property.

The record is not absolutely clear as to the circumstances under which Mrs. Tucker received the corporate shares in question, but we think that, as a whole, it sustains what was apparently the view of the learned judge of the District Court. Mrs. Tucker gave no consideration for them. She never had any separate estate of her own belonging to her before she was married, or coming to her in any way afterwards, unless the gift, or gifts, to her of the corporate shares in question had sufficient validity to create one. There was evidently some

conversation before the marriage in reference to a gift to her in connection therewith, but whatever occurred was not sufficient to create what could be called an antenuptial agreement, or a positive agreement of any form. Therefore there was no consideration in that connection such as the law fully recognizes, although probably what was said before the marriage in a certain way led up to her acquisition of the stocks afterwards.

There were two acquisitions, differing as to dates and forms. She loaned Frederick M. Tucker 25 shares of the capital stock of the Amalgamated Copper Company and 40 shares of the preferred capital stock of the United States Steel Corporation. Mrs. Tucker was married on June 26, 1901. At that time her husband was the owner of 25 shares of the stock of the United States Steel Corporation and of the 25 shares of the Amalgamated Copper Company. These came to him from the estate of his grandfather in the form of certificates issued to the former holders, and indorsed by them in blank; and they were in that condition when he was married. Soon after marriage he took out new certificates for both lots in the name of Mrs. Tucker, and delivered them to her. Thus her title to them became in form fully perfected. The remaining 15 shares of the United States Steel Corporation were purchased by her husband on September 11, 1901, and, on purchase, they were transferred directly into her name by the corporation, and a certificate was issued to her, and immediately delivered to her; so that the title thereto never vested in her husband either in form or in fact, unless a vesting was compelled by the law by reason of the existing marriage relations. It is said, although this is not important, that the certificates were subsequently placed in a safety deposit box which was held in the name of Mrs. Tucker, and that she received the dividends and used the money as she saw fit. No question is made that, at the time these gifts were made, they were free from fraud so far as creditors were concerned, and were made in good faith in all respects. Yet it is apparent that no consideration which the law regards as valuable passed therefor from Mrs. Tucker to her husband.

Mrs. Tucker maintains that this case is covered by our opinion in James v. Gray, 131 Fed. 401, 65 C. C. A. 385, 1 L. R. A. (N. S.) 321, passed down on July 6, 1904. Neither the question before us in that case nor the opinion involved or disposed of the issue which arises on this appeal. The matters brought to our attention in James v. Gray were strictly limited to the disposition of what we regarded as a part of the wife's separate estate. Starting with a statutory separate estate, we applied the broad rules of equity that, as between husband and wife, the chancellor will follow out and protect such an estate; and that was all. At page 408 of 131 Fed., at page 392 of 65 C. C. A., we stated as follows:

"We find that the real issue presented is whether under the federal bankruptcy statutes, which permit the allowance of equitable claims, a loan by a wife to her husband from property secured to her by the Massachusetts statutes creates an equity in her favor."

Thus we started with the fact that the wife, after coverture, had a separate estate, either at common law or under the rules of equity, or

under the statutes of Massachusetts. Here the dispute is whether she ever had any separate estate, a dispute which James v. Gray does not reach. Where there is a mere gift without any consideration which the law regards as valuable, no such clear equity arises as when the existing estate of a wife is dealt with, unless a third person is brought into the case. Then, if the property is conveyed to him, either in strict trust for the wife or that he may convey it to her, a clear equity arises against him in her behalf, which chancellors everywhere, including those in Massachusetts, admittedly enforce.

The opinions of the learned judge of the District Court declare that, under the statutes of Massachusetts, a gift from a husband to a wife is void; and it is established there that a married woman cannot acquire personal property by a perfect gift from her husband except through a third party. Spelman v. Aldrich, 126 Mass. 113, 117, decided in January, 1870. Spelman v. Aldrich raised an issue between the wife and a subsequent creditor on a state of facts which we will explain later. The opinion did not hold that a gift direct from the husband to the wife is void; but it was to the effect that it may be so far valid as to vest in the wife a right at the death of the husband as against his heirs and executors, invalid, nevertheless, as to his creditors. That this is the settled rule in Massachusetts is made apparent by the cases cited in Marshall v. Jaquith, 134 Mass. 138, 139, 140. Marshall v. Jaquith was between the wife and the husband's administrator, and the wife prevailed; but the authorities cited therein settled the law as we have said.

Although it was declared in some earlier authorities in some parts of New England that the English chancery system in regard to contracts between husband and wife had been created after our ancestors emigrated, and so had not become law on this side of the water, yet there has long existed no difficulty in Massachusetts in this respect, because, in consequence of there being no chancery jurisdiction in its early judicial history, the principles of equity were very largely adopted by the common-law courts. For example, the action for money had and received came in the Massachusetts Bay colonies to represent in no inconsiderable degree equitable rights and equitable remedies. So the common law of Masachusetts early adopted some of the chancery rules about the relations of husband and wife. Stanwood v. Stanwood, 17 Mass. 57, 59. Moreover, there is no difficulty in Massachusetts arising out of any rule relative to subsequent creditors. So far as that is concerned, if the gift to the wife, or any other mere gift, does not prejudice existing creditors, and is not actually intended to defraud future creditors, it is valid so far as any question of that character is concerned. Jaquith v. Massachusetts Baptist Convention, 172 Mass. 439, 52 N. E. 544.

One other difficulty existing at the common law does not exist under the Massachusetts statutes. As to personal property which lies in possession, the possession of the wife was at common law always the possession of the husband. This made a difficulty which was not wholly done away with in England, even in equity. But with reference to matters which lie in action, known as "choses in action," including

shares of corporate stocks, while, at common law, those vesting in the wife before the marriage and those taken in her name from others than her husband after marriage survive to her, even as against her husband's creditors and assignees in bankruptcy, unless reduced into possession during the life of the husband, as shown in Reeves' Domestic Relations (1888) 2, 7, Kent's Commentaries, vol. 2, 135, Addison's Law of Contracts (10th Ed. 1903) 248, 249, and Draper v. Jackson, 16 Mass. 480, yet they were all subject to the control of the husband, creating difficulties in making perfect gifts from him to his wife even as between them. Under the statutes of Massachusetts, however, the wife can take from a stranger a perfect title to personal property, as well as she could at common law to real estate. Rev. Laws 1902, c. 153, § 1. So it comes about that, as conceded by the trustee in this case, the wife, under the statutes of Massachusetts, may take by gift from her husband a perfect title to personal property with the aid of the intervention of a third person.

Section 3 of chapter 153, Rev. Laws 1902, is the provision which especially relates to transfers between husband and wife. It is not necessary that we should cite it at length, but it is plain that it might be so interpreted as, by implication, to prohibit a gift from husband to wife, either directly or indirectly, except so far as specified therein. But its practical construction, so far as this case is concerned, is that Spelman v. Aldrich, and other cases of its class, do not declare gifts which would be valid under the chancery rules to be invalid, unless as against creditors. Wherever it is clear that a gift was intended, and a chose in action has been put in the name of the wife, as in the case at bar, and only executors or distributees have interfered, the gift has been maintained.

We are thus clearly supported in two propositions by the local law of Massachusetts, as declared by the decisions of the Supreme Judicial Court and as conceded at bar. First, under the statutes of Massachusetts, as we have said, the wife may, after marriage, accept a gift of personal property, especially choses in action, which shall be free from the control of her husband; and, second, such a gift, may be free from the control of the husband's creditors, if it comes from strangers or from the husband through the intervention of a third person, the intervention to be of such a character as we will discuss and explain. Such has long been the rule, not only generally where the English language is spoken, but even in Massachusetts, when the third person receives from the husband property held under a strict trust for the benefit of the wife. When such is not the form of the gift, questions as to the form have arisen everywhere, as they do here; and such questions may, perhaps, be answered differently in different jurisdictions, according to the greater or less local anxiety with regard to preventing uncertainties as to titles to goods, and intermixtures thereof, which might operate to the prejudice of creditors and innocent purchasers. It is, however, only a question of the mere form of a gift which is involved in the case before us. Gifts by mere transfer from the husband to the wife are, as we have said, necessarily imperfect at common law, and are not always perfected in equity.

Eversley's Law of the Domestic Relations (2d Ed. 1896) 293. At page 294, however, the author states that a valid gift is accomplished by a transfer by the husband into the wife's name of stock, though previously purchased. This is the settled rule in England. In re Eykyn's Trusts, 6 Ch. D. 115, 118. This does not necessarily mean corporate shares, as in England the word "stock" includes, also, certain public and private obligations, usually known with us as bonds. There is no direct ruling in Massachusetts to the contrary, and the most that can be claimed here is by alleged analogy to Spelman v. Aldrich, 126 Mass. 113, already cited, which related to a deposit in a savings bank. The pith of that decision was that the interposition of a savings bank, under the circumstances of the case, was not such an intervention of a third party as gave the wife a new equity, so that, notwithstanding such interposition, the gift was directly from the husband to the wife, and therefore ineffectual as against the husband's creditors.

We are, however, forced to the conclusion that Spelman v. Aldrich, even if not practically overruled, cannot control us here. First, Spelman v. Aldrich was not a case of transfers of shares of stocks to the wife, requiring the active intervention of corporations in accepting the surrender of the original certificate, and issuing new certificates to the wife. From the instant an old certificate is surrendered with a transfer on it to the wife, the corporation assumes an obligation to her to issue her a new certificate, which obligation lays the basis for a bill in equity by her for specific performance. This obligation may even sustain an action by her at common law in the federal courts. Hendrick v. Lindsay, 93 U. S. 143, 23 L. Ed. 855; McKee v. Lamon, 159 U. S. 317, 322, 16 Sup. Ct. 11, 40 L. Ed. 165. It is true that the same principle would seem to apply to a savings bank which had received a deposit; and yet, under the circumstances, we would be at liberty, if necessary, to hold that there is a distinction.

Moreover, we are not bound to follow Spelman v. Aldrich, because, even if not overruled, it is plain that the principles therein announced have not been continuously and consistently applied by the Supreme Judicial Court of Massachusetts. We begin with Sweeney v. Boston Five Cent Savings Bank, 116 Mass. 384, 385, where, in an opinion arising out of a suit by the husband against a savings bank to recover a deposit which he had made in the name of his wife, having delivered her the savings bank book, the court said:

> "The book is evidence of a contract of the defendant with her"—that is, the wife—"and it appears from the report that this contract was made with his sanction and concurrence."

It was held that the husband's suit could not be maintained.

Brown v. Brown, 174 Mass. 197, 201, 54 N. E. 532, 75 Am. St. Rep. 292, related to a deposit in a savings bank, where the proceeding was in behalf of the administrator against the wife. It is true that the report of the case does not state whether the estate was insolvent, so that the creditors were the real parties in interest, or whether the parties in interest were the distributees. It appears, however, from the reference which the opinion, at page 204 of 174 Mass., page 533

of 54 N. E. (75 Am. St. Rep. 292), makes to Spelman v. Aldrich, and from the following extracts, that the court was discussing the question of a perfect gift, good against creditors. At page 199 of 174 Mass., page 533 of 54 N. E. (75 Am. St. Rep. 292), the opinion observes:

"A husband may give and deliver personal property to a third person, who may straightway give and deliver the property to the wife; and this would be a valid transfer of the property from husband to wife, although the sole purpose of all parties was to make such transfer. But the gift cannot be made directly. * * * If it appears that the title comes to her by such a contract"—that is, through a stranger—"then it is good, if not fraudulent as to creditors, although the only consideration for the contract moves from the husband."

It appeared that the husband saved a considerable portion of his earnings. His habit was to share those savings with his wife, keeping one half for himself, and providing that the other half should go to her as her own money. The wife, as the agent of her husband, received the one-half intended for her, and as his agent delivered it, while it was still his, to the bank, and, still acting as his agent, directed the bank to make a contract with her to deliver a like amount to her; and the bank, taking the money from her as the agent of the husband, did, in compliance with her directions, deliver her in her individual capacity the deposit book made out in her name. These are the facts as stated by the court at pages 198 and 201 of 174 Mass., pages 533, 534 of 54 N. E. (75 Am. St. Rep. 292). If Brown v. Brown does not overrule Spelman v. Aldrich, the distinction it makes is so fine that dealing with certificates of stock, which, by the intervention of the corporations, had been issued to the wife, we are not required to accept Spelman v. Aldrich, rather than Brown v. Brown, as analogous to this case. Moreover, we find nothing in the local decisions of such stable and consistent character as would require us to follow them, even if there were any substantial identity between transactions relating to savings bank deposits and those before us on this appeal. Therefore we find here sufficient intervention by new third parties, in the action of the several corporations whose shares of stock are in question, to establish Mrs. Tucker's title as against the executors; distributees, or creditors of her husband.

In this particular case, however, we find an intervention of a third party, as required by local decisions in Massachusetts, of the most formal and positive character. What we have to deal with here is not merely the identical shares of stock out of which this appeal arose, but the obligation of Frederick M. Tucker under the assignment to Mrs. Tucker of November 18, 1902, of his seat in the New York Cotton Exchange, and the lien arising therefrom. Assuming that Mrs. Tucker's husband had at that date any interest whatever in the shares of corporate stock which he gave her, or that his gift was imperfect in any particular, what he then did made it perfect, and divested him and those claiming under him of any possible interest. As we have shown, the transaction received his assent as though he had formally joined in it. By virtue of it there was completed in Frederick M. Tucker a perfect title to the shares of stock in question, and there was substituted therefor an agreement of Frederick M. Tucker with Mrs. Tucker to account to her for the shares, accompanied with a lien on the

Exchange seat to protect the equity which thus arose in her favor against him. Here was a clear novation by the intervention of Frederick M. Tucker, and, by the consent of all concerned, a new contract between him and Mrs. Tucker, which gave her a clear equity against him and on his seat in the Exchange. Thus there arose a right of action in equity, if not at common law, vesting in Mrs. Tucker, which she could avail herself of without the assistance of her husband; and thus there arose all the rights which would have existed in the event that there had been a formal deed of trust, by virtue of which Frederick M. Tucker accepted the shares, and agreed with her to hold them and account to her for them, or the income thereof. Under these circumstances we see nothing, even if the strictest rules are applied with reference to the intervention of third parties, as stated in what we have cited from Brown v. Brown, which leaves the interest vested in Mrs. Tucker in any possible particular imperfect, whether from the standpoint of her husband or from that of his subsequent creditors, as to whom there is no pretense that any fraud was intended.

The decree of the District Court is reversed; and the case is remanded to that court, with directions to enter a decree in favor of Gertrude F. Tucker, the appellant, and to award her the costs of that court and of appeal.

ALDRICH, District Judge (dissenting). In this case a wife seeks to prove a claim, based upon a supposed gift from her husband, against a bankrupt partnership of which her husband is a member.

Under the law of Massachusetts, if the gift in question is established as one passing title to the property from the husband to the wife (a proposition to which I do not assent), the wife cannot enforce a claim in respect to it against a firm of which her husband is a member, either at law, Edwards v. Stevens, 3 Allen (Mass.) 315, or in equity. Fowle v. Torrey, 135 Mass. 87; Bank v. Tyndale, 176 Mass. 547, 57 N. E. 1022, 51 L. R. A. 447; Woodward v. Spurr, 141 Mass. 283, 6 N. E. 521; Clark v. Patterson, 158 Mass. 388, 33 N. E. 589, 35 Am. St. Rep. 498.

If the title passed from the husband to the wife, which I am far from assuming, and if she loaned the stock to Frederick M. Tucker, her claim, under the circumstances and under the assignment, would be against Frederick M. Tucker alone. Clark v. Patterson, 158 Mass. 388, 391, 33 N. E. 589, 35 Am. St. Rep. 498.

The property rights of married women rest upon local law, and if there could be no recovery under the statutes and decisions of Massachusetts, there should be none in the United States courts.

Provable claims under section 63 of the bankrupt law of July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447] are such claims as have a legal, or equitable, enforceable status under the local law of the State. It was not the purpose of the bankrupt law to enlarge the rights, or the remedies, of creditors and give them more in the federal courts than they are entitled to have under the state law.

In James v. Gray, 131 Fed. 401, 402, 403, 65 C. C. A. 385, 386, 387, 1 L. R. A. (N. S.) 321, the opinion of the majority proceeded upon the distinct ground that the claim there in question would have no legal or

equitable standing in the courts of Massachusetts, and the majority decision was based upon the supposed existence of a broader equity power in the federal courts. From that view I dissented upon the ground that if there was no property right enforceable under the law of the state, there was nothing here to remedy in any form of proceeding. See Meade v. Beale, Fed. Cas. No. 9,371, opinion by Chief Justice Taney; Lumber Co. v. Ott, 142 U. S. 622, 627, 628, 12 Sup. Ct. 318, 35 L. Ed. 1136; District of Pella v. Beard (C. C.) 83 Fed. 5, 15–16.

The general rule is stated by Pomeroy (Pomeroy's Equity Jurisprudence [Ed. 1881] § 297) as one which must constantly be borne in mind:

"Since the original jurisdiction of the United States courts, especially of the circuit courts, in large measure depends upon the state citizenship of the litigant parties as its sole basis, it follows that in most cases of ordinary controversies—in all those which do not directly arise under statutes of Congress or provisions of the United States Constitution—the subject-matter of the suit, the primary rights, interests, or estates to be maintained and protected, are created and regulated by state laws alone."

It is further observed by the same author that while the equitable jurisdiction of the national courts and their power to entertain suits and grant remedies, derived from the Constitution and the laws of the United States, remain unabridged by any state legislation, on the other hand, the primary rights, interests, and estates which are dealt with in such suits and are protected by such remedies, are within the scope of state authority, and may be altered, enlarged, or restricted by state laws, and the notes illustrate the proposition by referring to the rights of married women as something to be regulated by local law.

I do not understand that direct gifts from a husband to a wife are valid and enforceable by the wife in the courts of Massachusetts, either as a claim direct against the husband or as a claim against a firm of which he is a member. In Spelman v. Aldrich, 126 Mass. 113, 117, it is said that:

"A married woman cannot acquire property to be held as her sole and separate property by gift from her husband. Gen. St. 1860, c. 108, § 10. Though such a gift may be so far valid as to give the wife a right to the property at the death of the husband, as against his heirs or executors, it is invalid as to his creditors. Property thus given remains the property of the husband during his life, and may be demanded by him or attached by his creditors."

I do not understand that Brown v. Brown, 174 Mass. 197, 54 N. E. 532, 75 Am. St. Rep. 292, which was a case simply presenting questions of estate administration based upon rights as between husband and wife, and therefore in no way involving creditor rights in an insolvency situation, at all questions or qualifies the law declared in Spelman v. Aldrich. On the contrary, while distinguishing Spelman v. Aldrich from the case then under consideration, it not only expressly recognizes the binding force of the rule of that case as to direct gifts, but, at page 199, in stating the rule as to gifts which undertake to pass property from the husband to the wife through the agency of a third party, far from accepting such a situation as creating a perfect gift good against creditors, expressly makes the validity of indirect gifts subject to the important qualification "if not fraudulent as to creditors."

It seems to me that in a local creditor situation, like that involved in the proof, and allowance of contemporaneous claims in bankruptcy, that a wife's claim based upon a transaction with a bankrupt husband, like the one in question, though not assailed by proof of actual fraud, is in contemplation of Massachusetts law constructively fraudulent as to creditors, because the recognition of such a gift would be giving an effective status to a claim not enforceable against the husband or his assets to which the creditor interests attach under the local law of the state.

In this case the wife had no separate property or independent estate, and Judge Lowell finding the facts in the District Court (131 Fed. 647) in a careful opinion, supplemented by a further opinion not reported, treated the transaction as one involving a direct and pure gift from the husband to the wife and as void under the statutes of Massachusetts; and, while the majority opinion here treats the gift as one accomplished through the instrumentality of a third party, it accepts the situation as one not involving the separate estate of the wife, the transaction as one not involving consideration, and the claim of the wife as one depending upon the gift or gifts from her husband. In my view the stock transaction in question does not warrant the third party assumption. The gift was direct from the husband to the wife, and at the time of the pretended loan to Frederick M. Tucker the wife had no title which she could transfer to him by loan or otherwise. The certificates indorsed in blank were in the possession of the husband as his property, and were filled out and delivered to the wife by the husband as a direct gift. If the transaction was a valid one in contemplation of law, the title passed then and there, and the mere formal insertion, without consideration by the transfer agent of the corporation, of the wife's name in certificates relating to shares of stock owned and in the possession of the husband, which he intended to give to the wife without consideration, in no legal sense constituted a case of the receipt of property by a wife from a stranger within the meaning of section 1, c. 153 (1902), of the Revised Laws of Massachusetts, nor did it in any substantial sense constitute a transfer of the title through a third party wihin the meaning of the Massachusetts decisions, and especially that of Brown v. Brown, 174 Mass. 197, 54 N. E. 532, 75 Am. St. Rep. 292, where there was a contract direct between the bank and the wife, in which the bank, through a bankbook in her name, engaged to deliver money actually in the bank at the time the contract was made.

The possession of Mrs. Tucker was merely nominal and under circumstances which at least create suspicions of a cover and of an entirely ficticious transaction. The certificates were at once indorsed by her in blank and returned to the husband, who passed them to Frederick M. Tucker for the use of the firm, and the transaction of the assignment of the Stock Exchange seat, though nominally in the wife's name, was really a transaction between Frederick M. Tucker and Tracy Tucker, the actual owner.

In Jaquith v. Massachusetts Baptist Convention, 172 Mass. 439, 52 N. E. 544, there was a solemn conveyance by deed from the husband

to a third party, who, in turn, conveyed to the wife. The proceeding was not by the wife to enforce a contract with her husband, and so was not within the prohibition of section 2, c. 153, of the Revised Laws of 1902, as construed by the Massachusetts courts. There the suit was by an assignee in insolvency to vacate a judgment of foreclosure of a mortgage upon the property given by the husband and wife to secure the husband's creditors, and thus it in no way presented the questions involved here.

I agree with the reasoning of Judge Lowell in the District Court that a decision sustaining the claim of Mrs. Tucker in this case would make altogether inoperative the laws of Massachusetts governing the relations of husband and wife; and the effect would be to establish two rules of law in Massachusetts as to local business dealings. It would establish a substantive right in behalf of the wife in respect to gifts from her husband, which does not exist under the laws of Massachusetts. Giving such a claim an effective status would be in fraud of creditors, because it would sweep out of the estate a certain amount of asset which would otherwise, and according to their rights under the local law, be distributed among them.

In this case there is nothing in the transaction or the questionable possession of the wife which, either upon grounds of sanctity of contract or upon equitable considerations, requires this claim to be upheld against actual creditors for value, and a decision giving the claim of Mrs. Tucker an enforceable status would go far beyond what was held in James v. Gray, 131 Fed. 401, 65 C. C. A. 385, 1 L. R. A. (N. S.) 321, in the direction of establishing within a certain domain two sets of law, or two measures of equity, respecting property rights. In that case I gave the reasons for my dissent at considerable length. I must adhere to the position there taken, and I refer to my dissent in that case as the ground for not concurring in the majority opinion here.

CONTINENTAL WALL PAPER CO. v. LEWIS VOIGHT & SONS CO.

(Circuit Court of Appeals, Sixth Circuit. January 5, 1906.)

No. 1,509.

1. MONOPOLIES—CONTRACT—RESTRAINT OF TRADE—REASONABLENESS.

Where a combination of manufacturers and wholesalers of wall paper was claimed to be in restraint of trade and in violation of the congressional anti-trust act of 1890 (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), it was immaterial to the invalidity of the combination that the agreement was valid at common law as imposing only a reasonable restraint on competition, provided the direct result of its operation was to directly restrain freedom of commerce between the states or with foreign nations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, § 10.

Monopolistic contracts—validity as affected by public policy, see note to Chicago, M. & St. P. Ry. Co. v. Wabash, St. L. & P. Ry. Co., 9 C. C. A. 666; Cravens v. Carter-Crume Co., 34 C. C. A. 486.]

2. SAME—CONTRACT—RESTRAINT OF TRADE—VALIDITY.

Plaintiff corporation was formed to control the output of 98 per cent. of the wall paper mills of the United States, and to this end made contracts with them to buy their entire output at an agreed price. Plaintiff was nominally to make all sales to wholesalers and others, either directly or indirectly, at a uniform price, subject to an agreed scale of discounts, varying according to an arbitrary classification of buyers. The difference between the price at which the manufacturers sold to plaintiff and the price exacted from the buyers from plaintiff constituted the dividends to be distributed to plaintiff's shareholders, who were composed exclusively of those controlling the combining manufacturers; the stock being distributed in proportion to the size of the manufacturer's product the year before plaintiff was formed. The contract provided against the enlargement of the manufacturers' plants, and the only two manufacturers of wall paper machinery in the United States were induced to become parties by agreeing not to sell except to members of the combination. An agreement was also made with Canadian manufacturers to prevent cutting the price. Each member was required to deposit his shares with plaintiff, to be held as security to prevent a breach of the contract. Contracts were then made with jobbers and wholesalers, binding them to buy their entire requirements of plaintiff at specified prices, and not to sell at less than the prices fixed by plaintiff, on pain that if they did not enter into such contracts they could not buy at all. *Held*, that such transaction constituted an illegal combination in restraint of trade and interstate commerce, in violation of Congressional Anti-Trust Act 1890 (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]).

3. SAME—ILLEGALITY OF CONTRACT—SALES—ACTION FOR PRICE.

Plaintiff corporation formed an illegal combination of manufacturers and wholesalers of wall paper in the United States, which constituted a restraint on interstate commerce, and a violation of Congressional Anti-Trust Act 1890 (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). Under the contract between plaintiff and the manufacturers, plaintiff was the nominal seller of all the wall paper manufactured by the combination, though it was actually purchased from various jobbers or mills within the combination. Defendants, wholesalers of wall paper, having been compelled to enter the combination and agree to purchase and sell wall paper in accordance with the monopolistic terms of the contract, purchased paper from various members of the combine, for which plaintiff brought suit. *Held* that, since plaintiff was bound to rely on the combination contract to show its capacity to sue, the illegality thereof constituted a defense to the action.

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

This is an action to recover a balance of $57,762.10, due on account for wall paper sold and delivered to defendants. The case turned upon the sufficiency of the third defense submitted by the answer to the petition of the plaintiff. To this defense the plaintiff demurred. This demurrer was overruled. The plaintiff declined to plead further, whereupon judgment was rendered for the defendants, dismissing the petition, and taxing the plaintiff with costs. The defense so held to be sufficient was in substance: First. That the plaintiff is a member of an illegal combination among the manufacturers of wall paper, formed for the purpose of enhancing prices, stifling competition, and restraining freedom of commerce between the states and with foreign nations, being such a combination or trust as is forbidden by the anti-trust act of 1890 (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) and by the laws of Ohio. Second. That the defendants were compelled to become parties to the illegal combination, and that the contract upon which this suit depends for price and terms of sale constitutes one of the agreements which go to make up the illegal combination represented by the Continental

Wall Paper Company. The answer, embodying the defense here involved, in substance avers: That the National Paper Company, a corporation owning or controlling a large number of wall paper factories situated within the states of New York, Pennsylvania, New Jersey, and Massachusetts, together with a large number of independent firms and corporations engaged in the same manufacture, combined or conspired together for the purpose of controlling the wall paper production in this country by suppressing competition among themselves, and enhancing the price of that article to jobbers, wholesalers, retailers, and consumers. That for this purpose and this end, and to better cover this scheme, they caused the organization under the laws of New York of a corporation known as the Continental Wall Paper Company, with a capital stock of $200,000, divided into 16,000 shares, the shares to be divided among the conspiring firms and corporations in proportion to the production of each factory during the year preceding July, 1898. That the scheme and agreement was that the National Wall Paper Company, as representative of a large number of corporations dominated by it, should select three directors, the other firms and corporations three more, and that the six directors so selected should select a seventh, and the seven directors should direct the combination through the corporate name of the Continental Wall Paper Company. That the plan was that each of the combining concerns should enter into a contract, styling themselves "vendors," with the said company. These contracts to be signed by the several corporations and firms entering into this combination were identical in terms, and were in the following words and figures:

"Exhibit 1.

"This agreement, made this ——— day of ———, in the year one thousand eight hundred and ninety-eight, by and between ———, a corporation organized under the laws of the state of ——————— (hereinafter called the 'Vendor') party of the first part, and the Continental Wall Paper Company, a corporation organized under the laws of the state of New York (hereinafter called the 'Company'), party of the second part: Whereas, the vendor is engaged in the manufacture and sale of wall paper, borders, and other articles usually produced and handled in connection therewith, and the company is desirous of acting as its selling agent in handling the entire product of the vendor; and whereas, the company has an authorized capital of two hundred thousand dollars, divided into 16,000 shares, of the par value of $12.50 each; and whereas, the dealer is desirous of acquiring ——— shares of the stock of said company at par, and to that end has offered to enter into this agreement and to secure the performance thereof by the deposit of said shares: Now, therefore, in consideration of the foregoing recitals, and for other good and valuable consideration, it is agreed, between the parties hereto as follows:

"First. The vendor hereby sells unto the company, and the latter agrees to purchase, the entire product of wall paper that may be manufactured by the vendor for the period from July 20, 1898, to the first day of July, 1899. The prices at which the merchandise shall be sold to the company are set forth in a schedule hereto annexed marked 'A,' and hereby made a part of this agreement. The vendor further grants unto the company the right to two renewals of said contract of one year each, provided that, in the event of the election of the company to avail itself of either of said renewals, it shall so signify in writing to the vendor before the first day of June next preceding the renewal term, and provided further, that such election to renew shall be accompanied by the written consents of all the registered stockholders of the company, including that of the vendor.

"Second. The goods acquired by the company from the vendor hereunder, which are to be sold to jobbers, shall be sold by the company, and not by the vendor for the account of the company. Such sale shall be made by the company at discounts from road prices fixed in the schedule hereto annexed marked 'B,' which is hereby made part of this agreement. The vendor will deliver such goods upon the direction of the company at the risk and for the account of the latter f. o. b. at the place of manufacture, provided, however, that in all cases in which the goods are manufactured at places other than the cities of New York or Philadelphia, the vendor will equalize the freights with

either of said cities out of the proceeds receivable for such goods. Memorandum invoices shall be supplied to the customer and to the company immediately upon the shipment and delivery of such goods, said invoices specifying quantities and road prices.

"Third. There shall be furnished by the vendor to the company on the 7th, 14th, 21st, and last days of each month (except when those days fall on Sundays, and then on the next succeeding day) a just and true statement of all shipments and deliveries of merchandise included in this contract which the vendor may make for the account of the company, which statement shall contain the names of the purchasers, the character of the goods sold, and the prices at which they were sold, to the end that the company may make the proper charges, and in order to entitle the vendor to be credited with the agreed cost price for such goods. Each of such statements of shipments shall be accompanied by an affidavit of one of the officers of the vendor and of one of its bookkeepers and of one of its shipping clerks, to the effect that the information therein contained is true.

"Fourth. The company shall permit the vendor to sell in its own name, and the latter hereby agrees to sell for the account of the company, such of the goods manufactured by the vendor as are to be disposed of to purchasers not classified as jobbers, which sales shall be made at the cost and expense of the vendor; said vendor hereby guarantying all credits and the collection of all accounts connected with such sales. The prices at which and the terms upon which such goods are to be sold are designated in this agreement as the 'Road prices,' and are contained in a schedule hereto annexed marked 'C,' which is hereby made a part of this agreement. On the 7th, 14th, 21st, and last days of each month (except when those days fall on Sundays, and then on the next succeeding days), the vendor will furnish to the company a statement showing all the shipments made on account of such sales, which statements shall contain the names of the purchasers, the character of the goods, and the prices at which they were sold, and such sales shall be credited to the vendor by the company at the prices fixed in Schedule A, and shall be charged against said vendor at the prices at which they were sold, which shall in no event be less than those designated in Schedule C. The vendor is to receive for its services and expenses connected with such sales and allowances discounts equal to those who are designated in a classification made by the parties hereto as 'second class jobbers,' less the discounts made on sales to purchasers designated in the accompanying schedules as 'quantitive purchasers,' on which the vendor has allowed the quantitive discount, except that where special and exclusive goods are sold there shall be an allowance of 30 per cent. discount to the vendor. The prices of goods as fixed by Schedules A and C may be altered from time to time, but the discounts allowed to jobbers shall not be altered at any time during the term of this agreement.

"Fifth. The vendor will make collection of all accounts for goods sold by it for the account of the company under the provisions of this agreement, except for sales to jobbers (which accounts the company is to collect), and will, on the 10th day of each and every month during the term of this agreement account to the company. Such account shall be accompanied by a payment by the vendor to the company of the difference between the prices at which the goods are agreed to be sold to the company as imbodied in Schedule A, and the prices at which the vendor has agreed to dispose of said goods as contained in Schedule C. The purchases made by the company from the vendor hereunder shall be upon the same credit and terms as those accorded to other dealers, but the company shall have the right to anticipate the due date of all such purchases, and will pay, on the 10th day of each month, to the vendor a sum on account of all shipments of the preceding month equal to not less than 30 per cent. of the road prices of goods shipped to jobbers by the company.

"Sixth. The vendor hereby grants unto the company the right, and it shall be the duty of the latter, through its officers selected for that purpose, to audit the books of account of the vendor as to production, sales, and shipments at such times and in such manner as the company may, from time to time, deem necessary or proper. This provision is of the essence of the agreement, and a failure on the part of the vendor to faithfully perform the same

shall operate as a breach of the contract, entitling the company to abrogate the agreement, and to such damages as it may be able to establish in addition to the absolute transfer and surrender to it of the stock to be pledged as hereinafter provided.

"Seventh. There shall be a committee selected from the company, to be known as the 'Auditing Committee,' which shall be made up from among the directors. Said committee shall have power to establish such a system of bookkeeping as in its judgment may be advisable. In order to conform as nearly as may be to the laws of the various states in which the factories of the vendor are located, it is understood that the vendor shall not be at liberty to require from the company the acceptance of the product of more than ten hours per day of any one of said factories. The product intended to be sold to the company hereunder, and which the latter undertakes to acquire, does not contemplate the enlargement of the manufacturing facilities of the vendor; but nothing herein contained shall be construed as affecting the right of the vendor to substitute new machinery of the same capacity for any now in use which may become useless through wear or through destruction by fire or other casualty. The power to designate the parties who are to be classed as jobbers, and the discounts to which they are entitled, is expressly reserved by the company, and such designation is to be made through its board of directors; but the vendor shall have the right to select the jobbers through whom the goods manufactured by it are to be distributed, and to designate the amount of its goods such jobbers may buy, subject to such credit limitations as the board of directors may impose. All orders placed with the vendor by jobbers on behalf of the company must be at once reported to the latter.

"Eighth. The company hereby agrees to sell and the vendor agrees to purchase ——— shares of the comomn stock of the company, for which stock the vendor agrees to pay the sum of ——— in cash as soon after the execution and delivery of this agreement as the same may be demanded by the company; but only if and when the entire share capital of the company shall have been fully subscribed at not less than par. The vendor will, after paying for said shares of stock, indorse the certificates representing the same, and deliver the certificates so indorsed in blank to the company, upon the trust and agreement that the company shall hold said certificates as security for the performance by the vendor of each and all of the covenants and conditions of this agreement; and upon the refusal, neglect, or omission of the vendor, its successors or assigns, to perform this agreement, or any part thereof, the said shares of stock and the certificates represented thereby shall be immediately sold by the company at public or private sale, without notice, upon such terms and at such price as the company or its officers may deem reasonable, and that the proceeds of sale be paid into the treasury of the company as the agreed and liquidated damages to the company for the breach of said agreement. The parties hereto have fixed upon the said stock and the proceeds thereof as liquidated damages, because of the difficulty in establishing, in a court of law, the actual damage that would be suffered by the company in the event of the refusal, neglect, or omission to perform this agreement, and in order to avoid the difficulty of such proof.

"In witness whereof, the vendor and the company have respectively caused this agreement to be executed by their respective presidents, and their respective corporate seals to be hereto attached, pursuant to resolutions of their respective boards of directors, the day and year first above written."

It would unduly lengthen this statement to fully set out the schedules referred to in the above exhibit, and made a part of the contract between the so-called vendors and the company. The answer then avers that the prices to be charged the company for the product of each so-called vendor was the estimated cost of production and incidental expense to such manufacturer of carrying out his or its part of the contract. Schedule A of the contract sets out the "list price" of all qualities of paper, and in a parallel column the sale price to the company. Schedule B sets out the sale price by the company to the several classes of jobbers which the company binds itself to exact, and the terms of sale. The gross sale price in this schedule is the list price of Schedule A, with a discount, which depends upon the classification of jobbers

provided for by the seventh clause of the contract. Schedule C sets out the sale price to purchasers "other than jobbers" and terms of sale, these prices being also designated as "road prices." These prices are the "list prices" of Schedules A and B, with no discount. To purchasers described as "other than jobbers" certain discounts are provided, dependent upon quantity. Under clause 7 of the contract, set out above, "the company," acting through its directors, selected in the manner heretofore mentioned, is given authority to classify jobbers, and prescribe the discount to each class; each "vendor" being allowed "to select the jobbers through whom the goods manufactured by it are to be distributed, and to designate the amount of its goods such jobbers may buy."

"The distribution of profit over cost to the company may be illustrated by taking two classes of wall paper, one a cheap kind and the other more expensive. Thus the list price of wall paper styled "Brown" is 4 cents per bolt; the sale price to the company 2 cents. The price by the company to "jobbers" in the first class is 4 cents, with a discount of 20 per cent., to "jobbers" in the second class, 4 cents, with a discount of 17½ per cent., to "jobbers" in the third class, 4 cents, with a discount of 15 per cent. The selling price to all purchasers other than those classified as jobbers is fixed at 4 cents flat, unless a discount of small proportions is obtained as a result of a purchase bringing the buyer within the terms of those called "quantity purchasers." "Embossed Bronzes" of one class are listed 18 cents per bolt; jobbers being allowed a discount of 45 per cent., 40 per cent., or 30 per cent., according to the class they have been placed in. All the schedules contain a provision for the equalization of freights with certain cities, thus eliminating advantages due to locality. It is further averred in said defense that the companies, corporations, and firms which organized said company, and which subsequently subscribed for stock and signed one of the agreements like that heretofore set forth, constituted 98 per cent. of all the manufacturers of wall paper in this country. It is further stated that, for better carrying out of the said combination, agreements were made by the plaintiff with parties, companies, and corporations within the United States and Canada, "by which each agreed not to compete with the other nor cut prices, the Americans in Canada and the Canadians in the United States." It is also alleged that to further carry out the purpose to prevent competition and enhance prices, that a contract was made between plaintiff and John Waldron & Son and the Kaukauna Machine Company, the only two manufacturers of wall paper machinery in the United States, one having a manufactory in New Brunswick, New Jersey, and the other a maufactory in Kaukauna, Wisconsin, by which said manufacturers agreed, during the existence of the plaintiff, to sell wall paper machinery only to it and said combination, and not to any mills preparing to start. It is then averred that all wholesale dealers in the United States were arbitrarily divided into two classes—jobbers and "road" or "quantity buyers"—and that the jobbers were arbitrarily divided into the three classes heretofore mentioned, and the other wholesalers into "road" or "quantity buyers" and "special buyers," with the purpose that all should then be compelled to sign written agreements obligating themselves to buy their entire stock of merchandise from the plaintiff direct, or through members of the combination, and to this end identical printed agreements were presented to all jobbers and wholesalers throughout the United States and the territories, by which each obligated itself to buy their entire purchases of wall paper from said plaintiff at list prices of Schedule A, heretofore set out, subject to discounts shown by schedule accompanying each such agreement, and binding each such jobber or wholesaler not to sell at prices lower or better than those shown by another schedule accompanying each such agreement. A copy of the agreement, so required to be signed by each jobber and wholesaler, is made a part of the answer as "Exhibit 2." Same is here set out below.

"Exhibit 2.

"An agreement made this ——— day of ———, in the year one thousand eight hundred and ninety-eight, between the Continental Wall Paper Company, a corporation organized under the laws of the state of New York (hereinafter called the 'Company'), party of the first part and ——— of ——— (here-

inafter called the 'Jobber') party of the second part. In consideration of the sum of one dollar, paid by the jobber unto the company for the granting of this agreement, the receipt whereof is hereby acknowledged, and other valuable considerations, it is agreed, between the parties hereto as follows: First. That the company will sell, subject to such credit limitations as it may impose, and the jobber will purchase, the entire requirements of the jobber in his business of selling wall paper for the business year ending July 1, 1899, to the amount of a gross value, without discounts, of ———, the jobber reserving to himself the right to purchase such merchandise as he may need in excess of ——— from others. The company is to deliver the goods without additional charge f. o. b. at New York or Philadelphia, or to equalize freights from the places at which it makes deliveries to either of said cities. Second. The jobber shall be allowed discounts at the rates shown in the accompanying schedule marked 'A,' which is hereby imbodied in this agreement as a part thereof. The terms of payment to be as follows: Four months from the date of invoice, with discount at the rate of 1 per cent. per month for anticipated payment; provided settlement be made within 30 days from date of shipment either by cash or note. Invoices for all goods shipped between October 15th and March 1st to take the latter date. Third. Attached hereto marked 'B' is a schedule of the road prices at which the company sells its goods for the term embraced in this contract to dealers other than jobbers, and also a statement of discounts allowed to such customers other than jobbers for quantity purchasers, together with the terms of credit and freight allowance to which such customers are entitled. It is an essential condition of this agreement that the jobber will not directly or indirectly sell or offer for sale any of the merchandise purchased from the company hereunder at lower prices or upon better or more favorable terms than those shown in Schedule B; the intent hereof being to assure the company against the use by the jobbers of this agreement to undersell the company. The prompt performance by the jobber of the provisions of this agreement as to payment and otherwise is a condition precedent to exacting the continuous performance of said agreement by the company.

"In witness whereof the company has caused this instrument to be executed, and the jobber has hereunto set his hand the day and year first above written.

"———.

"———."

Schedule A of the above agreement is identical with Schedule B of the agreement between "vendors and the company," heretofore set out, and Schedule B, attached to and made a part of Exhibit 2, above set out in full, is same as Schedule C attached to Exhibit 1, heretofore set out.

It is charged that "the immediate, intended, and direct effect of said combination and agreements was the stifling of competition between said manufacturers and vendors of wall paper and between jobbers and wholesalers thereof, and to unduly enhance the price of wall paper, making it one-half more than the price which it would be if same had been left to free and unrestricted competition." It is further distinctly averred that by these agreements and contracts aforesaid the entire wall paper trade throughout the United States passed into the hands of the plaintiff company, and that it "threatened defendant that, unless it signed said agreement (Exhibit 2, set out above), no wall paper would be sold to it. That said combination would make it impossible for it to buy wall paper or to continue its business, and would drive it out of its said business, and compel it to sacrifice the good will owned by it, as aforesaid, and the capital invested by it in said business." It is further averred that the defendant conducted for many years a large business in wall paper at Cincinnati, selling to retailers and consumers in Ohio and other states of the Union. That the defendant, finding it impossible to continue business without signing said agreement shown in Exhibit 2, did sign and become a member of said combination. The defendant charges that, under the contract so signed by him, he purchased more than $200,000 worth of wall paper, and that the prices he was compelled to pay were extortionate and unreasonable, and more than 50 per cent. greater than they would

have been had competition between wall paper makers not been completely suppressed by the agreements between such manufacturers and said corporation.

Lewis Marshall, for plaintiff in error.
Orris P. Cobb and Morrison R. Waite, for defendant in error.

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

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

It has been urged that the defense to the claim in suit must fail upon either of two grounds: First, that the contract between the plaintiff corporation and the manufacturers of wall paper does not contain any stipulations beyond those admissible and essential to protect the contracting parties in securing reasonable prices and against unreasonable and demoralizing competition; second, that if it be conceded that the agreement does constitute an unlawful combination in restraint of interstate trade and commerce, that that fact affords no defense to a suit for the price of goods sold and delivered to the defendant. These in their order.

As to the first point, it need only be said that the legality of the contract between the combining companies at common law, as imposing only a reasonable restraint upon the freedom of competition, is not a defense if the dominant purpose of the agreement and the direct result of its operation is to directly, and not incidentally, restrain freedom of commerce between the states or with foreign nations. Until the Supreme Court shall otherwise hold, we feel concluded by the meaning placed upon the act by United States v. Freight Association, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; United States v. Joint Traffic Association, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; Chesapeake & O. Fuel Company v. United States, 115 Fed. 610, 53 C. C. A. 256; and not departed from in Northern Securities Company v. United States, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679. But we think the combination and agreement shown by Exhibit 1 comes within the prohibition of the act of Congress, whether that act be aimed only at unreasonable restraints or not. That contract and agreement is one between 98 per cent. of all the wall paper makers in the United States, who co-operate through a corporation organized by them for the single purpose of selling their gross product. That there shall be no competition between the combined companies is insured by the agreement that each manufacturer shall sell his entire product at an agreed price to the plaintiff corporation, which is to nominally make all sales, either directly or indirectly, at a uniform price, subject to an agreed scale of discounts, varying only according to an arbitrary classification of buyers. The difference between the price at which the so-called "vendors" sell to the plaintiff company and the price exacted from those who buy from it will be profit, and the profits will constitute the dividends to be distributed to plaintiff's shareholders, and plaintiff's shareholders are exclusively composed of the combining companies, called "vendors"; its comparatively insig-

nificant amount of stock being placed with these vendors in proportion to the product of the year before the combine took effect. To prevent the enlargement of the product of any one of the vendors, it is provided, in effect, that there shall be no enlargement of plant, though new machinery may be used to replace old or that destroyed.

To insure a monopoly of the business to themselves, and keep strangers out of it, it is alleged, and not denied, that the only two manufacturers of wall paper machinery in the United States became parties to the combination by agreeing to sell no machinery to strangers, and to confine their sales to the combine. To add to the protective force of the tariff duties tending to keep out foreign products, it is also averred that an agreement was made with Canadian paper makers to protect each other against any cutting of prices. To insure against any kicking out of the agreement or violations in any way, each member is required to indorse its shares in the Continental Wall Paper Company to that corporation, which is to hold and apply the same as liquidated damages in case of any breach. But that there should be no inducement to fly the contract, the scheme contemplated that every wholesale buyer should engage himself to buy his entire supply from the combine; and to secure the engagement of each such jobber or wholesaler to the scheme, no paper was to be sold to such as did not sign. This made the contract practically unbreakable, for if a factory should weary of the monopoly, it could find no jobbers or wholesalers free to buy its product, and it would be driven to rely upon such orders as it could get from retailers or consumers. That this union of former competitors—a union embracing substantially all of the wall paper mills in the land (for the 2 per cent. left out may be ignored as an active competition), should result in an unreasonable enhancement of prices is precisely what we might anticipate. Wall paper is a product of universal necessity, and the consumers are found in every household. Every principle of economic law instructs us that under such conditions there will be an enhancement of price, limited only by the unknown boundary of human greed and corporate avarice. It is therefore not to be doubted that the averment confessed by the pleading, that prices have been advanced 50 per cent., is substantially true. The conspiring mills were situated in many states. The consumers embraced the whole citizenship of the United States. The jobbers and wholesalers who were to be coerced into contracts to buy their entire demands from the Continental Wall Paper Company, or be driven out of business, were in every state.

Before the combination, each of the combining companies was engaged in both state and interstate commerce. The freedom of each, with respect to prices and terms, was restrained by the agreement and interstate commerce directly affected thereby, as well as by the enhancement of prices which resulted. A more complete monopoly in an article of universal use has probably never been brought about. It may be that the wit of man may yet devise a more complete scheme to accomplish the stifling of competition; but none of the shifts resorted to for suppressing freedom of commerce and securing undue prices, shown by the reported cases, is half so complete in its details. None of the schemes with which this may be compared is more cer-

tain in results, more widespread in its operation, and more evil in its purposes. It must fall within the definition of a "restraint of trade," whether we confine ourselves to the common-law interpretation of that term, or apply that given to the term as used in the federal act by the cases we have cited above.

This brings us to the vital question in the case, which is the bearing of the fact that the plaintiff is but the corporate hand of an illegal combination under the anti-trust law of 1890 upon the liability of the defendants in this action for the price of wall paper bought from the illegal combine. The contention is that the contract upon which the action is brought is wholly collateral to any contract between the plaintiff and the other members of the illegal combination. But if the contract to pay for the goods included in the account sued upon is only part of an entire agreement, which includes stipulations which are illegal, the case of the plaintiff must fail. It is elementary law that the courts will not lend assistance in any way in carrying out an illegal agreement. McMullen v. Hoffman, 174 U. S. 639, 654, 19 Sup. Ct. 839, 43 L. Ed. 1117; Embrey v. Jemison, 131 U. S. 336, 348, 9 Sup. Ct. 776, 33 L. Ed. 172. Nor can a plaintiff show only such part of an entire agreement as is legal, and sue upon that alone. The whole must come. See cases just cited. If the combination had stopped with the agreement between the manufacturers and the plaintiff, by which the competition between the makers of wall paper had been obviated and a uniform sale price settled, this fact would have been no defense for the price of goods sold by the illegal combination to a stranger. If the defendants had been injured in their business by such an illegal method of enhancing prices, their only remedy would have been a direct action for damages, under section 7 of the anti-trust act (26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]). Montague & Co. v. Lowry, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608; City of Atlanta v. Chattanooga Foundry & Pipe Works Co., 127 Fed. 23, 61 C. C. A. 387; and Connolly v. Union Sewer Pipe Company, 184 U. S. 540, 551, 552, 22 Sup. Ct. 431, 46 L. Ed. 679. If the illegal agreement in restraint of trade had included only a contract between the manufacturers themselves, the defendants and all other jobbers would at least have had the privilege of buying from whom they could best get that which they wanted, and the liberty of selling to whomsoever and at such prices as they saw fit. Competition between themselves in buying and selling would be free except in so far as the market was monopolized by the combine between manufacturers. But this might have resulted in conditions threatening to the permanency of the manufacturers' monopoly by offering a strong inducement for strangers to enter the field with new plants, and to those within the fold to break away. These considerations doubtless led to such an extension of the agreement or combination, as to take in the jobbers and wholesalers. This was easy to do, for the threat to refuse to sell to such as would not come in would inevitably bring them to an agreement. And so the defense avers that the plan and agreement of the manufacturers, who organized the plaintiff as an instrumentality through which competition between themselves might be stifled, included the bringing into the combination all the

jobbers and wholesalers in the United States by identical agreements with each such dealer and the plaintiff, whereby the contracting jobbers should agree to buy exclusively from the plaintiff or other members of the combine, and to sell only according to a schedule of prices and terms of credit dictated by the plaintiff. It is also averred and admitted by the demurrer that this purpose was carried out, and identical agreements obtained with all jobbers and wholesalers. The form of all such contracts with jobbers has been set out as Exhibit 2 in the statement of this case. Under threat that they must sign this jobbers' agreement or be driven out of business, the defendants signed, and this is an action for goods sold upon the terms and prices settled by that contract. That contract provides, among other things, that the jobbers shall deal only with the plaintiff. The form in which this agreement is stated is to buy his demand up to a certain sum inserted by the plaintiff, and only the excess over that from other sources of supply. But that form of putting the agreement is but a shallow blind. The amount inserted to fill the blank is, as averred, always twice as much, or more, than the gross purchases of the preceding year. This leaves no probability of any demand over the sum inserted. With reference to the jobber's liberty of sale, it is provided:

"Third. Attached hereto marked 'B' is a schedule of the road prices at which the company sells its goods for the term embraced in this contract to dealers other than jobbers, and also a statement of discounts allowed to such customers other than jobbers for quantity purchases, together with the terms of credit and freight allowance to which such customers are entitled. It is an essential condition of this agreement that the jobber will not directly or indirectly sell or offer for sale any of the merchandise purchased from the company hereunder at lower prices or upon better or more favorable terms than those shown in Schedule B; the intent hereof being to assure the company against the use by the jobbers of this agreement to undersell the company. The prompt performance by the jobber of the provisions of this agreement as to payment and otherwise is a condition precedent to exacting the continuous performance of said agreement by the company."

Schedules A and B, referred to in the jobbers' agreement, are Schedules B and C of the manufacturers' agreement. But the essential entirety of agreement between the so-called vendors and the plaintiff and that between the plaintiff and the defendants and all other jobbers, and the necessity the plaintiff is under to found its right of action upon the entire agreement, is illustrated by the company's attitude as plaintiff. It does not make a roll of paper. The mill-owners continued to operate their respective mills, and to take and fill orders after as before the combine. But by Exhibit 1 all sales to "jobbers" were to be in the name and on account of the plaintiff, and the price collected by the plaintiff. As the contract suggestively puts it, *"the vendor shall have the right to select the jobbers through whom the goods manufactured by it are to be distributed, and to designate the amount of its goods such jobbers may buy."* Thus the petition or declaration in this case is upon an account which shows purchases by the defendants from many different members of the combine, and the amount bought from each. But the plaintiff sues for the aggregate balance due upon the several purchases. This action it seeks to maintain, not upon any averment of an assignment

by the several vendors to it, but as upon an account with it and not the vendors. These and other considerations lead us to the conclusion that the several agreements we have referred to constitute one whole, and that the general purpose and design and the undoubted result is to establish an illegal combination of manufacturers and wholesale dealers in restraint of trade—state and interstate.

The jobbers who have signed the particular contract essential to secure their co-operation are, in a sense, victims, for they have been coerced into agreement. Nevertheless, they are also members of the illegal combination, and active participants in the scheme for the illegal enhancement of prices, the stifling of competition, and the restraint of freedom of trade and commerce. The jobbers do not share in the benefits which result to the manufacturers from the stifling of competition between themselves and the enhancement of prices thereby resulting. By that the jobbers are victimized. But the jobbers do share in the benefits growing out of the destruction of competition in prices as between themselves. The enhanced prices which they pay are exacted again from retailers. The consumer, at last, is the only real victim. It is the consumer who makes up the public, which it is the object of the law to protect against undue exactions through illegal combinations in restraint of freedom of commerce and fair play in commercial transactions.

The defense which we sustain here is not for the sake of William Voight & Sons. The averment that they paid 50 per cent. more for their gross purchases in consequence of the illegal combination has little merit in it, moral or otherwise. They doubtless sold again at the great minimum profit they agreed to exact from retailers, and the retailers later exacted the undue profit from the consuming public. There, at last, like all burdens, it must rest. The defense here sustained is good only because it is only possible to protect the public by refusing all assistance in carrying out an illegal agreement.

This is the policy of our law, and to maintain this policy the judgment of the Circuit Court must be affirmed.

NOTE.—Following will be found the opinion of the court below, submitted on demurrer to the second, third, fourth, and fifth defenses of the answer:

"The demurrer cannot be sustained to the second defense. The plaintiff is a corporation duly organized, and the transaction in question was between it and the defendant. If the transaction be lawful, then any cause of action arising out of it against the defendant is vested in the plaintiff, and no one else can sue upon it. If it be unlawful, recovery will be denied, not because the plaintiff is not the real party in interest, but because the policy of the law will not permit a recovery. If there be a right of action at law, it is, upon the defendant's own showing, vested in the plaintiff.

"In the third defense it is shown that the defendant for many years prior to the bringing of this suit was a jobber in buying and selling wall paper in Ohio and other states and territories of the United States; that certain persons, firms, and corporations, 36 in number, engaged in the manufacture of wall paper, their product being upwards of 98 per cent. of all the wall paper manufactured and sold in the United States, conspiring to form a combination by which to limit the production of wall paper in the United States, and to enhance the prices thereof to jobbers, wholesalers, retailers, and consumers, and to restrain trade and commerce between the several states and territories of the United States and with foreign nations, 'agreed with each

other that, while said corporations and persons should retain ownership of their said plants and business, and preserve and continue their several identities, and operate said manufactories and businesses as before, the control of said businesses, and all matter relating to and affecting the production of said establishments and the price and sale of all wall paper manufactured thereby, should be under the control of a committee to be appointed by said several corporations and firms, each to have a voice in such appointment in proportion to the capacity of the several factories owned by them, respectively; that such committee should adopt rules and regulations governing the manner of conducting the business of said firms and corporations, the hours said factories owned by them should be operated, the patterns of wall paper to be manufactured by them, the times when samples of the goods to be manufactured for the ensuing season should be submitted to a pricing committee appointed by said committee, to enable it to classify and fix the list prices thereof, to fix and determine list prices, discounts, terms of sale, equalization of freight rates, and all other matters affecting the production and regulation of prices, and the classification of the dealers in wall paper in the United States, and the prices at which wall paper should be sold to and by such several classes, and the division of the profits arising among said corporations and firms, not in proportion to their production and sales, but in proportion to their capacity; and, further, that, to secure the faithful performance by each of said persons and corporations of the provisions of said trust agreement, they should each pay a sum into a common pool, in proportion to the capacity of their respective manufactories, which said sum should be forfeited by any of said manufacturers who should break said agreement, compete with the other parties to said agreement, or sell at other or different prices than those to be fixed by said committee.' And to defeat and evade the law it was further agreed that: 'For the more effectual carrying out of said scheme, a corporation should be ostensibly formed under the laws of the state of New York, to be called the "Continental Wall Paper Company," being the plaintiff herein, with a capital stock of $200,000, to be divided into 16,000 shares of the par value of $12.50 each, said stock to be divided among said corporations and firms in proportion to the number of rolls of paper manufactured by them in the year preceding said month of July, A. D. 1898.' That seven directors of said Continental Wall Paper Company should be selected by the members of the combination. That said corporations and firms each and the Continental Wall Paper Company should sign a printed contract, a copy of which is attached to the answer as Exhibit 1, in which the manufacturer is designated as the vendor and the plaintiff as the company, and which provides, among other things, in substance, that the company shall act as selling agent in handling the entire product of the vendor at the prices set forth in Schedules A, B, and C of Exhibit 1. That there shall be no enlargement of the manufacturing facilities of the vendor, but that new machinery may be substituted for old which may become useless. It also provides for the classification of the purchasers of wall paper. And it was further agreed that the Continental Wall Paper Company should require all dealers in wall paper, whether jobbers or wholesalers, to sign an agreement, a copy of which is attached to the answer as Exhibit 2, which, among other things, provides: 'First. That the company will sell, subject to such limitations as it may impose, and the jobber will purchase, the entire requirements of the jobber in his business of selling wall paper for the business year ending July 1, 1899, to the amount of a gross valuation, without discounts, of ———, the jobber reserving to himself the right to purchase such merchandise as he may need in excess of ——— from others. * * * Second. The jobber shall be allowed discounts at the rate shown in the accompanying schedule, marked "A," which is hereby imbodied in this agreement as a part thereof. Third. Attached hereto marked "B" is a schedule of the road prices at which the company sells its goods for the term embraced in this contract to dealers other than jobbers, and also a statement of discounts allowed to such customers other than jobbers for quantity purchases, together with the terms of credit and freight allowance to which such customers are entitled. It is an essential

condition of this agreement that the jobber will not, directly or indirectly, sell or offer for sale any of the merchandise purchased from the company hereunder at lower prices or upon better or more favorable terms than those shown in Schedule B the intent hereof being to assure the company against the use by the jobber of this agreement to undersell the company.' And in the event of the refusal of any wholesaler to sign such agreement, no paper should be sold to him, and he should be driven out of business. It is further shown that 'to conceal the fact that it (Exhibit No. 2) was an agreement to purchase from no one but said company and the members of said combination and trust, the amount of purchases made by the buyer in the previous year from all the members of said combination and trust, being the entire amount of purchases made by such buyer during the preceding year, was ascertained, and an amount at least double thereof, being an amount supposed to be, and which was in fact, more than, by any possibility, could be needed by such buyer, was inserted in said blanks as the amount to be purchased by such buyer from the company.' And it is further shown that 'at the time of the formation of said combination and trust John Waldron & Son and the Kaukauna Machine Company were the only manufacturers in the United States of wall paper manufacturing machinery in the United States, having their factories, one in New Brunswick, N. J., and the other in Kaukauna, Wis., and were engaged in manufacturing wall paper machinery in said states. * * * In further carrying out of said combination and trust, * * * agreements were made between said manufacturers of machinery and said plaintiff, by which, for a certain consideration, said manufacturers of machinery agreed, during the existence of plaintiff, to sell wall paper manufacturing machinery only to it and the members of said combination, and not to any new mills desiring to start.' And it is further shown that 'the members of said combination and trust, the said plaintiff, further to carry out said agreement, compelled all the other wholesale and quantity buyers to sign agreements, in the form attached to this answer, marked "Exhibit 3," the same being a printed form with blanks for signatures, and having attached thereto the prices shown as Schedule C, attached to Exhibit 1, which are the list prices referred to in said agreement.' And it is further shown that the combination had the power and the will to prevent the defendant from obtaining wall paper for its trade, and to drive it out of business, and that, by reason thereof, it was compelled to, and did, sign the agreement attached to the answer as Exhibit 2, and in carrying out said scheme and combination did purchase from the plaintiff, and the plaintiff did deliver to the defendant, 'in the year from September, 1898, to September, 1899, wall paper, for which this defendant paid to said plaintiff for and per direction of the members of said combination the sum of $144,854.14,' as shown by the statement of account attached to the petition. That the prices charged in the exhibit attached to the amended petition are the prices fixed and determined in pursuance of and by the combination or trust agreement, and at least one-half more than they would otherwise have been, and that the wall paper was purchased by the defendant and delivered by the plaintiff in pursuance of said combination or trust agreement, and that this suit is an attempt to enforce and recover the prices so fixed by said combination.

"In short, this defense shows a combination of manufacturers of wall paper, of manufacturers of wall paper machinery, and of jobbers and wholesalers of wall paper, with power to control the production and sale of all wall paper machinery and 98 per cent. of all wall paper manufactured in the United States, and that in the exercise of this power it limited production, prevented competition, fixed and enhanced the prices of wall paper, and compelled the jobbers and wholesalers throughout the United States to buy and sell to retailers and consumers at the prices so fixed, and that this action is founded on an account for wall paper sold to the defendant as one of the members of the combination, by the plaintiff as the agent and trustee of the combination, at the prices so fixed by the combination, and in furtherance of the purposes of its organization. Assuming, for the purpose of the demurrer, that the allegations of this defense are true, it follows that the combination was illegal and unlawful, within the meaning of the anti-trust laws of Ohio and

of the United States. The present case differs from the Connolly Case, 184 U. S. 540–549, 22 Sup. Ct. 431, 46 L. Ed. 679, in this: that the purchases by the defendant had direct and necessary connection with the illegal combination. The defendant was not an outsider, purchasing goods of the plaintiff in the usual and ordinary course of buisness, but a member of the combination, who purchased the goods from the combination through its representative and agent, upon the terms prescribed by the combination, and in furtherance of its purposes. The demurrer to this defense, therefore, is not well taken, and will be overruled.

"Under the fourth and fifth defenses, the defendant seeks to recover by way of cross-petition under the anti-trust laws of Ohio and of the United States, as damages, double and treble the moneys paid by it to the plaintiff for wall paper, as shown by the exhibits attached to the petition and the amendment thereto. The demurrer to these defenses is well taken, and will be sustained. It is not admitted in these defenses that the defendant was a party to the illegal combination, but the defendant is bound by the admission of the third defense. It will not be permitted to admit for the purposes of the third defense, and deny for the purpose of the fourth and fifth defenses, a fact pertinent to the transaction under investigation."

FIRST NAT. BANK OF COUNCIL BLUFFS, IOWA, v. MOORE.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1906.)

No. 1,323.

1. BILLS AND NOTES—RIGHTS OF TRANSFEREE—BONA FIDE PURCHASER.
The purchaser of a promissory note for value before maturity is not deprived of his character of purchaser in good faith, by proof that he took the note with knowledge of such circumstances as ought to put an ordinarily prudent man on inquiry to ascertain the facts; but the proof must go further and show that he had at the time of the transfer knowledge of facts that would impeach the title as between the antecedent parties to the note, or knowledge of such facts that his failure to make further inquiry is presumptive evidence of bad faith on his part.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 821–824.]

2. SAME—BURDEN OF PROOF.
To defeat recovery by an indorsee of a promissory note for value and before maturity, on the ground that the note was given without consideration or was obtained by fraud, the burden rests upon the defendant to prove that the indorsee had knowledge of such fact or was chargeable with bad faith.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1675, 1676.]

3. APPEAL AND ERROR—RECORD—EXCEPTIONS.
A bill of exceptions, which is certified by the trial judge to contain the substance of all of the testimony given on the trial, is sufficient to enable the appellate court to pass on the question whether the court erred in refusing to direct a verdict; the presumption being that nothing which is material to any of the exceptions taken was omitted from the bill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2911–2915, 2918–2924.]

4. BILLS AND NOTES—ACTION BY INDORSEE—DEFENSES.
Evidence considered, in an action on a promissory note, and *held* not sufficient to warrant the submission to the jury of the defense that an indorser for value before maturity, through whom plaintiff claimed, took the note with knowledge that it was without consideration and obtained by fraud, or of facts which impeached its good faith.

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

James Kiefer and James McNeny, for plaintiff in error.
L. C. Gilman and M. M. Lyter, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

DE HAVEN, District Judge. This was an action brought to recover the sum of $5,000, with interest from January 2, 1897, the amount alleged to be due upon three promissory notes made by the defendant in error to the Citizens' State Bank of Council Bluffs, Iowa, assignor of the plaintiff in error. The answer put in issue the allegation of the complaint in reference to the assignment of the notes and also alleged that the action was barred by the statute of limitations. The answer further set forth that the notes sued upon were given in renewal of a note made by the defendant in error, in March, 1893, to one George J. Crane, for the sum of $5,000, and that the original note made to Crane was without consideration, and was obtained from the defendant in error by fraud and by false representations upon the part of said Crane and his partner, one F. P. Bellinger; the answer in this connection alleging:

"That the sole and only consideration for the said original note for $5,000 and several notes sued upon in this action was the agreement by and between the defendant and the said Crane and Bellinger that they, the said Crane and Bellinger, would organize a corporation under the laws of the state of Washington and transfer to said corporation, in payment for its capital stock, a secret remedy, formula, recipe or prescription for the cure of the morphine, cocaine, chloral, opium, liquor, tobacco and other drug habits and the diseases and infirmities caused by the habitual use of such drugs and to transfer to the defendant one-fifth of the capital stock of the said corporation."

"That, with intent to cheat and defraud the defendant and to induce him to execute and deliver the said original note of $5,000, the said Crane and Bellinger falsely and fraudulently represented and pretended to the defendant that the said Bellinger was the discoverer of, and author of, and in possession of, the said secret remedy. formula, recipe or prescription, and that the said was a secret and known only to the said Bellinger, and the same was a sure and certain cure and a specific for the said habits and diseases, and that they intended to deliver the said secret formula to the said corporation; that the said Crane and Bellinger, on the 15th day of March, 1893, procured a corporation to be organized, under the laws of the state of Washington, and then represented and pretended that they had transferred and assigned to the said corporation the said remedy, formula, recipe or prescription in payment for the entire capital stock of said corporation; that, relying on the said representations, and believing them to be true, the defendant gave to the said Crane and Bellinger the said original note for $5,000; that the said representations and pretenses of the said Crane and Bellinger were and are wholly false and untrue and were known to be so by the said Crane and Bellinger when made; that the said Crane and Bellinger had not nor had either of them any secret or other remedy, formula, recipe or prescription for the cure of the said habits and diseases or either or any of the said habits and diseases, and they had not nor had either of them any intention to deliver to the said corporation any secret or other remedy, formula, recipe or prescription for the cure of any or either of the said diseases or habits, * * * * and the stock of the said corporation is and was wholly worthless and of no value whatsoever and was known to be so by the said Crane and Bellinger."

The answer further alleges that the Citizens' State Bank of Council Bluffs acquired said original note after maturity, without paying value therefor, and with notice that the same was without consideration and had been obtained from the defendant in error by the fraudulent representations of the payee therein, and that, in order to induce the defendant in error to execute the notes sued on in this action, in renewal of the said note for $5,000, the Citizens' State Bank of Council Bluffs falsely represented to him that it had taken said original note for $5,000, in the ordinary course of business before maturity, and had paid value therefor, without notice of any defense thereto, and that, believing these representations to be true, he executed to the Citizens' State Bank of Council Bluffs the notes sued upon. The defense of the statute of limitations does not seem to have been relied upon at the trial. It appears from the evidence that the assignor of the plaintiff in error, the Citizens' State Bank of Council Bluffs, Iowa, acquired the original note executed by the defendant in error to George J. Crane, before maturity in due course of business and for value; that is, it appears that the note was indorsed by Crane to said bank as collateral security for a previously existing indebtedness of Crane to the bank. There was also evidence tending to show that the original note executed by the defendant in error to Crane was without consideration and was obtained from the defendant in error by means of the false and fraudulent representations alleged in the answer. When the testimony was closed, the plaintiff in error moved the court to give to the jury a peremptory instruction to find a verdict for it for the full amount sued for, stating as one of the grounds of the motion that the evidence was insufficient to show that the Citizens' State Bank of Council Bluffs, at the time of acquiring the original note, had knowledge or notice that the same was without consideration, or had been obtained from the defendant in error by fraudulent representations. The motion was denied, and this ruling was duly excepted to. The court then gave to the jury the following, among other instructions:

"If the jury find from the evidence that, when the Citizens' State Bank of Council Bluffs, Iowa, received the note made by the defendant for $5,000 in favor of George J. Crane, in March, 1893, the officers of said bank knew of nothing to apprise them or put them upon inquiry with respect to the claim now made by the defendant that the note was given without consideration or procured by fraud, the verdict of the jury will be for the plaintiff for the full amount sued for."

The foregoing is substantially in the language of one of the instructions requested by the plaintiff in error, and then the court added:

"Now, gentlemen of the jury, there is a question in the case as to which there is a conflict of testimony, and it is referred to the jury to decide what the truth about it is, whether there was knowledge on the part of the cashier, or whoever acted for the Citizens' State Bank of Council Bluffs at the time of receiving that $5,000 note. It is shown by uncontradicted evidence that the transaction was through Mr. Hannan, who was an officer of the bank at that time, and whose deposition has been taken in this case. Mr. Hannan will be presumed, as the result of the uncontradicted testimony in the case, to have been authorized to act for the bank in that matter, and any knowledge or information which he had on the subject is to be imputed to his principal, the bank for which he was acting, and the jury must determine this question of whether he knew of the fact that Mr. Moore had been swindled (if in fact

he was swindled) in the transaction by which the note was obtained by him In determining that question you are to consider all the facts and circumstances attending the transaction and showing what knowledge Mr. Hannan did have in regard to the maker and the payees of the note and in regard to their dealings together with respect to that note and the circumstances under which the note was obtained, and determine from a consideration of the testimony whether the evidence shows that Mr. Hannan did know of enough of the transaction to have put a prudent man on inquiry before accepting the note as a purchaser of it in good faith. The bank is chargeable, not only with the knowledge which Mr. Hannan actually did have, but, if there was some knowledge on his part which should have been a warning to him and would have caused a prudent business man to have made inquiry, then the bank is chargeable with all the knowledge that might have been obtained by an inquiry, and, if there was a swindle practiced, and the bank, through Mr. Hannan, knew it or should have known it, then the note was equally void in the hands of that bank as in the hands of Crane and Bellinger, and, if void in the hands of the Citizens' State Bank, it is likewise void in the hands of the plaintiff bank."

The bill of exceptions shows that the plaintiff in error excepted to so much of the foregoing instruction as states that:

"Any knowledge of Hannan or information which he might have which would put a prudent man upon inquiry, was to be imputed to the bank and considered the knowledge of the bank so far as anything which might have been found out by inquiry goes."

The court, also, at the request of the defendant, instructed the jury as follows:

"I charge you that, if you shall find from the evidence that said note was fraudulent and without consideration in its inception, then the burden of proof is upon the plaintiff to establish by preponderance of evidence that the Citizens' State Bank was a bona fide holder of said note, and, if you shall find from the evidence that the said note was fraudulent and without consideration in its inception, and shall further find that the plaintiff has not established by a preponderance of the evidence that the same was taken in due course of business without notice of such fraud, then your verdict must be for the defendant."

This instruction was also excepted to by the plaintiff in error. The verdict of the jury was for the defendant, and judgment was thereupon rendered in his favor. The case is brought here by the plaintiff on writ of error. There are many assignments of error, but we only deem it necessary to notice those which relate to the rulings of the court in refusing to instruct the jury to return a verdict for the plaintiff, and in giving the foregoing instructions to which exceptions were taken.

1. The defendant in error has interposed a motion to strike from the printed record what purports to be the bill of exceptions, on the ground that it does not constitute a sufficient or legal bill of exceptions, in that the exceptions "to the instructions given and refused by the court appear to have been taken in solido, and not specifically to separate and distinct propositions of law involved in said instructions." The motion must be denied. The exceptions to the instructions given are sufficient. The bill of exceptions is in proper form, and the court has had no difficulty in determining therefrom the various rulings excepted to. Objection is also made to the sufficiency of the assignments of error, but in our opinion the objection is without merit.

2. In passing upon the questions raised by the assignments of error, it will be more convenient to first consider whether, upon the assump-

tion that the evidence was sufficient to carry the case to the jury, the instructions given by the court were correct. The instruction above quoted, to the effect that the assignor of the plaintiff, the Citizens' State Bank, was chargeable not only with the knowledge which its cashier actually had at the time the original note to Crane was transferred to it, "but if there was some knowledge on his part which should have been a warning to him, and would have caused a prudent business man to have made inquiry, then the bank is chargeable with all the knowledge that might have been obtained by an inquiry," is not in accordance with the rule declared in Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; Goodman v. Simonds, 20 How. 343, 15 L. Ed. 934; Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857; Hotchkiss v. National Bank, 21 Wall. 354, 22 L. Ed. 645; Collins v. Gilbert, 94 U. S. 753, 24 L. Ed. 170; Swift v. Smith, 102 U. S. 442, 26 L. Ed. 193; Kaiser v. First National Bank, 78 Fed. 284, 24 C. C. A. 88; Doe v. Northwestern Coal & Transporation Co. (C. C.) 78 Fed. 62.

In discussing the rights of the holder of negotiable paper acquiring title thereto by indorsement before maturity and for value, the court, in Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857, said:

"Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. * * * Such is the settled law of this court, and we feel no disposition to depart therefrom. The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith. They are the same in effect. Where there is fraud there can be no question."

In Doe v. Northwestern Coal & Transportation Co. (C. C.) 78 Fed. 62, the same rule was declared by this court, in the following language:

"In the federal courts it is the well-settled rule that the purchaser of a promissory note is not deprived of his character of purchaser in good faith by proof that he took the note with knowledge of such circumstances as ought to put an ordinarily prudent man upon inquiry to ascertain the facts. The proof must go further, and show that he had at the time of the transfer knowledge of facts that would impeach the title as between the antecedent parties to the note, or knowledge of such facts that his abstention from further inquiry will be tantamount to a willful closing of the eyes to the means of knowledge which he knows are available, and therefore presumptive evidence of bad faith upon his part.

3. We think the court also erred in giving to the jury, at the request of the defendant in error, the following instruction:

"I charge you that, if you shall find from the evidence that said note was fraudulent and without consideration in its inception, then the burden of proof is upon the plaintiff to establish by preponderance of evidence that the Citizens' State Bank was a bona fide holder of said note, and, if you shall find from the evidence that the said note was fraudulent and without consideration in its inception, and shall further find that the plaintiff has not established by a preponderance of the evidence that the same was taken in due course of business without notice of such fraud, then your verdict must be for the defendant."

There are undoubtedly many cases which hold, in accordance with this instruction, that when, in an action by an indorsee for value and

before maturity of a promissory note, it is shown that the note was given without consideration, or was obtained by fraud, the burden is then cast upon the plaintiff to show that he acquired the same without notice of such want of consideration or fraud in its inception. Thompson v. West, 59 Neb. 677, 82 N. W. 13, 49 L. R. A. 337; Canajoharie National Bank v. Diefendorf, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676; Vosburgh v. Diefendorf, 119 N. Y. 357, 23 N. E. 801, 16 Am. St. Rep. 836. But in the federal courts it may be now considered as the settled rule that a person who takes negotiable paper before maturity for value is entitled to recover as against the maker, unless it is shown that, in the transaction by which title was acquired, the indorsee had knowledge of facts which would render the same invalid as against the maker, or was guilty of bad faith, and the burden of proving such knowledge or bad faith lies on the defendant. Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857; Hotchkiss v. National Bank, 21 Wall. 354, 22 L. Ed. 645; Collins v. Gilbert, 94 U. S. 753, 24 L. Ed. 170; King v. Doane, 139 U. S. 166, 11 Sup. Ct. 465, 35 L. Ed. 84.

4. There remains for consideration only the question whether the court erred in refusing to instruct the jury to return a verdict for the plaintiff in error. The bill of exceptions, in setting forth the testimony of some of the witnesses, purports to give the substance of their testimony, and the judge, in certifying to the correctness of the bill, only certifies that it "contains all of the testimony in substance taken and admitted upon the trial of said cause." It is claimed by the defendant in error, upon this state of facts, that the bill of exceptions does not show that it contains all of the evidence given upon the trial, and for that reason the question whether the court erred in refusing to instruct the jury to return a verdict for the plaintiff in error cannot be considered. The cases of Gulf, C. & S. F. R. Co. v. Washington, 49 Fed. 347, 1 C. C. A. 286, and National Masonic Acc. Ass'n v. Shryock, 73 Fed. 776, 20 C. C. A. 3, cited by the defendant in error, seem to sustain his contention. The decisions referred to are entitled to great respect, but upon a question of practice, such as this, we think it better to adopt a more liberal rule. It is, of course, true that, in order to enable this court to determine whether the evidence was such as to justify the trial court in submitting the case to the jury, the court must have before it all of the evidence, and the bill of exceptions must show this; but we are of the opinion that a bill of exceptions, which is certified by the trial judge to contain the substance of all of the testimony given upon the trial, is sufficient to enable us to pass upon that question. A bill of exceptions and the certificate thereto should receive a reasonable interpretation, and, when the judge in settling the bill certifies that it contains the substance of all of the testimony admitted upon the trial, the presumption must be that nothing which was material to any of the exceptions taken is omitted therefrom.

The sufficiency of such a bill of exceptions was before the court in Cavender v. Roberson, 33 Kan. 626, 7 Pac. 152, and in answer to the objection that the case made did not purport to contain all of the evidence, that court said:

"The case does, however, show that it contains the substantial parts of the evidence, and we construe this to mean that it contains, in substance, all the evidence offered upon the trial, although it is not written out in the record in minute detail."

So, also, in Townley v. Chicago, Milwaukee & St. Paul Ry. Co., 53 Wis. 626, 11 N. W. 55. The question before the court was whether the evidence was sufficient to justify a nonsuit. The court said:

"But counsel contend that the bill of exceptions is not certified to contain all the evidence, and that we must therefore presume that there was other evidence not before us which justified the nonsuit. The certificate is in these words: 'The foregoing is the substance of all the testimony given on the trial of said action.' The learned counsel for the railroad company has referred us to quite a number of Iowa cases holding similar certificates insufficient. But this is a question of practice, and, with great deference for the Iowa court, we feel justified in following our own decisions. Besides, we think the distinction made by that court is a little too refined for practical purposes. Here the trial judge certifies, in effect, that the bill of exceptions contains 'the substance of all the testimony' upon which he granted the nonsuit, and yet we are asked to find that he must have granted it upon some other testimony. To so hold would, in our judgment, disregard substance for mere form."

Our conclusion upon this point is that the question is sufficiently presented by the bill of exceptions, and we therefore proceed to inquire whether, in view of the evidence, the court erred in refusing to direct a verdict for the plaintiff in error. The written assignment, under which the plaintiff in error claims title to the notes sued on, purports to have been signed thus, "Citizens' State Bank, by Charl R. Hannan, Cashier," and there was evidence tending to show that Hannan never signed, nor authorized any one else to sign, his name to this instrument; but the fact appears from the evidence, and is undisputed, that the Citizens' State Bank delivered these notes and the purported assignment to the plaintiff in error for value, and that this was done by the Citizens' State Bank for the purpose of transferring the title to such notes to the plaintiff in error. This being so, the title of such notes was by such assignment and delivery vested in the plaintiff in error as against the Citizens' State Bank, and constitutes it the owner and holder of such notes. This is not disputed by the counsel for the defendant in error, who very properly concede in their brief "that these notes were assigned after maturity by the Citizens' State Bank to the plaintiff in error." The plaintiff in error then succeeded to all the rights of the Citizens' State Bank, and, as that bank acquired title to the original note which forms the consideration of those involved in this action, before maturity and for value, the plaintiff in error was entitled to a peremptory direction to the jury to return a verdict in its favor, unless the evidence was sufficient to show that, when such original note was acquired by the Citizens' State Bank, it had knowledge that it was without consideration, or had been obtained from the defendant in error by means of the fraudulent representations alleged in the answer. The only evidence in the record bearing upon this question is contained in the deposition of the witness Hannan, who was cashier of the Citizens' State Bank at the time, and acted for it in the transaction by which it acquired title to the said original note. Of course, whatever knowledge Hannan then had in

relation to the consideration or origin of that note must be imputed to the bank for which he acted. The testimony of Hannan in relation to his knowledge, as it appears in the record, omitting the questions, to which his answers were given, is as follows:

"I did take from George J. Crane a note signed by Mr. Moore. It was while I was cashier of the Citizens' State Bank. I had learned from Mr. Crane of the transaction he had with Mr. Moore, and he had advised me of the details of the deal, and that he had Mr. Moore's note. Mr. Crane at that time was owing us quite a sum of money, the collateral to which I did not consider of much value, and, being anxious to obtain as much collateral as possible for the note, prevailed on him to turn the note over to us, which he eventually did. * * * Mr. Crane had fully explained to me just what he was doing—explained what they tried to do in Denver, San Francisco, and other places before they went to Seattle—and I was fully advised at all times as to what he was doing. I knew full well what the note was given for; it having been given for the recipe and privilege of using the recipe for an opium and whisky cure. * * * I state that I knew all about the consideration for the original note. * * * Mr. Crane advised me upon his return to Council Bluffs from Seattle and the West how he had obtained Mr. Moore's note. This was prior to our taking the note."

This is the entire evidence bearing upon the question under consideration, and we think it must be conceded that it falls far short of showing that Hannan knew or had notice of anything tending to show that the note was without consideration, or had been obtained by the fraudulent representations set forth in the answer. It does show that Hannan was advised as to the consideration of the note, and that it was given in consideration of stock in a corporation represented to be the owner of a secret formula or prescription for the cure of the morphine, cocaine, and other drug habits; but there is nothing which tends to show that he knew that such alleged formula or remedy was worthless, or that the payees of the original note had failed to transfer or deliver to said corporation any such formula or prescription, or that the stock of said corporation was worthless, or that Crane or his partner, Bellinger, had made false representations as to the character of such formula or prescription, or made any of the fraudulent representations set out in the answer. Knowledge of the consideration will not prejudice the rights of the purchaser of a negotiable note, unless the consideration was illegal, or the purchaser knew that the same was without value. This witness further testified:

"I wrote Mr. Moore many letters, or caused them to be written, in behalf of the Citizens' State Bank of Council Bluffs, always claiming that the bank had acquired the entire note in good faith, for value, and without notice, as the letters written by me while in the bank will show."

And there is nothing in his testimony to warrant the inference that, when he wrote such letters, he did not believe them to be true. In the absence of evidence tending to show that the witness Hannan knew or had notice of the facts relied upon by defendant in error to show want of consideration for the original note, or that such note was obtained from him by the fraudulent representations claimed, the jury should have been instructed to find for the plaintiff in error.

Judgment reversed, and cause remanded for a new trial.

MASON CITY & FT. D. R. CO. v. WOLF.

(Circuit Court of Appeals. Eighth Circuit. November 5, 1906.)

No. 2,327.

1. EMINENT DOMAIN—COMPENSATION FOR DAMAGE TO PROPERTY NOT TAKEN—NEBRASKA CONSTITUTION.

Const. Neb. 1875, art. 1, § 21, which provides that "the property of no person shall be taken or damaged for public use without just compensation," as construed by the Supreme Court of the state, entitles a property owner to recover for special injury caused to his property by the construction and operation of a railroad in the vicinity, in excess of that sustained by the public at large, although no part of his own property is actually invaded or appropriated. Such right of recovery includes damage to the property from noise, smoke, cinders, and vibrations of the ground, and the obstruction or impairment of the right of the owner to make use of public highways in the vicinity, which permanently depreciates its value, the measure of recovery being the difference between the market value of the property before the construction and operation of the railroad and its market value afterward; and it is immaterial whether the road is constructed on property condemned or purchased by the railroad company for the purpose, or upon or over public streets or highways under permission granted by the duly constituted public authorities. Damages are not recoverable, however, because of the mere presence upon adjoining property owned by the railroad company of its structures or excavations which do not affect the lateral support of plaintiff's ground.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 233–238.]

2. COURTS—RULES OF DECISION—CONSTRUCTION OF PREVIOUS DECISIONS.

General expressions in the opinion of an appellate court as to recoverable damage are to be taken in connection with the facts of the case in which they occur, and not extended to those cases which are fairly subject to the operation of a different principle.

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

This writ of error challenges a judgment obtained by Tressa Wolf against the railroad company for damages to her property caused by the construction and operation of railroad tracks in the vicinity thereof.

William D. McHugh (Asa G. Briggs, on the brief), for plaintiff in error.

H. C. Brome (A. H. Burnett, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. Upon the plaintiff's lot in Omaha, Neb., were a double dwelling house and a cottage. No part of her property was taken or physically encroached upon by the railroad company, nor was there any proof of negligent construction of its works or operation of its engines and cars. But evidence was received at the trial of injury resulting from a deep excavation made by the company in adjoining lots purchased and owned by it, from the extension of the excavation across the public street upon which plaintiff's lot fronts and

also across the alley that runs in the rear, from the noises of the operation of the road, from smoke and cinders emitted by the engines, and from the vibration of plaintiff's ground caused by the movement of the engines and cars. The excavation was from 20 to 30 feet deep, and at its nearest point it was about 10 feet from plaintiff's property line. The street and alley directly in front and at the rear were not touched, and full and unobstructed use thereof towards the north was not impaired; but on the south, a short distance from the south line of plaintiff's lot, both thoroughfares were permanently destroyed by the excavation, and the company fenced them off to prevent accidents.

At the trial the company, by appropriate objections to the evidence, motions, and requested instructions, sought to have each element of damage claimed excluded from consideration by the jury; but the court admitted all of them, with the qualification, however, that in respect of smoke and the noises of railroad operation there must be an injurious effect upon the value of plaintiff's lot in the mind of a good-faith purchaser, and not a mere personal inconvenience to the occupants. With this explanation the court charged the jury that plaintiff was entitled to recover whatever the evidence showed her lot had depreciated in value by reason of the construction and operation of the railroad in proximity thereto, and that the amount was determinable by the difference between the market value before the road was built and the market value afterwards. It was conceded that the city council of Omaha had granted by ordinance the right of way to the company, and had vacated those portions of the street and alley within the exterior limits of the excavation, and also that the company had contracted to indemnify the city against all damages resulting from the action of the latter. The controlling questions in the case are whether each of the elements of injury above mentioned were proper for the consideration of the jury in the assessment of damages, and whether the trial court in its instructions correctly announced the measure of recovery. The solution of these questions involves a consideration of the fundamental law of the state and the decisions of its highest judicial tribunal.

The Constitution of Nebraska (section 21, art. 1, Const. 1875) provides:

"The property of no person shall be taken or damaged for public use without just compensation."

Gottschalk v. Railroad, 14 Neb. 550, 16 N. W. 475, 17 N. W. 120: In this case the railroad company, acting under municipal authority, constructed its road in an alley in the rear of plaintiff's lot. The court held that the property owner had a cause of action. After referring to the Nebraska Constitution of 1866, which limited the recovery to cases in which property was "taken" for public use, and the enlargement of the right of recovery by the addition of the words "or damaged" in the Constitution of 1875, it said:

"The evident object of the amendment was to afford relief in certain cases where, under our former Constitution, none could be given. It was to grant relief in cases where there was no direct injury to the real estate itself, but some physical disturbance of a right which the owner possesses in connection

with his estate, by reason of which he sustains special injury in respect to such property in excess of that sustained by the public at large. To this extent the property owner is entitled to recover. It is not necessary, to entitle a party to recover, that there should be a direct physical injury to his property, if he has sustained damages in respect to the property itself, whereby its value has been permanently impaired and diminished. This is but justice. While public improvements are essential to progress and to the welfare of the race, yet, as the public are to receive the benefits, whether by the opening of streets and public grounds or by the construction of railways, the party receiving the benefit should bear the burden. This should not be cast upon others."

In support of the conclusions reached the court employed liberal quotations from the case of Rigney v. Chicago, 102 Ill. 64, where, in considering a constitutional provision like that of Nebraska, the Illinois court said:

"But under the present Constitution it is sufficient if there is a direct physical obstruction or injury to the right of user or enjoyment, by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally, which by the common law would, in the absence of any constitutional or statutory provisions, give a right of action. * * * The question, then, recurs: What additional class of cases did the framers of the new Constitution intend to provide for which are not embraced in the old? While it is clear that the present Constitution was intended to afford redress in a certain class of cases for which there was no remedy under the old Constitution, yet we think it equally clear that it was not intended to reach every possible injury which is necessarily incident to the ownership of property in towns or cities, which directly impair the value of private property, for which the law does not and never has afforded any relief. For instance, the building of a jail, police station, or the like, will generally cause a direct depreciation in the value of the neighboring property, yet that is clearly a case of damnum absque injuria. So, as to an obstruction in a public street, if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases, to warrant a recovery, it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provisions on the subject, the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present Constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law."

Railroad v. Ingalls, 15 Neb. 125, 16 N. W. 762: Here the railroad was laid upon the side of a country road adjacent to the plaintiff's land, and a recovery by him was sustained against a contention that the railroad merely afforded one of the modes of enjoyment of the public easement and the county commissioners had expressly authorized its construction. There was no especial discussion in the opinion of the constitutional provision or the limitations of its application.

Railroad v. Reinhackle, 15 Neb. 279, 18 N. W. 69, 48 Am. Rep. 342: A railroad company, with leave of the city authorities, laid two tracks upon the east side of a street, upon the opposite side of which the plaintiff's lot abutted. The track near the middle of the street was used as a team track, and was constantly kept nearly filled with cars to be loaded and unloaded. It was held that every lot owner whose lot abutted on the street had a special interest therein distinct from that of the pub-

lic at large, and that the permission of the city authorities to a railroad company to use the street was no defense to an action by an abutting lot owner who suffered special damage from a permanent obstruction. The court also approved of an instruction that the measure of damage was the difference between the market value of the property before the permanent obstruction and the market value afterwards.

City of Omaha v. Kramer, 25 Neb. 489, 41 N. W. 295, 13 Am. St. Rep. 504: The damages claimed in this case were caused by the construction of a viaduct over railroad tracks upon a street upon which plaintiff's lots fronted. The court declined to follow the rule, announced in Penn. R. Co. v. Marchant, 119 Pa. 541, 13 Atl. 690, 4 Am. St. Rep. 659, that under a constitutional provision similar to that of Nebraska there can be no recovery in the absence of "such a legal wrong as would be the subject of an action for damages at common law." Referring to the Nebraska provision, the court added:

"The provision, therefore, is remedial in its nature, and the well-known rule, that in the construction of remedial statutes three points are to be considered, viz., the old law, the mischief, and the remedy, and so to construe the act as to suppress the mischief and advance the remedy, is to be applied. 1 Blackstone, Com. 87. Applying this rule to the provision in question, and it embraces all damages which affect the value of a person's property, and includes cases like that under consideration. In other words, the words 'or damaged,' in section 21, art. 1, of the Constitution, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property."

It should be said, however, that in support of this conclusion the court cites the Gottschalk Case and Rigney v. Chicago. The court further said:

"The fact that damages are consequential will not preclude a recovery, if the construction and operation of the public improvement is the cause of the injury; and it is not necessary that the damages be caused by trespass or an actual physical invasion of the owner's real estate. The test is: Excluding general benefits, is the property in fact damaged? If so, the owner is entitled to compensation."

In all the cases thus far reviewed the damages were caused by the obstruction of public highways or the operation of railroads therein. In Railroad v. Rogers, 16 Neb. 117, 19 N. W. 603, a railroad company was held liable where it had built its road and occupied all of the lot adjoining the plaintiff's property and had extended its tracks into the street. In these respects the case of Railroad v. Fellers, 16 Neb. 169, 20 N. W. 217, is similar. But in neither of them does it appear that the mere existence of the structures of the railroad company upon its own property, as distinguished from the public thoroughfare, was regarded as affecting the amount of the recoverable damage.

Railroad Co. v. Hazels, 26 Neb. 364, 42 N. W. 93: Hazels was the owner of a half of a block of ground upon the south side of Third street in Pawnee City, Neb. The railroad company acquired by purchase, and not by condemnation, the south half of several blocks of ground upon the opposite side of the street, and constructed various railroad tracks thereon and across the intervening streets. Upon its own ground opposite the land of plaintiff it also constructed a depot, which, with the main and side tracks of the railroad, practically occu-

pied the entire half of the block. The railroad tracks were laid upon a fill rising from the natural grade to about 9 feet above it, with the result that Sherman street, which ran on the east of plaintiff's property, and Sheridan street, on the west, were closed near their intersection with the north line of Third street. The tracks also crossed Grant street a block east of plaintiff's property in a cut about 15 feet deep, over which was constructed a bridge along Grant street. The south approach of the bridge extended into Third street, substantially closing the street at that point. There were other remote obstructions of Third street. The result of all this was that plaintiff's access to his property was limited to Third street westward and Sherman and Sheridan streets southward. Under these conditions the railroad company contended that it was not liable for any injury to plaintiff's property produced by the lawful and proper construction and operation of its railroad on its own land north of Third street; but the Supreme Court of Nebraska rejected the contention, and held that the question was foreclosed by the provision of the state Constitution and the cases to which we have already referred, and among the cases cited is Gottschalk v. Railroad, supra. It was also urged, doubtless in view of the language of the court in the Kramer Case, that the company was exempt from liability for damages arising from the lawful use of its own property, which it had acquired by purchase, and not by the exercise of eminent domain. As to this the court said:

"It seems to be the contention of plaintiff in error that by the occupation of the lots and parts of blocks he [it] has purchased it is placed upon the same footing as a private owner of property, and therefore has the right to make use of its property as it may see fit, so long as it does not create thereon a public nuisance, and therefore, if an injury was suffered, it is damnum absque injuria. To this we cannot agree. We cannot consent to base defendant's right to recover upon the simple method adopted by plaintiff in procuring its right of way. Had it been anything else than a railroad company, the owner of any single lot along its track could have declined to sell his lot, and thereby prevent its construction; but, owing to the fact that plaintiff was a railroad corporation, this right on the part of the lot owner did not exist. Can it be said, then, that because the lot owners consented to sell their lots the plaintiff could purchase and thus defeat the right of adjoining property owners to maintain their action for damages? Such to our minds would be a novel conclusion."

Again:

"So far as this injury is concerned, it must be conceded that the property of plaintiff has been damaged by the occupation for public use of the streets and adjacent lots; that is, its value to a greater or less extent has been destroyed. This loss must fall upon the owner, unless by the clause of the Constitution referred to he is given an action against the corporation causing it for his damages."

And then, after a consideration of the Gottschalk, Reinhackle, and Fellers Cases, the court added:

"It has been uniformly held by this court that the provision of the Constitution giving compensation to the owner of property damaged for public use shall be given a reasonable and practical construction, and that where property is rendered of less value by the construction of a public improvement of the kind mentioned the owner shall have 'just compensation therefor'. The amount or extent of damage is a question of fact for the jury."

It was also held that it was proper for the jury, in arriving at the depreciation of the value of the property, to consider the effect of smoke, soot, and dust from the engines, the noise from the operation of the road, and the danger to buildings from sparks from the passing engines, although they were not necessarily elements of damage upon which an estimation might be separately based by a jury.

Railroad v. Janecek, 30 Neb. 276, 46 N. W. 478, 27 Am. St. Rep. 399: In this case an unobstructed street intervened between the property of the plaintiff and that which had been purchased and was being occupied by the railroad company with its tracks, engine house, and other structures. No part of the street was encroached upon or molested. The injury to plaintiff's property was alleged to arise solely from the noises made by the ringing of the bells, the sounding of the whistles, the throwing of soot, smoke, and cinders, and the shaking of plaintiff's house by the passing of trains. The court observed that it was the settled law of the state that under the constitutional provision it was not necessary that any part of an individual's property should be actually taken for public use to entitle him to compensation, and that if the property had been depreciated in value by reason of the public improvement, which the owner specially sustained and which was not common to the public at large, a recovery might be had. It was said:

"In the case at bar the plaintiff's property is depreciated in value by the noise caused by the operation of the defendant's engines and cars in front of his premises and in close proximity to his house, by the casting of soot, smoke, and cinders upon his property, and by the vibration of his house. The plaintiff has sustained special damages by the construction and operation of the railroad near his premises, in excess of that sustained by the community at large. Smoke, soot, and cinders are not thown upon property situated a few blocks from the road, nor does the moving of trains jar buildings that are distant from the track."

In Railroad v. Boerner, 34 Neb. 240, 51 N. W. 842, 33 Am. St. Rep. 637, it was held that a property owner was entitled to recover damages caused by the closing of a highway at a point more than 1,000 feet distant from his property.

In Railroad v. O'Connor, 42 Neb. 90, 60 N. W. 326, railroad tracks and a coal house were constructed in a street in front of plaintiff's property, their presence and use so obstructed the street that he was isolated from the enjoyment thereof, and there was much noise and a destructive vibration of his dwelling house.

Railway v. O'Neill, 58 Neb. 239, 78 N. W. 521, was also a case of the obstruction of a street. The Gottschalk Case and Rigney v. Chicago are among the cases cited in the opinion. The court said:

"In such an action the measure of recovery is the difference between the value of the land before and its value after the road was constructed and put in operation."

These decisions seem to answer most of the contentions of the railroad company in the case at bar and to compel the following conclusions:

Permission granted to a railroad company by the duly constituted public authorities to erect its structures and lay its tracks upon a street or other highway does not relieve it from liability to a property owner

for such damage as is within the contemplation of the constitutional provision. It is obvious that a vacation by municipal authorities of a public street and alley for the exclusive benefit of a railroad company cannot afford immunity from liability where a mere grant of the use would not do so. The right of recovery under the state Constitution is not limited to those cases in which the property of a private owner is actually invaded or appropriated by a railroad company. It extends to cases where the value of the property is depreciated by the disturbance of some right, either public or private, which the owner enjoys in connection therewith. It matters not whether the disturbance proceeds from works and operations upon public highways, or from those upon grounds acquired and owned by the company itself; and in the latter case the method of acquisition, whether by purchase or by the exercise of the power of eminent domain, is immaterial. The right of recovery inlcudes damage to the property from noise, smoke, cinders, and vibrations of the ground, and the obstruction or impairment of the right of the owner to make use of public highways in the vicinity. The measure of the recovery is the difference between the market value of the property before the construction and operation of the railroad and its market value afterwards. It should be said, however, that this measure is inapplicable, and an instruction giving it is erroneous, if there is present in the particular case some element of injury for which the plaintiff is not entitled to recover, unless attention is directed to it and a sufficient exception expressed.

In the case at bar the doubtful element in the damages awarded the plaintiff is that arising from the excavation in the property of the railroad company, as distinguished from that in the street and alley. The proof was insufficient to show that the lateral support of plaintiff's ground was in any wise affected, yet witnesses in her behalf testified that their estimates of lessened values were in part based upon the fact that the company had made an excavation upon its own ground, and the trial court declined to instruct the jury to disregard that feature of the case. An excavation upon adjoining property that does not impair the right of plaintiff to lateral support does not disturb her in the use and enjoyment of any right connected with her own land or appurtenant thereto. Nor is such an excavation at all similar, in respect of its relation to her land and its effect upon the same, to disturbances caused by smoke, dust, cinders, noises, and vibrations. The latter sensibly and appreciably affect the physical use and enjoyment of adjoining property, while the mere proximity of an excavation upon the land of another appeals alone to the sentiment in the same sense, though with reverse impression, that a pleasing landscape does.

We do not understand that the Supreme Court of Nebraska has extended the rule of liability under the state Constitution so far as to include supposed damage arising from the bare presence, without more, of works or structures devoted to public use upon neighboring property acquired for that purpose. In every case that has come under our observation there was either an occupation and obstruction to a greater or less degree of a public highway, or a disturbance and annoyance from noise, smoke, etc., or both. And, while it is true that some broad, general expressions as to recoverable damage may be

found in some of the opinions of that court, they are to be taken in connection with the facts of the case in which they occur, and not extended to those cases which are fairly subject to the operation of a different principle. This rule was adopted at an early day by the Supreme Court of Nebraska for its own guidance (McConnell v. Dewey, 5 Neb. 385, 387), and in the national courts it has been regarded as a maxim ever since Cohens v. Virginia, 6 Wheat. 264, 399, 5 L. Ed. 257. In no case brought to our attention has the point been made and decided that the bare presence, without annoying operations, of railroad structures, not upon the highway or other public ground, but upon the property acquired for that purpose, worked a damage to neighboring property owners that was recoverable under the Nebraska Constitution. In that particular a mere excavation for railroad tracks confined to the property of the company stands in the same class. Were it otherwise, municipal corporations would with equal reason be liable in damages to the owners of private property for the establishment of market houses, hospitals, fire engine houses, police stations, and jails. Aside from the disturbances caused by operation, we can perceive of no distinction between structures of the kind just enumerated and railroad tracks and buildings that would permit of recovery of damages in the one case and deny it in the other. The constitutional provision makes no discrimination in respect of the character of the public use. The undesirability of the presence of city jails and the like is generally regarded as being damnum absque injuria in states whose constitutional provisions are like that of Nebraska. Bacon v. Walker, 77 Ga. 336; Van De Vere v. Kansas City, 107 Mo. 83, 17 S. W. 695, 28 Am. St. Rep. 396; Rigney v. Chicago, 102 Ill. 64. See, also, 2 Dillon on Munic. Corp. (4th Ed.) § 587d; 1 Lewis on Eminent Domain (2d Ed.) p. 560.

The excavation of the railroad company upon its own land was a lawful work. It did not encroach upon the property of the plaintiff, nor impair her right of adjacent support. It did not affect to any degree the full use and enjoyment of her property, or any right that was appurtenant thereto. We are of the opinion that it was not a proper element upon which to base the recovery of damages.

The judgment is reversed, and the cause remanded for a new trial.

KNUDSEN-FERGUSON FRUIT CO. v. MICHIGAN CENT. R. CO.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1906.)

No. 2,378.

1. CARRIERS—RAILROADS ENGAGED IN INTERSTATE COMMERCE—SCHEDULE OF RATES.

Semble, that a railroad company engaged in interstate commerce in its schedules of rates and classifications filed with the Interstate Commerce Commission pursuant to Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3156], may state separately its rate for the carriage of ordinary commodities of a particular class and its charge for icing cars when commodities of the same class are of a character requiring to be shipped under refrigeration, and that its collection of both charges when refrigeration is used is lawful, provided they are each reasonable and do not cover double compensation for the same service.

2. SAME—ACTION FOR DAMAGES BY SHIPPER—GROUNDS OF RECOVERY.

To support an action by a shipper against a carrier under section 8 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3159]), he must show either that there has been some unreasonable or excessive charge imposed or some unlawful discrimination practiced against him by which he has been pecuniarily damaged, and he cannot recover, on a merely technical construction of the law, because, in addition to the ordinary scheduled rate, an extra charge for icing service, also shown by the schedules, but separately, has been collected from him, where such charge is not shown to be unreasonable and has not been so held by the Interstate Commerce Commission.

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

The fruit company sued the Michigan Central Railroad Company to recover the sum of $27 claimed to have been unlawfully exacted for the icing of a car load of grapes shipped from Matawan, Mich., to Duluth, Minn., and the further sum of $500 as a reasonable attorney's fee. The grapes were transported over the Michigan Central Railroad from Matawan to Chicago, and thence over the Chicago, Milwaukee & St. Paul Railroad to Duluth. It was charged in the complaint that the railroad companies had duly filed their joint schedules of rates with the Interstate Commerce Commission, as required by the act to regulate commerce approved February 4, 1887 (Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3156]), and the acts amendatory thereof, and that the rate specified in the schedules was 48 cents per 100 pounds of grapes for receiving, handling, transporting, caring for in transit, and safely delivering, when transported in car load lots, from Matawan, Mich., to Duluth, Minn., and that this rate purported to cover all charges of every kind and description, and that there was nothing in the schedules indicating an additional charge for icing in transit; that the defendant company entered upon the bill of lading as advance charges its proportion of the published through rate, and in addition thereto the sum of $27 for the icing of the car in which the grapes were shipped, and that when the car reached its destination at Duluth the plaintiff paid the entire amount of charges, but that the item in controversy was paid under protest and duress. It was further charged in the complaint that the exaction of the charge for icing or refrigeration was collected without warrant of law and contrary to the provisions of the acts to regulate commerce, and, further, that it was unjust and unreasonable. There were received in evidence at the trial copies of the documents filed with the Interstate Commerce Commission as required by the act of Congress. One was a schedule of class rates which showed the through rate from Matawan to Duluth for second-class freight to be 48 cents per 100 pounds. This schedule contained a reference to the official classification. The latter, also filed with the commission, rated grapes in car load lots as second-class, and it contained an express provision that grapes and certain other fruits mentioned, not forwarded in pick-up cars, would be subject to an additional charge for icing at a minimum rate of $2.50 per ton of 2,000 pounds, fractions of a ton proportionately. Another contained special rulings affecting rates and official classification, and among them was a provision that the regular transportation rate did not include the charge for icing, and that for the latter service there would be imposed a minimum charge, upon shipments of grapes and other fruits, of $2.50 per ton, fractions proportionately. There was also a supplement to the sheet of special rulings which provided that "the rates herein named are subject to the weights, rules, conditions, and special instructions of the official classification," etc. All of these documents were connected together by appropriate references. It apeared from the evidence that by a general arrangement with the defendant company the refrigerator car in which the grapes were shipped was furnished and the icing done by another corporation, known as the "Armour Car Lines," and that the latter received from the defendant the charge for icing, which was billed as an advance charge and collected from the plaintiff by the connecting carrier at Duluth. The arrangement with the Armour Car Lines was such that no other refrigerator cars than those

belonging to it could be used in that traffic, and no one else could perform the icing service. At the conclusion of the evidence the trial court directed a verdict for the defendant, and, judgment being rendered accordingly, the plaintiff prosecuted this proceeding in error.

Roger S. Powell, for plaintiff in error.

C. A. Severance (Frank B. Kellogg and Robert E. Olds, on the brief), for defendant in error.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

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

It should be observed at the outset that, although the plaintiff charged to the contrary in its complaint, the schedules published and on file with the Interstate Commerce Commission clearly showed that the specified rate for transportation of the grapes did not include, and was not intended to include, any charge for the icing of the car in transit. As shown by those schedules, there was a separate and distinct charge for icing in addition to the transportation rate. There was no proof at the trial that the charge collected for icing the refrigerator car in which the grapes were shipped was not a just and reasonable one for that particular service; nor proof that the freight rate from the point of shipment in Michigan to the destination in Minnesota which was charged and collected was not a just and reasonable rate for the transportation of the grapes, considering that service as separate and apart from the icing of the car. In other words, there was no proof that the sums of money exacted of and paid by the plaintiff were unjust and unreasonable charges for the services performed, whether regarded separately or in the aggregate. Again, there was no proof that the amounts demanded by the defendant and paid by the plaintiff were in excess of the rates and charges separately specified in the schedules filed with the commission; nor was it claimed that the railroad company was guilty of discrimination against the plaintiff by the performance for others of like and contemporaneous services for a less compensation.

We will assume, without considering the question, that the payment of the charge imposed for the icing of plaintiff's car of grapes was made under such circumstances as would entitle it to recover, did it otherwise have a cause of action, although in a case quite similar the Circuit Court of Appeals of the Seventh Circuit held that a payment by the same plaintiff was voluntarily made and that therefore there could be no recovery. Knudsen-Ferguson Fruit Company v. Railway Company (C. C. A.) 149 Fed. 973.

The plaintiff contends in effect that at common law it is the duty of a common carrier to provide adequate and suitable facilities for the transaction of the business in which it is engaged; that its duty of transportation comprises, not only the reception, the carriage, and the delivery of the property intrusted to it, but also that measure of protection and care during transit which its known characteristics demand; that when it holds itself out as a carrier of perishable commod-

ities, that can only be moved in refrigerator cars and under refrigeration, and invites and accepts traffic of that character, its duty keeps pace with the necessities of the business, and it must not only furnish suitable cars, but also the refrigeration of the same during transit; that, although the carrier leases the equipment or contracts with another corporation to furnish it and perform the incidental service, no new or independent element is injected into the relation between the shipper and the carrier that affects or impairs the full responsibility of the latter; that a charge for the necessary icing of a refrigerator car in which a perishable commodity is transported is a charge imposed for a service which it is the duty of the carrier to perform as part of its duty of transportation.

With the foregoing as a premise, the plaintiff further contends, in effect, that under the act to regulate commerce, approved February 4, 1887, and the amendments thereof, a transportation rate is single and indivisible, and embraces compensation for services of every kind and character that a railroad company is required to perform as a necessary incident to its contract of carriage, and that it was therefore unlawful for the defendant and its connecting carrier to segregate the rate and to specify in the tariff schedules a charge for the icing of refrigerator cars separately from the ordinary rate of transportation for second class freight from Matawan, Mich., to Duluth, Minn. It may well be admitted that, if a railroad company promulgates a rate which justly and reasonably compensates for the entire service it is required to perform, it cannot exact additional compensation by also naming one of the services which is an essential and integral part of its duty of transportation and affixing to it a distinct and separate rate. But assuming, without deciding, that a railroad company may be required to furnish ice for refrigerator cars and to maintain refrigeration during transit, it is not clear that a reasonable charge for that service may not be scheduled separately from the rate for ordinary transportation, provided, of course, no part of one is covered in the other.

Section 6 of the act of February 4, 1887, provides:

"That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges."

Provision is also made for the establishment of joint tariffs over continuous lines or routes operated by more than one carrier and the filing of the same with the commission, and that:

"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 persons or property or for any services in connection therewith between any points as to which a joint rate, fare or charge is named thereon, than is specified in the schedule filed with the commission in force at the time."

It is also provided that:

"The commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient."

It at least seems to have been recognized by Congress that there may properly be rules or regulations which in some wise change, affect, or determine a part or the aggregate of the scheduled rates and charges, and there is nothing in the act clearly indicating that the rate or charge for every service must be included in one specified sum. It is true that in Covington Stockyards Co. v. Keith, 139 U. S. 128, 135, 11 Sup. Ct. 461, 463, 35 L. Ed. 73, the court said:

"A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stockyards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stockyards which itself owns, maintains, or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession."

But in that case, which arose before the passage of the interstate commerce act, the conduct of the railroad company that was complained of resulted in the imposition of a charge for the use of facilities for the unloading of live stock and delivery to the consignee in addition to the customary and legitimate charges for transportation which were assumed to be in themselves fully compensatory.

In Interstate Commerce Commission v. Railroad, 186 U. S. 320, 22 Sup. Ct. 824, 46 L. Ed. 1182, the court upheld the right of the railroads to make a distinct charge from the point of shipment to Chicago, and a separate terminal charge for delivery to the stockyards in that city, which was a point beyond their lines; but, because it did not arise in the case, the court declined to express an opinion upon the question whether the rule would be applicable to terminal services by a carrier upon its own line which it was obliged to perform as a necessary incident to its contract to carry.

In Walker v. Keenan, 19 C. C. A. 668, 73 Fed. 755, the court, in discussing the Keith Case, said there was no reason why the compensation of a carrier should not be apportioned if the public convenience were subserved thereby, but that since the passage of the interstate commerce law the apportionment should be specified in the tariff schedules for the information of shippers.

So far as the accomplishment of the great purposes of the interstate commerce act is concerned, it would not seem to be very material whether charges for icing are fixed at a specified rate per ton of ice furnished and therefore separately stated in the schedules, or measured

according to the weight of the commodity subject to refrigeration and the distance of transportation, in which event they might be more easily covered into the transportation rate. The former method would probably result in a closer approximation of charge imposed to value of service performed, and be more adjustable to the variable conditions of the seasons and the demands of the shippers, while the latter might the better conduce to simplicity in the schedules. Which should be adopted would seem to be a question of practice and expediency, rather than one of law.

The Interstate Commerce Commission, not considering that the question was foreclosed by any provision of the act of Congress, has thus expressed its views:

"There are at least three methods which may be adopted by the carrier in imposing such charges. It may charge for the ice actually used at so much per ton; it may charge for the service of refrigeration at so much per car, whatever the quantity of ice consumed may be; or it may charge at a rate by the hundred pounds, when property moves under refrigeration. All these different systems have their advantages and disadvantages. Some witnesses were in favor of one system, some of another. It is not within the province of this commission to prescribe the method which shall be adopted, so long as the price charged the shipper is fair."

This was said in a cause pending before the commission involving the very practice now challenged by the plaintiff. 11 Int. Com. Com'n R. 129, 141. The commission disposed of the complaint against the Michigan Central Railroad Company, the defendant here, by stating that it had purchased its own refrigerator equipment and would in the future charge $2.50 per ton for the ice actually consumed, and concluding:

"We have found that this is a reasonable price and that company should therefore be dismissed from this proceeding."

In various other instances the commission has made rulings as to the reasonableness of icing charges that were separated from the transportation rate in the schedules. The Truck Farmers' Case, 6 Interst. Com. Com'n R. 295; The Citrus Fruit Case, 9 Interst. Com. Com'n R. 182; Id., 10 Interst. Com. Com'n R. 590, 608; The Michigan Fruit Case, 10 Interst. Com. Com'n R. 360.

But, even if it could be said that the defendant violated the provisions of the act of Congress (Act Feb. 4, 1887, c. 104, § 8, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3159]), by dividing its rate and separately specifying a charge for icing, it does not follow that plaintiff has made a case. This action was brought under the eighth section of the act:

"That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

To support a recovery under this section, there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the government, or to corrective or coercive proceedings at the instance of the commission. It is not every imperfect or inaccurate specification of rates in the schedules that will give to a shipper a cause of action for damages. He must show, either that there has been some unreasonable or excessive charge imposed, or some unlawful discrimination practiced against him. The plaintiff here, having founded his cause of action upon a technical construction of the law, and without the basis of any ruling or order of the commission, seeks to recover without proof of pecuniary damage. The schedules of rates filed with the commission clearly showed that there was a charge for icing, and that it was not included in or absorbed by the ordinary second-class rate from Matawan, Mich., to Duluth, Minn. Stating this fact conversely: It clearly appeared that the second-class rate specified in the schedules, and doubtless applying to many commodities that are not moved under refrigeration, did not include compensation for the icing of cars containing fruits that do require refrigeration. It goes without saying that the icing service entails an expense not required in the transportation of most commodities, and that it calls for a just and reasonable recompense. There is no presumption that rates specified in official schedules are unjust and unreasonable. The record before us discloses no finding and ruling of the commission against the reasonableness of the rates, and there was no proof upon the subject. There was no proof that what the plaintiff actually paid was in excess of a reasonable compensation for the services performed, whether considered separately or in the aggregate; nor does it appear that any discrimination of any kind or character was practiced against it. In the absence of a showing of injury or damage, there can be no recovery.

But one other matter requires notice: The plaintiff complains of a denial by the trial court of its application for an order requiring the presence at the trial of officers of the defendant and the production of records. Without considering the sweeping and general character of the application, or whether the plaintiff secured all that was required by the testimony of the officer whose deposition was taken and by the documents read in evidence at the trial, it is sufficient to say that no exception appears to have been taken to the ruling of the court.

The judgment is affirmed.

LOESER v. SAVINGS DEPOSIT BANK & TRUST CO.

(Circuit Court of Appeals, Sixth Circuit. November 22, 1906.)

No. 1,535.

1. BANKRUPTCY—PREFERENCES—DELAY IN RECORDING CHATTEL MORTGAGE.
A state statute which requires a conveyance or transfer to be recorded in order to be effectual against any class or classes of persons is a law by which such recording is "required," within the meaning of Bankr. Act July 1, 1898, c. 541, § 60a, 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], which defines preferences given by a debtor within four months prior to his bankruptcy and provides that "where the preference consists in a transfer such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

2. SAME—OHIO STATUTE.
A chattel mortgage given in Ohio to secure an antecedent debt, which by the law of the state is required to be recorded to render it valid as against lien creditors of the mortgagor or subsequent purchasers or incumbrances in good faith, and which, while given previously, was not recorded until within four months prior to the mortgagor's bankruptcy, constitutes a preference under Bankr. Act July 1, 1898, c. 541, § 60a, 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], and where at the time it was given the mortgagee knew or had reasonable cause to believe the mortgagor to be insolvent the preference is voidable by the trustee in bankruptcy.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 262.]

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

Smith, Taft & Arter and L. J. Grossman, for appellant Loeser.
W. W. Boynton, for appellee.

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

LURTON, Circuit Judge. The question in this case is as to whether Mrs. Chadwick's chattel mortgage securing a past indebtedness to the Savings Deposit & Trust Company of $37,000 is invalid as a preference under section 60a of the Bankrupt Law of July 1, 1898 (30 Stat. 562, c. 541 [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].

This mortgage was made April 27, 1904. By an agreement between the parties it was withheld from record until November 22, 1904, on which day the mortgagee took actual possession of the mortgaged property and put the mortgage to record. On December 1, 1904, proceedings in bankruptcy were begun against Mrs. Chadwick, and in due course she was adjudged a bankrupt. By agreement the mortgaged property was placed in the hands of the bankrupt receiver for purpose of sale, the rights of the mortgagee in the fund to be reserved and adjudicated by the court. Thereupon the bankrupt trustee filed a petition attacking the mortgage as a preference voidable under the bankrupt law. The bank consented to the jurisdiction and entered its appearance, and filed a cross-petition asserting its right to enforce the

lien of its said mortgage, and that its claim, when determined, be awarded priority by virtue of the lien of its said mortgage against the fund in the possession of the court, the proceeds of the sale by the trustee of the chattels covered by the mortgage. The District Court denied this relief, and the cross-petitioner has appealed. The property mortgaged included Mrs. Chadwick's entire chattel estate, and consisted of household furniture, china, bric-a-brac, pictures, jewels, an automobile, and all chattels in her residence on Euclid avenue, Cleveland, and in her barns.

The transcript recites that it was conceded by the mortgagee bank on the hearing below:

"That at the time the chattel mortgage was executed by Cassie L. Chadwick, to-wit: April 27, 1904, and delivered to J. C. Hill, its president, that said Cassie L. Chadwick was insolvent, and that said J. C. Hill as president of said bank had reasonable cause to believe at that time that she was insolvent and that such condition existed on the 22d day of November, 1904. It also appeared from the evidence that the effect of enforcing such chattel mortgage, if held valid, will be to enable said bank to obtain a greater percentage of its debt than any other of the bankrupt creditors of the same class."

The concession brings this transfer squarely within the definition of a voidable preference, provided it was such a transfer as under the law of Ohio was "required" to be recorded within the meaning of section 60a of the bankrupt law of 1898 as amended by the act of February 5, 1903. District Judge Tayler, who heard this case in the court below, was of opinion that under the laws of Ohio, the state wherein the mortgaged property was situated, a chattel mortgage is not "required" to be recorded within the meaning of the amendment referred to, and that the preference related to the date of the actual execution of the transfer, and was, therefore, valid as a preference made more than four months before the filing of the petition. To support this conclusion he cites section 4150, Ohio Rev. St. 1906, Francisco v. Ryan, 54 Ohio St. 307, and In re Shirley, 112 Fed. 301, 50 C. C. A. 252, as to the validity of an unrecorded chattel mortgage "not accompanied by an immediate delivery and followed by an actual and continual change of possession," as against all persons except "creditors of the mortgagor, subsequent purchasers and mortgagees in good faith." To support the proposition that an unrecorded lien, good as between the parties under the law of the state, is good against a bankrupt trustee, if the lien antedates the filing of the petition more than four months, the cases of Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956, and Rogers v. Page et al., 140 Fed. 596, 72 C. C. A. 164, decided by this court, are cited. As to the construction of section 60a before the amendment of 1903, Meyer Brothers Drug Co. v. Pipkin Drug Co., 136 Fed. 396, 69 C. C. A. 240, an opinion arising under the recording statute of Texas, and decided by the Circuit Court of Appeals of the Fifth Circuit, is cited as holding that the law has not been changed by the amendment of February 5, 1903. It must be conceded that, under the settled law of Ohio, this mortgage was valid without recording, as between the parties and became good when recorded against all creditors who had fastened no lien thereon before, questions of actual fraud in witholding it from record out of the way. It must also be conceded that prior to the amendment of the bankrupt law by the amending act of February 5,

1903, the preference, if free from actual fraud, would relate to the date of the making and delivery of the instrument creating it, and, if that date was more than four months before the filing of the petition for adjudication in bankruptcy, the lien would be good against the trustee. Humphrey v. Tatman and Rogers v. Page et al., cited above. Both of the cases last cited arose under preferences given before the amendment of February 5, 1903. What has been the effect of that amendment? This fact was referred to by Mr. Ray of the House Judiciary Committee, who explained the amendment in question, when proposed in Congress, as intended to prevent preferences under unrecorded instruments given more than four months before the filing of the petition. Touching this he said:

"By adding to 'A' a clause which shall be equivalent to that found in section 3 B (1) Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]. It seems that as section 60A now stands a preferential mortgage may be given and the creditor preferred, by withholding it from record four months be able to dismiss the trustee suit to recover the same though the paper was actually recorded within the four months period. See In re Wright (D. C. Ga.) 96 Fed. 187; In re Mersman (N. Y.) 7 Am. Bankr. Rep. 46." Volume 35, part. 7, Cong. Record, 6,943.

Before this amendment section 60a read as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or 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."

This section, in its original form, was construed in the cases of Humphrey v. Tatman and Rogers v. Page et al., cited above, and in several other reported cases as avoiding no preference which originated under an unrecorded transfer made more than four months before the beginning of bankruptcy proceedings against the maker. Subsequently Mr. Ray became district judge for the Northern District of New York, and in the case styled In re Hunt (D. C.) 139 Fed. 283, he quotes from Collier on Bankruptcy (5th Ed.) p. 453, a statement that the amendment as offered added after the word "required" the words "or permitted," and "that the Senate for some reason struck out these words." Judge Ray, from this history, held that because under the laws of New York an unrecorded conveyance was good as against everybody except subsequent purchasers without notice, that it was not "required" to be recorded in order to be effectual against a bankrupt trustee. Independently of this legislative history, Judge Archbald, in English v. Ross (D. C.) 140 Fed. 630, and the Circuit Court of Appeals for the Eighth Circuit, in First National Bank v. Connett (C. C. A.) 142 Fed. 33, reached an opposite conclusion and held that a recording statute, which required a conveyance or transfer to be recorded to be effectual against a certain class or classes of persons, was a law which "required" the recording of the transfer in question, within the meaning of section 60a as amended. With this conclusion we agree.

Among the reasons which justify this interpretation are these:

(1) A preference which is an act of bankruptcy by section 3 should in an harmonious law be voidable by the trustee. By that section a

transfer made by one "while insolvent" of any portion of his property to one or more of his creditors "with intent to prefer such creditors over his other creditors" is made an act of bankruptcy, and a petition may be filed against such person "within four months after the commission of such act." With respect to the date of the commission of such act of bankruptcy, subdivision (1) of the same section provides that the date from which the four months begins to run shall be "the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property * * * for the purpose of giving a preference as hereinbefore provided, * * * if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment." By section 60a, a definition of a "preference" is given which under section 3 would constitute an act of bankruptcy and by section 60b, a "preference" so defined is made voidable by the trustee. But, as we have seen heretofore, sections 60a and 60b did not make a preference voidable by the trustee unless the preference, whether under a recorded or unrecorded instrument, was given within four months prior to the filing of a petition in bankruptcy. Thus a "preference" under section 3, as defined by section 60a, might constitute an act of bankruptcy and justify an adjudication if given by an unrecorded instrument more than four months prior to bankruptcy and the preference itself be enforced as a perfectly valid act. The plain purpose of the amendment of section 60a was to bring it into harmony with section 3, by making the same period of time the test as to whether a preference may be avoided by the trustee, under the former, or may constitute an act of bankruptcy under the latter. The construction given to section 3 should be carried forward and given to section 60a as amended; thus bringing them into consistent relations. "The two, said Judge Archbald, in English v. Ross, cited above, "are intimately related, the one in this particular being the basis of and dominating the other, and it is the failure to realize this and to draw them together as they should be that is responsible for any misapprehension. What is thus 'required' in the way of recording in the one is also 'required' as a conveyance in the other and for the same purpose."

(2) The evil to be corrected was that of secret preferences, given by withholding from record instruments which by the whole policy of recording statutes should be recorded. This evil was pointed out by the author of the amendatory act of 1903 and the object of the amendment of 60a was stated to be the remedying of this evil. The law, as it stood, encouraged such secret liens and preferences, for, if they could be concealed for four months, though acts of bankruptcy, they were not voidable by the trustee. If we say that unless the law of the state where the transfer is made makes void all such transfers as to all the world, that it is not a law which "requires" recording, the evil will continue and judges will continue to bewail the iniquity of a law which makes such a secret transfer an act of bankruptcy and yet holds the preference valid against the bankrupt's estate because made more than

four months before starting bankrupt proceedings against the maker. See the lament of Judge Ray in Re Hunt, 139 Fed. 286, 287.

(3) Some effect should be given to the amendment of section 60a if the language of the provision will permit. If "required" be construed as applying only to a law which makes every such transfer absolutely void as to all persons, the amendment will be of no effect, for no recording statute, of which we have any knowledge, makes void transfers or conveyances as between the parties and all of them give effect to such instruments as against some classes of persons having actual notice. The amendment would be idle, and the evil sought to be remedied would flourish as before and the legislative purpose be frustrated.

(4) In view of all of the foregoing considerations, we reach the conclusion that the word "required," as used in the amendment, refers to the character of the instrument giving the preference or making the transfer, without reference to the fact that as to certain persons or classes of persons it may be good or bad according to circumstances. If to be valid against certain classes of persons, the law of the state "requires" the constructive notice of registration it is a transfer which under the amendment is "required" to be recorded. This takes account of the purpose and policy of recording acts, remedies the evil which flourished under the law before the amendment, gives effect to the plain purpose of Congress, and gives some effect and force to a provision which would otherwise be meaningless, and brings section 3 and 60a and 60b into harmony of purpose and meaning.

(5) We do not ignore the argument that in section 3 the word "required" is followed by the words "or permitted," and that the latter words are omitted from the amendment, and that the words "or permitted" were in the act as introduced by the author of the bill and retained in the amendment as it passed the House, but was dropped in the Senate.

It is a fact of which we may take notice that it is common to recording statutes to set out a list of contracts, conveyances, and transfers which may be registered, or as "entitled" or "permitted" registration. But, if an instrument is not "entitled" or "permitted" by law to be recorded, its record is of no effect as constructive notice. The effect of recording statutes is limited to such instruments as the statute permits record of. Burck v. Taylor, 152 U. S. 634, 14 Sup. Ct. 696, 38 L. Ed. 578; Lynch v. Murphy, 161 U. S. 247, 16 Sup. Ct. 523, 40 L. Ed. 688; Blake v. Graham, 6 Ohio St. 580, 67 Am. Dec. 360; 24 Encyclopedia of Law, p. 142, and cases cited. The Ohio statute concerning the recording of chattel mortgages does not require that such mortgages shall be recorded in order to be valid as against the parties or purchasers with notice. Only creditors and purchasers without notice can ignore an unrecorded chattel mortgage, and they cannot do so if there immediately followed a delivery and notorious change of possession. Yet the mortgagor or mortgagee is entitled or "permitted" to record the instrument, though not essential to its validity as against certain classes of persons.

We conclude from the general purpose and policy of recording statutes that the words "or permitted" are of no vital signification in sec-

tion 3. If the instrument giving the preference is one which is "permitted" to be recorded in order to give it validity as against certain classes of persons, though perfectly valid without record as to other classes, it is an instrument "required" to be recorded within the meaning of the word as there used. The words "required" and "permitted" in the connection used are of synonymous legal meaning. The dropping of the words "or permitted" by the Senate is, therefore, of no vital signification if we are right in regarding section 3 and section 60a as closely connected provisions. It is only in extremely doubtful matters of interpretation that the legislative history of an act of Congress becomes important. If the word "required," as used in sections 3 and 60a, is used as referring to the character of the instrument giving the preference, and not as to the persons as between whom it may be valid without recording or the persons as to whom it is void for failure to record, the words "or permitted" in section 3 were surplusage, and the Senate might well omit them from the amendment, the plain purpose being to tie the two provisions together. Why they were omitted from the bill as it finally passed we can only conjecture. If they had been retained, no one would question that the amendment made the preference, constituting an act of bankruptcy by section 3, voidable by the trustee under section 60a and 60b. To say that this plain purpose has failed because "or permitted" was inserted by one house and stricken out by the other, would be to make nothing of the amendment. We should so construe the act as to give it vitality if the words of the act will permit.

Under section 4150, Rev. St. Ohio 1906, a mortgage of chattels, not followed by immediate delivery and no actual and notorious change of possession, is "required" to be recorded. Otherwise it is invalid as to some persons and valid as to others. That such a mortgage is "required" by the law of Ohio to be recorded within the meaning of section 60a as amended, we have no doubt.

Other objections to the validity of the mortgage lien under the laws of Ohio, especially section 6343, Rev. St. Ohio 1906, have been argued. We express no opinion upon any other question than that discussed and decided.

The decree of the court below must be reversed, and the case remanded, with direction to proceed in accordance with this opinion.

CRESSON & CLEARFIELD COAL & COKE CO. v. STAUFFER.

(Circuit Court of Appeals, Third Circuit. November 21, 1906.)

No. 9.

BANKRUPTCY — CORPORATION — EFFECT OF INSOLVENCY PROCEEDINGS UNDER STATE LAW.

Proceedings under Pa. Act, April 7, 1870 (P. L. 58), by which the franchise and property of an insolvent corporation are sold under a special writ of fieri facias for distribution among its creditors, do not work a dissolution of the corporation so as to defeat the jurisdiction of a court of bankruptcy to adjudge it a bankrupt, or disenable its directors to admit its insolvency and willingness to be adjudged a bankrupt which constitutes an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3a (5), 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 23.]

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

Boyd Lee Spahr, for appellant.
Henry N. Wessel, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the district court for the eastern district of Pennsylvania, sitting as a court of bankruptcy, in the matter of The International Coal Mining Company, adjudicating the said corporation a bankrupt.

The opinion of the district judge (143 Fed. 665), in making this adjudication, is as follows:

"Holland, District Judge. On July 14, 1905, a writ of fieri facias, on a judgment obtained by the Cresson & Clearfield Coal & Coke Company, was issued against the alleged bankrupt, which was returned unsatisfied. Whereupon the judgment creditor filed a petition under the Pennsylvania Act of April 7, 1870 (P. L. 58), and the common pleas court of Philadelphia directed the issuance of a special writ of fieri facias authorized by this act, under which the Sheriff seized upon the bankrupt's property and duly advertised for sale the 'franchise right to be a corporation, together with all property, real, personal and mixed, and all book accounts, claims, choses in action, causes in action arising out of contracts, torts or penalties, and assets of every description belonging to or in any way appertaining to the International Coal Mining Company, excepting only lands held in fee,' and on the twenty-ninth day of September, 1905, sold the same to P. H. Walls for the sum of forty dollars ($40). The costs of the said proceedings were twenty-five and ninety-two hundredth dollars ($25.92), which are retained by the sheriff, and the balance, fourteen and eight-hundredth dollars ($14.08), is distributable pro rata among all the creditors of the International Coal Mining Company under the seventy-fourth section of the Pennsylvania act of June 16, 1836 (P. L. 775). It does not appear, however, that this distribution has been made.

"On December 5, 1905, an involuntary petition in bankruptcy was filed against the alleged bankrupt, setting forth as one of the acts of bankruptcy the execution and sale of the alleged bankrupt's property above mentioned, and its failure to vacate or discharge this alleged preference. It is also alleged in the petition that on the twenty-fifth day of November, 1905, the International

Coal Mining Company admitted in writing its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground.

"The Cresson & Clearfield Coal & Coke Company in due season, objected to the International Coal Mining Company being adjudged a bankrupt, for the reason that the sale under the special fieri facias authorized by the Pennsylvania act of 1870, supra, worked, under the laws of Pennsylvania, a dissolution of the corporation, and at the time of filing the petition in bankruptcy it had no legal existence, and, further, that the equal distribution required under the seventy-fourth section of the act of June 16, 1836, in effect prevented the preference, which is prohibited by the Bankrupt Act, § 3, subd. 3, Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], and there was consequently no commission of this act of bankruptcy. It is further contended that on November 25, 1905, when the alleged bankrupt corporation, through its board of directors, admitted in writing its inability to pay its debts and its willingness to be adjudged a bankrupt, that it had no legal existence, and this act of the board of directors is a nullity.

"Prior to the passage of the act of April 7, 1870, supra, a return of 'unsatisfied in part or in whole' to an execution against certain corporations entitled the plaintiff in the judgment, upon petition, to have a sequestrator appointed, whose duty it was to distribute the net proceeds of the property among all the creditors of such corporation according to the rules established in the case of insolvency of individuals, and such sequestrator was accorded all the powers and was subject to all the duties of trustees appointed under the law relating to insolvent debtors. The fieri facias, which this act of 1870 authorizes, after the insolvency of the corporation is established by a return of nulla bona, is in lieu of the provisions or proceedings by sequestration under the seventy-fourth section of the act of 1836, P. L. 775 (Philadelphia & Baltimore Central Railroad Co. v. McCullough, 70 Pa. 355), and the duties of the sequestrator are performed by the sheriff who is still required to make equal distribution of the proceeds of sale to all the creditors of the insolvent corporation. Bayard's Appeal, 72 Pa. 453.

"The proceedings in effect, beginning with an execution, a return thereto, establishing the insolvency, followed by a sale of all the property of the insolvent corporation on the special fieri facias under the act of April 7, 1870, and an equal distribution among creditors of the corporation, is nothing more or less than a state insolvent law for the purpose of administering the property of insolvent corporations. It is made an act of bankruptcy to put a receiver or trustee in charge of the property of a corporation under state laws by section 3, subd. 4, and the substitution of the sheriff to effect the same result will not defeat the provisions of the act.

"In these proceedings the property of the insolvent corporation is not placed in the hands of a receiver or trustee by that name, but it is so in effect, because the sheriff, after a sale of the property on execution, is required to distribute the net proceeds among the creditors of the corporation according to the rules established in cases of insolvency of individuals and the same as a receiver or trustee would have been required to do under the law relating to insolvent debtors in the state.

"The placing of the insolvent corporation's property in the hands of a receiver or trustee under the state laws is not charged as one of the acts of bankruptcy in the creditor's petition, and an adjudication cannot be entered for that reason as the record now stands, and we do not think that the execution and sale of the property and the distribution of the proceeds in this proceeding is an act of bankruptcy set forth in section 3, subd. 3, of the bankrupt act because there is no lien created by the levy (Bayard's Appeal, supra), and no creditors will obtain a preference, but the admission in writing by the board of directors of the inability of the corporation to pay its debts and its willingness to be adjudged a bankrupt is set forth as an act of bankruptcy which will entitle the creditors to an adjudication, if, for the purposes of the bankrupt law, they had authority to pass upon this question. We think they had.

"The bankrupt law is paramount to all the state insolvent laws, and where the effect of enforcing the state law is to defeat the object of the provisions of

the bankrupt act, that part of the state law must yield to the provisions of the latter.

"To concede the contention of the respondent here, that the sale of the property of the alleged bankrupt by the sheriff of Philadelphia county on this peculiar writ worked a dissolution of the corporation so that proceedings in bankruptcy could not be instituted against it, would 'result in the anomalous situation that the commission of an act of bankruptcy would prevent the bankrupt act from taking effect.' But even under the act of 1870 the corporate existence does not entirely disappear upon the sale of the property and franchises upon an execution under that act, because the act 'excepts lands held in fee' from sale on the special fieri facias, which must 'be proceeded against and sold in the manner provided for in cases for the sale of real estate.' The title to this excepted real estate must remain in the corporation until sold, and a dissolution cannot take place so long as this asset exists, even under that act. But even if this were not so, the bankrupt act would so far control the matter of dissolution of the insolvent corporation as to prevent its legal extinction by superseding all state laws in conflict with its provisions to an extent necessary to enable creditors of insolvent corporations to have the assets of their insolvent debtor administered in accordance with its terms. Scheuer v. Book Co., 7 Am. Bankr. Rep. 384, 112 Fed. 407; Storck Lumber Co. of Baltimore, 8 Am. Bankr. Rep. 86, 114 Fed. 360; Hercules Adkin Co., Ltd., 13 Am. Bankr. Rep. 369. 133 Fed. 813."

On the day of the adjudication, to wit, February 21st, 1906, the petitioning creditor obtained leave to file, and duly filed in pursuance thereof, an amendment to his petition, nunc pro tunc as of the 5th day of December, 1905, the date of the filing of the original petition. By this amendment, the placing under the laws of the state of Pennsylvania of the insolvent corporation's property in the hands of the sheriff is alleged, as set out in the petition and answer thereto, as an act of bankruptcy, in that thereby, because of insolvency, a receiver or trustee had been put in charge of the bankrupt's property under the laws of a state.

No objection on the part of the appellant, or of any other party in interest, to the filing of this amendment, nunc pro tunc, appears in the record. No denial is made in the answer of the appellant, of the allegations of the petitioning creditor, as to the insolvency of the bankrupt. All the material facts as set out in the petition and by the learned judge in his opinion, are admitted in the said answer, which is, in effect, a demurrer to the petition, and the questions rising thereon were decided as questions of law by the court. The opinion and conclusion of the court in regard to the proceedings under the special fi. fa. issued by the state court, as being in effect the placing under the state law of a receiver or trustee in charge of the bankrupt's property, now sustain the allegation of the amendment, nunc pro tunc, that these proceedings were of themselves an act of bankruptcy. The sheriff has taken the place of the sequestrator, and is still required to make equal distribution of the proceeds of sale to all the creditors of the insolvent corporation, in accordance with the requirements of the insolvent law of the state of Pennsylvania.

However this may be, the ground upon which the adjudication was actually made, was a sound one. The admission in writing by a person (which designation applies to a corporation), of his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground, is one of the acts of bankruptcy expressly declared in the third section

of the act. The admission in this case was made in writing by the secretary of the corporation, specially authorized by a vote of the board of directors, as set out in the petition and record. This admission is in the terms of the act, and is dated on the 25th day of November, 1905, nearly two months before the filing of the creditor's petition. Though there is a general denial that this written admission of insolvency was authorized by a board of directors having general authority under the charter of the corporation, to make such an admission, no serious contention was made in that regard. It is, however, strenuously insisted that this act of the board of directors was a nullity, for the reason alleged that, at the time it was made the corporation had ceased to exist, and that therefore, the directors and all other officers were functi officiis. It is true, that the law already referred to provides that the property and franchises of the corporation, sold under this special fi. fa., shall pass to the purchaser, thus, in effect, terminating the existence of the old corporation. If, however, the proceeding by which this property and franchises were sold, was an act of bankruptcy, it was void and of no effect. If it were not, still the existence of the corporation is not terminated in every respect by this requirement of the state law. It has often been held that, even where a charter expires by time, its existence will be considered as being extended for the purpose of winding up its affairs, securing creditors and satisfying the ends of justice, even without special statutory authority for that purpose, and we think that the paramount authority of the federal bankrupt law is sufficient to keep alive the corporation in this case for the purposes of the bankrupt jurisdiction created by the said act, and to give efficacy to the admission made by the directors of the insolvent corporation as an act of bankruptcy. But even the Pennsylvania law, both in regard to sequestration under the act of 1836 and the special fi. fa. under the act of 1870, while providing for the sale of the franchise, specially excepts lands held in fee, thereby making it necessary that the corporation should still have existence in respect to such ownership. We think, therefore, that in this case the act of the directors, in admitting insolvency and expressing willingness that the corporation should be declared a bankrupt, was predicated on a sufficient corporate existence to make the same an act of bankruptcy under the bankrupt law. The Ice Co., 214 Pa. 640, 64 Atl. 398.

The adjudication of the court below is therefore affirmed, for the reasons stated by the learned judge of that court.

BROWN BAG-FILLING MACH. CO. v. DROHEN.

(Circuit Court of Appeals, Second Circuit. March 6, 1900.)

No. 226.

1. PATENTS—INFRINGEMENT—BAG-FILLING MACHINE.
The Cummings patent, No. 539,171, for a bag-filling machine, *held* valid and infringed as to claims 14, 53, 54, 30, 24, 53, 61, 41, 11, 12, 16, 17, 19, 23, 34, 35, and 20, but not infringed as to claims 1, 2, 6, 13, 8, 9, 18, 29, and 75, which each contain as an element a flexible bag opener not found in defendant's machine.

2. SAME.
The Brown patent No. 578,133 for an improved folding mechanism for use with the bag-filling machine of the Cummings patent No. 539,171 *held* valid and infringed.

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

On appeal by defendant from a decree of the Circuit Court for the Western District of New York, holding valid and infringed certain claims of letters patent No. 539,171, granted May 14, 1895, to H. H. Cummings, for an improvement in bag-filling machines, and granting an injunction and an accounting. The opinion of the Circuit Court is reported in 140 Fed. 97.

J. C. Sturgeon, for appellant.
Nathan Heard, for appellee.

Before LACOMBE and COXE, Circuit Judges.

PER CURIAM. We agree with the conclusion reached by the judge of the Circuit Court, except in one particular. He has held valid and infringed claims 1, 2, 6, 13, 8, 9, 18, 29, and 75. One of the elements of each of these claims is a "flexible bag opener" or an "elastic bag opener," which element is not found in the defendant's machine. In his machine the bag opener is a rigid, inflexible, knifelike blade, which descends and rises vertically. It is not at all necessary that it should perform the function attributable to the flexibility of the complainant's opener, which moves in the arc of a circle and cannot operate successfully without a certain amount of elasticity. In defendant's machine the resiliency of the bags pressing against the knifelike opener furnishes all needed flexibility. The almost infinitesimal movement of the knife, assuming it exists, is entirely negligible.

Other claims have as an element a bag opener without any qualifying adjective, and, as nothing in the patent or the prior art requires the limitation of these claims to the precise form of opener shown, we think them valid and infringed. In all other respects we are in accord with the opinion of the Circuit Court, and find it unnecessary to add to the full and accurate discussion of the issues involved.

The decree should be modified by a finding of noninfringement as to claims 1, 2, 6, 13, 8, 9, 18, 29, and 75; and, as so modified, it is affirmed, but without costs of this court.

CHESAPEAKE & O. S. S. CO. v. MORRIS.

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

Convers & Kirlin, for complainant.
A. Opdyke, for defendant.

LACOMBE, Circuit Judge. Complainant is in error in stating that the "evidence" on which he relies here was "offered and excluded" in the District Court. It was all set forth in the record in that court, and apparently was considered by the district judge, as it certainly was by the Court of Appeals. 148 Fed. 11. The very point relied on here, that such evidence tended to show a condition precedent as to the Rapidan, was urged upon the attention of the court and fully considered, and that evidence was held insufficient, even if uncontradicted, to sustain the contention made, because it was apparent on the face of the papers that there was "an entire contract, not seven separate ones." If complainant desired to reform that contract so as in effect to make separate contracts out of it, he should have applied to a court of equity long ago. The present application is in substance and effect an effort to reargue a point which was fully considered by the court and decided adversely to defendant in the admiralty cause. Had that court found the point meritorious, it would, with the broad equitable powers which admiralty courts possess, have found some way to relieve the defendant in that cause. Therefore this motion is denied.

It may be added that the writer, weighing the oral testimony relied on as against the written testimony which the contract afforded, was satisfied that the fact was not as the witness asserted, but that his memory of the transactions was inaccurate.

BROOKS v. SOUTHERN PAC. CO.

(Circuit Court, W. D. Kentucky. December 31, 1906.)

1. COMMERCE—CARRIERS—FEDERAL EMPLOYERS' LIABILITY ACT—CONSTITUTIONALITY.

Act June 11, 1906, c. 3073, 34 Stat. 232, "relating to the liability of common carriers * * * engaged in commerce between the states * * * to their employés" as stated in its title, and which makes every such carrier liable to any employé or his personal representative for all damages which may result from the negligence of any of its officers, agents, or employés, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works, is not a regulation of interstate commerce, but establishes new rules of liability, growing out of the relation of master and servant, which, if valid, are binding on all courts, both state and federal, but which have no such relation to interstate commerce as to bring them within the constitutional power of Congress to regulate such commerce, and the act is, for that reason, void.

2. SAME.

Act June 11, 1906, c. 3073, 34 Stat. 232, which makes every common carrier engaged in interstate commerce liable to any employé, or his personal representative, for all damages which may result from the negligence of

any of its officers, agents, or employés, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, ways or works, if it can be held a regulation of interstate commerce, is still void for want of constitutional authority in Congress to enact it, inasmuch as it is so framed that its provisions are applicable alike to all commerce, including that between citizens of the same state, and cannot be confined to that which is subject to the control of Congress.

3. EXECUTORS AND ADMINISTRATORS—CAPACITY TO SUE IN ANOTHER STATE—KENTUCKY STATUTES.

The personal representative of a decedent qualified in one state cannot sue in another state without authorization by the latter, and Ky. St. 1903, §§ 3878, 3879, which authorize the county court to empower a foreign administrator to sue for "debts" due the decedent cannot be invoked in support of an action to recover damages for a tort.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 2330.]

At Law. On demurrer to petition.

Wm. M. Smith, J. E. Torrence, and S. C. Bloss, for plaintiff.

Alexander P. Humphrey, for defendant.

Wm. R. Harr, amicus curiæ.

EVANS, District Judge. Morris S. Brooks, a citizen and resident of Kansas, but employed by the defendant as a fireman on one of its locomotives engaged in interstate commerce in the state of Nevada, having been killed in the latter state on June 16, 1906, by the negligence of certain of his fellow servants in the same occupation, the plaintiff, N. C. Brooks, his mother, was qualified as his personal representative by the probate court of Cowley county, Kan. Thereafter she, alleging herself to be a citizen of Kansas, instituted this action against the defendant, a citizen of Kentucky, seeking to recover $25,000 in damages for the injury to her son, resulting from the alleged negligence of the defendant's employés. The defendant filed a general demurrer to the petition, and the questions thus raised have been elaborately argued.

The Attorney General of the United States, conceiving, we suppose, that the United States had some interest in the case, sent one of his special assistants to intervene on behalf of the government. When the application was made, it was objected by the defendant that this was a litigation strictly inter partes, with which the United States had no concern. The court found it difficult to see how any other conclusion could be reached, and, indeed, in all such cases neither of the parties really interested might desire to be affected by the contentions of any outside person. But, while it is not thought that such a practice should be especially encouraged, inasmuch as there is no statute or law which authorizes or directs the Attorney General to support by arguments in the courts generally the legislation of Congress where the United States is not a party, nor its interests involved in any tangible way, yet the court, desiring light upon the very important questions involved in the case, decided to hear the special assistant of the Attorney General as a friend of the court; but, as both of the parties in interest in the litigation might desire to combat his views if regarded as conflicting with the grounds and arguments upon which they, respective-

ly, might desire to rest the case, the court thought it best that he should speak first, and he did so at length.

Some question was also made as to whether a personal representative qualified in Kansas could sue in any other state without authority from such other state, and some cases would seem to support that contention, but in view of the act of Congress, to which we shall presently allude, and other somewhat obvious considerations, we have concluded that this contention, which was indeed not much pressed, should not at present prevail. Kansas was the domicile of the deceased fireman, and the defendant does not operate its railroad within that state. Being his domicile at the time of his death, that fact, per se, gave jurisdiction to the court there to appoint his administratrix. He was killed in Nevada, and the defendant is a citizen of Kentucky. In neither of those states is it probable that the deceased fireman had any assets to give jurisdiction to the courts of either state for a similar purpose. A mere claim for damages for a tort does not seem to be assets for such purpose. So that from necessity, and in order that the plaintiff may have a remedy which could be enforced against a corporation which did not have a residence in the state of domicile, we are inclined, for the purposes of a suit based on the act of Congress, to treat the plaintiff as the personal representative of Morris S. Brooks within the purview of that act, especially as we think the case ought to be decided upon broader grounds than those which would confine it to the legality of the appointment of the plaintiff. It was expressly conceded at the hearing by plaintiff's counsel that she must succeed, if at all, upon the provisions of the act of Congress relating to the liability of common carriers to their employés, approved June 11, 1906 (34 Stat. 232, 233), which will presently be set out in full. The plaintiff's case, in short, must stand or fall with that act. If it be a valid exercise of legislative power, the plaintiff's right to recover damages is clear if the averments of the petition be true. Otherwise the demurrer must be sustained. The questions involved are therefore of very great and possibly far-reaching importance, and have deserved and received our most careful consideration.

The act referred to is as follows:

"An act relating to liability of common carriers in the District of Columbia and territories and common carriers engaged in commerce between the states and between the states and foreign nations to their employés.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states, or between any territory and another, or between any territory or territories and any state or states, or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, shall be liable to any of its employés, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employés, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works.

"Sec. 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employé, or where such injuries

have resulted in his death, the fact that the employé may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé. All questions of negligence and contributory negligence shall be for the jury.

"Sec. 3. That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employé, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employé: Provided, however, that upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employé, or, in case of his death, to his personal representative.

"Sec. 4. That no action shall be maintained under this act, unless commenced within one year from the time the cause of action accrued.

"Sec. 5. That nothing in this act shall be held to limit the duty of common carriers by railroads or impair the rights of their employés under the safety-appliance act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three." Act June 11, 1906, c. 3073, 34 Stat. 232, 233.

To determine the questions before us, it is important clearly to understand the exact scope and purport of the act. While the title is not controlling in the construction of an act of Congress, it may aid us in our investigation to note that the title in this instance labels the act as one relating to the liability of certain common carriers to their employés. This label, so to speak, quite accurately describes the contents of the measure, for it in fact does nothing more than fix the liability of certain common carriers to their employés. The first section provides that every common carrier engaged in trade or commerce between the several states shall be liable to any of its employés, or, in the case of his death, to his personal representative for the benefit of his widow, etc., for all damages which may result from the negligence of any of its officers, agents or employés, or by reason of any defect or insufficiency due to its negligence in respect to its cars, etc. This section obviously abrogates the familiar doctrine of the courts, founded upon considerations of public policy, that an employé when entering the service of his employer is conclusively presumed to have assumed the ordinary risks of the occupation, including those which may result from the negligence of his fellow servants. The second section imposes, in complicated form, the doctrine of comparative negligence, so as greatly to modify the ordinary judicial rule that a person cannot recover if, by his own negligence, he so contributed to his own injury as that without it that injury would not have occurred. Other sections further change existing laws in respects which have no present bearing on the discussion. If the act did no more than change the law as administered in the courts of the United States, and so as to control only cases pending therein, the right to do so by appropriate legislation might not be open to question, as mere judicial rules founded on the common law or upon considerations of public policy, but having all the force of law, are no more sacred than legislative enactments, which may be altered or repealed at the will of Congress; but its title and first section elaborately and unmistakably show that the scope

of the act in question is immeasurably different, and Congress obviously intended it to be so. If the act be valid as a regulation of commerce, which is all that was claimed for it at the argument, and doubtless all that can fairly be claimed for it in any event, it is the supreme law of the land of general application, and as such is binding upon all courts —state and federal—and fixes imperative rules by which all of them must hereafter be governed.

It is manifest that legislation of that scope, namely, legislation designed to regulate commerce, must find its warrant in article 1, § 8, of the Constitution of the United States, which, for the purposes of this discussion, is in this language:

"The Congress shall have power," among other things, "* * * to regulate commerce with foreign nations and among the several states and with the Indian tribes," and "* * * to make all laws which shall be necessary and proper for carrying into effect the foregoing powers."

As we recently had occasion to point out, the construction of the last of these clauses is governed by the rule laid down in the opinion of the court in McCulloch v. Maryland, 4 Wheat. 421, 4 L. Ed. 579, which, while showing that constitutional limits are not to be transcended, also holds that in regulating commerce the National Legislature must have large discretion in carrying into execution the high powers conferred upon it in the manner most beneficial to the people, and if the end be legitimate and the act within the scope of the Constitution, then that all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but which consist with the letter and spirit of the Constitution, are constitutional.

Upon the legislation now under discussion two questions arise, each of them of vital importance. The first is whether the subject-matter of the act, namely, the creation and enforcement of liabilities growing out of the negligence of certain common carriers to their employés, is a regulation of commerce among the states within the meaning of that phrase in the Constitution; and the second is whether the act, if it does regulate commerce among the states, does not also regulate commerce that is exclusively within the several states, and whether the latter is not so inseparably combined with the former as to condemn the whole act as unwarranted by the Constitution. In the opinion delivered in the case of United States v. Scott, 148 Fed. 431, we recently had occasion to discuss similar questions, and need not repeat now much of what was said then, though we have industriously re-examined the whole subject.

Having found that the act of June 11, 1906, is not limited, and manifestly was not intended to be limited to the purpose of changing certain rules of law administered in the federal tribunals in suits for damages pending therein, but was designed to operate as a regulation of commerce under the clause of the Constitution referred to, we come to the first of the questions, viz.: Whether the act can fairly and properly be considered as a regulation of commerce in any sense. Obviously the first inquiry is whether an act, strictly limited as this is to fixing liability to their employés of such common carriers as are engaged in interstate commerce, is a regulation of such commerce; that is to say, does it prescribe a rule for carrying on commercial intercourse

among the states, which seems to be the essential requisite in such legislation? The solution of that question may, and probably must, depend upon whether a rule of liability for injuries is or by any reasonable probability can be regarded as commerce or a rule for carrying it on in any sense whatever, either as the word is used in the Constitution or otherwise. Commerce has been described by the Supreme Court in many cases, from 1824, in Gibbons v. Ogden, 9 Wheat. 189, 6 L. Ed. 23, down to very recent times, but it has never been deemed desirable to give the word any hard and fast definition in view of the great changes constantly occurring in the business affairs of the world. It may help us to note that Webster defines commerce to be "the exchange or buying and selling of commodities, especially the exchange of merchandise on a large scale between different places or communities; extended trade or traffic." In Gibbons v. Ogden, it was said that commerce is more than traffic; it is intercourse, and that it is regulated by prescribing rules for carrying on that intercourse. In many cases it has been held by the Supreme Court that commerce includes navigation and transportation of both persons and property, as well as traffic generally, and all the cases agree in treating the word "commerce" as one of large and extensive meaning. In Hopkins v. United States, 171 U. S., at page 597, 19 Sup. Ct., at page 47 (43 L. Ed. 290), speaking through Mr. Justice Peckham, the court said:

"Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of different States, and the power to regulate it embraces all the instruments by which such commerce may be conducted. Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347; Mobile County v. Kimball, 102 U. S. 691, 26 L. Ed. 238; Gloucester Ferry Company v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158; Hooper v. California, 155 U. S. 648, 653, 15 Sup. Ct. 207, 39 L. Ed. 297; United States v. E. C. Knight Company, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325."

And the instruments by which commerce may be carried on necessarily vary as improvement and invention expand the opportunities and facilities therefor. Many cases might be cited showing the various applications of the word "commerce" to existing instrumentalities of traffic, but it is not deemed necessary to elaborate that phase of the discussion. Certainly section 8, art. 1, of the Constitution gives Congress the power to regulate commerce among the states; and, as we have seen, it may do this by any law which is appropriate and plainly adapted to that end, and which is within the scope and consistent with the letter and spirit of the Constitution—conditions of great moment which cannot be overlooked. While the courts would be exceedingly slow to inquire into the mere appropriateness of legislation, they cannot decline the duty of inquiring whether legislation is within the constitutional power of Congress when a proper case demands the investigation, and a most patient consideration of the question in this instance has led us to the conclusion—we think to the inevitable conclusion—that the act of June 11, 1906, only creates and imposes a liability upon certain common carriers to their employés, and in no way prescribes

rules for carrying on traffic or commerce among the states, and consequently in no way regulates such commerce. If the operation of the act could in any wise affect commerce among the states, it would do so in a manner so remote, incidental, and contingent, as in no proper sense to afford a factor of any value in determining the question now in contention. With what the Supreme Court has said in many cases before us, and with an open Constitution to control, we should be trifling with important things if we gave force to any other conclusion. Indeed, it may be said that it is obvious that Congress, in the act referred to, had in contemplation no more than the creation of the liability mentioned, and it would be a most strained construction to hold that it included anything broader than that. Creating new liabilities growing out of the relations of master and servant on the one hand, and regulating commerce on the other, are two things so entirely different that confusion of the judicial mind upon them is hardly to be expected under normal conditions. In the opinion of the court the act does not regulate commerce among the states. While congress seems to have desired in this instance to exert the power given by the Constitution for that purpose, it, in fact, regulated something which is not commerce at all.

2. But if we are in error in the conclusion that the act when properly considered does not "regulate commerce among the states," there yet remains to be considered the second of the questions above stated, namely, whether the act, if it does regulate commerce among the states, does not also equally regulate commerce that is exclusively within the several states, and thereby embrace, not only matters which are constitutional, but also those which are unconstitutional in a way to make the two indivisible, and to bring the entire act under condemnation when subjected to well-established rules of construction. But, before entering upon a discussion of this last question, it may not be inappropriate to recall the trite, but transcendently important, proposition that, while the powers given to Congress are to be fairly and even liberally construed, especially in respect to the commerce clause of the Constitution, yet those powers have a limit beyond which Congress cannot legitimately go. We should not grow restive under the restrictions and limitations of that great instrument, for the stability of our institutions largely depends upon their enforcement, and so great is our respect for the legislative branch of the government that we shall always regard any overstepping of those bounds by that body to have been an inadvertence. This the courts can and should correct when they come to look more critically into the subject than Congress had probably had the opportunity to do.

In the Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550, the Supreme Court had before it in concrete form the second question to which we have just referred. The following syllabi prefixed to the report of that case clearly and accurately summarize the points decided, and present at once and in succinct form the propositions of law upon which the question now under discussion must turn:

"If an act of Congress can in any case be extended, as a regulation of commerce, to trade-marks, it must be limited to their use in 'commerce with foreign nations, and among the several States, and with the Indian tribes.' The legis-

lation of Congress in regard to trade-marks is not, in its terms or essential character, a regulation thus limited, but in its language embraces, and was intended to embrace, all commerce, including that between citizens of the same state. That legislation is void for want of constitutional authority, inasmuch as it is so framed that its provisions are applicable to all commerce, and cannot be confined to that which is subject to the control of Congress."

Sutherland, in his work on Statutory Construction (section 169), says:

"In this country legislative bodies have not an unlimited power of legislation. Constitutions exist which contain the supreme law. Statutes which contravene their provisions are void. Courts have power, and they are charged with the judicial duty, to support the constitutions under which they act against legislative encroachments. They will declare void acts which conflict with paramount laws."

And in section 170, he states the general principle applicable to this case, as follows:

"It may be laid down generally as a sound proposition that one part of a statute can not be declared void and leave any other part in force, unless the statute is so composite, consisting of such separable parts that, when the void part is eliminated, another living, tangible part remains, capable by its own terms of being carried into effect, consistently with the intent of the Legislature which enacted it in connection with the void part. If it is obvious that the Legislature did not intend that any part should have effect unless the whole, including the part held void, should operate, then holding a part void invalidates the entire statute."

The text of the author is supported by many cases, state and federal, cited in his notes.

The general doctrine has been reannounced in numerous cases by the Supreme Court. In Baldwin v. Franks, 120 U. S. 686, et seq., 7 Sup. Ct. 656, 763, 32 L. Ed. 766, it was much emphasized, as it also had been in previous cases. And that there is no disposition to change this thoroughly established rule was unmistakably manifested when the Supreme Court, on the day on which this case was argued, in Illinois Central R. R. v. McKendree, 27 Sup. Ct. 153, 51 L. Ed. ——, held that an order of the Secretary of Agriculture regulating quarantine was void, because too broad in its scope, and, speaking through Mr. Justice Day, said:

"The terms of Order 107 apply to all cattle transported from the south of this line to parts of the United States north thereof. It would, therefore, include cattle transported within the state of Tennessee from the south of the line as well as those from outside that state. There is no exception in the order, and in terms, it includes all cattle transported from the south of the line, whether within or without the state of Tennessee. It is urged by the government that it was not the intention of the Secretary to make provision for intrastate commerce, as the recital of the order shows an intention to adopt the state line, when the state by its Legislature has passed the necessary laws to enforce the same completely and strictly. But the order in terms applies alike to interstate and intrastate commerce. A party prosecuted for violating this order would be within its terms if the cattle were brought from the south of the line to a point north of the line within the state of Tennessee. It is true the Secretary recites that legislation has been passed by the state of Tennessee to enforce the quarantine line, but he does not limit the order to interstate commerce coming from the south of the line; and, as we have said, the order in terms covers it. We do not say that the state line might not be adopted in a proper case, in the exercise of federal authority, if limited in its effect to interstate commerce coming from below the line, but that is not the

present order, and we must deal with it as we find it. Nor have we the power to so limit the Secretary's order as to make it apply only to interstate commerce, which it is urged is all that is here involved. For aught that appears upon the face of the order, the Secretary intended it to apply to all commerce, and whether he would have made such an order, if strictly limited to interstate commerce, we have no means of knowing. The order is in terms single, and indivisible."

After quoting from United States v. Reese, 92 U. S. 221, 23 L. Ed. 563, and from the Trade-Mark Cases, 100 U. S. 99 (25 L. Ed. 550), the court added:

"We think these principles apply to the case at bar, and that this order of the Secretary, undertaking to make a stringent regulation with highly penal consequences, is single in character, and includes commerce wholly within the state, thereby exceeding any authority which Congress intended to confer upon him by the act in question, if the same is a valid enactment."

With this perfectly plain rule before us, we must, by its requirements, test the act of June 11, 1906, which, we repeat, provides that "every" common carrier engaged in interstate commerce shall be liable to "any" of its employés, or in case of his death to his personal representative, for "all" damages which may result from the negligence of "any" of its officers, agents or employés, or by reason of "any" defect or insufficiency due to its negligence in its cars, etc. Language could hardly be broader or more comprehensive in its scope. Argument was made attempting to show that the language should be construed to create a liability only where the employé was at the time of the injury engaged upon interstate commerce; but the words of the statute are plain and unambiguous, and, if they admit of any construction, it clearly does not admit of the one contended for. On the contrary, as already emphasized, that language expressly is that every such common carrier shall be liable to any of its employés for all damages which may result from the negligence of any of its employés or by reason of any defect in cars, etc. The rule is elementary that where language is plain it admits of no construction, but must be taken in its obvious signification, and to mean what it says. The act in question was attempted to be likened to that of March 2, 1893, usually known as the "Safety Appliance Act"; but, in all the respects with which we are concerned, the provisions of the latter act are wholly different from those of the former, as will at once be seen by comparing section 1 of the safety appliance act with section 1 of the act of June 11, 1906. Section 1 of the former provides that it "shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic which is not equipped, etc., * * * or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped," etc. Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]. This comparison at once makes manifest the difference between the two acts. No doubt it is for this reason that small question has ever been made as to the constitutionality of the safety appliance act.

Furthermore, the act of June 11, 1906, obviously includes all of the employés of every common carrier which is engaged in interstate commerce, whether the employé is so engaged or not. If the common carrier be itself engaged in interstate commerce as part of its business,

it is wholly immaterial, under the terms of the act, whether an injured employé was ever so engaged. Take as an illustration near home: The Louisville & Nashville Railroad Company has an important branch which only extends from Louisville, on the northern border of the state, to Lexington, near its center, and the business of that branch is necessarily for the most part confined to commerce entirely in Kentucky. That company also has very large shops in Louisville, at which it employs a very great number of servants. Its general offices are here, in which are many clerks. The duties of most of these employés, namely, those in its shops and general offices, cannot possibly have any direct relation to interstate commerce, and those of many of them can have no relation to interstate commerce at all. Yet the enactment that every common carrier engaged in interstate commerce shall be liable to any of its employés for all damages resulting from the negligence of any of its officers, agents, etc., embraces all of the employés of that common carrier, whether or not those employés have anything to do with interstate commerce. So, with a common carrier who might use horses and wagons in a general business which might embrace the carriage of merchandise, say between St. Louis, Mo., and East St. Louis, Ill., or between Louisville, Ky., and New Albany, Ind. Now, although small proportions of the carrier's business might be interstate and much the greater part be confined locally to St. Louis in one instance or to Louisville in the other, yet, as those common carriers were respectively and to some extent actually engaged in interstate commerce, the act of June 11, 1906, would impose upon them the liability it creates, even though one of their employés might be injured in conducting the purely local business of the carrier, and whether or not he ever had anything to do with interstate commerce.

An intelligent consideration of the authorities will lead, we think necessarily, to the conclusions, first, that even if the act regulates commerce in any possible constitutional sense it is too broad and applies not only to interstate commerce, but also to that which is entirely within the states, respectively; and, second, that the provisions of the act in these respects are single and altogether inseparable, the one from the other. Even if some part of the act might be sustained if it stood alone, yet, as all its parts are inseparably connected, all must fall if any should do so. The applicable rule is well established, and we do not have to go far for the reason upon which that rule is based. It is this: It cannot be presumed that Congress, when it so joined them together, meant to pass or would have passed either of them separately. In its opinion, in Baldwin v. Franks, 120 U. S., at page 687, 7 Sup. Ct., at page 660 (32 L. Ed. 766) the court, quoting from its opinion in the Trade-Mark Cases, said:

"'While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part, where they are distinctly separable, so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body.' And again, further on, after citing United States v. Reese, and quoting from the opinion in that case, it was said, page 99 of 100 U. S. (25 L. Ed. 550): 'If we should, in the case

before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under state law.'

"The same question was also considered and the former decisions approved in United States v. Harris, supra; and in the Virginia Coupon Cases, 114 U. S. 270, 305, 5 Sup. Ct. 903, 29 L. Ed. 185, it was said that to hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact.' "

This rule is also clearly stated in the opinion in Illinois Central R. R. Co. v. McKendree, and the subject has often been so treated by the state courts in cases which are collected in Sutherland in the work referred to in sections 169 to 174 inclusive. Furthermore, it may be remarked that in several instances the Supreme Court has held that city ordinances imposing taxes on telegraph companies were void or not void as they differentiated a tax on interstate business from one on state or local business alone. See Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311, and cases cited. In short, the Constitution of the United States, which firmly fixes our form of government, gives Congress the power to regulate interstate commerce, but leaves to the states, respectively, the exclusive power of regulating that comerce which is carried on altogether within the limits of a state. Here the congressional enactment attempts, through the same provisions, to regulate commerce generally, including both interstate commerce and that which is purely local to the states. It consequently embraces matters which are within and matters which are not within the reach of congressional power, and, as the matters which are within congressional competency are inseparably combined with those which are not, no part of the act can be sustained. Not because they were difficult, but because of widespread interest in the questions involved in this case, we have stated, probably with more than necessary fullness, the grounds of our decision, which we rest upon the two propositions discussed, and thereupon hold that the act of June 11, 1906, is invalid.

3. This conclusion, however, may possibly leave another question open, which is this: With the act eliminated, is a cause of action otherwise disclosed by the plaintiff's petition in this action by a citizen of Kansas against a citizen of Kentucky? The cause of action arose in Nevada. At the common law, of course, no action for damages would lie in favor of an administrator where the injury had resulted in death. Such right always must depend upon some statutory enactment. The legislation of Nevada upon the subject is found in the act of March 24, 1905, amending section 3983 of the compiled laws of that state. Laws 1905, p. 254, c. 148. The right to sue given by that statute to the personal representative seems to be made to depend upon the strict condition that the action shall be brought in Nevada, and not elsewhere. This condition renders it more than probable that the right of action given by the statute is not transitory, because the right is given only where the suit is brought in Nevada. But, assuming that the action may be considered transitory in the general sense, we are then con-

fronted with decisions like those in Noonan v. Bradley, 9 Wall. 400, 19 L. Ed. 757, and Maysville, etc., Co. v. Marvin, 59 Fed. 91, 8 C. C. A. 21, which rule that a personal representative qualified in one state cannot sue in another state without the latter's authorization. In the last-named case it was distinctly held by the Circuit Court of Appeals of this circuit that a claim for damages for tort will not support an exercise of the power given under sections 3878 and 3879 of the Kentucky Statutes of 1903, which authorize the county court to empower a foreign administrator to sue for "debts" due the decedent. This decision was in accord with the doctrine of the Kentucky Court of Appeals in construing the statutes of that state. And, of course, if the act is eliminated, it is obvious that the petition is insufficient, because on its face it shows that the injuries of the deceased resulted from the negligence of his fellow servants.

So that, from every point of view, the judgment of the court must be that the plaintiff has not manifested by the averments of her petition any right to recover in this action. The demurrer is therefore sustained, but, as required by the Kentucky Code, she will be given leave to amend her pleading, if so advised.

HOWARD v. ILLINOIS CENT. R. CO. et al.

(Circuit Court, W. D. Tennessee, W. D. January 1, 1907)

No. 3,861.

1. COMMERCE—REGULATION OF INTERSTATE COMMERCE—POWERS OF CONGRESS—LIABILITY OF COMMON CARRIER TO ITS EMPLOYÉS.

   The liability of a common carrier to its employés for personal injuries is not commerce, and the regulation of such liability with respect to carriers engaged in interstate commerce is not within the power of Congress under the interstate commerce clause of the Constitution.

2. SAME—FEDERAL EMPLOYERS' LIABILITY ACT—CONSTITUTIONALITY.

   Act June 11, 1906, 34 Stat. 232, c. 3073, "relating to the liability of common carriers * * * engaged in commerce between the states * * * to their employés," as stated in its title, and which makes every such carrier liable to any employé or his personal representative for all damages which may result from the negligence of any of its officers, agents, or employés, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, ways, or works, is not a regulation of interstate commerce, but declares a new rule of liability for torts applicable to a single class of employers, and is void as not within the constitutional power of Congress to regulate such commerce.

3. SAME.

   Act June 11, 1906, 34 Stat. 232, c. 3073, which makes every common carrier engaged in interstate commerce liable to any employé or his personal representative for all damages which may result from the negligence of any of its officers, agents, or employés, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, ways, or works if it can be held a regulation of interstate commerce is still void for want of constitutional authority in Congress to enact it, inasmuch as it is so framed that its provisions are applicable alike to all commerce, including that between citizens of the same state, and cannot be confined to that which is subject to the control of Congress.

At Law. On demurrer to declaration.

Bell, Terry, Anderson & Bell and William R. Harr, Special Assistant to Attorney General of United States, for plaintiff.

Burch & Biggs, for defendant.

McCALL, District Judge. For certain wrongs and injuries inflicted by the defendant railroad companies upon a locomotive fireman, Will Howard, one of their employés, and from which he died, the plaintiff, as the administratrix of said Howard, sues the defendants for damages, under and by virtue of an act of Congress, approved June 11, 1906, and entitled "An act relating to liability of common carriers, * * * engaged in commerce between the states, * * * to their employés," and which is commonly known as the "Employers' Liability Act." (Act June 11, 1906, 34 Stat. 232, c. 3073.)

To the declaration the defendants interpose a demurrer. Without setting out here the demurrer verbatim, it is sufficient to state the grounds thereof, as summed up by the defendants' counsel in their brief, under four general heads, as follows: (1) The act of Congress of June 11, 1906, is not a regulation of commerce, and is unconstitutional and void. (2) The act is unconstitutional, in that it makes no distinction between interstate commerce and intrastate commerce, and, if a regulation of commerce at all, it regulates intrastate, as well as interstate, commerce. (3) The act is unconstitutional, in that it violates the fifth amendment of the Constitution of the United States, which provides that "no person shall * * * be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation." (4) The act is unconstitutional, in that it contravenes the seventh amendment to the Constitution of the United States, which provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." We have here the constitutionality of the act of June 11, 1906, singly and sharply raised.

The questions as to whether or not this particular plaintiff is entitled to a verdict upon the facts in this case, or whether common carriers engaged in interstate trade or commerce should be made liable in this and similar cases, are of small consequence in comparison to the question raised by the demurrer. Far above and beyond in its importance to all the people of the United States is the question, is Congress authorized to enact the law under consideration by virtue of the power delegated to it in article 1, § 8, cl. 3, of the Constitution of the United States, which provides "that Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes"? Manifestly neither the merits nor the demerits of the act should be considered in determining its constitutionality.

It is unnecessary to cite authorities in support of the proposition that Congress has no powers except those expressly delegated to it, or necessarily and clearly implied from powers expressly granted. Hence it follows that, if Congress is empowered to enact the legislation under

consideration, that power must be expressly conferred by the Constitution, or is clearly incident to some power which is expressly given. Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23. Unquestionably Congress has the power to regulate commerce between the several states, because that power is expressly granted by the Constitution. As is said in Veazie and Young v. Moor, 14 How. 568, 14 L. Ed. 545:

"The design and effect of that power, as evinced in the history of the Constitution, was to establish a perfect equality amongst the several states as to commercial rights, and to prevent unjust and invidious distinctions, which local jealousies, or local and partial interests, might be disposed to introduce and maintain."

To the same effect is Railroad Company v. Richmond, 19 Wall. 584, 22 L. Ed. 173.

What is this power? This question was asked by Chief Justice Marshall in the masterly opinion delivered by him in the case of Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23, and which opinion has been the chart for the bench and bar since that time in all cases of this character. The answer to the question is terse: "It is the power to regulate," he said, "that is, to prescribe the rule by which commerce is to be governed." In defining the extent of this power, the eminent Chief Justice says:

"This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than those prescribed by the Constitution."

The sovereignty of Congress over the objects delegated to it is plenary, and the power over commerce between the several states "is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." Gibbons v. Ogden, supra. Without citing the great array of cases which support the proposition, we may restate the well-settled rule that Congress has full, ample, and plenary power to regulate interstate commerce, and therefore to regulate the business of interstate commerce as carried on by common carriers.

What is meant by the power to regulate commerce? As has been seen, it is the power to prescribe rules by which commerce is to be governed. Gibbons v. Ogden, supra; Welton v. Missouri, 91 U. S. 279, 23 L. Ed. 347. But what is this commerce, for the regulation of which Congress has power to prescribe the rules, when carried on between the states? This brings us face to face with the bone of contention in the case. With that question answered correctly, the remainder of the way is comparatively smooth.

"Commerce is the exchange, or the buying and selling of commodities. Intercourse." Webster.

"Commerce undoubtedly is traffic; but it is something more. It is intercourse." Gibbons v. Ogden, supra.

"Transportation of freight and passengers is commerce." Wabash, St. L. & P. R. R. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244.

Interstate commerce is the trading and trafficking in commodities between and amongst citizens of different states. It is transporting by common carriers passengers and property from one state into another

state. It is the selling and buying of a commodity, or commodities, by a citizen of one state to a citizen of another state, which commodity is to be transported from the state of the seller to the state of the buyer, or to another state, and there resold, or used, as may serve the purpose of the buyer. The citizen may be an individual, firm, or corporation. Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347; Mobile County v. Kimball, 102 U. S. 691, 26 L. Ed. 238; Gloucester Ferry Company v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158; Wabash, St. L. & P. R. R. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244; Hopkins v. United States, 171 U. S. 597, 19 Sup. Ct. 40, 43 L. Ed. 290.

These definitions do not solve the problem here. The interstate feature of it may be, and perhaps is, sufficiently clear. But manifestly the character of commerce legislated about, or on, by the act in question, is not of the varieties or kinds heretofore mentioned. The commerce mentioned and referred to in the act of June 11, 1906, is the liability of common carriers, engaged in interstate trade or commerce, to their employés. Congress, by the enactment of this law, assumed that this liability is commerce, or so related to or connected with it as to fall within the power of Congress as a proper subject for its legislation under article 1, § 8, cl. 3, of the Constitution of the United States.

The demurrant challenges the correctness of this position, and insists that the liability of the employer to the employé for injuries is not commerce at all, and that Congress exceeded its authority under the Constitution in enacting the law in question. No case of the federal Supreme Court, holding that such liability is commerce within the meaning of the commerce clause of the federal Constitution has been cited, and I know of none.

The Supreme Court of the United States has, in cases on writs of error to the state courts, repeatedly upheld the decisions of the state Supreme Courts where the latter courts have sustained the validity of state statutes which altered the common-law rule in regard to common carriers and made them liable to their employés for injuries, much in the same fashion as is done by the act under consideration. Missouri Pacific Ry. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; Minneapolis & St. L. Ry. Co. v. Herrick, 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. Ed. 109; Tullis v. Lake Erie & Western R. R., 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192.

It does not follow, however, that, because the United States Supreme Court upheld the validity of these state statutes, that that is tantamount to deciding that a federal statute to the same purport and effect would be valid. What was decided in all or in many of these cases was that such state legislation did not undertake to regulate interstate commerce, and was not obnoxious to the Constitution or to any law of the United States for that reason. This would necessarily be so under the well-known rule that the Supreme Court will follow the decisions of the Supreme Court of a state in its construction of its own statutes and Constitution, unless such statute or Constitution is obnoxious to the Constitution or laws of the United States. It would not necessarily follow, therefore, because it has been held in several of the states that the liability of common carriers for injuries to their employés is

a proper subject for state governmental regulation, these state decisions not having been disturbed by the Supreme Court of the United States on review, that the liability of common carriers for injuries to their employés is a proper subject for federal governmental regulation, for the very simple reason that many things are subjects of state governmental control which are not subject to federal control. I am unable to bring my mind to the conclusion that the liability of a common carrier to its employés for injuries is interstate commerce, or commerce of any character, within the meaning of the commerce clause of the Constitution.

It is insisted that the relation between common carriers and their employés more or less affects interstate commerce, and that this legislation more or less affects interstate commerce, and for that reason it is within the power of Congress to regulate it. Chief Justice Fuller, speaking for the court in Williams v. Fears, 179 U. S. 278, 21 Sup. Ct. 131, 45 L. Ed. 186 says:

"If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise, and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states, and would exclude state control over many contracts purely domestic in their nature."

In the case of Sherlock v. Alling, 93 U. S. 99, 23 L. Ed. 819, the court says:

"Legislation, in a great variety of ways, may affect commerce and persons engaged in it, without constituting a regulation of it, within the meaning of the Constitution."

See, also, State Tax Case, 15 Wall. 293, 21 L. Ed. 164, to the same effect.

Congress has power to regulate; that is, to prescribe rules by which commerce is to be governed. Under this construction of the interstate commerce clause of the Constitution the "Safety Appliance Act" was passed. That act has been acquiesced in, if not sustained, by the Supreme Court of the United States. Perhaps its validity has not been questioned. The fact that the safety appliance act imposes a liability upon common carriers, and the further fact that that act has passed muster before the Supreme Court of the United States, and by that court its provisions have been enforced, does not necessarily warrant the conclusion that the employers' liability act should be sustained.

Our attention is called to that act, and the insistence is made that the safety appliance act and the employers' liability act are the same in character; and, if it is within the power of Congress to enact the former, it must have the power to enact the latter. There is a vast difference between the two enactments. In the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), Congress lays down specific rules and regulations with which common carriers are required to comply. For a failure to observe such rules or perform such duties prescribed by Congress for the conduct and government of their business a penalty is provided, which may be recovered by the United States government, and in addition it provides:

"That any employé of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier, after the unlawful use of such locomotive, car or train has been brought to his knowledge."

There the carrier is made liable to the employé, not simply because he is injured, but rather because the carrier violates and sets at naught the rules for the government of its business, prescribed by Congress, and because, as a result of such violation, the employé was injured. This liability, in its nature and essence, is a penalty. The power of Congress to prescribe a penalty for the infraction of a rule or regulation which it is empowered to enact by the express terms of the Constitution is clearly and necessarily implied; but, if it was not so implied, then authority for its enactment is found in clause 18, § 8, art. 1, of the Constitution.

In the act of June 11, 1906, Congress does not undertake to prescribe a rule or regulation for the conduct or government of the business of the common carrier, for the infraction of which a penalty or liability is imposed; but the act only declares that the carrier shall be liable for all damages to its employés, the result of the negligence of its officers, agents, employés, etc. In other words, the act abolishes the common-law rule as to fellow servants, as heretofore applied in the United States courts. There is no express grant of power to Congress over the subject of the liability of common carriers, or other employers, to their employés for torts; nor, in my opinion, is there any express grant from which such power can be necessarily or even reasonably implied. The power to prescribe rules for the government of interstate commerce necessarily carries with it the power and right to declare liability for their infraction. Otherwise, a statute prescribing a rule would be a dead letter. A government, with power to enact laws, but without power to enforce obedience to them, would be a howling farce in these strenuous, practical times. Had the act prescribed some rule, or rules, for the safer and more expeditious transaction of the business of common carriers, and which they were to observe, and fixed the liability, as it is in the act, for their failure to observe the rules and regulations, we would have a different act, and one very similar to the safety appliance act.

My conclusion on this branch of the case is that the power of Congress to define the liability of common carriers, engaged in interstate commerce, to their employés, and to create rights of action in favor of employés, and to define the method of procedure, can only be exercised when Congress in the first instance has prescribed rules of conduct governing common carriers, and it is only for the breach of these rules that Congress has the power to prescribe civil liability. Independent of such rules, Congress has no power to define the liability of a common carrier to its servants on account of torts committed by other servants of the common carrier. Sherlock v. Alling, 93 U. S. 99, 23 L. Ed. 819.

The second ground of demurrer in substance is that, if the act regulates commerce at all, it regulates intrastate, as well as interstate, commerce. The act provides that every common carrier engaged in trade or commerce between the several states shall be liable to any of its

employés, etc. The character of commerce—that is, whether it is intra or inter state—is to be determined by the point of reception and the point of destination, and not by the number or length of railroads over which it is routed. All common carriers who haul or forward interstate commerce over any portion of its route are engaged in interstate commerce, if the several roads have existing a joint schedule of traffic rates for the purpose of handling through passengers and freight. Now, manifestly, the line of one of the carriers may lie wholly within a single state, yet it is engaged in interstate commerce if it maintains a joint traffic schedule of rates, and receives from an interstate road freight that comes from another state, and forwards it to its point of destination, or delivers it to a connecting line. And under this act of Congress its liability to all of its employés for all damages is the same as is the common carrier whose line extends across the continent, when in point of fact this intrastate road may handle only one car or one train of interstate freight in a month, while, under the act, it is liable for all damages to all employés all the time, even though at the time of the injury it is doing strictly an intrastate business. This infirmity in the act is so plainly observable that I deem it unnecessary to further discuss it. Certain it is that the states have not delegated to Congress the power to regulate commerce wholly within a single state; and, if Congress has the power to enact the law in question limited to interstate common carriers, it has, in this act, exceeded that power by including within its terms intrastate commerce.

It was indirectly suggested in the argument that, if the court should take this view of the case, and hold that as the act reads it applies to intra as well as inter state commerce, it was not the intention of Congress that the act should extend to and embrace intrastate common carriers, and that this objection might be remedied by judicial interpretation and construction. The act is plain on its face. It applies to all common carriers engaged in trade or commerce between the states, and imposes upon common carriers whose lines lie wholly within a state, if such lines do any interstate business, the same liability as a common carrier who handles only interstate business.

Three days before this case was heard, the Supreme Court of the United States, in the case of I. C. R. R. Co. v. McKendree, 27 Sup. Ct. 153, 51 L. Ed. ——, decided a very similar question to the one raised here against the contention of the plaintiff. In that case the Supreme Court was, among other things, asked to pass upon the validity of an order (No. 107) of the Hon. Secretary of Agriculture, made pursuant to an act of Congress of February 2, 1903, the effect of which order was to ratify and adopt for the United States a quarantine line formerly adopted by the state of Tennessee, running from east to west through the state of Tennessee; the same not following the state lines between the states of Tennessee and Kentucky, or any other States. This order prohibited the carrying of cattle from south of the line to the north of it, and, in effect, prohibited the carrying of cattle from a county in Tennessee south of the line to a county in Tennessee north of it. The contention of the defendant was that the statute was unconstitutional, and, therefore, the order was a nullity, because it embraced in its terms intrastate, as well as interstate, commerce. It was insisted by the gov-

ernment that it was not the intention of the Secretary to make provision for intrastate commerce, as the recital of the order shows an intention to adopt the state lines. In disposing of this contention the Supreme Court says:

"The terms of order 107 apply to all cattle transported from the south of this line to parts of the United States north thereof. It would, therefore, include cattle transported within the state of Tennessee from the south of the line, as well as those from outside that state. There is no exception in the order, and in terms it includes all cattle transported from the south of the line, whether within or without the state of Tennessee. It is urged by the government that it was not the intention of the Secretary to make provisions for intrastate commerce, as the recital of the order shows an intention to adopt the state line, when the state by its Legislature has passed the necessary laws to enforce the same completely and strictly. But the order in terms applies alike to interstate and intrastate commerce. A party prosecuted for violating this order would be within its terms, if the cattle were brought from the south of the line to a point north of the line within the state of Tennessee. It is true the Secretary recites that legislation has been passed by the state of Tennessee to enforce the quarantine line; but he does not limit the order to interstate commerce coming from south of the line, and, as we have said, the order in terms covers it. We do not say that the state line might not be adopted in a proper case, in the exercise of federal authority, if limited in its effect to interstate commerce coming from below the line; but that is not the present order, and we must deal with it as we find it. Nor have we the power to so limit the Secretary's order as to make it apply only to interstate commerce, which, it is urged, is all that is here involved. For aught that appears upon the face of the order, the Secretary intended it to apply to all commerce, and whether he would have made such an order, if strictly limited to interstate commerce, we have no means of knowing. The order is in terms single and indivisible." Citing U. S. v. Reese, 92 U. S. 214–221, 23 L. Ed. 563; Trade-Mark Cases, 100 U. S. 82, 89, 25 L. Ed. 550; U. S. v. Ju Toy, 198 U. S. 253, 262, 263, 25 Sup. Ct. 644, 49 L. Ed. 1040.

These principles apply to the act under consideration, and by it Congress undertook to make a sweeping and far-reaching change in the law of torts as heretofore administered by the United States courts, touching the liability of common carriers to their employés. The act is single in character, and includes commerce, if it be commerce, wholly within the state, thereby exceeding the authority delegated to Congress by the Constitution of the United States.

My conclusion is that Congress is not authorized, under the commerce clause of the Constitution of the United States, to enact this legislation, for the reason that the relation of interstate common carriers, engaged in interstate trade or commerce, to their employés, and their liability to them in damages for injuries sustained in their employment, as the result of the negligence of any of their officers, agents, or employés, or by reason of any defects or insufficiency due to their negligence in their cars, engines, appliances, machinery, track, roadbed, ways, or works, is not commerce within the meaning of the Constitution. But, if it were, the act does not undertake to regulate this relation or liability, but simply announces by an act of Congress a new law on torts, limited to a special class of those engaged in interstate commerce. The act does not limit the liability which it seeks to impose upon common carriers engaged in interstate trade and commerce to such common carriers, but imposes the same liability upon common carriers engaged in trade and commerce wholly within the state.

Without discussing the two remaining grounds of demurrer, I am of the opinion that the demurrer is good, and must be sustained. An order will be entered in conformity with this opinion.

THE OAK.

THE DAUNTLESS.

(District Court, E. D. Virginia. October 20, 1906.)

TOWAGE—LOSS OF TOW—UNSEAWORTHINESS.

Conflicting evidence considered, and *held* not to sustain the allegations of a libel, that the sinking of a barge while being towed with four others tandem behind it from Baltimore to Norfolk, and when passing into Hampton Roads through the channel to the west of Thimble Light, was due to the negligence of the tug, either in proceeding when the weather was so stormy as to render it imprudent, or in navigation, but to show that the sinking was due to the unseaworthiness of the barge which was old and unable to stand the strain put upon it as first of the tow.

In Admiralty. Suit to recover damages for loss of barge in tow.

Edward R. Baird, Jr., for libelant.
John W. Oast, Jr., and Floyd Hughes, for respondent

WADDILL, District Judge. On the morning of the 14th day of March, 1906, the steam tug, Dauntless, 100 feet long, 400 horse power, left the port of Baltimore bound for Norfolk, with five loaded barges in tow; one of which was the Oak, the property of the libelant. The Oak was 140 feet long, 23½ feet beam, 302 tons net burden, and loaded with 630 tons of fertilizer, and was the hawser barge in the tow; the hawser being 125 fathoms long, followed by four other barges of about the same length, all loaded, and on hawsers of about 75 fathoms each. On the evening of the same day, the tug and tow went into the port of Annapolis, on account of stormy weather, and remained there until the morning of the 16th, when they proceeded, and again came to anchor in the Patuxent river, on account of like weather conditions; remaining there until the morning of the 18th, when the voyage was again resumed. At that time the wind was about northwest, accompanied by snow, and continued in that direction until about 8 o'clock at night, when it changed to the southeast, and continued from that point with increasing velocity until the morning of the 19th, when it reached from 25 to 30 miles an hour, and so continued until the sinking of the barge. About 7 o'clock of that morning, the tug and tow were off Back river, and from that point proceeded on their course, with due allowance for drift to westward, for Thimble Light, making slow progress, with the wind and sea on the port bow; the weather conditions while unfavorable, not being such, in the estimation of the master of the tug, as to delay the trip. Upon reaching the vicinity of Thimble Light, the tug having changed her course to westward to go into Hampton Roads through the swash channel, and to the westward of Thimble Light, while passing Thimble Light, and about a mile therefrom, with the light about a beam of

the barge, and about 10:30 in the forenoon, during the weather conditions existing as aforesaid, the Oak was observed to be settling by the stern, and, in a short time, she sunk. The tug thereupon cut loose from the barge, the tow was broken up and came to anchor; the tug subsequently proceeded to Norfolk with two of the barges, and the remaining two were taken up by two other tugs; the crew of the sunken barge being taken on board the Pamlico, and brought to Norfolk.

The libel in this case is to recover for the loss of the barge, Oak, and the cargo of fertilizer and personal effects on board; the same having proved a total loss. The charges of negligence by the libelant and respondent, respectively, place the responsibility for the sinking of the barge one upon the other; and while many counter specifications of negligence and acts of omission are made, the case turns solely upon the issue of fact as to whether the sinking of the Oak was caused by the negligence of those navigating the Dauntless, in proceeding under existing conditions, having regard to tide, wind, and sea, to the westward of Thimble Light into shoal water, or from the unseaworthiness of the barge. The legal questions involved relate to the duty owed by the tug to the tow under her charge, on the one hand, and of the obligation of the Oak to be in seaworthy condition for the voyage in hand, on the other; and are too well settled to admit of serious controversy, or to call for special comment by the court. Considerable evidence was adduced by the parties, respectively, and the libelant sought to show that, in addition to the negligence at the time of the sinking of the barge, that the same had been subjected by the tug's negligence, to undue strain and increased exposure, by alleged improper navigation in shoal waters after leaving Back River Light, to the point of departure for Hampton Roads, and, on account of which the Oak had struck bottom twice before she finally sank near Thimble Light; due notice of which striking was signaled to the tug, but not heeded by her, as claimed by the libelant. After mature consideration of all the evidence, the conclusion reached by the court is that the claim that the barge, Oak, grounded before the occasion on which she sank at the point near Thimble Light, is not sustained. The fact that neither of the other barges encountered trouble, though one of them, at least, and probably two of them, and the tug, were of quite as heavy draft as the Oak, coupled with the Oak's failure to make known these two groundings, convinces the court that they did not take place. Whatever may be said as to the condition of the sea at the time of the sinking of the barge, and for several hours prior thereto, there was nothing to indicate or make probable that the Oak would have grounded, and the other four barges escape.

Coming to the accident, the evidence is conflicting as to what brought it about; but taking all of the facts and circumstances into consideration, and the fair inference to be drawn therefrom, the court is satisfied that the sinking occurred because of the unseaworthiness of the barge, Oak, rather than from any negligence on the part of those in charge of the tug, in proceeding to the westward of Thimble Light. The evidence is overwhelming that the course to the westward of Thimble Light is the one usually taken by navigators in charge of tows

of the size and draft of the one in question, coming into Hampton Roads; and, in the judgment of the court, there did not exist on this occasion conditions which made it impracticable or undesirable thus to proceed. On the contrary, it strongly preponderates in favor of that being, not only the proper, but the safe and more practicable, course to pursue, under the then conditions. It is true that there are shoals on either side of the inner channel to the westward of Thimble Light, over which it might not have been entirely safe to pass with a tow; but it seems quite clear that the master of the tug, who was an exceptionally prudent and experienced man in his line, having been on vessels for some 40 years, and none having higher qualifications, as is conceded, did not attempt to cross over these dangerous shoals, but proceeded in the channel, which was some 300 yards wide, between the shoals; and the evidence demonstrates that the sinking occurred in this channel, and not upon either shoal. It is highly improbable that one of Capt. Jones' long experience would have been so negligent in going in to the westward of Thimble Light, with a tow of this size, and under the existing conditions of wind and weather, as not to have proceeded within, instead of outside of, the channel. Those in charge of the tug positively swear that he did keep in the channel on this occasion. Every disinterested witness likewise so testified, including the master of the steamer New York, who had shortly before passed out across the bay to Cape Charles, and who further stated that in returning that evening, he found the Oak settled in this channel.

The court is convinced that the accident resulted from the unseaworthiness of the barge, and not because of insufficiency in the tug, or any negligence on the part of her navigators, either at the sinking, or any other time during the voyage. The barge was an old one, had been in service some 13 years, and bought at second hand by the libelant; and it is quite apparent that when subjected to the test of the strain upon her as the hawser barge, of four other barges to her rear, of about 1,000 tons each, herself heavily loaded, and the prevalence of the then weather conditions, that she gave way, took water, settled astern, and quickly sank.

A decree may, therefore, be entered, dismissing the libel, with costs.

THE TUGBOAT NO. 6.

THE CARFLOAT NO. 4.

(District Court, S. D. New York. November 7, 1906.)

1. COLLISION—STARBOARD HAND RULE.
   The starboard hand rule does not apply to a vessel, although having another on her starboard side, where the latter has no definite course.

2. SAME—STEAM VESSELS CROSSING—INSUFFICIENT LOOKOUTS.
   An outgoing ocean steamer from North river and a tug, with a car float in tow on her side bound from Jersey City to the East river, both *held* in fault for a collision between them, on the ground that neither had an efficient lookout, and neither signaled the other.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 40.]

In Admiralty. Suit for collision.

Butler, Notman & Mynderse, for libellant.
William Greenough, William S. Montgomery, and Henry G. Ward, for claimant.

ADAMS, District Judge. The libellant, La Veloce Navigazioni Italiana a Vapore, was the owner of the steamship Nord America, which was in collision about 1:45 o'clock p. m. on the 23rd of November, 1904, with a carfloat, 250 feet long, in tow on the port side of the New York, New Haven & Hartford tug No. 6. The sterns of the tug and float were about even and the float projected about 160 feet ahead of the tug. The steamer was bound from her pier, at the foot of 34th Street, North River, to sea. The tug and float were bound from a pier below the Communipaw ferry, Jersey City, to the Harlem River through the East River. The collision occurred in the channel 200 or 300 feet south and east of the white buoy marking the northeasterly corner of the anchorage ground in that vicinity, the eastern side of which is defined by a line running south-southwest from said white buoy. The collision occurred, a little to the southward of the buoy and a few hundred feet to the eastward of the said line, by the port corner of the float striking the starboard side of the steamer forward of the stern. Both vessels were moving ahead at the time and the consequence of the blow was damage to the steamer, said to amount to $26,000.

The steamer alleges that the collision was occasioned by the fault of the tug (1) in having no proper lookout, (2) in proceeding across the anchorage grounds and coming out of the same without giving any signal, (3) in starboarding her wheel without giving any signal thereof, (4) in not continuing under a starboard wheel so as to pass under the stern of the steamer, (5) in maintaining undue speed and in not avoiding the collision by stopping and backing.

The tug alleges that the collision was caused by the steamer (1) in that having the tug and float on her starboard hand she failed to keep out of the way, (2) that she failed to stop and back in time, (3) that she failed to observe the tow in time to comply with her obligation under the starboard hand rule, (4) that she did not have a proper lookout and (5) that she failed to sound any warning signal of her approach or intended movements.

The testimony shows that the steamer left her pier under the charge of a Sandy Hook pilot and proceeded down the river. Her movements were adapted to the contingencies of navigation, which gradually brought her to the starboard side of the channel opposite the anchorage grounds. About the time it became necessary to observe the tug and float on her starboard side, the attention of those on her were absorbed by the movements of a schooner just ahead, which was apparently being towed to an anchorage across the steamer's bow. The steamer reduced her speed to allow such a manœuvre on the schooner's part and failed to see the approach of the tug and float until shortly before the collision. The pilot did not see them until the steamer was on a line with the white buoy. The pilot said that they were then not

taking a course across the river to the East River but were on a course of S. S. E., exposing the whole port side of the float broad on the steamer's bow, about 5 points, and might have been bound down to the Baltimore & Ohio Railroad Company's yards on Staten Island, or to some place in that vicinity. When, almost immediately thereafter, he saw they were swinging to the port and creating danger of collision, he rung up full speed on the engines, with a view of escaping in that way but it was too late and the collision occurred. The steamer had a lookout but he was apparently too much engaged in observing the movements of the schooner to see the approach of the tug and float.

The tug made fast to the float heading in towards New Jersey, backed out and allowed the sterns to swing down the river. They then went ahead turning eastward, but did not pursue a straight course for the East River. They turned to the southward so much that at one time they were on a course nearly parallel with that of the steamer. They sagged down the river and reached a point to the southward of the white buoy and were going over the anchorage ground. By this time the tow was getting headed more around and then the steamer was first seen by the pilot, 800 to 1000 feet away, bearing 4 or 5 points on the tug's port bow. The tug continued to turn and shortly afterwards the collision took place. A floatman on the float was requested by the master of the tug to keep a lookout and he did so, but inefficiently. He said in one place that he first saw the steamer when she was about two float lengths away; that up to that time his view was obstructed by the ferryboat Bound Brook, which came out from her slip, above the pier where the tug started from, bound across the river. In another place he said that he knew the steamer was coming because he had seen her when they were backing out, before the ferryboat partially obstructed his view. It is not claimed that a report of the steamer was made at any time. As the tug was intending to cross the channel, it was incumbent upon her to notice vessels going either way and for her lookout to report them. Such a precaution would probably have avoided this very careless collision.

The steamer candidly admits that she was in fault and only asks for half damages. The tug urges that there was no fault on her part because under the starboard hand rule and Inspectors' Navigation Rule 2, the steamer was bound to avoid her and give the necessary signals.

The starboard hand rule does not apply to this case, though the tug and float were on the starboard hand of the steamer, because the tug had no definite course. The failure of the steamer to see and signal the tow was undoubtedly a fault on her part without regard to the rule, but the fact that the tow swung so far down as to be navigating over the anchorage ground and her uncertain course give a somewhat different aspect to the matter from that which would prevail if both vessels were in ordinarily navigable waters, where other vessels would naturally be encountered, and the starboard hand rule was observed by one of them. It seems that the tug was in fault for failing to see, or receive a report of the steamer, until a collision was imminent. The tug's continued swing toward the steamer's course

in the absence of the exchange of signals was clearly contributory to the collision. It was a case where both vessels were negligent with respect to lookout duty and signals, and both should be condemned.

Decree for the libellant for half damages, with an order of reference.

NATIONAL BOARD OF MARINE UNDERWRITERS v. BOWRING & CO. et al.

(District Court, S. D. New York. November 5, 1906.)

SHIPPING—LOSS OF CARGO—SINKING OF LIGHTER AT PIER.

Evidence considered, in an action against the owner of a lighter to recover for loss of her cargo through her sinking at a pier during the night, and *held* not to show that her sinking was due to unseaworthiness, but that it was caused by a blow received from some unknown vessel in collision with her, or from swells causing her to collide with a vessel or wharf alongside.

In Admiralty.

Black & Kneeland, for libellant.
Convers & Kirlin, for Bowrlng & Co.
James J. Macklin, for Johnson and Henjes.

ADAMS, District Judge. This action was brought by the National Board of Marine Underwriters against Bowring & Company and Johnson and Henjes, the charterer and owner of the lighter Boaz to recover the value of 428 casks of dried fish lost or destroyed by the sinking of the said lighter in the night of October 19th or in the early morning following, between piers B. and C. Erie Basin, Brooklyn. The libellant was the assignee of several firms in Halifax, Nova Scotia, who in the month of October, shipped the said fish on the Red Cross Line steamer Rosalind bound to New York. The fish were destined for places in Porto Rico. The fish were shipped in good order on the Rosalind and when she reached New York, they were delivered to the respondent Johnson to be carried to the Porto Rico Line of steamers. Johnson was a lighterman and at the time had the Boaz, belonging to Henjes, under charter. After some delay the fish were raised and placed upon a wharf but they were found to be in such a bad condition that they were condemned by the Board of Health as putrid and dangerous to the public health and destroyed under section 1210 of the New York Charter. Laws 1901, p. 515, c. 466. The loss to the shippers was said to be $12,175.

The libellant seeks to recover because it alleges that the lighter was in a defective, unfit and unseaworthy condition. Such condition is denied by the respondents. The unseaworthiness is sought to be established by the alleged fact that the vessel sank near her wharf without apparent cause.

The testimony shows that the fish were duly delivered in New York by the Rosalind and loaded on the deck of the lighter at the pier in Erie Basin. They were consigned to Bowring & Company, who arranged for their transfer by lighter to the connecting line. The dis-

charge from the Rosalind and the loading on the Boaz were completed on the 19th of October, and the lighter then remained in the slip of pier B, where she was loaded, in charge of her mate, a competent sailor, named Albert, about 38 or 40 years of age. This action was brought January 11, 1906, and the service of the papers was the first notice received by the respondent Johnson, Albert's employer, of any claim to be made upon him. In the meantime Albert disappeared. It is shown that he went to sea about the middle of November and could not therefore be produced on the trial. His statements to several persons, however, were drawn out in cross examination by Bowring & Company which were not objected to by the libellant and were received in evidence. From them it may be gathered that the lighter was in good condition, not leaking, when the fish were loaded a little before 6 o'clock p. m. After that the fish were covered with tarpaulins, which took over an hour, and the mate then went below and all through the boat with the captain, who then left her. The mate at the time went down in the cabin and arranged to sit there and take care of the boat. He said that about 12 o'clock, the boat received several hard knocks from a swell she was subjected to and he looked outside to ascertain what caused the swell but could not do so; that he then went below again and heard some water running in the hold, which he went to look after and saw the water running in; that he then started to pump and pumped in the rain for a couple of hours but finding he did not gain on the leak, went to a tug boat that was in the basin for assistance but was refused and he tried otherwise without success to obtain help and then went to pumping again but notwithstanding his efforts, the boat sank about 3 or 4 o'clock in the morning. The master of the lighter was examined in court and corroborated the statement of the mate so far as his knowledge went, and the statements with respect to the swells were corroborated by the watchman on the wharf, who said that the mate told him that he had been pumping all night. In the latter respect the testimony is inconsistent as far as the statements go and the watchman's version, in this respect, should I think be disregarded because his account would indicate a sinking without a peril. The testimony taken altogether seems to show that the account given by the mate to the owner and to the master that the pumping commenced at midnight after the hard knocks should be credited.

When the master left at 7 o'clock, the Boaz was lying outside of the lighter Harvester, which hauled in between the Boaz and the pier about 6 o'clock, after the Boaz had finished loading. The Boaz was lying starboard side to the pier, head out, when the Harvester came and when the latter was put in between the Boaz and the pier, both were lying in the same direction.

It is evident that some accident happened to the lighter during the night, because apart from the mate's account, it appeared that she, though about 40 years old, had been renewed, repaired from time to time and kept in good order. She was bought by Henjes about 6 years prior to the accident from the Pennsylvania Railroad, when he put new timbers, spars, railing and plank in her, recaulked her and altogether put her in good condition at an expense of about $2,100. The testi-

mony shows she was in a reasonably sound and strong condition. There is no suggestion of weakness or rottenness about the hull, frames or planking or that the caulking was defective in any particular. She had been regularly employed, carrying cargoes to the satisfaction of people using her. On the day before the accident she had carried 130 tons without developing any leaks, while this load was only 96 or 97 tons. She was insured to carry 100 tons and cargoes on her were regularly covered by policies.

There seems to be no doubt that the lighter by reason of swells from some passing steamers pounded heavily several times against the Harvester or the pier. On a survey held on the 26th of October, it was found that a 3x10 plank at the light water line on the starboard side about amidships was broken between 2 frames. The wood surrounding the break was found to be sound. A surveyor, who was in court as a witness for the libellant but was not put upon the stand until the close of the case when, some comment having been made upon the circumstance, the libellant examined him. He said that the broken plank was sufficient to account for the sinking. I have no doubt that such is the fact and I think that no presumption of unseaworthiness arises from the evidence in the case.

Libel dismissed.

THE CROWN OF CASTILE.

(District Court, S. D. New York. December 6, 1906.)

ADMIRALTY—PRACTICE—EXTENSION OF RULE 59.

A vessel sued for nondelivery of cargo, all of which was received and loaded by the charterer, and for which bills of lading were signed by the master without prejudice under the terms of the charter, upon an allegation of delivery of all cargo received on board, is entitled by analogy to admiralty rule 59 to bring in the charterer, in order to determine in one action all the matters arising out of the loss.

In Admiralty. On exception to petition of claimant.

Convers & Kirlin, for claimant.
Whitridge, Butler & Rice, for American-Asiatic Steamship Co.

ADAMS, District Judge. This is an exception on the part of the American-Asiatic Steamship Company to the petition of the claimant of the steamship Crown of Castile to bring into the action the said Steamship Company. The claim of the libellant is for the value of 2 cases of rubber, which it is alleged were shipped on the steamer at New York on the 23rd of August, 1905, for delivery at Kobe, Japan, subject to the perils of the seas and other exceptions, for an agreed freight, which has been paid. It is alleged that the steamship proceeded to Kobe and delivered 3 of the 5 cases but negligently failed to deliver 2 of the cases and the libellant seeks to recover the value of the same. The claimant of the steamship subsequently filed the petition mentioned, in which it is alleged that a charter was executed between

the agents of the steamer and the American-Asiatic Company, which contained, among other things, these provisions, which are relied upon by the petitioner:

"10. The cargo to be received and delivered alongside. * * * Captain to report daily during loading at Charterers' office to sign Bills of Lading.

* * * * * * * * * * *

16. The Master, or person appointed by him, shall sign Bills of Lading as presented without prejudice to this charter, any differences between chartered and Bills of Lading freight being settled on sailing; if in Charterers' favor, by usual Captain's draft against freight, payable at sight on arrival at a port of discharge to be selected by Charterers; if in Steamer's favor, in cash, less cost of insurance; a sum of £200 to be withheld by Charterers until final settlement has been made at all ports of discharge for damage and shortage claims on account of steamer, but this amount not to be taken as a limitation of steamer's liability. The steamer to have an absolute lien upon the cargo, for freight, dead freight and demurrage. Charterers' liability, except for any deficiency of Bill of Lading freight payable in cash, to cease on shipment of cargo, providing same is worth freight, dead freight and demurrage (if any)."

The charter also contained the following clause, which is relied upon by the charterer:

"13. Steamer and Owners to be held responsible for the number of packages signed for in Bills of Lading."

The petition alleges:

"Eighth: The claimant and petitioner had and has no knowledge of the exact quantity, contents or description of the cargo referred to in the bills of lading that were prepared by the charterers and signed by the master. All the cargo referred to in the libel herein that was actually loaded on board the vessel was delivered at the port of destination in accordance with the terms and provisions of the charter party and bills of lading that were issued therefor and that evidenced the contract under which the goods were carried.

Ninth: If any loss or damage occurred to any merchandise referred to in the libel herein and covered by the bill of lading issued therefor, such loss or damage occurred while the said merchandise was in the custody and control of the charterers, their agents, servants or representatives, and was within one or more exceptions in the bill of lading that was issued for the said merchandise, or was due to the negligence of the charterers, their agents, servants or representatives in the custody and care of the cargo, and was not due to any fault or negligence on the part of the petitioner or owners of the steamship, their servants or agents, or any one for whom they may have been responsible. If the libellant is entitled to any recovery against the steamship by reason of the matters set forth in the libel, the owners of the said vessel are entitled to be indemnified with respect to such liability by the charterers, the American-Asiatic Steamship Company."

The question in the matter is whether the claimant is entitled, under analogy to the 59th Rule, to bring in the charterer to indemnify the steamer in case it has to pay for the cases.

It is urged by the steamer that, under the contract, the charterer undertook the entire business of receiving the cargo and loading it upon the vessel, including the providing of a wharf and the employment of clerks and watchmen to look after the cargo; that all of the cargo that was delivered upon the wharf for shipment upon the vessel remained in the custody of the charterer until it was actually placed upon the vessel; that the charterer prepared bills of lading for the master

to sign and he signed them in accordance with section 16, supra, which provided that the master should sign bills of lading as presented.

It is alleged that the steamer actually delivered all the cargo that was loaded upon her and it stated that if the loss occurred, it was while the cargo was in possession of the charterer and not by reason of any default on the part of the vessel and that if the libellant was entitled to any recovery against the vessel, the owners would be entitled to indemnity with respect to such liability from the charterer through whose default the loss, if any, occurred.

The charterer, on the other hand, contends that the master of the vessel had an opportunity at the time the cargo was received to check it off and it was at his peril if he failed to ascertain the cargo actually received and for his negligence in this respect, the charterer is not in any way liable and therefore should not be brought into the action.

In view of the provisions of the contract, taken altogether, I think that while it would have been more prudent for the master to check off the packages as received and sign for only such as were put on board, as in The Tongoy (D. C.) 55 Fed. 329, nevertheless, it seems that the best way to adjust the matters arising out of the claimed deficiency of cargo, will be to have all the parties before the court on the trial. If the libellant establishes a case by the proof, and the petitioner's allegations are true, then doubtless the vessel was liable, with a right of action over against the charterer, if it was through the charterer's default that the loss occurred, and if the charterer is in the action, all the matters can be disposed of in one trial. It was to avoid a multiplicity of actions that the rule was established in collision cases, and has been extended by analogy to many other causes of action, of which it seems that this should be considered one.

Exception overruled.

HELLER et al. v. PENDLETON et al.

PENDLETON et al. v. HELLER et al.

(District Court, S. D. New York. November 10, 1906.)

SHIPPING—CHARTER PARTY—BREACH BY DELAY IN REPORTING FOR CARGO.

Where a charter party provided that the vessel should be tight, staunch, strong, and in every way fitted for the voyage, and that she should proceed under the charter after completing the voyage she was then on, no time for delivery being further specified, a delay in reporting for cargo after completing her then voyage caused by the necessity for repairs to make her seaworthy was a breach of the contract, which renders her liable for the damages resulting to the charterer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 165–168.]

In Admiralty. Action by charterer for breach of charter and cross-action for demurrage.

Hyland & Zabriskie, for Heller and Hirsh.

Avery F. Cushman, for Pendleton and others.

ADAMS, District Judge. The first of the above entitled actions, Heller and Hirsh against Pendleton, was brought to recover damages for an alleged breach of a charter of the schooner M. V. B. Chase, dated November 16, 1904. The contract was as follows:

"This Charter Party, made and concluded upon in the City of New York, the 16th day of November 1904 Between Pendleton Bros, agents for owners, of the Schr. 'M. V. B. Chase,' of New York of the burthen of 380 Tons or thereabouts, register measurement, now lying in the harbor of New Haven, Conn. of the first part, and Mess. Heller, Hirsch & Co. of the second part, witnesseth, that the said party of the first part agrees in the freighting and chartering of the whole of the said vessel, * * * unto said party of the second part, for the voyage from South Lyme, Conn. to Savannah, Ga. Sufficient water guaranteed at loading place or charterers to move vessel to a place where there is sufficient water and lighter cargo at their expense. Vessel drawing ab't 9 ft. light & abt 16 ft. loaded with full cargo coal on the terms following. The said vessel shall be tight, staunch, strong and in every way fitted for such a voyage, and receive on board during the aforesaid voyage the merchandise hereinafter mentioned. * * * The said party of the second part doth engage to provide and furnish to the said vessel a cargo of acid scrap, in bulk, estimated between 6/700 tons the bills of lading to be signed without prejudice to this Charter, and to pay to said party of the first part, or agent, for the use of said vessel during the voyage aforesaid, One dollar & twenty-five cents ($1.25) per gross ton delivered and charterers to load, trim and discharge cargo free of expense to vessel and to tow vessel from New Haven to loading place or places and when loaded to sea. It is agreed that the lay days for loading and discharging shall be as follows (if not sooner despatched) commencing 24 hrs from the time the vessel is ready to receive or discharge cargo. Dispatch for loading and discharging to be One hundred (100) tons per day. A delay at one place to be offset by quicker dispatch at the other places and that for each and every day's detention by default of the said party of the second part, or agent Forty $40.00 dollars per day, day by day, shall be paid by said party of the second part or agent, to the said party of the first part, or agent. The cargo or cargoes to be received and delivered alongside, within reach of the vessels tackles. It is understood that the vessel is now at New Haven discharging lumber and to proceed under this charter after completing her present voyage. * * *"

It appears that the schooner prior to reaching New Haven was on a voyage from the south, and at the end of it she was in a condition requiring some repairs. These were made and cost $320.62. They caused some delay in her reporting to the charterers. By reason of this they claim that though they did not insist upon a right to cancel the contract they were entitled to damages.

The law in this connection is expressed in the (2d Ed.) Amer. & Eng. Ency. of Law, vol. 7, p. 206, as follows:

"When there is no express stipulation in the contract of affreightment as to the time at which the vessel shall begin and complete her voyage, there is an implied obligation that the vessel shall sail without unnecessary delay and proceed with all reasonable dispatch to her destination, and for any injury caused by an unreasonable or unnecessary delay the shipowner is liable."

It is provided in the contract that the vessel "shall be tight, staunch, strong and in every way fitted for such a voyage." This did not leave any margin for the vessel's repairs at the termination of the discharge, yet she was not then in a condition for delivery and some delay ensued before she was fitted for service and the libellants claim that they were damaged thereby, in being obliged to incur extra expense in

loading the cargo, lightering the same to the place where the schooner was finally loaded and further sustained a loss in interest on the value of the cargo during the time of delay, amounting to the sum of $1,600.

South Lyme is situated upon an open roadstead and vessels of the size of the Chase when loading to the draft provided for in the contract, are obliged to leave the wharf and either take the goods in from a lighter while lying in the roadstead or proceed to some port in the vicinity. When the Chase went to the wharf, December 16th, she soon took ground and the master declined to remain there, whereupon the libellants' chartered steam lighter, upon the master's request, towed her to New London, where she was finally loaded. It is said, with apparent truth, that loading vessels in such a roadstead, becomes more dangerous and difficult as the season advances, hence the lightering became necessary through the vessel's default. I think this claim is fairly well sustained by the testimony and that the libellants are entitled to succeed. Hence there will be a decree in their favor upon their libel, with an order of reference.

The action of Pendleton et al. against the libellants for demurrage depends to some extent upon the result of the commissioner's finding in the first action and he will consider it upon the merits and make such report thereon, both with respect thereto and the damages, as the ascertained facts may require.

THE CHARLES TIBERGHIEN.

(District Court, S. D. New York. September 28, 1906.)

ADMIRALTY—COSTS—PARTY BROUGHT IN BY PETITION.

The claimant of a libeled vessel, who for his own protection brings in a third party by petition under or by analogy to admiralty rule 59, is liable for the taxable costs and expenses of such new party in defending, where upon a hearing both the libel and petition are dismissed, and is not entitled to have such costs taxed to the libelant.

In Admiralty. On appeal from taxation of costs.
See 147 Fed. 307.

Wing, Putnam & Burlingham, for Arnhold, Karberg & Co.
Convers & Kirlin, for the Charles Tiberghien.

ADAMS, District Judge. This action was brought against the steamship Charles Tiberghien by Arnhold, Karberg & Company to recover the damages sustained through the loss of certain goods shipped at New York for the East. The steamship brought in the charterer, which probably would have been liable, if it had been decided that the libellants were entitled to recover, but the trial resulted in a decision that the goods alleged to have been lost were actually delivered to the libellants and both the libel and petition were dismissed. Thereupon the charterer taxed its costs against the steamship and the latter sought to tax the same against the libellants. The clerk rejected this claim, whereupon the steamship appealed.

The question is whether an unsuccessful libellant should be held responsible for the costs incidental to the bringing in of a third party by the claimant of a vessel.

The practice has uniformly been in this district to hold the party who brings in a third one, liable for the latter's costs where there is a dismissal of the petition. This is based on sound reasoning, inasmuch as the third party is brought in by and for the protection of the party invoking the remedy, under or by analogy to the 59th Rule. While there is much in the position of parties under some circumstances, to warrant the allowance of charterer's costs to the claimant of the vessel and it seems to be the practice in other districts (The Maurice, et al. [D. C.] 130 Fed. 634), it is a well established practice here to hold the original defending party liable to the third party when brought in by it, for the taxable expenses of defending the action, and I fail to see any reason to justify the charging of such expenses to the original libellant upon a dismissal of the libel and petition. If the libellant does not wish to run the risk of bringing the third part into the action and prefers to rely upon the original defendant, it does not seem just that he should be called upon to pay the expenses incurred when the third party is brought in for the protection of the second.

Costs are always in the discretion of the court and in some instances it might be proper to afford the relief here sought, but such discretion should not be exercised to impose the costs upon a libellant when the third party is brought in for the benefit of the second, whose defense could have been established, under the decision in this case, without the presence of the charterer as a third party.

The taxation is confirmed.

MEMORANDUM DECISIONS.

AMERICAN NEWS CO. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. November 16, 1906.) No. 77. Appeal from the Circuit Court of the United States for the Southern District of New York. For opinion below, see 142 Fed. 786. A. H. Washburn, for appellant. Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. Affirmed in open court.

AUTOMATIC SWITCH CO. OF BALTIMORE CITY v. CUTLER-HAMMER MFG. CO. (Circuit Court of Appeals, Second Circuit. October 15, 1906.) No. 118. Appeal from the Circuit Court of the United States for the Southern District of New York. For former opinion, see 147 Fed. 250. Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. The motion to amend the mandate in this case is granted, and the mandate will be recalled and amended, so as to authorize the Circuit

Court to entertain a motion to permit the Automatic Switch Company, incorporated under the laws of the state of New York, to bring its original bill in the nature of a supplemental bill, in order to revive the suit as assignee of the original complainant therein.

GASTONIA COTTON MFG. CO. v. W. L. WELLS CO. (Circuit Court of Appeals, Fourth Circuit. November 8, 1906.) No. 469. In Error to the Circuit Court of the United States for the Western District of North Carolina. O. F. Mason, A. Burwell, and Edwin T. Cansler, for plaintiff in error. Murray F. Smith, J. Hirsh, and C. W. Tillett, for defendant in error. Before GOFF and PRITCHARD, Circuit Judges, and WADDILL, District Judge.

GOFF, Circuit Judge. This case was remanded to this court by the Supreme Court of the United States, with directions to set aside the judgment theretofore rendered in this cause, and to proceed further touching the merits as may be consistent with law and with the opinion of said court. 198 U. S. 177, 25 Sup. Ct. 640, 49 L. Ed. 1003. For the proceedings heretofore had in this court concerning this case, see 128 Fed. 369, 63 C. C. A. 111. For the opinion of the court below, see 118 Fed. 190, in which the case is most fully and clearly stated. We consider it unnecessary to again set forth the facts involved in this litigation. The only question remaining for this court to dispose of is the action of the court below in directing a verdict for the appellee. The plaintiff in error contends that said court erred in withdrawing the consideration of the case from the jury and directing a verdict for the plaintiff below. The insistence is that the evidence more than reasonably tended to establish the plea of payment, and that the jury should have been permitted to pass upon it. The plaintiff in error claims that before the suit was instituted it paid $50,000 of its indebtedness to defendant in error, by and through one John F. Love, the secretary and treasurer of the two companies—the Gastonia Cotton Manufacturing Company and the Avon Mills. Such payment is said to have been made to a corporation known as the "Loray Mills," for stock in that mill subscribed for by the W. L. Wells Company, acting by and through W. L. Wells. The transaction referred to is fully described by Judge Boyd in his opinion. Plaintiff in error claims the evidence shows that, acting through Love, it, under the direction of said W. L. Wells, paid at one time $10,000 of its indebtedness to defendant in error, by applying that sum on the purchase of the stock so subscribed, and that at another time it applied the sum of $40,000 for like purposes. So far as the last-mentioned sum is concerned, there is no evidence that it was so applied with the knowledge of, or by the authority of, the W. L. Wells Company. In fact the testimony relating to that transaction tends to prove that what took place between Love and W. L. Wells was carefully concealed from the W. L. Wells Company, and there is no evidence from which the ratification of that company concerning said matter can be inferred. The view of the court below regarding it has our approval. The claim for credit so far as the item of $10,000 is concerned is quite different; for the testimony tends to show that Love gave the W. L. Wells Company notice in August, 1900, that $10,000 due it for cotton sold during the season of 1899–1900 had been applied to the payment of Loray stock; that John T. Wells admitted that such notice was received and filed among the papers of the company, and that from the date of such receipt until in August, 1901, no demand was made by him, or by any one else, for the W. L. Wells Company, upon the defendants below for said amount; that thereafter, in December, 1900, a settlement was made by defendant below for all cotton shipped it to that date, invoices of which were marked paid by the W. L. Wells Company; that from December 18, 1900, to January 31, 1901, the W. L. Wells Company made several demands upon defendant below for payments on account of cotton shipped in the months of November and December, 1900, without reference to former shipments. Therefore, so far as the item of $10,000, is concerned, there was testimony strongly tending to support the contention of the defendants below, and it should, we think, have been submitted to the jury. This error will necessitate the reversal of the judgment

rendered, and the granting of a new trial, unless the defendant in error will enter in the court below a remittitur covering the said claim for credit of $10,000.

It appears by the record that the court below, with the consent of parties, consolidated this case with the case of the same plaintiff against the Avon Mills, for the purpose of more conveniently trying the issue before the jury; it being provided in the court's order that a separate verdict and judgment should be entered in each case. It is further disclosed that, after the trial had been concluded, it was stipulated by the parties that this writ of error should be prosecuted, with the understanding that the judgment in the Avon Mills Case should abide the decision of the appellate court concerning the questions raised by the record now before us. We conclude that this case shall be remanded to the court below, with direction to set aside the judgment complained of, also the verdict, and award a new trial, unless the defendant in error files, within 20 days after the mandate of this court shall have reached the court below, a remittitur as to said sum of $10,000, apportioned as follows: $5,901.38, to be credited as of June 9, 1902, on the judgment rendered in this case, and $4.098.62, as of said date, on the judgment against the Avon Mills. In case said remittitur is filed, then the judgment rendered below will stand affirmed. If it is not so filed, then the court below will enter an order setting aside said judgment and awarding a venire facias de novo. Modified and affirmed.

J. A. SCRIVEN CO. v. GIRARD CO. (Circuit Court of Appeals, Second Circuit. November 19, 1906.) No. 23. Appeal from the Circuit Court of the United States for the Southern District of New York. On appeal from an order of the Circuit Court for the Southern District of New York, dated October 2, 1905, granting an injunction pendente lite. For opinion below, see 140 Fed. 794. Louis Marshall, for appellant. A. von Briesen, for appellee. Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Upon full consideration of the facts appearing in the record we are of the opinion that the order of the Circuit Court should be amended so as to read as follows: "Ordered, that until the further order of this court the said defendant Girard Company, its officers, directors, trustees, managers, servants, agents, attorneys and workmen, and each and every of them, be, and they hereby are, restrained and enjoined from directly or indirectly making use of the words "Elastic Seam" or "Stretchiseam" in the construction, manufacture, sale, delivery, working, operation or use, offering for sale, or advertising men's drawers with a longitudinal yellow strip down the sides, or down the sides and back, of said drawers. And it is further ordered, that the said defendant Girard Company, its officers, directors, trustees, managers, servants, agents, attorneys, and workmen, and each and every of them, be, and they are hereby, restrained and enjoined from using said words "Elastic Seam" or "Stretchiseam" in connection with men's drawers containing strips of elastic material, white, gray, or other color, unless accompanied by a statement conspicuously, clearly, and unmistakably specifying that such drawers are the product of the Girard Company, and are not the product of the Scriven Company." The order, as so modified, is affirmed.

KESSLER et al. v. ENSLEY LAND CO. et al. (Circuit Court of Appeals, Fifth Circuit. December 13, 1906.) No. 1,556. Appeal from the Circuit Court of the United States for the Northern District of Alabama. For opinion below, see 141 Fed. 130. J. A. W. Smith, Wm. A. Gunter, and Thomas M. Steeger, for appellants. Jno. B. Knox and E. J. Smyer, for appellees. Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

PER CURIAM. The matters complained of in the bill were intra vires the Ensley Land Company, and as the record shows that a majority of the directors and stockholders, at the time of bringing the suit, were not in-

terested adversely to the company, the right of the complainants, as stockholders, to bring and maintain this suit, is doubtful. If the complainants can bring and maintain the bill, in prosecuting the same they can only assert the rights and equities which the company itself, if willing to sue, could assert, and any defense good against the Ensley Land Company is good against the complainants. Four years, during which the defendants, the Ensley Company and others, were exploiting the lands in controversy, elapsed before the suit was brought, and we fail to find sufficient evidence to meet the charge of laches. On the facts of the case made in the transcript, we concur with the learned judge whose exhaustive opinion is found in the record. The decree appealed from is affirmed.

OLD DOMINION COPPER MINING & SMELTING CO. v. LEWISOHN et al. (Circuit Court of Appeals, Second Circuit. December 4, 1906.) No. 64. Appeal from the Circuit Court of the United States for the Southern District of New York. On appeal from a decree of the Circuit Court for the Southern District of New York sustaining a demurrer to an amended bill of complaint and dismissing the bill for want of equity. The opinion of the Circuit Court sustaining the demurrer to the original bill is reported in 136 Fed. 915. The court held upon the hearing of the demurrer to the amended bill that there was no substantial difference between it and the original bill, and followed the former decision. Final decree was thereupon entered, and the complainant appeals. The facts sufficiently appear in the opinion of the Circuit Court sustaining the demurrer to the original bill (136 Fed. 915), and are stated in full in Old Dominion C. M. & S. Co. v. Bigelow, 188 Mass. 315, 74 N. E. 653, 108 Am. St. Rep. 479. Louis Brandeis, for appellant. Eugene Treadwell, for appellees. Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The bill prays for relief as follows: First, that the sale of the mining claims to the complainant by Leonard Lewisohn, the defendants' testator, and Albert S. Bigelow, a citizen of Massachusetts and not a party to this action, be rescinded, and the real estate reconveyed to the defendants, upon receipt by the complainant of the consideration paid therefor; second, that defendants return to the complainant the consideration paid by complainant for said property, namely, 30,000 shares of its capital stock, or account therefor; third, that, if the court shall decide that the complainant is not entitled to rescind the sale of said real estate to it, then and in that event that the court ascertain the amount of damages sustained by complainant and direct the defendants, as executors, to pay the amount to complainant. We are unable to perceive how this relief, or any part thereof, can be granted the complainant upon the facts alleged in the bill. The fundamental difficulty with the bill is that it fails to state any facts showing that the complainant was in any way injured or defrauded by the transactions complained of. At the time of the transfer by Bigelow and Lewisohn to the company, Bigelow and Lewisohn and their representatives owned the entire issue of stock of the corporation. The sale by them to the corporation was in effect a sale by them to Bigelow and Lewisohn. A corporation can only act through the human beings who compose it. It cannot be deceived or defrauded, unless its stockholders and directors are deceived or defrauded. The corporation knew all that Bigelow and Lewisohn knew, and no one of the original parties to the transfer was defrauded by the exchange of the stock controlled by Bigelow and Lewisohn for the real estate controlled by them. It may be that such a large overcapitalization as is alleged in the bill might mislead and deceive careless and credulous purchasers of the stock; but we are not now dealing with the case of a stockholder alleging concealment, fraud, and misrepresentation. The stockholders, apparently, have no complaint. At least they have not propounded any. Indeed, it is not easy to see how a purchaser, who paid $25 per share, could be defrauded, in view of the allegation of the bill that "the shares of this corporation so issued in payment for the property sold to it as aforesaid were at the time of the fair market value of twenty-five (25) dollars each, and continued for a long time there-

after to be of such or greater value." It is enough, however, that this is not a stockholders' action. The subscribers for the 20,000 shares subsequently issued were not deceived. They asked for no statement, and received none. They got what they purchased, and are not complainants here. A protracted discussion is unnecessary, for the reason that this court and the Circuit Court of the Southern District have decided the question adversely to the complainant's contention. Foster v. Seymour (C. C.) 73 Fed. 65; McCracken v. Robison, 57 Fed. 375, 6 C. C. A. 400. To the same effect are the decisions of the New York Court of Appeals. Barr v. N. Y., L. E. & W. R. Co., 125 N. Y. 263, 26 N. E. 145; Blum v. Whitney, 185 N. Y. 232, 77 N. E. 1159. It is true that the Supreme Court of Massachusetts (188 Mass. 315, 74 N. E. 653, 108 Am. St. Rep. 478) has taken a different view, but we feel constrained to adhere to the prior adjudication of this circuit. The decree is affirmed, with costs.

REGINA CO. v. NEW CENTURY MUSIC BOX CO. (Circuit Court of Appeals, Second Circuit. November 7, 1906.) No. 31. Appeal from the Circuit Court of the United States for the Southern District of New York. On appeal from a decree of the Circuit Court for the Southern District of New York adjudging invalid the complainant's patent, No. 500,371, for an improvement in music boxes, The opinion of Judge Ray in the Circuit Court is reported in 138 Fed. 903. Arthur von Briesen, for appellant. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The Circuit Court found that the patent was invalid for lack of invention, and, after an examination of the record, we see no reason to disturb this finding. The important element of the combination of the claims, and the one which produced a real advance in the art, was the transfer of power from the center to the periphery of the moving disk by means of the sprocket-wheel engaging in the apertures near the outer edge of the disk; but this was not new with the patentees. The other elements of the combination are old, and the combination itself, speaking broadly, is old, being differentiated from the prior art by the introduction of the hinged rod, with anti-friction wheels thereon, as a substitute for the devices of the prior art used to produce similar results. This may be an improvement over the means previously adopted for giving uniform pressure to the disk; but in view of the prior art, as disclosed by the record, and in view of the very obvious use of anti-friction wheels in such environments, we are of the opinion that the adoption of the hinged rod of the patent did not involve invention. It was the work of a mechanic familiar with the requirements of the art, and not of an inventor. The decree is affirmed.

SNYDER et al. v. HOME INS. CO. (Circuit Court of Appeals, Second Circuit. October 18, 1906.) No. 18. Appeal from the District Court of the United States for the Southern District of New York. John F. Foley, for appellants. Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. Decree (133 Fed. 848) affirmed in open court.

SOUTHERN RY. CO. et al. v. TIFT et al. (Circuit Court of Appeals, Fifth Circuit. December 15, 1906.) No. 1,495. Appeal from the Circuit Court of the United States, Southern District of Georgia. For opinion below, see 138 Fed. 753. Ed Baxter, for appellants. W. D. Ellis and W. A. Wimbish, for appellees. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. A majority of the judges being of opinion that this case was correctly ruled and decided in the Circuit Court, the decree of that court is affirmed.

UNITED STATES v. AULTMAN CO. (Circuit Court of Appeals, Sixth Circuit. December 31, 1906.) No. 1,563. In Error to the District Court of the United States for the Northern District of Ohio. John J. Sullivan, U. S. Atty. John P. Morley, for defendant in error.

PER CURIAM. Action for penalty for violation of alien contract law. Judgment below for defendant affirmed, on opinion of Tayler, District Judge. See 143 Fed. 922.

UNITED STATES v. WALKER. (Circuit Court of Appeals, Fifth Circuit. November 3, 1906.) No. 1,511. In Error to the United States Circuit Court for the Middle District of Alabama. For opinion below, see 139 Fed. 409. W. S. Reese, Jr., U. S. Atty., J. Sternfeld, Asst. U. S. Atty., and E. J. Parsons, U. S. Atty. W. A. Gunter, for defendant in error. Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

PER CURIAM. For the reasons given by the judge in the court below, the judgment of the Circuit Court is affirmed.

VICTOR TALKING MACH. CO. et al. v. LEEDS & CATLIN CO. SAME v. TALK-O-PHONE CO. (Circuit Court of Appeals, Second Circuit. October 12, 1906.) Nos. 166, 167. Appeals from the Circuit Court of the United States for the Southern District of New York. For opinion below, see 146 Fed. 534. Louis Hicks, for appellants. Horace Pettitt, for appellees. Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. Orders affirmed in open court.

WERCKMEISTER v. AMERICAN LITHOGRAPHIC CO. et al. (Circuit Court of Appeals, Second Circuit. December 11, 1906.) No. 102. Appeal from the Circuit Court of the United States for the Southern District of New York. For opinion below, see 142 Fed. 827. Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. Affirmed in open court.

CHAMBERLAYNE v. AMERICAN LAW BOOK CO. (No. 2). (Circuit Court, E. D. New York. November 19, 1906.) See 148 Fed. 316. Field & Chittenden, for plaintiff. Judson & Hale, for defendant.

THOMAS, District Judge. The plaintiff should serve a bill of particulars respecting the statements in subdivision 10 of the complaint, showing what portions of plaintiff's said "article or treatise, or what purported to be the same," the defendant did publish, and showing also the portion of the publication prepared by others, and the name or names of persons connected therewith. To comply with this order, the plaintiff should point out headings and divisions of the matter that the plaintiff claims as his own, for the purpose of identifying them, although such matter may, in the hands of the publisher, have been subjected to changes, and should in a similar manner identify the published matter prepared by others, and the names connected therewith as the article was published. Moreover, the plaintiff should particularize, in connection with subdivision 13 of the complaint, respecting "statements and authorities which plaintiff desired to add to his incompleted manuscript," and "respecting matter prepared and written by plaintiff as a part of said article." It will be regarded as a sufficient compliance with the order in such regard, should the plaintiff state the topic or topics by identifying them by the subdivision heading most immediate thereto, in connection with which the

"statements and authorities" were desired to be added, and from which "the matter prepared and written by plaintiff as a part of said article" was omitted, as alleged in such subdivision.

McDUFFEE v. HESTONVILLE, M. & F. PASS. RY. CO. (Circuit Court, E. D. Pennsylvania. November 28, 1906.) No. 45. C. V. Edwards, for complainant. C. L. Buckingham, for defendant.

J. B. McPHERSON, District Judge. Leave is hereby granted to the Allis-Chalmers Company to file the supplemental bill of which a copy is attached to its petition; and, since it appears that the petition has been on file in the office of the clerk since October 31, 1906, and that a copy thereof, with notice of a motion for leave to file the supplemental bill, was served upon defendant's counsel on October 29, 1906, it is ordered that answers to the supplemental bill be filed by the railway company and by the General Electric Company (which has been conducting the defense), on or before December 10th. Leave is also granted to the General Electric Company to intervene as a defendant in this cause, and to file a cross-bill, if it shall be so advised, to enforce the title to the patent in suit that is set up by its petition; the cross-bill to be filed on or before December 10th, and answers thereto to be filed by the defendants named therein on or before December 24th. Replications to be filed in the respective proceedings on or before December 27th. Testimony on behalf of the Allis-Chalmers Company to be taken before January 15th; on behalf of the General Electric Co., to be taken before January 31st; and rebuttal testimony by the Allis-Chalmers Company to be taken before February 5th. Thereupon either party may apply to the court to fix a time for the argument of the questions raised by the pleadings and proofs referred to in this order.

SIMPLEX ELECTRIC HEATING CO. v. LEONARD et al. (Circuit Court, S. D. New York. October 23, 1906.) In Equity. On rehearing. For original opinion, see 147 Fed. 744. Duncan & Duncan, for complainant. Kenyon & Kenyon, for defendants.

PLATT, District Judge. I have examined this matter with some care, and can find no occasion for a rehearing. I think that all the demurrers were properly overruled. My memorandum was in no sense a "finding." It gave some of the reasons (but by no means all of them) which forced me to my final conclusion. A further study emphasizes the correctness of that conclusion. I cannot see that the decision by Judge Wallace, referred to in the petition, ought in any sense to affect my action herein. Petition denied.

END OF CASES IN VOL. 148.